4th E-Compendium of CESTAT Case Laws

Pro - Revenue

संजय कुमार अग्रवाल
अध्यक्ष
Sanjay Kumar Agarwal
Chairman

भारत सरकार
वित्त मंत्रालय
राजस्व विभाग
केन्द्रीय अप्रत्यक्ष कर एवं सीमा शुल्क
Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes & Customs

Chairman's Message

I am happy to see the 4th edition of e-compendium compiled by the Office of CC(AR), CESTAT, Delhi. In the past, 3 compendium have been made available by the CESTAT for the benefit of all concerned in the CBIC formations. These compendia proved very useful in taking informed decisions and reducing further litigation.

The present compendium will also feature case laws which support the revenue cause. The officers should go through them with a broader view of understanding the nuances of law pertaining to various issues and not only with a view of pro-revenue bias. Many of the judgments set out standards of ratios which are very useful in clarifying the underlying issues.

I am more than happy to congratulate CC(AR) and his entire team of officers from all its zones, who put in lots of efforts in compiling the compendium in addition to ably representing the Department before the CESTAT Benches in the interest of Revenue. I wish them all the best for their future endeavors.

(Sanjay Kumar Agarwal)

North Block, New Delhi-110 001 Tel. : +91-11-23092849, 23092890 E-mail : sanjayk.agarwal@gov.in

Vivek Ranjan
विवेक रंजन
विशेष सचिव एवं सदस्य
Special Secretary & Member

सत्यमेव जयते

आजादी का अमृत महोत्सव

भारत सरकार
वित्त मंत्रालय, राजस्व विभाग
केन्द्रीय अप्रत्यक्ष कर एवं सीमा शुल्क बोर्ड
नॉर्थ ब्लॉक, नई दिल्ली-110001
Government of India
Ministry of Finance, Department of Revenue
Central Board of Indirect Taxes & Customs
North Block, New Delhi-110001

Member (Legal) Message

It gives me great pleasure to inform that the 4th edition of e-compendium of pro-revenue decisions from different CESTAT benches, covering the period from August, 2023 to January, 2024, is ready for circulation.

2. A wide range of topics relevant to the Customs, Central Excise, and Service Tax domains are covered by the case laws, which would be useful for the officers in discharge of their day-to-day work including adjudication, investigation and effective defense of departmental cases.

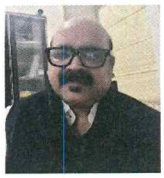
3. The compendium is quite user friendly as it has a search facility feature that makes it simple to retrieve case laws based on the issues involved. I am confident that the field formations will find great value in this e-compendium.

4. I want to compliment the Office of the Chief Commissioner (AR) and his team who have put in sincere efforts to ensure compilation of this e-compendium.

(Vivek Ranjan)

सत्यमेव जयते

S. FAHEEM AHMED
CHIEF COMMISSIONER (AR)



भारत सरकार
वित्त मंत्रालय (राजस्व विभाग)
मुख्य आयुक्त (ए.आर.) कार्यालय
सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण
वैस्ट ब्लॉक–2, दूसरा खण्ड, प्रथम तल,
आर. के. पुरम, नई दिल्ली–110 066

GOVERNMENT OF INDIA
MINISTRY OF FINANCE (DEPARTMENT OF REVENUE)
OFFICE OF THE CHIEF COMMISSIONER (AR)
CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK 2, WING NO.-2, 1ST FLOOR,
R.K. PURAM, NEW DELHI-110 066

Editor in Chief-Preface to 4th Edition of e-Compendium

Greetings Colleagues, as we all know, the doctrine of judicial precedent involves an application of the principle of *stare decisis* i.e. "stand by the decision already made". In practice, this means that inferior courts are bound to apply the legal principles set out by superior courts in earlier cases. This provides consistency and predictability in the law.

Based on the above principle, the e-Compendium is a resource that is produced with the aim of providing guidance to Authorized Representatives' in representing cases and assisting Court proceedings. The same will also be very helpful to all the field formations in decision making as it would be helpful in proper understanding and interpretation of the act, law and rules etc.; relevant to a specific subject and topic, setting out ratios that are applicable to many similar issues.

The office of the CC(AR) has been compiling the compendia of case laws which in the instant context means cases decided by the CESTAT in its Principal Bench and the zonal Benches. These case laws which are essentially pro-revenue in nature have been taken up to provide a necessary framework guidance for day to day working of field formations be it assessment, adjudication, review or investigations.

Previously, 3 compendiums had been compiled and uploaded on the CBIC website as a link and proved to be very useful for the field formations. Therefore, in order to continue the trend set by the office of the CC(AR), the 4th compendia is compiled and uploaded on the CBIC website.

These compendiums are not straight jacketed to make the officer to think in a single direction based on the assumption that the case quoted pre-dominantly favours the revenue. The important part of the case laws,

the spirit of the decisions which is called the *ratio decidendi* along with the facts needs to be looked upon by the officer concerned.

The Hon'ble Chairperson of the CBIC and Member (Legal) have been a force of great encouragement and guidance, especially the present Chairperson also released the 3rd compendium in his chamber in the presence of all the Hon'ble Members.

Any sizeable effort which brings all around good is not without sacrifices and hard work by the officers who are associated with the compilation of the compendia. In this regard, I would like to mention certain officers namely, S/Shri S.K. Rehman, PC(AR), Reyaz Ahmed, Commr.(AR), Ranjan Prakash, Commr.(AR), Rajiv Agarwal, Commr.(AR), Nagendra Yadav, ADC(AR), Rakesh Agarwal, JC (AR), Rohit Issar, AAD (AR). Apart from these officers, I also appreciate other contributors from Hqrs./Zones, who contributed for the success of this compendium.

As a CC(AR), I am immensely happy to present a very useful compendium for the benefit of field formations and I am sure they will make use of it for the purpose it is meant for and became a part of meaningful appropriate legal decisions.

(S. Faheem Ahmad)

Editor:

S. Faheem Ahmed, Chief Commissioner (AR)

Contributors (Hqrs):

S. K. Rahman, Pr. Commissioner (AR)

Reyaz Ahmad, Commissioner (AR)

Ranjan Prakash, Commissioner (AR)

Nagendra Yadav, Additional Commissioner (AR),

Rakesh Agarwal, Joint Commissioner (AR)

Rajeev Kapoor, Assistant Commissioner (AR)

Rakesh Kumar, Additional Assistant Director (AR)

Rohit Issar, Additional Assistant Director (AR) – Nodal Officer

Deepak Kumar, Inspector

Contributors (Zones):

Rajiv Kumar Agarwal, Commissioner (AR), Bangalore

Mihir Rayka, ADC, CESTAT, Ahmedabad

Rudra Pratap Singh, ADC (AR), Chennai

P. Saravana Perumal, ADC (AR), CESTAT, Bengaluru

Mahesh Y. Patil, ADC (AR), CESTAT, Mumbai

Siddharth Jaiswal, JC (AR) CESTAT, Chandigarh

M. Anukathir Surya, JC (AR), CESTAT, Hyderabad

Manish Raj, AC (AR), CESTAT, Allahabad

Tariq Sulaiman, AC (AR), CESTAT, Kolkata

Customs

S. No.	Title	Keywords
1	Sanjay Prabhakar Vs. Commissioner of Customs, Airport & General	Revocation of CHA License
2	Sumridhi Aluminium (P) Ltd. Vs. The Commissioner of Customs	Valuation
3	Sunlight Overseas Vs. Commissioner, Customs-New Delhi	Valuation
4	Bright Metal India Pvt. Ltd. Vs. Commissioner of Customs, Central Excise, Jaipur	Classification, Goods of Pakistan Origin
5	Sanjay Porwal, Director of Bright Metal India Pvt.Ltd., Jaipur, Vs. Commissioner of Customs, Excise and CGST, Jaipur.	Classification
6	Commissioner of Customs (A&G), New Delhi Vs. Aradhya Export Import Consultants Pvt. Ltd	Suspension of the CB licence
7	Vaibhav Global Ltd. Vs. Commissioner of Central Excise and Customs, CGST, Jaipur-I	Dismissed for non-prosecution
8	Planet Green Retail Vs. Principal Commissioner of Customs (Preventive)	Gold smuggling, confiscation and Penalty
9	Globe Impex and Gagan Uppal Vs. Commissioner of Customs (Imports), ICD, Tughlakbad	Classification of "Scented Sweet Supari"
10	Container Corporation of India Ltd. Vs. Commissioner of Customs (Exports)	Duty demand from Custodian u/s 45 of the Act.
11	Decor Rubber Industries Vs. Commissioner of Customs	Valuation
12	SKH Freight Logistics Pvt. Ltd. Vs. Commissioner of Customs, (Airport & General)	Revocation of CHA License
13	Durga Link Logistics (Pvt.) Ltd. Vs. Commissioner of Customs (Airport & General)	Forfeiting of security deposit and imposing penalty
14	Javeria Impex India Pvt. Ltd. Vs. Commissioner Of Customs (ICD) TKD	Valuation
15	Qasim Khan Authorized Representative of Javeria Impex India Pvt Ltd. Vs. Commissioner Of Customs (ICD) New Delhi	Valuation and Penalty
16	Windlass Online Stores Pvt. Ltd. Vs. Commissioner of Customs	Import Policy Restrictions of "Replica Fire Arms"
17	Shree Shyam Enterprises Vs. Commissioner of Customs (Import)	Valuation
18	Nitesh Shekatkar, Proprietor Aashavi Enterprises Vs Commissioner of Customs, Indore	Pre Deposit
19	Commissioner of Customs, New Delhi (Airport and General) Vs. Air Logix solutions	Revocation of Courier License
20	L.G. Electronics India Private Limited Vs. Principal Commissioner of Customs, New Delhi	Classification
21	Holyland Marketing Pvt Ltd Vs. Commissioner of Customs (Import) ICD, Tughlakbad	Classification and Exemption benefits
22	C.L. International Vs. Commissioner OF Customs (Import) , New Delhi	Conditions for Provisional release
23	Vijay Kumar Sharma, Rohit Shakhuja and others Vs. Commissioner of Customs (General)– New Delhi	Clandestine removal and imposition of Penalty
24	Asfaque Abubaker Naviwala Vs. Commissioner of Customs (Export)	Valuation Penalty under Sec 114(iii) and Sec 114AA of Customs Act.
25	Global Diamond Pvt Ltd Vs. Pr. Commissioner of Customs Noida and Customs	Clandestine removal of goods from SEZ, duty demand and Penalty under Customs Act
26	Daxen Agritech India Pvt. Ltd. Vs. Principal Commissioner of Customs	Classification

27	Shankar Lal Goyal Vs. Commissioner of Customs	Confiscation of Gold seizure, Penalty under Customs Act
28	Suresh Bhonsle and Mohd. Wajid @ Bunty Vs. Commissioner of Customs (Preventive)	Confiscation of Gold seizure, Penalty under Customs Act.
29	Rakesh Luthra, S/o Krishan Lal, Sunita Luthra, D/o Mangat Rai and Sonia Luthra, D/o Mr. Puran Parkash Nischal Vs. Commissioner of Customs (Airport & General)	Confiscation of Gold seizure, Penalty under Customs Act.
30	HBS Logistics Vs. Commissioner of Customs (Airport & General)	Revocation of the Customs Brokers License
31	Surendra Electricals Vs. Commissioner of Customs (Exports)	Undervaluation and Penalty under Customs Act
32	Vijendra Singh Vs. Commissioner of Customs (Airport & General)	Revocation of CHA License Forfeiture of Security and Penalty
33	Global Links Vs. Commissioner of Customs (A&G), New Delhi	Suspension-Confirmation
34	Jain Wooltex Vs. Commissioner of Customs, Inland Container Depot	Classification and Import policy restrictions
35	Air Impex Cargo Agency Vs. Commissioner of Customs (Airport & General)	Revocation of CHA License Forfeiture of Security and Penalty
36	Freight Logistics Vs. Commissioner of Customs (Airport & General)	Penalty imposed on Customs broker
37	R.P. Cargo Handling Services Vs. Commissioner of Customs (Airport & General)	Imposition of Penalty on CHA
38	Ananya Exim Vs. Commissioner of Customs (Airport & General)	Revocation of CHA License Forfeiture of Security and Penalty
39	Subhrabrata Chattaraj Vs. Commissioner of Customs, Indore	Penalty under Sec 112 of the Customs Act
40	Bhalinder Singh Mann, Rohit Sharma, Container Corporation of India Limited Vs. Commissioner of Customs (Import)	Mis declaration, undervaluation and imposition of penalty under Sec 112 and 114AA of the Customs Act,1962
41	Mahalaxmi Valves Pvt Ltd Vs. the Commissioner of Customs (Import)	Denial of Cross examination
42	Kashi Kumar Aggarwal Vs. Commissioner of Customs (Appeals)	Maintainability of Appeal
43	Harish Choudhary Vs. Commissioner of Customs Export, New Delhi	Pre deposit
44	Ingram Micro India Private Limited Vs. Commissioner of Customs, ACC (Imports)	Maintainability of Refund application without challenging the assessment
45	Glanbia Performance Nutrition India Pvt Ltd Vs. CC, Mundra	Classification of goods
46	Reliance Industries Ltd Vs. CC, Jamnagar	Ineligible Refund
47	Amardeep Exports Vs. CC, Jamnagar	Demand of Custom Duty
48	Isgec Heavy Engineering Ltd Vs. CC, Ahmedabad	DTA Clearance under EPCG
49	Bhatia Shipping Pvt Ltd Vs. CC, Kandla	Penalty
50	M M Trading Company Vs. CC, Mundra	Misclassification issue
51	Asia World Exports Vs. CCE, Ahmedabad	Abetment of duty
52	Ply Point Vs. Commissioner of Customs Cochin	Under valuation
53	American Power Conversion India (P) Ltd Vs. The Commissioner of Central Excise, Customs & ST, Bangalore (South)	The benefit of Notification No. 52/2003
54	Elite Green Pvt. Ltd. Vs. The Commissioner of Customs- Cochin	Refund claim of SAD
55	Hikoki Power Tools India Pvt. Ltd. Vs. The Commissioner of Customs (City Customs) Bangalore	Classification of Brush cutters
56	IBM India Pvt. Ltd. Vs. The Commissioner of Customs (City Customs) Bangalore	Amendment under Section149 of the Customs Act, 1962
57	ABB Ltd. Vs. The Commissioner of Customs, ACC-Bangalore	Classification of 'Frequency Converter'
58	The Commissioner of Customs, City Customs-Bangalore Vs. Kronos Systems India Ltd.	Classification "CTH 8543"

59	Glass House Vs. The Commissioner of Customs, Cochin	Notification No.4/2009
60	The Commissioner of Customs, City Customs-Bangalore Vs. Larson & Tuobro	Classification Chapter Heading 8537
61	Woodtech Consultants (P) Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (West)	Under invoicing, Valuation
62	ABB Ltd. Vs. The Commissioner of Customs, City Customs- Bangalore	Classification frequency converter" "inverter"
63	The Commissioner of Customs, City Customs-Bangalore Vs. Bosch Ltd.	Classification Smartra immobiliser"
64	Enterprise Software Solutions Lab Vs. The Commissioner of Customs, City Customs- Bangalore	Classification" "Time & Attendance System" "CTH 8543"
65	Fobin Poly Glass Vs. The Commissioner of Customs, Bangalore	"mis-declaration" and "undervaluation" of the goods Imported
66	Sree Rayalaseema Hi Strength Hypo Ltd. Vs. The Commissioner of Customs- Cochin	"Section 149" "amendment of shipping bill"
67	Cochin Shipyard Ltd. Vs. The Commissioner of Customs- Cochin	Refund claim
68	Lovable Lingerie Ltd. Vs. The Commissioner of Customs (City Customs) Bangalore	Classification of the goods 'Bra Cups'
69	The Commissioner of Customs Mangalore Vs. RMKS Minerals Exports (P) Ltd.	Relevant date
70	The Commissioner of Customs City Customs-Bangalore Vs. Snom Technology India Ltd.	"Classification" "Fingerprint Reader" "CTH 8543"
71	Nuance Group (India) Pvt. Ltd. Vs. The Commissioner of Customs (ACC) Bangalore	Violation under Section 58 & 72 of the Customs Act, 1962
72	UDL Logistics (P) Ltd. Vs. The Commissioner of Customs- City Bangalore	Mis-declaration & Smuggling
73	Saraswati Knitwear Pvt. Ltd. Vs. Commissioner of Customs Ludhiana	Interest on Refund, Provisional Assessment.
74	Safe Cargo Clearing Services Vs. C. C. Ludhiana	Custom broker license, CBLR 2018,
75	Narayan Sharma Pardeep Saini Sreet Saini Vaibhav Rai Rakesh Rai Vs. C. C. Amritsar	Gold smuggling, Confiscation of Gold, Customs Act, 1964
76	C. C. New Delhi (import & General) Vs. Namo Alloys Pvt Ltd	Import of goods, enhancement of assessable value, value assessment, valuation Rules 2007
77	Royal International Vs. Commr. Of Customs, Amritsar	Export of Prohibited Goods.
78	Nanda Agency House Shipping Service Pvt. Ltd. Vs. Commissioner of Customs, Chennai-II	Interest on delayed refund at Notified Rates
79	(i) Ghazzali Trading, (ii) N. Akbar Proprietor, Ghazzali Trading Vs. Commissioner of Customs, Chennai Air	Misuse of IEC for filing Bills of Entry
80	HLG Trading Vs. Commissioner of Customs, Chennai-IV	Import of polyester spun yarn, blankets, fabric, knit fabrics, etc.,
81	Aditya International Ltd. Vs. CC(Air Cargo) , Ch-VII	Import of polyester spun yarn, blankets, fabric, knit fabrics, etc.,
82	Micro Labs Limited Vs. Commissioner of Customs	Import of Hydrocortisone under Focus Market Scheme
83	Balaji Building Technologies (P) Ltd. Vs. Commissioner of Customs (Imports), Chennai	Mis-Declaration of Clear Float Glass as Extra Clear Glass
84	Tamilnadu Dyes and Chemicals Vs. Commissioner of Customs, Tuticorin	Mis-declaration of imports of Superior Kerosene Oil as Low Aromatic White Spirit
85	Commissioner of Customs-IV Vs. Gamesa Wind Turbines Pvt. Ltd.	Rejection of refund of SAD
86	Premier Enterprises Vs. Commissioner of Central Excise & Customs, Coimbatore	Renewal of CHA licence
87	IQDS Dental India Private Limited Vs. Commissioner of Customs, Chennai-VII	Valuation of Fingertip Pulse Oximeter

88	Alcock Mcphar Geotech India Vs. Commr. of Customs (Admn & Port), Kolkata	Late exportation of re-imported goods.
89	Pankaj Kumar Sharma Vs. Commr. of Customs, Patna	Late Filing of Appeal
90	Saleh Ahmed Vs. Commr. of Customs (Prev), Kolkata, Sanowar Ali Vs. Commr. of Customs (Prev) Kolkata.	Smuggling of Gold.
91	Pranav Kumar Vs. Commr. of Customs, Patna, Sudhir S. Chamria Vs. Commr. of Customs, Patna, Innovagen Compserv Private Ltd. Vs. Commr. of Customs, Patna, Lata S. Chamria W/o Shudhir S. Chamria Vs Commr. of Customs, Patna	Mis-declaration of goods.
92	Suparna Karmakar Vs. Commr. of Customs (Prev), Kolkata	Late Filing of Appeal
93	Manoj Baid Vs. Commr. of Customs (Port) Kolkata	Mis-declaration of goods.
94	Raj kumar vs Commr. of customs, Central Excise & Service Tax, Patna, Dipender Ji @ Deependra Sharaf Vs. Commr. of Customs, Central Excise & Service Tax, Patna	Smuggling of Gold.
95	India Potteries Ltd. Vs. Commr. of Customs (Port), Kolkata	Customs duty valuation on enhanced value
96	Madan Kumar Vs. Commr. of Customs, Patna	Smuggling of Betelnut.
97	Opel Exports Vs. Commr. of Customs (Port) Kolkata	Provisional release of goods.
98	Beximco International Vs. Commr. of Central Excise & Customs, Bolpur	Mis-declaration of the origin of the goods.
99	Container Corporation of India Ltd. Vs. Commissioner of Customs, Nhava Sheva.	Mis-declaration of goods
100	Shashi Dhawal Hydraulics Pvt Ltd Vs. Commissioner of Customs (Import), Mumbai.	Short payment of duty on imported goods.
101	Srinivas Clearing & Shipping (I) Pvt. Ltd. Vs. Commissioner of Customs (General), Mumbai.	CBLR
102	Arun Kumar Vs. Commissioner of Customs (Preventive), Lucknow	Confiscation of Foreign Currency

Excise

Sl. No.	Title	Keywords
1	Agarwal Aluminiums, Varanasi Vs. Commissioner, Central GST & Central Excise Commissionerate	Eligibility of area-based exemption Notification No. 50/2003-CE dated 10.06.2003 based on start of commercial production on or before 31.03.2010 (Sun-set date).
2	Commissioner, CGST & Central Excise, Jodhpur Vs. Prem Mehandi Center, Distt. Pali, Rajasthan	Retrospective eligibility of Refund of Central Excise duty on Heena Powder/Paste under Section 11C Vs Section 11B of Central Excise Act, 1944.
3	Rajeev Agnihotri, Director, Socrus Pharmaceuticals Ltd., Pithampur, MP Vs. Pr. Commissioner, CEGST, Indore	Condonation of delay in filing appeal
4	R. N. Alloys, Haridwar, UK Vs. Commissioner of CGST	Eligibility for job work in the absence of fulfilling conditions of exemption, Notification No. 214/1986-CE.
5	Rai Bahadur Narain Singh Sugar Mills Ltd. Vs. Commissioner of CGST, Dehradun	Eligibility of area-based exemption notification on account of expansion of the factory or setting up a new factory
6	Total Oil India Pvt Ltd., Rohat, Pali, Raj. Vs. Commissioner of Central Excise, Jaipur-II	Unjust enrichment in the case of protest.
7	Forward Minerals & Metals Pvt Ltd., Delhi Vs. Directorate General of GST Intelligence, (Adjudication Cell), New Delhi	Maintainability of appeal in the absence of Pre-deposit under Section 35F
8	H L Passey Engineering Pvt Ltd. Vs. Commissioner of CGST & Central Excise, Bhopal	Rectification of Mistake (RoM) application cannot seek appellant remedy beyond mistake apparent on record.
9	Dinesh Irrigation Pvt Ltd., Vs. Commissioner of CGST & Central Excise, Jaipur	Reversal of Cenvat credit used in exempted and dutiable goods
10	Progressive Alloys (India) Pvt Ltd., Delhi Vs. Commissioner of CGST, New Delhi	Condonation of delay in filing the appeal.
11	Principal Commissioner CGST, Vs. Som Global Zarda Pvt Ltd. New Delhi	One kind of exemption to a duty will not exempt other kind of duties automatically
12	Honda Motorcycle and Scooter India Pvt Ltd. Vs. CGST, Alwar	Whether availment of Cenvat Credit of input service credit on service tax paid on Inland Haulage Charges/Transport Charges on the basis of invoices
13	The Divisional Forest Officer, Rishikesh Vs. CGST and Service Tax, Dehradun	Whether activity pertaining to extraction of Resin from Pine tree is production of goods eligible to Central Excise duty.
14	Suncity Synthetics Ltd. Jodhpur Vs. The Additional Director General (Adj.)., New Delhi	Strict interpretation of exemption Notification No. 08/2014-CE dated 11.07.2014.
15	Ruchi Soya Industries Ltd Vs. CCE, Rajkot	Refund
16	Karimbhai Nanjibhai Shah Vs. CCE, Ahmedabad-II	Evasion of Central Excise duty and penalty under Rule 26
17	Birla Cellulosic Vs. CCE, Surat-II	Ineligible Cenvet Credit
18	Hitachi Life & Solution India Ltd Vs. CCE, Ahmedabad-III	Refund
19	Prafful Overseas Pvt Ltd Vs. CCE, Vadodara-II	Refund of education Cess

20	PGP Glass Pvt Ltd Vs. CCE, Surat-I	Levy of excise duty
21	Sonic Chain Pvt Ltd Vs. CCE, Rajkot	SSI Exemption
22	Universal Comfort Products Ltd Vs. CCE, Vapi	Ineligible Cenvet credit
23	Sagar Rolling Mills Pvt Ltd Vs. CCE, Ahmedabad-II	Abetment of duty
24	Special Prints Ltd Vs. CCE & ST-Surat-I	Refunds
25	Cyient DLM (P) Ltd. Vs. The Commissioner of Central Excise, Customs & ST, Mysore	Refund
26	Elvina Pharmaceuticals Ltd. Vs. The Commissioner of Central Excise-Belagavi	Valuation of physician samples
27	Kurlon Ltd. Vs. The Commissioner of Central Excise & ST- Bangalore (South)	Benefit of Notification No.1/2011 dated 1.3.2011
28	BEML Ltd. Vs. The Commissioner of Central Excise, & ST- Mysore	Deemed manufacture
29	Elvina Pharmaceuticals Ltd. Vs. The Commissioner of Central Excise-Belagavi	valuation of physician sample
30	Flexifoil Packaging (P) Ltd. Vs. The Commissioner of Central Excise, & ST-Bangalore (West)	“Packing charges” CENVAT on rejected / returned goods”
31	Maini Precision Products (P) Ltd. Vs. The Commissioner of Central Excise, & ST-Bangalore (North-West)	inadmissible CENVAT Credit
32	Praxair India (P) Ltd. Vs. The Commissioner of Central Excise, & ST-Bangalore (East)	Valuation
33	MRO Tek Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (North)	Valuation
34	MTR Foods Vs. The Commissioner of Central Excise, & ST- Bangalore (South)	Classification -Badam Milk Drink - Ready to Drink
35	3M India Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (South)	Inadmissible Cenvat credit attributable to trading activity
36	Fouress Engineering (I) Ltd. Vs. The Commissioner of Central Excise, & ST-Bangalore (North-West)	wrongly availment of the Cenvat Credit on security services, input short received
37	Karnataka Agro Chemicals Vs. The Commissioner of Central Excise, & ST-Bangalore (West)	“classification” “micronutrients fertilizers” “Plant Growth Regulator” “CSH 3808”
38	KEMS Forgings Ltd. Vs. The Commissioner of Central Excise, & ST-Bangalore (East)	Rule 3(5) of Cenvat Credit Rules, 2004
39	Poduval Industries Vs. The Commissioner of Central Excise, & ST- Cochin	“Clearance without payment of duty”
40	Rakon India (P) Ltd. Vs. The Commissioner of Central Excise, & ST-Bangalore (North)	Refund claim
41	Ultra Tech Cements Ltd. Vs. The Commissioner of Central Excise, & ST-Belagavi	Valuation - of Rule 8 of Central Excise (Valuation) Rules, 2000 ,Rule 4 of Central Excise (Valuation) Rules
42	IFB Industries Vs. The Commissioner of Central Excise & ST, Bangalore (East)	Valuation - of Rule 8 of Central Excise (Valuation) Rules, 2000, Rule 4 of Central Excise (Valuation) Rules
43	The Himalaya Drug Company Vs. The Commissioner, Central Excise & Service Tax- Bangalore (North-West)	Classification of Liv 52 Protec

44	Minerva Mills Vs. The Commissioner of Central Excise & ST, Bangalore (West)	Valuation
45	Ind Swift Labs Ltd vs. C. CE Chandigarh-II	Refund of Education Cess and Secondary & higher education cess, Notification No. 56/2002-CE dated 14.11.2002, Notification No. 71/2003-CE dated 09.09.2003, Unicorn Industries,
46	Shree Balaji Alloys vs. C. CE Chandigarh-I	
47	Hawco Petrofer LLP vs. C. CE Jammu & Kashmi	
48	J & K Pigments Pvt Ltd vs. C. CE Jammu & Kashmir	
49	PBI Metals Pvt Ltd vs. C. CE Jammu & Kashmir	
50	Jammu Pigments Limited vs CCE & ST-Chandigarh-I	Refund of Education Cess and Secondary & higher education cess, Notification No. 56/2002-CE dated 14.11.2002, Notification No. 71/2003-CE dated 09.09.2003, Unicorn Industries,
51	Alfred Berg and Co. India Pvt. Ltd. Vs. Chennai Outer GST & C.Ex	Refund of accumulated Cenvat Credit
52	Mr. Innasimuthu Vs. Commissioner of GST & C.EX, Madurai	Excitability of matches by Packaging of dipped splints
53	Ankit Ispat Pvt. Ltd. Vs. Commissioner of CGST& Excise, Trichy	Cenvat Credit on Imported Shredded Scrap based on ineligible documents
54	1.Vaibhav Metals 2.Bothra Metals and Alloys Pvt. Ltd. 3.Yash Industries 4.Shree Padmavathi Metals 5.Shrinivas Impex Vs. Commissioner of CGST & Excise, Coimbatore	Illegal availment of CENVAT credit of CVD paid on the imported goods
55	Avail Printers private limited Vs. Commissioner of CGST & Excise, Kolkata North	Availment of Cenvat credit
56	Asha Engineering Works Vs. Commissioner of Central Excise, Kolkata-II	Demand of Excise duty
57	Klar Sehen pvt Ltd. Vs. Commr. of Central Excise, Kolkata	Demand of Excise duty
58	Bharat Roll Industries Private Ltd. Vs. Commr. of Central Excise, Kolkata IV	Demand of differential duty.
59	Sai Krishna Health Care Products Vs. Commissioner of Central Tax, Medchal – GST (E)	SSI - Brand name - Denial of benefit of exemption notification.
60	JSW Steel (Salav) Ltd. Vs Commr of Central Excise & Service Tax, Raigad	Dispute on availment of Cenvat Credit
61	Commissioner, Central Excise & Service Tax, Lucknow Vs. Harsh Traders	Penalty under Section 11 AC of CEA 1944
62	Mamta Steel India Pvt. Ltd., and Lal Padmakar Singh, Director Vs. CCE, Lucknow	Clandestine removal of Goods
63	M/s Sachdeva Holdings Pvt. Ltd. Vs. CX and CGST, Noida	Refund of duty paid in excess
64	Simbhaoli Sugar Ltd. Vs. CCE, Noida	Disallowance of CENVAT Credit in respect of the printer and cartridges
65	Pintu Tyagi Vs. CCE, Ghaziabad	Clandestine removal of Goods
66	Sumit Nagrath Vs. Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida	Refund of duty paid by mistake

Service Tax

S. No.	Title	Keywords
1	Om Sokhal Builders & Constructions Pvt. Ltd. Vs. The Commissioner of Central Excise, Jaipur	The value for legal and professional services is very much taxable, as it qualifies to be called as service for post negative list period it is not covered under the exclusion clause of section 66 D of Finance Act.
2	Agriculture Produce Marketing Committee Vs. Commissioner (Appeals-I) Central Tax/GST Delhi	Commissioner (Appeals) can entertain the appeal by condoning the delay only upto 30 days beyond the normal period for preferring the appeal, which is 60 days.
3	Carry Fast Agency Vs. Pr. Commissioner, CEGST, Indore	The activities of Clearing and Forwarding Services rendered by respondent shall constitute one synchronized service of C&F agent. Hence respondent is liable to levy under Section 65(25) of the Finance Act.
4	Nagar Parishad Vs. Commissioner of Central Excise & C.G.ST – Udaipur	Appellant had received payouts on account of transfer fee, forfeit charges, tamir izazat, annual lease, rent of shops and other rent amounting to Rs.5,83,46,864/-. As such the appellant was observed to be liable to pay the service tax amounting to Rs.64,16,499/-
5	Export Inspection Agency, Delhi, Vs Commissioner of Service Tax, Delhi-I	Export Council under Free Trade Agreement executed between India and foreign nation's products, eligible for Certificate of Origin required for preferential treatment in exporting country. This was subject to the said product being certified by certifying authority approved by both the countries. In pursuance to the said FTA, the appellant has been recognised as certificating authority for different food products. The Department alleged that the service provided by the appellant were exigible to service tax.
6	Berkowits Hair & Skin Clinic Vs Principal Commissioner of GST & Central Excise, Delhi South Commissionerate	limitation issue
7	Archna Traders Vs. CCE, Surat-I	VCES scheme
8	Natural Petrochemicals Pvt Ltd Vs. CCE, Rajkot	Non-payment of Service tax
9	Cadila Pharmaceuticals Ltd Vs. CST, Ahmedabad	Service tax on RCM
10	Mann & Hummel Filter (P) Ltd Vs. The Commissioner of Central Excise, Customs & ST, Bangalore (North-West)	ST on Manpower Recruitment or Supply Agency Services
11	Ocean Polymers Vs. The Commissioner of Central Excise, Customs & ST, Thiruvananthapuram	Refund claim under Section 104 of the Finance Act
12	Holifaith Builders & Developers Pvt. Ltd. Vs. The Commissioner of Central Excise, Customs & ST, Cochin	Refund
13	Krishna Bhagya Jala Nigam Ltd. Vs. The Commissioner of Central Excise, & ST-Bangalore (North)	"Support service"

14	Bangalore Housing Development & Investments Vs. The Commissioner of Central Excise, & ST- Bangalore (North)	"Interest rate"
15	The Commissioner of Central Excise, & ST- Thiruvananthapuram Vs. Kerala State Electricity Board	Refund claim
16	Embassy Property Developments Ltd. Vs. The Commissioner of Central Excise, Customs & ST- Bangalore (North)	Management Consultancy Services
17	IBP Auto Service Vs. The Commissioner of Central Excise & ST, Calicut	Condonation of delay
18	The Kerala Minerals & Metals Ltd. Vs. The Commissioner of Customs (Prev.) Cochin	"Classification" 'Huy glass1105 M-Membrane Bags' "CTH 8421"
19	The Commissioner, Central Excise & Service Tax- Belagavi Vs. Vicat Sagar Cement Ltd.	Cenvat Credit on GTA
20	Lovely Autos vs Commissioner of Central Excise, Ludhiana	Business Auxiliary Service, Notification No. 12/2003, Suppression, Extended Period
21	General Manager Punjab Roadways vs. C. CE & ST Ludhiana	Condonation of delay,
22	Laxmi Pipes Ltd. vs. C. CE & ST Rohtak	Business Auxillary services, Business Support Service, Agreement, Commission Agent, Administrative Services
23	Competent Constructions vs. C. CE & ST Chandigarh	Adjustment of excess payment
24	H B Securities Ltd vs. C. CE & ST Delhi-IV	SEBI, Stock Broker, Brokerage
25	Canon India Private Limited vs. C. CGST Gurgaon-I	Manpower recruitment & Supply Agency Service, Reverse Charge Mechanism, FEMA, Section 65B(4) of the Finance Act, 1994
26	Goodyear India Limited Vs CCEx & ST Delhi	Business Auxiliary Service, RCM, Revenue Neutrality, Extended period, section 66A.
27	GS Promoters an Developers Vs Comm. of CGST Ludhiana	Rate of Interest, Interest on refund,
28	Sigma Moulds Nad Stampings Pvt Ltd vs Gurgaon II	Refund matter Notification No. 52/2011-ST dated 30.12.2013 and the subsequent Notification No. 41/2012-ST dated 29.06.2012
29	Coswain Technologies Ltd. Vs. Commissioner of Central Excise, Chennai-III	Non-payment of Service Tax on Broadcasting service
30	Surin Automotive Pvt. Ltd. Vs. Commissioner of Central Excise, Chennai-III	Non-payment of Service Tax on Bill Discounting facility under Banking and Financial Services
31	Upshot Utility Services Vs. Commissioner of Central Excise, Chennai-III	Non-payment of service tax on Manpower Recruitment Agency Services to Units located inside SEZ
32	Alstom T & D India Ltd. Vs. Commissioner of Central Excise, LTU, Chennai	Non-payment of interest on Service Tax payable on Royalty and Technical Knowhow fees
33	Tamil Nadu Medical Services Corporation Ltd. Vs. Commissioner of GST & Central Excise, Chennai North Commissionerate	Non-payment of Service Tax on Storage and Warehousing Services and Cargo handling Services

34	KRSS Manpower Service Vs. Commissioner of GST & Central Excise, Salem	Non-payment of Service Tax on 'Mining Services'
35	International School for Management Studies Vs. Commissioner of Service Tax, Chennai-600035.	Non-payment of Service tax under the category of "commercial training or coaching centre"
36	Kaveri Warehousing Pvt. Ltd. Vs. Commissioner of GST & Central Excise,Chennai North Commissionerate	Non-Payment of Service Tax on storage and Warehousing Services
37	International Seaport Dredging Limited Vs. Commissioner of GST & Central Excise,Chennai Outer Commissionerate	Non-Payment of Service Tax on dredging services
38	Orient Flights Pvt. Ltd.Vs. Commissioner of Service Tax, Chennai	Leasing of Aircraft- Supply of Tangible goods Service-Invocation of extended period
39	Green House Promoters Pvt. Ltd. Vs. Commissioner of GST & C.Ex, Chennai South Commissionerate	
40	N.M. Zackriah & Co. Vs. Commissioner of Service Tax, Chennai-III	
41	King Network Vs. Commissioner of CGST & C.EX, CGST, Salem	Non-payment of Service Tax on Cable Operators Service
42	Aban Offshore Ltd. Vs. Commissioner of CGST, Chennai North	Non-payment of Service Tax on engineering consultancy, management consultancy, testing & inspection and banking service
43	Panjab National Bank vs Commr. of CGST & CX, Patna	Refund of Service tax
44	S. Ranjan & Associates vs Commr. of Central Excise & Service Tax, Patna	Payment of Service Tax
45	Nizam Club Vs. CCE & ST, Hyderabad - II	Demand - Club - Self Service - Space for advertisement - Renting of Immovable property. Demand of Interest
46	Chaitanya Industrial Service Vs. Commissioner of Central Tax Visakhapatnam – II	Provision of Manpower Recruitment or Supply Agency services.
47	L & T Infocity Ltd Vs. CCE & ST, Hyderabad - IV	Management, Maintenance or Repair Service - Parking Fee - Reimbursable expenses.
48	Adani Gangavaram Port Ltd Vs. Commissioner of Central Tax, Visakhapatnam – II	CENVAT Credit - Taken but not utilised – Interest.
49	Akash Engineering Services Vs. Commissioner of Central Tax, Visakhapatnam – I	Works Contract Service - Main Contractor - Sub Contractor - Demand on Sub-contractor.
50	BNG Contractors Pvt. Ltd., Vs. CCE, Lucknow	Condonation of Delay
51	Origin Advertising Pvt. Ltd. Vs.. Commissioner of Central Excise &Service Tax, Lucknow	Advertising Agency Services
52	Patanjali Yogpeeth Trust Vs. Commissioner of Central Excise, Meerut-I	Health and Fitness Services - teaching yoga and meditation by way of organizing Yoga Camp.

Single Member Bench

S. No.	Title	Keywords
1	Hakim Singh Contractor Vs. CCE &ST, Alwar	Limitation
2	VKV Exports Pvt Ltd Vs. Commissioner of Customs (Delhi)	Redemption fine, Penalty
3	Petro Lubes India Vs. Commissioner of Customs, Delhi	Test Reports validity, Mis-declaration of description of goods in Bill of Entries
4	Lupin Limited Vs. Commr. Customs Indore	SEZ, Cleared goods without processing
5	Harjeet Singh Johar Vs. Commissioner of Customs Delhi, ICD Patparganj.	Mis-declaration in Bill of entry, liability of Customs Broker
6	Genuine Filter & Fabrics vs Commissioner CGST & Central Excise Indore	Service Tax under Section 66(E) (e) of Finance Act, 1994

Brief Notes of the cases

Customs

Back

1. Sanjay Prabhakar Vs Commissioner of Customs, Airport & General

(Customs Appeal No. 51402 of 2019
Final Order No. 51158/2023 dated 05.09.2023)

Issue:- Whether the appellant CHA who was not in knowledge of the mis-declaration of the export goods 42,00,000 number of Gutkha pouches – a prohibited item as against the declared pan masala shall be liable for revocation of his Customs broker License.

Held:- It is an admitted fact that the documents such as the invoice and the packing list was prepared by the appellant in his office. This is corroborated by Sh. Shubham Garg, the IEC holder. The export consignment was packed and stuffed in the presence of the representative of the appellant. This has been corroborated by others in their respective statements. The appellant was aware that the IEC of Shubham Garg of M/s Navrang Jewel and Export was being used by Salim Dola for export of Gutka, which is a prohibited item. It has to be concluded that the appellant was very much aware of the nature of the consignment and aware of the fact that the IEC did not belong to the actual exporter of the consignment. He had indulged in this offence for monetary gains.

2. Sumridhi Aluminium (P) Ltd. Vs The Commissioner of Customs ICD Patparganj, Delhi.

(Customs Appeal No. 52491of 2019 with a bunch of other 91 appeals
Final Order No._51191-51282/2023 dated 13.09.2023)

Issue:- Whether the aluminium scraps imported by the aluminium alleged to be undervalued and the method and enhanced value as suggested by the Department of re valuation accepted in writing by the appellant is hit by the ratio of the decision of the Supreme court in Sanjivani Non-ferrous metals or not.

The assessing officer enhanced the assessable value on the basis of contemporaneous imports data, which value was accepted by the appellant in writing with a further statement that the appellant would not want a speaking order to be issued nor it would require any show cause notice to be issued or opportunity of personal hearing to be granted. The appellant also deposited customs duty on the enhanced value accepted by the appellant and thereafter out of charge order was also issued by the department.

Held:- That In Sanjivani Non-Ferrous Trading, the Supreme Court observed that it was necessary for the assessing officer to give reasons as to why the transaction value declared in the Bills of Entry was rejected. This decision would not come to the aid of the appellant for the reason that in the present case the appellant had accepted the enhanced value of the imported goods. The enhanced value once accepted in writing under Section 17(5) of the Customs Act, 1962 shall be deemed to be the transaction value.

3. Sunlight Overseas vs Commissioner, Customs-New Delhi (ICD TKD)

(Customs Appeal No. 52804 to 52807/2019
Final Order no. 51328-51331 /2023 dated 20.09.2023)

Issue:- It is case of mis-declaring of value and quantity of import of furniture. Although the quantity in numbers was found as declared Goods were examination gross mis-declartion in weight of furniture were found. The value was enhanced as per weight found and the same was accepted by importer during assessment. Also there was request for waiver of SCN in the matter.

Held:- The Hon'ble CESTAT held that, since a unique quantity code (UQC) is fixed for each type of goods and the importer is required to indicate the quantity in that code. For furniture, it is weight in kg. Therefore, the adjudicating authority was fully justified in rejecting transaction value and re-determining it.

This appeal is against re-assessment in which the appellant waived, in writing, the SCN and personal hearing and in which it had not even disputed that the goods which were imported were much more than what was declared. By waiving the SCN and also the personal hearing, the appellant made it both unnecessary and impossible for the department to show the basis of re-determining the value of the goods. Accordingly, the party appeal was dismissed upholding differential duty, fine and penalty.

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4. **Bright Metal India Pvt. Ltd. vs Commissioner of Customs, Central Excise, Jaipur.**

(Customs Appeal No.54929 of 2023 with Customs Misc. Application No.50334 of 2023
Final order nos.51371 /2023 dated 26.09.2023)

Issue:- Whether the brass scrap PALLU imported by the appellant were rightly classified under ITC HSN 74 being originated from Sharjah Port or should be re classified under CTH HSN 980060000 being originated from Pakistan and should be treated as restricted/ prohibited goods. Whether the goods should be allowed re export without RF/ penalty

Held:- The Honble tribunal has held that that the country of origin of the containers in question is Pakistan and therefore, the same are classifiable under the Notification No.5/2019 as per CTH 980060000. Since the goods have been imported on the basis of fake PSIC, they are liable to be confiscated in terms of Section 111(m). relief of re-export, in the facts of the case, needs to be affirmed on payment of redemption fine and also enhanced penalty both under Section 112 (a)(ii) and Section 114AA of the Act

5. **Sanjay Porwal, Director of Bright Metal India Pvt. Ltd., Jaipur, Vs. Commissioner of Customs, Excise and CGST, Jaipur**

(Customs Appeal No.54930 of 2023
Final Order No.51372 /2023 dated 26.09.2023.)

Issue:- Whether the brass scrap PALLU imported by the appellant were rightly classified under ITC HSN 74 being originated from Sharjah Port or should be re classified under CTH HSN 980060000 being originated from Pakistan and should be treated as restricted/ prohibited goods. Whether the goods should be allowed re export without RF/ penalty

Held:- The Hon'ble tribunal has held that that the country of origin of the containers in question is Pakistan and therefore, the same are classifiable under the Notification No.5/2019 as per CTH 980060000. Since the goods have been imported on the basis of fake PSIC, they are liable to be confiscated in terms of Section 111(m). relief of re-export, in the facts of the case, needs to be affirmed on payment of redemption fine and also enhanced penalty both under Section 112 (a)(ii) and Section 114AA of the Act

6. **Commissioner of Customs (A&G), New Delhi Vs. Aradhya Export Import Consultants PVT. LTD**

Customs Appeal No. 50241 of 2021
Final Order No. 51380/2023 dated 03.10.2023.

Issue:- The present appeal filed by the department was against order-in-original No. 83/MK/Policy/2020 dated 05.10.2020 passed by the Commissioner wherein the suspension of the CB licence was revoked despite of the fact that the CB had filed 8 shipping bills despite of the fact that the exporter was not existing at the address mentioned in the IEC and facilitated the fraudulent exports to avail ineligible IGST refund / drawbacks.

Held:- In the present case from the above discussion it has come on record that M/s Fine Overseas is a firm existing only on the papers which was created in the name of Shri Sirajul Kallu. The exporter was not existing at the address mentioned in the IEC. The IEC and bank accounts were obtained for facilitating the fraudulent exports to avail ineligible IGST refund / drawbacks.

In the light of the obligations conferred upon the CB by the Regulations CBLR, 2018 and the proven fraudulent act and conduct of CB on record, we hold that suspension of his licence is quite a proportionate penalty. The order under challenge is upheld to this extent. In the light of the entire above discussion, holding that there is no violation of Regulation 10(e) has been set aside but violation of Regulation 10(n) of CBLR, 2018 by the appellant has been confirmed with confirmation that CB licence, in given circumstances is proportionate penalty. Hence, the appeal stands party allowed and cross-objections stands allowed, consequently licence stands suspended.

7. **Vaibhav Global Ltd. vs Commissioner of Central Excise and Customs, CGST, Jaipur I**

(Customs Appeal No. 53676 of 2018 [DB]
Final Order No. 51442/2023 dated 04.10.2023.)

Issue:- Whether the appeal filed in the year 2018 should be dismissed for want of prosecution as well as presence since the appellant has not been represented for long.

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Held:- The Hon'ble Tribunal has observed that the There is no presence for the appellant w.e.f. July, 2019. Several notices of hearing subsequently have also been served upon the appellant. On the last date of hearing i.e. 12.09.2023, the appellant was warned with the last opportunity to cause its presence.

8. Planet Green Retail vs Principal Commissioner of Customs (Preventive)

Customs Appeal No. 51896 OF 2018
Final Order No. 51390/2023 dated 04.10.2023

Issue:- It is a case of gold smuggling in machinery. The gold bars were concealed in Machines. Importer did not file B/E and the goods the machines were ready for disposal by auction. The case was investigated by SIIB before auction and gold bars were recovered. The gold was ordered for absolute confiscation and penalty was imposed on the person against whom IGM and Bill of Lading were issued.

Held:- The Hon'ble CESTAT vide said order has upheld the order passed by the department and penalty imposed on appellant and has observed as under:

The manifest dated 28.02.2015 showing that consignee in both the AWBs was M/s Planet Green Retail, and that the value of the consignment was declared as "NVD means No value declared. .The appellant did not respond to the said CELEBI notice it did not respond to the show cause notice issued under Section 124 the appellant also fail to respond three notices of personal hearing where after the impugned order was passed ex-parte.

During investigation it was revealed that the address mentioned on both AWB is belongs to the appellant which is also corroborative with IEC. Thus it becomes clear that the registered person of that IEC i.e. Shri Sumeet Jain the Proprietor of present appellant is the only person connected to the impugned AWB. He has not produced any evidence to show that the IEC has been forged in his name without his knowledge. The department has made sufficient compliance of Section 123 of Customs Act, 1962.Resultantly we hereby upheld the said order. Consequent thereto, the appeal stands dismissed.

9. Globe Impex and Shri Gagan Uppal vs Commissioner of Customs (Imports), ICD, Tughlakbad, New Delhi.

Customs Appeal No. C/55040/2023 & C/55035/2023
Final Order No.51407-51408/2023 dated 09.10.2023

Issue:- Case of determination of classification of "Scented Sweet Supari" under CTH 21069030 (where 100% BCD exemption by the virtue of Notification no. 96/2008 SI. No.1) instead of CTH 08028090 (where eligible for 60% BCD exemption by the virtue of Notification no. 96/2008). Also to determine whether goods are liable for confiscation or otherwise and importer is liable for penal action or otherwise? Whether demand in the case of previous Bill of Entry is sustainable or otherwise?

Held:- The goods held classifiable under chapter Heading 0802. Consequently, the benefit of Notification No 96/2008 dated 13.8.2008 of 100% exemption from BCD is not available to the appellant. The goods were held liable for absolute confiscation under Section 111(d), 111(m) and 111(o) of the Act. Consequently, the appellant is liable to pay the differential duty of Rs.46,95,133/- along with interest. Importer M/s. Globe Impex and also Shri Gagan Uppal held liable to penalty under Section 112(a)(i) of the Act. Accordingly, the appeals dismissed.

10. Container Corporation of India Ltd. Vs. Commissioner of Customs (Exports), ICD, Tughlakbad, New Delhi

Customs Appeal No. 53193 of 2018
Final Order No. 51422/2023 dated 10.10.2023

Issue:- Whether in view of the Regulation 6 HCCAR, 2009 and section 45 of Customs Act, 1962, the Custodian is liable to pay duty in case of pilferage of goods in customs bonded area.

Held:- All the allegations as fastened against the custodian are under Regulation 6 HCCAR, 2009 and section 45 of Customs Act, 1962 i.e. against the approved by custodian, who is none but CONCOR, the appellant. As per section 45 (2) (b) of Customs Act, 1962, the custodian is duty bound to not to permit such goods to be removed from the customs area, except under and in accordance with written permission of proper officer or otherwise dealt with. Admittedly, there was no such permission with CONCOR for removal of the goods. As per section 45, the custodian is burdened with the responsibility of safe custody of imported goods unless and until those goods cleared either for home consumption or for being warehoused. Admittedly, the goods got pilfered and container seal found tempered when the goods were

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not still cleared. Resultantly, we do not find any reason to absolve the appellant from the responsibility fastened upon him and violation confirmed.

11. Decor Rubber Industries Vs. Commissioner of Customs, Air Cargo Complex (Export)

Customs Appeal No. 50828 of 2021 [DB]
Final Order No 51494/2023 dated 03.11.2023

Issue:- whether the alleged undervaluation solely based on the market enquiry and overseas investigation where in the report were in Chinese and without any authentication can be relied to prove the said undervaluation. The goods were found to be rolls of branded Reflective Sheets of brand name "Sablite". The value submitted before the Chinese Customs for the goods was different than the value in the invoices presented before the Indian Customs Authorities for the same goods in the same consignments. Demand under Sec 28 and Penalty under Sec 114A and Sec 114AA on the appellant importer.

Held:- The Tribunal has held that- the Bill of Lading numbers, names of the vessels, container numbers, etc. corresponding to what was declared before Chinses Customs match with what was shown before Indian Customs which showed that the values declared in the four Bills of Entry were low and the actual values were declared by the exporter in the declarations before the Chinese authorities. Accordingly, the rejection of the declared transaction value in respect of these four Bills of Entry under Rule 12 and redetermination of it based on the actual transaction value in respect of the four Bills of Entry is confirmed. Consequently, the demand of differential duty of customs under section 28. And Penalty under Sec 114A and Sec 114AA is also confirmed.

12. SKH Freight Logistics Pvt. Ltd. Vs. Commissioner of Customs, (Airport & General)

Customs Appeal No. 50871 OF 2019 [DB]
Final Order No.51504/2023 dated 06.11.2023.

Issue:- The allegations of the department is the offence of availing undue drawback by means of fraudulent exports. Department formed the opinion that M/s Linwood Sales Pvt. Ltd., Kolkata was involved in fraudulent export under drawback scheme to avail huge undue drawback amount. The Customs Broker who facilitated the fraudulent export is M/s. SKH Freight Logistics Pvt. Ltd was charged with revocation of his license under CBLR 2018 for violating Regulations 1(4), 10(a), 10(b), 10(d), 10(k) 10(n) and 13(12) of Custom Broker Licensing Regulation, 2018 (hereinafter referred as CBLR, 2018) erstwhile Regulation 10, 11(a), 11(b), 11(d), 11(k), 11(n) and 17(9) of CBLR, 2013.

Held:- The Hon'ble Tribunal has held that Apparently no authorization letter in favour of the appellant from M/s. Linwood Sales could be produced on record. Hence, we do not find any infirmity when violation of Regulation 10 (a) of CBLR has been confirmed against the appellant. Similarly no verification was undertaken and the provisions of the CBLR 2018 was violated/ not adhered to. CB was liable for revocation of his license and forfeiture of security deposits and penalty.

13. Durga Link Logistics (Pvt.) Ltd. Vs. Commissioner of Customs (Airport & General), New Delhi

Customs Appeal No. 51791 of 2022 [DB].
Final Order No. 51507/2023

Issue:- Revocation of appellant's customs broker license - forfeiture of security deposit and imposition of penalty affirmed Revocation of license set aside -

A dispute where in the weight of pan masala mentioned on invoice cum packing list was much higher than the actual weight thereof found during examination - an opportunity of cross-examination not provided - no finding has been given with respect to the submissions made by the appellant - violation of principles of natural justice

Held:- Violation of Regulations 10(a), 10(b), 10(d) 10(e), 10(j), 10(k) and 10(q) of CBLR, 2018 was examined and the Hon'ble Tribunal has held that - the appellant is held guilty of the violations under Regulation 10(a), 10(b) and 10(e) but these are not so grave as to justify the revocation of the customs license. These violations are observed to be the consequence of negligence on part of the appellant custom broker. Depriving him of his livelihood is held to be disproportionate in the light of given findings. Revocation order set aside.

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14. Javeria Impex India Pvt. Ltd. Vs. Commissioner of Customs (ICD) TKD, New Delhi

Customs Appeal NO. 3 OF 2011.
Final Order No. 51525-51526 /2023 dated 08.11.2023

Issue:- Whether the differential duty demanded on the goods imported for Live BOEs (hereinafter called current Bills of Entry) and five past Bills of Entry are correct ;

Whether the goods imported under the current Bills of Entry were confiscated but were allowed to be redeemed on paying redemption fine is right ; and whether penalties imposed on the Firm is correct or not.

Held:- The Hon'ble Tribunal has held that M/s. Jhaveria Impex is partly allowed by upholding the re-assessment of duty in the impugned order in respect of the two current Bills of Entry filed on 9.2.2009 and 17.2.2009 and confiscation of the goods imported under these two Bills of Entry and the redemption fines imposed.

15. Mohd. Qasim Khan Authorized Representative of javeria Impex India Pvt Ltd. Vs. Commissioner Of Customs (ICD) New Delhi, Tughlakbad, New Delhi

Customs Appeal No. 4 OF 2011 Customs Miscellaneous Application No. 50182 OF 2020
Final Order No. 51525-51526 /2023 dated 08.11.2023.

Issue:- Whether the differential duty demanded on the goods imported for Live BOEs (hereinafter called current Bills of Entry) and five past Bills of Entry are correct ;

whether the goods imported under the current Bills of Entry were confiscated but were allowed to be redeemed on paying redemption fine is right ; and whether penalties imposed on the Firm is correct or not. Also whether the appellant Shri Mohd. Qasim Khan , authorised representative of the importer assailing the Penalties by filing the Customs Appeal No. 4/2011 assailing the personal penalty of Rs. 15,00,000/- imposed on him by the impugned order is correct or not.

Held:- The Honble Tribunal has held that -Shri Qasim is the person most directly connected with the filing of the two Bills of Entry and the values of the goods in these did not match the imported goods which rendered the goods liable to confiscation under section 111(m). Therefore, Shri Qasim squarely falls under Section 112(a) and is liable to penalty under it.

16. Windlass Online Stores Pvt. Ltd. vs Commissioner of Customs, Air Cargo Complex (Import)

Customs Appeal No. 51098 of 2019 (DB)
Final Order No. 51524/2023 dated 08.11.2023

Issue:- The appellant imported "Replica Fire Arms" convertible into Fire Arms" classifiable under CTH 93040000, which was restricted as per ITC (HS) Import Policy, without any license or authorization from the DGFT and also imported "daggers" and "swords" with blade size more than 9" without fulfilment of the requirements specified in the MHA Notification No.S.O.667(E) dated 12.09.1985 and Notification No.S.O.831 (E) dated 02.08.2002 and thereby contravened the provisions of para 2.08 of FTP 2015 - 2020 read with Section 11 (1) of the Foreign Trade (Development) and (Regulation) Act, 1992 (as amended).

Held:- Neither the applicability of the legal provisions particularly with reference to the Arms Act and the Rules and various notifications have been considered nor any reasoning has been given with reference thereto by the Commissioner (Appeals) though being the first appellate authority. The impugned order is therefore unsustainable and deserves to be set aside with a direction to the appellate authority to consider the appeal and decide the same giving proper and substantive reasoning in support thereof. Accordingly, matter remanded to the Commissioner (Appeal).

17. Shree Shyam Enterprises Vs. Commissioner of Customs (Import) ICD

Customs Appeal No.51513 OF 2018
Final Order No.51546/2023 dated 14.11.2023

Issue:- Whether the Adjudicating authority has rightly enhanced the value of the goods under rule 7 of CVR, 2007 and having the same accepted and cleared the goods, the importer has left has right to further challenge the same.

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Held:- We feel that the resorting the valuation under Rule 7 of the Customs Valuation Rules by the Department is legally sustainable in the facts and circumstances of this case as narrated above. While holding the above view, we take shelter of the decision of this Tribunal in the case of Commissioner of Customs (Import), ICD, TKD, New Delhi Vs. Sodagar Knitwear reported in 2018 (362) E.L.T. 819 (Tri. Del.) which has also been confirmed by Hon'ble Apex Court in its decision reported under 2018 (362) E.L.T. A213 (S.C.).

18. Nitesh Shekatkar, Proprietor Aashavi Enterprises Vs. Commissioner of Customs

Customs Appeal No. 50271 OF 2021.
Final Order No. 51569/2023 dated 15.11.2023

Issue:- The appeal was filed against imposition of penalty of Rs. 25,00,000/- on co-noticee. The appellant stated that 7.5% of the penalty amount of Rs. 25,00,000/ - had been deposited, but neither the challan number nor the date was mentioned. A copy of the challan enclosed with the appeal also does not give the challan number or date or the bank name the same could not be verified by respective Commissionerate.

Held:- Although the appeal was listed for hearing, CESTAT held that the statutory requirement of pre-deposit has not been made the appeal has to be dismissed and is dismissed.

19. Commissioner Of Customs, New Delhi (Airport and General), Vs. Air Logix solutions

Customs Appeal No. 52946/2018
Final Order No. 51591/2023 dated 29.11.2023

Issue:- It is about Courier licence. In the OIO only penalty was been imposed Dept. filed appeal for revocation of licence

Held:- The Hon'ble CESTAT has allowed Dept. appeal and passed Final Order dt. 29-11-23 giving directions for Revocation of licence. In the instant case same KYC was used for multiple importers.

20. L.G. Electronics India Private Limited Vs. Principal Commissioner of Customs, New Delhi

Customs Appeal No. 50234 of 2021
Final Order No. 51585/2023 dated 30.11.2023

Issue:-It is about classification of Hybrid Smart watch (smart watch with additional analog function) under CTH CTH 8517(smart watch) or CTH 9102 (analog watch). The Hon'ble CESTAT has issued Final Order dt 30-11-23 concluding that Hybrid smart watch is classifiable under CTH 8517 as a smart watch.

The said goods under CTH 91021900 was self-assessed with basic customs duty at the rate of 'NIL' BCD after claiming the benefit of entry serial no. 955 of Notification No. 152/2009-Cus whereas the CTH 8517 was not covered under Notification 152/2009-Cus. Resultantly, short payment of customs duty amounting to Rs.86,62,852/-

Held:- It is held by the Hon'ble CESTAT that since appropriate CTH is 8517 and the same was not covered under claimed Notification even the COO was issued with the CTH 8517. The CTH 8517 was covered under Notification 151/2009 under the same Rules of Origin however the same was not claimed at the time of assessment.

21. Holyland Marketing Pvt Ltd Vs. Commissioner of Customs (Import) ICD, Tughlakbad, New Delhi

Customs Appeal no. 54708 of 2023
Final Order No. 51574 /2023 Dated 30.11.2023

Issue:- The main issue to be decided in the matter was whether the impugned imported goods viz "canned pineapple slices" is classifiable under CTH 20082000 or 08119010, as self-assessed by the appellant or under CTH 8043000, as proposed in the SCN. The appellant had claimed the benefit of Exemption Notification No. 46/201 Cus. dated 01. 06.2011, by classifying the said goods under CTH 20082000 or 08119010, which resulted in 'NIL' Basic Customs Duty (BCD). However, the benefit of the Exemption Notification No. 46/201 Cus dated 01. 06.2011 is not available under CTH 0804 3000, as proposed by the department.

Held:- The subject goods (canned pineapple slices) held classifiable under CTH 0804, wherein the benefit of said notification in not available and the appellant is required to pay merit duty. However, the Hon'ble

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CESTAT held that the demand for differential duty is limited to the normal period only. The interest would accordingly be reduced proportionately. The penalty under section 114A is set aside. Since the Department itself had classified the said goods under different headings, in view of the prevailing circumstances, the Hon'ble CESTAT held that the extended period cannot be invoked in the instant case.

22. C.L. International Vs. Commissioner of Customs (Import), New Delhi

Customs Appeal No.50823 of 2019.
Final Order No. 51597/2023 dated 05.12.2023

Issue:- Benefit of Merchandise Export from India Scheme (MEIS) - Seeking provisional release of goods - Mis-declaration of goods - Conditions imposed on the provisional release of the impugned seized goods - quantum of bond and the bank guarantee

Held:- As per the settled position of law there is no absolute right to claim provisional release and the same is subject to conditions that may be imposed by the competent authority, though the conditions that may be imposed cannot be arbitrary and capricious.

23. Vijay Kumar Sharma, Rohit Shakhuja and others Vs. Commissioner of Customs (General), New Delhi

Customs Appeal No. 51151-51153, 51942-51944, 52504 ,52514-52515 of 2015.
Final Order No. 51610-51620/2023 dated 06.12.2023

Issue:-It is a case of clandestine removal of import consignments of Air-conditioners and Refrigerant Gas, Cigarettes. Duty involved is Rs. 2.25 Crore.

Investigation was done by Directorate of Revenue Intelligence. It was found that the said container along with other containers had moved out from ICD, Tughlakbad (hereinafter referred to as "TKD"). On verification, investigating team observed that the container was removed on 25.05.2012 without filing any Bill of Entry but by using manual customs gate pass.

Held:- The Hon'ble CESTAT vide said order upheld the order passed by the department and penalty imposed on all appellants and has observed as under:

Investigation, of DRI and recorded statement of 120 persons and collected record, searched and examined by the DRI on 30.05.2012, 31.05.2012 and 7.6.2012. Searches lead to the recovery of such number of cylinders of R-22 gas, cigarettes and air-conditioners as has been tabled meticulously by the adjudicating authority. Rohit Sakuja and Ajit Chadha acknowledged being dummy proprietor of the company opened by them for illegally importing and clandestinely removing the goods from Customs area on the basis of forged customs gate passes. The observations about evidence collected these are sufficient to hold that there is meticulous investigation wherein voluminous documents obtained which corroborated testimony recorded during investigation proving the correctness of adjudication. Thus, we hold that we have no different opinion than the finding of original adjudicating authority while confirming allegation levelled against them and confirming proportionate liability.

Hon'ble CESTAT held that We have no reason to differ from the finding of the adjudicating authority. There is sufficient evidence even against shipper, K Line Singapore Pvt. Ltd. for colluding and abetting the impugned illegal import of goods consequently thereto all the appeals of the party were dismissed.

24. Asfaque Abubaker Naviwala Vs. Commissioner of Customs (Export) (ICD, TKD

Customs Appeal No. 52359 OF 2019.
Final Order No. 51635 /2023 dated 12.12.2023

Issue:- Whether non-mentioning of penalty proposition in the SCN would vitiate the impugned Order confirming Penalty. The present appeal has been filed to assail the order of the Commissioner Customs. Sh. Naviwala (hereinafter referred to as the appellant) has challenged the imposition of penalty of Rs.10,00,000/- (Rupees ten lakh only) under section 114(iii) of the Customs Act, 1962 and of Rs.20,00,000/- (Rupees twenty lakhs only) under Section 114AA of the Customs Act, 1962. It is case of overvaluation of export of garments to claim illegal Drawback by the exporter. The appellant, a partner of the overseas buyer, was involved in the abetment of the said forged exports

Held:- The Hon'ble Tribunal has held that - it is a settled position of law that wrong mention or non-mention of a rule in the show cause notice does not vitiate the proceedings. The Supreme Court in the case Fortune Impex vs Commissioner [2004(167) ELT A 134(SC)] has held that non mentioning a particular section of Customs Act, 1962 would not vitiate the proceedings when the allegations and charges against all the appellants were mentioned in clear terms in the show cause notice.

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It was also held that when importation or exportation of goods are subjected to certain prescribed conditions to be fulfilled either before or after clearance of the goods, and if those conditions are not fulfilled, the said goods would be considered as prohibited goods and Sections 2(23), 11 and 113(d) of the Customs Act, 1962 would come into play and the exporters would be liable for penalty.

25. Global Diamond Pvt Ltd Vs Pr. Commissioner of Customs, Noida and Customs

Customs Appeal No. 50642 of 2019.
Final Order No. 51652-51653/2023 dated: 15.12.2023

Issue:- The appellant is a manufacturing unit in the NOIDA Special Economic Zone. It imports gold duty free and manufactures and exports gold jewellery. Goods manufactured in the EPZ should only be exported. But they were being removed and sold in India (Domestic Tariff Area). Thus Central Excise Duty equivalent to the Customs duties leviable on such goods as if they are imported is demanded
The Central Excise officers caught some goods being clandestinely removed in a car from the assessee's factory and they seized them. The demand was made for goods caught as well as previously removed goods.

Held:- The basis on which duty demanded is on the basis of entries in WIP , on the basis of delivery challans of their related unit and on the basis of Rishu exercise book and Priya Exercise Book recovered from Shri Subhash Sharma Mumbai, their employee . The demand is upheld by CESTAT

26. Daxen Agritech India Pvt. Ltd. Vs. Principal Commissioner of Customs

Customs Appeal No. 50961 of 2020
Final Order No. 51678/2023 dated 20.12.2023

Issue:-Whether the confirmation of classification of goods i.e. "Bulk Reishi Gano Powder-100% Ganoderma and Bulk Ganocelium Powder 100% Gano Mycelium" and confiscation of the goods and the consequent demand of differential duty, interest and penalty, as proposed in the show cause notice. It appeared that they were mis-declaring these goods as Ayurvedic proprietary Medicine and consequently wrongly classifying the same under CTH 30039011 instead of correct CTH 21069099 of food supplements thereby evading payment of appropriate customs duty.

Held:- The Hon'ble tribunal has held that- a) The goods in question are re-classified as food preparations under CTH 2106 9099. Re classification as proposed by revenue is confirmed.

b) Demand for extended period should not be invoked.

c) The demand of differential duty is limited to the normal period, i.e. 03.07.2013 to 19.05.2015 and the same may be computed accordingly.

d) The interest under the provisions of section 28AA of the Act is also to be charged and recovered from the appellant for not paying the due customs duties in respect of the normal period of demand. Confiscation and Penalty not invoked. Matter remanded.

27. Shankar Lal Goyal Appellant. Vs Commissioner of Customs, New Customs House, New Delhi.

Customs Appeal No.50070 of 2020
Final Order No.51685/2023 dated 22.12.2023.

Issue:-The appellant has assailed the Order-in-Appeal No. CC(A)CUS/DII/Prev./NCH/640/2019-20 dated 19.09.2019 passed by the Commissioner of Customs (Appeals) affirming absolute confiscation of the seized gold of foreign marking and penalty under Section 112(b) of the Customs Act, 1062 (hereinafter referred to as the 'Act') Whether gold foreign origin would fall under prohibited category u/s 2(33) of the Act and can be imported on payment of Customs duty. Whether seizure, confiscation, imposition of penalty are rightly invoked.

Held:- Gold town seizure case :-

While affirming the findings of the Adjudicating Authority the Hon'ble Tribunal has held as under :- (a) gold seized (foreign origin) would fall under the definition of 'Prohibited goods' as per Section 2(33) of the act.

(b) gold being dutiable goods can only be imported on payment of customs duty under the Act.

(c) as per the admission of the appellant himself, the transaction in the present case has to be treated as smuggling as defined in Section 2(39) of the Act.

(d) the gold seized is liable for confiscation under Section 111(d) of the Act.

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(e) the adjudicating authority rightly did not invoke Section 110 A read with Section 125 of the Act and ordered for absolute confiscation.

(f) the appellant is liable to penalty under Section 112(b) of the Act.

28. Suresh Bhonsle and Mohd. Wajid @ Bunty vs Commissioner of Customs (Preventive)

(Customs Appeal No. 51257 and 51737 of 2018
Final Order No. 50015-50017/2024 dated 04.01.2024)

Issue:- Gold smuggling Town seizure. Absolute confiscation of 10 Kg Gold and imposition of Penalty under Sec 112 of the Act

Held:- The factum of recovery of such large quantity of 10 kgs. of gold concealed under the shirt speaks for itself and the appellant being the owner thereof was unable to provide any licit document of procuring the gold, justifies the confiscation under Section 111(b) and 111(d). Taking note of the fact that the appellant had indulged in such illegal gold transactions in the past, the absolute confiscation needs to be affirmed and therefore the gold seized cannot be provisionally released in terms of section 110A read with Section 125 of the Act - in the present case the appellant neither adduced any evidence to show that he had legally procured the gold by following requisite conditions of payment of customs duty and other charges nor did he produce any documents for having purchased the said gold within India and therefore the gold recovered were in violation of the prohibition imposed by DGFT and RBI apart from the provisions of the Customs Act hence was liable for confiscation under section 111 of the Act. Once liable for Confiscation Penalty under 112 has rightly been imposed.

29. Rakesh Luthra, S/o Krishan Lal, Sunita Luthra, D/o Mangat Rai and Sonia Luthra, D/o Puran Parkash Nischal Vs. Commissioner of Customs (Airport & General)

(Customs Appeal No. 50650, 50651, 50686 and 50156 of 2020.
Final Order No. 50019-50022/2024 dated 08.01.2024)

Issue:- Smuggling of Gold by four passengers through Green Channel, Commissioner of Customs (Gen) vide OIO dated 16.02.2020 allowed the gold recovered from them to be redeemed on payment of redemption fine or permitted for re-export and penalties were imposed on the three of the appellants and duty was demanded for earlier visits wherein they admitted to bring gold. Three of the appellant being aggrieved by said OIO filed appeal before Hon'ble CESTAT and the Department has also filed appeals against the decision of the adjudicating authority to permit Rakesh Luthra to redeem the gold, and the permission to re-export gold given to Sonia and Mamik Luthra.

Held:- Hon'ble CESTAT rejected the appeals filed by the three appellants and upheld the OIO also in case of departments appeal Hon'ble CESTAT held that goods are liable for absolute confiscation and allowed the department appeal

30. HBS Logistics Vs. Commissioner of Customs (Airport & General), New Customs House

(Customs Appeal No. 52249/2019
Final Order no. 50030 /2024 dated 09.01.2024)

Issue:- The present appeal filed by party to Challenge the order-in-original no.63/MK/Policy/2019 dated 10.05.2019 whereby the Commissioner Customs revoked the Customs Brokers License, forfeited the security amount of Rs.5 lakh and imposed penalty of Rs.50,000/- for contravention of the provisions of Regulation 10(j) and 13(12) of the CBLR, 2018.

Held:- From the facts of the case, we find that the same is distinguishable as contravention related to Regulations 11(a), 11(b), 11(n), 11(e) of CBLR, 2013 whereas in the present case regulation 10(j) of CBLR, 2018 has been invoked for forging/ fabricating the document whereby the first print page of the docket showed, "Examination has not been prescribed for this B/E" and also added the name of two officers from appraising Group-4 which gives an impression that the B/E has already been assessed by the group and examination is not required. This was just 13 to avoid the shed appraiser who keeps vigil over undervaluation cases in RMS and the present B/E was found to be undervalued. On the contrary the system entry showed, "Assessment and Examination has not been prescribed for this B/E." In other words, it amounts to fraud and the principle is that fraud vitiates all actions. In the circumstances no indulgence is required to set aside the order of revocation of Customs Broker License.

We are, therefore, of the considered view that the punishment imposed in the present case by the impugned order does not call for any interference and is hereby upheld. The appeal, is accordingly dismissed.

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31. Surendra Electricals Vs Commissioner of Customs (Exports)

Customs Appeal No. 50938 of 2020.
Final Order no. 50033/2024 dated 10.01.2024

Issue:- Whether the Department has rightly re-determined the value of the imported goods under Rule 5 of CVR, 2007 and rightly demanded differential duty and whether the penalties have rightly been imposed on the Importer

Held:- We are of the view that the present case being of mis-declaration which has been detected only on examination of the goods, it was justified for the department to reject the transaction value and re determine the same in terms of the Customs Valuation Rules which has been done as per Rule 5. The appellant has contravened the provisions of Section 17 and 46(4) of the Act by intentionally filing wrong declarations and by their acts of omissions and commissions had rendered the goods liable for confiscation under Section 111(l) and 111(m) of the Act. The appellant filing the Bill of Entry under self-assessment was duty bound to submit true and correct details. No interference is called for in the quantum of redemption fine and the same is within the prescribed limit as prescribed under Section 125 which provides that the amount of redemption fine shall not exceed the market value of the goods. Suffice it to say that the appellant is a habitual defaulter importing goods by mis-declaring both on account of quantity and 6 value is liable to penalty under Section 112(a)(ii) and section 114AA of the Act.

We accordingly, uphold the impugned order and dismiss the appeal.

32. Vijendra Singh Vs. Commissioner of Customs (Airport & General)

(Customs Appeal No. 50097 of 2020.
Final Order No. 50035/2024 dated 10.01.2024)

Issue:- Revocation of CHA License Forfeiture of Security and Penalty.

Held:- In terms of the aforesaid provisions of regulation 10(n) it is an admitted position that KYC norms were not verified before filing the bill of entry. Shri Shashikant Maruti Pol also admitted that he did not know the IEC holder of M/s. Pacific Imports as the work of import clearances were accepted from Shri Mehul Shah without even knowing him. Therefore, there is a clear violation by the Customs broker to know the antecedents, correctness of the IEC number, the identity and functioning of his client at the declared address as per the obligation cast on him under regulation 10(n). Even at the time of revocation of the suspension order, the Commissioner had also observed that there is prima-facie contravention of the provisions of Regulation 11(n) of CBLR, 2013. The appellant along with his representation dated 22.02.2017, had supplied copies of documents, KYC, reflecting the identity and antecedents of the importer, procured by the client and some of the documents such as authorisation letter dated 1.11.2016 for appointment of CHA, by the importer, M/s Pacific Imports, IEC copy of the importer, TIN, registration of the importer (State), TIN registration of the importer(Central) and proprietor's PAN was submitted at the time of personal hearing on 1.06.2019. The regulations provide for various penalties which can be imposed on the customs broker for violation of the provisions thereof. Regulation 17 provides for revocation of the license of a customs broker and for forfeiture of whole or part of the security. Regulation 18 provides for imposing penalty on the customs broker not exceeding Rs.50,000/-. The punishment of revocation of license has been held to be a very harsh punishment as it takes away the livelihood of a person on absolute basis. The Commissioner in the impugned order has taken a very fair and balanced view in refraining to order for revocation of licence and merely ordered for forfeiture of the security amount and imposing penalty of Rs.50,000/-, which would act as a deterrent to the appellant to be more cautious and diligent in executing his work.

The impugned order does not call for any interference and deserves to be upheld - Appeal dismissed.

33. Global Links Vs. Commissioner of Customs (A&G), New Delhi.

(Customs Appeal No. 55232 of 2023
Final Order No. 50049/2024 dated 15.01.2024.)

Issue:- The present appeal filed by CB was against order-in-original No. 28/ZR/Suspension-Confirmation/Policy/2023 dated 09.05.2023 passed by the Commissioner wherein the suspension of the CB licence was confirmed for the violation of Regulations 10(d), 10(e) and 10(m) of the CBLR.

Held:- CESTAT held that that once a violation of CBLR Regulations is admitted, the Revenue has to follow the discipline governing the Customs House Agents and as such, the Commissioner of Customs is empowered to revoke the license of Customs House Agent and also to forfeit his security if such agent fails to comply with the provisions of Regulation or gets involved in the Act which would amount to mis-

conduct/offence under the Act. Hence, there is no irregularity committed by the Adjudicating Authority while revoking the license of the appellant and imposing the consequential punishments under the Regulations. We do not find any infirmity in the impugned order. Consequently, the appeal stands dismissed.

34. Jain Wooltex Vs. Commissioner of Customs, Inland Container Depot

Customs Appeal No. 50415 of 2021
Final Order No. 50052/2024 dated 15.01.2024.

Issue:- It is a case of import of worn clothing in un-mutilated form. Briefly stated, the appellant filed the Bill of Entry for clearance of goods imported and declared as "Old Original Completely Pre-Mutated and Fumigated Mixed Hosiery Rags" and classified them under CTH 63109010.

The old un-mutialted mixed hosiery clothing classifiable under Tarrif item 63090000 is a restricted item as per 4 (ITC) (HS), 2017 notified under FTDR. read with paragraph 2.01 of the Foreign Trade Policy, 2015– 2020. As per para 2.08 of the Foreign Trade Policy, restricted items are permitted under an import License/Authorisation/Permission granted by the DGFT. The appellant has not submitted any such license and evaded duty.

Held:- CESTAT held that the goods imported were restricted goods and was imported without DFT Licence and the goods were mis-declared in respect of description, weight and value. Thus, the same are liable for confiscation and penalty under Section 112(a) of the Act for his act of omissions and commissions. The redemption fine imposed on the appellant of Rs.4,50,000/- is commensurate with the assessable value of the goods of ₹22, 90, 920/ and hence requires no interference.

35. Air Impex Cargo Agency vs Commissioner of Customs (Airport & General)

(Customs Appeal No. 50499 of 2021 [DB]
Final Order No. 50131/2024 dated 30.01.2024.)

Issue:- The appeal filed by CB was against revocation of Customs Broker license, forfeiture of security deposit and imposition of penalty. M/s Air Impex Cargo Agency, was instrumental and had actively connived with the main player by suggesting the description of the goods in the export documents and received extra amount in cash for clearance of the cargo of unscrupulous traders/exporters in export of carpet.

Held:- CESTAT held that the facts and circumstances of the case as discussed above are sufficient to establish the mensrea of the appellant. Accordingly, it is held that the adjudicating authority has not committed any error in holding that the Custom Broker Firm/appellant have failed in the compliance of the responsibilities cast upon them as per Regulation 10(a), (d), (e) and (n) of the Customs Broker Licensing Regulation, 2018, and 22 C/50499/2021 the consequent action for revoking the CB license, forfeiting the security deposit and imposing penalty.

36. Freight Logistics vs Commissioner of Customs (Airport & General)

Customs Appeal no. 50944/2021.
Final order no. 50161/2024 dated 02/02/24

Issue:-In a case of an attempt to export masks or fabric of mask to China by the exporter M/s Ala Foodstuff Pvt. Limited, wherein despite being declared as "packing material for pouches," the goods were actually found as "non-woven fabrics", potentially used in mask manufacturing, prohibited for export according to DGFT Notification No. 52/2015-2020 dated 19.03.2020, the Custom Broker, M/s Freight Logistics, was issued a SCN for violation of Regulation 10(a), 10 (e) & 10 (n) of CBLR, 2018. Further, while adjudicating the case, the adjudicating authority refrained from revoking the license but ordered forfeiture of security deposit and imposed a penalty of Rs. 50,000/- in terms of CBLR, 2018. The Custom Broker, M/s Freight Logistics, appealed this decision, leading to the current proceedings.

Held:- It is held that applying the doctrine of proportionality the forfeiture of security deposit is far beyond proportion and imposition of penalty of Rs. 50,000/- is sufficient. Accordingly, the impugned order is modified to the extent that forfeiture of the security deposit needs to be set aside and only the order whereby the penalty has been imposed is affirmed. Therefore, the appeal, filed by the appellant customs broker is partly allowed.

37. R.P. Cargo Handling Services Vs. Commissioner of Customs (Airport & General)

Customs Appeal no. 50490/2019.
Final Order no. 50160/2024 dated 02/02/24

Issue:-Whether the Adjudicating Authority has rightly revoked the CB License, forfeited security deposit and imposed penalty.

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Held:- Hon'ble CESTAT has held that on the issue of proportionality of imposing the punishment, we are again guided by the decision of the Delhi High Court in D.S. Cargo (supra) where the Court took note of the fact that the revocation of the license came into effect on 4.2.2019 and more than 4 1/2 years had lapsed which itself is a severe punishment and will serve as a reprimand to the appellant to conduct its affairs with more alacrity, the same order needs to be maintained. In the present case also, the order of revocation came into effect on 4.2.2019 and almost more than five years have lapsed since the appellant has been out of work on that account and which is a sufficient punishment for him to be cautious in future. In the facts of the present case, the punishment by way of revocation of license and forfeiture of security deposit is too harsh.

Therefore, relying on the judgment of Hon'ble Delhi High Court in D.S. Cargo, Hon'ble CESTAT has only upheld penalty on the CB and set aside the revocation of CB licence and forfeiture of security deposit.

38. Ananya Exim vs Commissioner of Customs (Airport & General)

Customs Appeal no. 52773/2019.
Final order no. 50224/2024 dated 09/02/24

Issue:-Revocation of Customs Brokers licence of the appellant - forfeiture of security deposit - Levy of penalty - violation of Regulations 10(a), 10(d), 10(e), 10(m) and 10 (n) of CBLR.

Held:- The appellant would have been correct if it had obtained the documents from the importer M/s. Angel Corporation. Obtaining the documents from some other person and filing benami Bills of Entry to clear mis-declared cargo, which in this case, happens to be a psychotropic substance banned under NDPS Act cannot, in our view, constitute fulfilment of Regulation10(n) - the Commissioner was correct in holding in the impugned order that the appellant had violated Regulations 10(a), 10(d) and 10(n). A Customs Broker is expected to behave and operate responsibly and he cannot simply file benami Bills of Entry which, in this case, resulted in import of a psychotropic substance. Filing of Benami Bills of Entry, if condoned, can have severe consequences. Customs procedures are based on trust and selective controls based on risk assessment. If Customs Brokers start filing Benami Bills of Entry, in the name of any importer, it can open the floodgates for free import of any contraband including, drugs, arms and explosives. Since examination is on selective basis, chances are that the contraband may not be detected (especially if mis-declared as a low risk import good) - filing Benami Bills of Entry is a serious violation and calls for toughest action.

There are no reason to interfere with the impugned order and uphold it. The appeal is, accordingly, rejected.

39. Subhrabrata Chattaraj vs Commissioner of Customs, Indore

Customs Appeal no. 52684/2019.
Final Order no. 50249/2024 dated 15/02/2024

Issue:-Whether the Appellant is liable for penalty under section 112 (a) of the Customs Act, 1962 ?

Held:- Hon'ble CESTAT has held that facts apparent on record are sufficient to hold that appellant was intentionally aiding Kirit and all his associates to let them commit illegal imports. Hence, it was held that there are sufficient ingredients for commission of offence by the appellant. It is clear that the Appellant was well aware about the proxy imports of Ajay and Kirit which were being cleared from a non-EDI port which was under the Appellant's control. Being the in charge of the customs port it was his duty to discourage this fraudulent practice. However, he not only kept mum but also encouraged the proxy importers to undertake such proxy imports from his port and even facilitated such proxy importers which clearly show his connivance in promoting the fraudulent practices Cross-examination is vital for meeting out the allegations but when there is sufficient corroboration to those allegations, denial of cross-examination cannot be held prejudicial.

40. Bhalinder Singh Mann, Rohit Sharma, Container Corporation of India Limited Vs. Commissioner of Customs (Import)

Customs Appeal no. 51911,52193, 52419/2018.
Final Order 54487-54489 /2024 dated 26/2/24

Issue:- Mis-declaring the imported goods as "glass beads with holes"- mis-declaring the nature of goods - Imported goods were found to be glass chatons – confiscation under Sec 111 - imposition of penalty under Sec 112 and 114AA of the Customs Act,1962. For being hand in gloves in the whole episode.

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Held:- Admittedly, Shri Rohit Sharma made a categorical statement under section 108 of the Customs Act before the Superintendent that he was the Manager of M/s Nomita International and that he had obtained the documents related to the import from owner of M/s Nomita International and handed them to Shri Bhatt for further processing and filing the Bill of Entry, and that he aware of the undeclared chatons which were seized by the customs authorities. This statement was made on 21.11.2014 and has not been retracted. All the material facts which were indicated in the statement such as the address of M/s Nomita International and the nature of its business matched with the facts available on record. We, therefore, find no reason to believe that the statement was made incorrectly or and under pressure or coercion. We also find that there was no retraction of the statement since November, 2014 until the issue of the show cause notice more than a year later. Any person who makes a statement under threat or coercion retracts it once the threat or coercion is removed. In this case, the appellant claims that he had left the service of Shri Bhatt in November, 2014 itself. That being the case, there was no scope for Shri Bhatt to exert any pressure on the appellant after that date. That we find no reason to interfere with the impugned order. The impugned order is upheld and the appeal is rejected in so far as Shri Rohit Sharma is concerned.

41. Mahalaxmi Valves Pvt Ltd Vs. The Commissioner of Customs (Import)

Customs Appeal no. 50198 of 2024.
Final Order 54525/2024 dated: 27/2/24

Issue:-Denial of Cross Examination

Held:- Though, learned counsel for the appellant contended that denial of cross-examination would prejudice the case of the appellant, but in our opinion it would always be open to the appellant to raise this issue once the final order is passed by the Principal Commissioner. It would not be appropriate, at this stage, when the Principal Commissioner is in the process of adjudicating the show cause notice, to examine this issue.

The appeal is, accordingly, dismissed with liberty to the appellant to raise the issue of denial of cross-examination before the Tribunal after the Principal Commissioner decides the matter. The miscellaneous application and the early hearing application also stand disposed of.

42. Kashi Kumar Aggarwal Vs. Commissioner of Customs (Appeals)

Customs Appeal no. 50536 of 2022.
Final Order 50105/2024 dated: 30/01/24

Issue:-Whether the Tribunal Delhi may adopt the findings of the coordinate bench in deciding another appeal under rule 41 of the CESTAT Procedure Rules, 1982 when the matter has been preferred in appeal by both sides before the Hon'ble High Court, Delhi.

Held:- Applicant has filed this miscellaneous application, seeking implementation of the order dated 23 March 2023 passed by this Tribunal in Appeal No. C/50536 of 2022 – CU (DB). On perusal of the case records, we find that both sides have filed appeal against the order dated 23 March 2023 before the Hon'ble Delhi High Court. Since, the said order passed by the Tribunal has been assailed by way of filing appeal before the higher judicial forum, it cannot be said that the order passed by the Tribunal has attained finality. Therefore, we are of the view that the present application filed under Rule 41 of the CESTAT Procedure Rules, 1982 cannot be acted upon at this juncture, for passing of an order for implementation of the same. Accordingly, the miscellaneous application filed by the applicant is dismissed.

43. Harish Choudhary Vs. Commissioner of Customs Export, New Delhi

Defect Diary No. 51190 of 2023 with Defect Diary No. 51675 of 2023, Defect Diary No. 51677 of 2023, Defect Diary No. 51679 of 2023.
Defect Miscellaneous Order No. 39-42/2024
Dated: 26/02/24

Issue:- Whether the drawback amount that was appropriated against the liability of some other person and not the appellant can be considered as pre deposit under Sec 129E of the Customs Act, 1962.

Held:- The appellant has not made the pre-deposit. As the law relating to pre-deposit has been settled by the Supreme Court in Narayan Chandra Ghosh vs. UCO Bank and Others, Chandra Shekhar Jha etc and the High Courts in Dish TV India Limited vs. Union of India & Ors. And in M/s Vish Wind Infrastructure LLP v/s Additional Director General (Adjudication), New Delhi4 the appeal would have to be dismissed for non-compliance of the statutory mandatory requirement.

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44. Ingram Micro India Private Limited Vs. Commissioner of Customs, ACC (Imports

Customs Appeal no. 50266of 2021.
Final Order 50266/2024 dated: 23/01/24

Issue:- Jurisdiction-power of Deputy Commissioner to re-assess the goods u/s 17(5) after the goods have been cleared for home consumption - Rejection of self-assessment by the importer of the imported goods whether the refund application can be entertained unless the assessment order has been challenged under sec 128 of the Customs Act, 1962. Whether the amendment application filed under sec 149 can be directed to be expedited.

Held:- It is not in dispute that in respect of eight Bills of Entry the appellant had not filed any appeal before the Commissioner (Appeals) for re-assessment. In this view of the matter, the Commissioner (Appeals) was justified in holding that the refund applications would not be maintainable in view of the decision of the Supreme Court in ITC. Decision of Hon'ble Supreme Court. It would, therefore, be appropriate that in case the application under sec 149 has already not been decided, it should be decided expeditiously and preferably within a period of three months from the date of filing of this order before the Deputy Commissioner.

45. Glanbia Performance Nutrition India Pvt Ltd Vs. CC, Mundra

Final Order No. A/11846-11874/2023 Dtd. 01.09.2023

Issue:- The appellant argued that Ld. Commissioner and Ld. AC have failed to consider the nature and composition of the impugned goods and simplistically reclassified the impugned goods under residual tariff heading 2106 of customs tariff.

Held:- It is clear that in instant case classification in favor of 2106 can be decided without resort to Explanatory Notes which in any case do not part of the legal provisions of the harmonized system. The matter can be decided with the help of statutory provisions of the Indian Customs tariff Act, 1975. While arriving at the above conclusion support is also drawn from the decision in the matter of Collector of Central Excise vs Frozen Food P.L reported in 1992.

46. Reliance Industries Ltd Vs. CC, Jamnagar

Final Order No. A/12380/2023 Dtd. 31.10.2023

Issue:- Short payment of Custom Duty and erroneous refund as the assessment of bill of entry was erroneously finalized by taking into consideration bill of lading quantity instead of Ship's Ullage Survey Report.

Held:- The matter is no longer res-integra as the Hon'ble Supreme Court in the case of M/s Mangalore Refinery and Petrochemicals Limited-2015 ELT 435(SC) has already decided the matter and the impugned order-in-appeal is legally tenable.

47. Amardeep Exports Vs. CC, Jamnagar

Final Order No. A/10267-10272/2023 Dtd. 30.01.2024

Issue:- The appellants were importing mix Brass scarp for manufacture for their final products in terms of Notification 52/2003 -CUSTOM dated 31.03.2003. The imported mix Brass scrap was first subjected to segregation and as a result non foundry scrap and foundry scrap were obtained. The foundry scrap was utilized in the manufacture of finish goods went for export. The dispute in the instant case is if the appellant has utilized raw material in excess of that prescribed - in the input/ output norms. It was alleged that appellants have utilized has excess imported raw material for the purpose as compare to the quantity eligible for manufacture of the finished goods.

Held:- Hon'ble Bench find that all the customs appeals the facts are practicably identical. We do not find any merit in appeals filed by the appellant the same are dismissed.

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48. Isgec Heavy Engineering Ltd Vs. CC, Ahmedabad

Final Order No. A/11897/2023 Dtd. 11.09.2023

Issue:- The clearance of the capital goods under EPCG was allowed under provisional assessment as per the provision of SEZ Act/Rules. The Department case was that appellant has not exited from SEZ and they are not eligible for clearing the capital goods under prevailing EPCG scheme as removal of goods is only available as per the Rule 74(4) of the SEZ Rules, 2006.

Held:- Stipulation of one time availment of EPCG Scheme at the time of exit cannot be read as permitting availment of EPCG Scheme under Rule 34 of SEZ Rule 2006 particularly under expression “on License” appearing in that Rule. Export promotional schemes since 1994 after existence of W.T.O are being made by member countries as complaint to the W.T.O provisions requiring no element of subsidy to be allowed even entering through procedural mechanism.

49. Bhatia Shipping Pvt Ltd Vs. CC, Kandla

Final Order No. A/11665/2023 Dtd. 04.08.2023

Issue:-Imposition of penalty for failure to properly perform the duty of CHA. A penalty has been imposed under Section 114 (iii) for violation of provisions of Section 34, 40 and 51 of the Customs Act.

Held:- The claim of the appellant is that the goods are liable for confiscation under Section 113 and therefore no penalty can be imposed. The goods were allowed to be loaded without let export order of the Custom officer. It is duty of the CHA to ensure that proper procedure is followed. In these circumstances. Hon’ble Bench do not find any merit in the appeal. The same is dismissed.

50. M M Trading Company Vs. CC, Mundra

Final Order No. A/11695/2023 Dtd. 14.08.2023

Issue:-the appellant filed Bill of Entry No.7032841 dated 02.07.2018 for clearance of 198.32 Mts of "Industrial Composite Mixture" classifying the goods under CTH 27101990. As per the test report, the imported goods were found "Light Oil, and not "Industrial Composite Mixture". The adjudicating authority found that the imported goods are classifiable under tariff heading 27101290 i.e. 'Other of sub heading Light Oils and Preparations'. The adjudicating authority also found that goods falling under tariff heading 27101290 are allowed to be imported through State Trading Enterprises (STE) only as per Policy condition-5 of Chaptr-27 of ITC (HS), Schedule-1. However, the appellant is neither STE nor they have submitted any documents showing grant of such rights by the DGFT to import or export any of the goods notified for exclusive trading through STES, therefore, they have violated the policy conditions of Foreign Trade Policy.

Held:- Party have accepted the classification and the nature of goods without seeking any re-test of the sample, we find that the present appeal is devoid of merits both on classification issue as well as violation of ITC policy and penalties imposed.

51. Asia World Export Vs. CCE, Ahmedabad

Final Order No. A/10063/2024 Dtd. 05.01.2024

Issue:- . They imported "Glass Beads Chatons" and sought classification under Heading 70181020. The goods were examined by Government approved valuer on 06.02.2014, and he certified the goods as "Glass Chatons" and described the goods as conical shaped stones resembling artificial diamonds without any piercing/ hole. This according to the revenue was not confirming the definition of "Beads", but appeared to be confirming to the "Chatons”.

Held:- It is apparent that the custom tariff itself was different when decision of Tribunal in the case of M/s. Art Beads Pvt Ltd was given and the same was the condition when the decision of Hon'ble High Court of Bombay was given in the case of M/s Starlite Corporation. In both these cases the classification was not being examined under the new custom tariff and in both these cases the explanatory notes given in HSN were not brought to the knowledge of the Courts.

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52. Ply Point Vs. Commissioner of Customs Cochin

Final Order No. 20869/2023 dated 23.08.2023

Issue:- Whether there was under-valuation in the import of Medium Density Fibre (MDF) Boards and Particle Boards from Malaysia

Held:- Based on the statements of the Country Manager of supplier, documents retrieved from his computer and the statement of the importer, the tribunal came to a conclusion that the Commissioner was right in determining the value of the goods under Rule 4 of the Customs Act, 1962. Accordingly, the differential duty demanded under Proviso to Section 28(1) of the Customs Act along with interest was upheld. It was also held that the goods were liable for confiscation and confiscation was upheld. Since Penalty imposed under Section 114A was upheld, penalty imposed on the importer under Section 112(a) of the Customs Act, 1962 was set aside.

53. American Power Conversion India (P) Ltd Vs. The Commissioner of Central Excise, Customs & ST, Bangalore (South)

Final Order No. 20828/2023 dated 23.08.2023

Issue:- The appellants had imported Enviro-Tuff Liner packing material classifying the product under CTH 39232990 and claimed the benefit of Notification No. 52/2003. The issue was whether the impugned goods could be considered to be packing material and the benefit of notification extended.

Held:- The Tribunal held that all second hand goods were restricted for import. The appellants had violated the provisions of Foreign Trade Policy and hence the order of the Commissioner (Appeals) was correct. The duty demand along with interest was confirmed and redemption fine & penalty was reduced to 10% and 5 % respectively.

54. Elite Green Pvt. Ltd. Vs. The Commissioner of Customs- Cochin

Final Order No. 20971/2023 dated 08.09.2023

Issue:- Refund claim of SAD@4% paid through Debit in the DEPB/ REWARD Scheme Script.

Held:- Appeal rejected on account of Appellant making 4% SAD payment by debiting in the DEPB/ REWARD Scheme Script and claiming refund, which is found to be violation of time limit fixed 30th Sep. 2013 (last fixed Deadline) as per Circular 18/2013-Cus dated 29.04.2013.

55. Hikoki Power Tools India Pvt. Ltd. Vs. The Commissioner of Customs (City Customs) Bangalore

Final Order No. 20945-20946/2023 dated 18.09.2023

Issue:- Classification of Brush cutters. The appellant wanted to classify under CTH 84322990 since that were used for Agricultural purpose. Department wanted to classify the same under CTH 84678990 since the said goods are hand held and HSN explanatory notes clearly mention Brush cutters under CTH 84678990

Held:- The Tribunal held that a plain reading of tariff entries and the HSN Notes make it clear that CTH 8467 refers to hand held tools whereas CTH 8432 and CTH 8433 refer to machines that are used in place of hand held tools. The Tribunal also clarified that the purpose for which the tools are used is not the criteria to determine the classification. The Tribunal relied on Hon'ble Apex Court's decision in the case of M/s O.K. Play (India) Ltd. Vs. CCE-2005 (180)ELT 300.

56. IBM India Pvt. Ltd. Vs. The Commissioner of Customs (City Customs) Bangalore

Final Order No. 20920/2023 dated 08.09.2023

Issue:-The appellant made import of Goods viz. SPO FOR 5691XXX CATIA HYBRID DESIGN vide BoE 276457 dated 27.11.2009. The said goods were cleared upon assessment and due payment of Customs duty. However, Post clearance of said Goods, the appellant came up with a request for amendment of BoE to change the Value of Goods based on purported PO/ amended PO bearing lesser Value on which said Goods were assessed and OOC given by the Customs officer. Upon examination the Provisions under Section 149 of Customs Act, 1962 it was held to be not applicable

Held:- The Hon'ble Tribunal held that the Provision of Section 149 of the Customs Act, 1962 cannot be held applicable in the fact of the case. With goods already been cleared on payment of appropriate duty, based on the Value as per PO, the Document which stood existed. Seeking amendment under Section149 of the Customs

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Act, 1962, on the basis of Documents viz. Amended PO not found/ made available at the time of Assessment, that too they being ACP client, with No Examination of Goods as such, cannot be legally Tenable. Thus, appeal stands rejected by the Tribunal, upholding the Commissioner (Appeals) order.

57. ABB Ltd. Vs. The Commissioner of Customs, ACC- Bangalore

Final Order No. 21151-21152/2023 dated 20.10.2023

Issue:- Classification of 'Frequency Converter' (Variable Speed Drive) : Whether under Heading 9032 8990 as claimed by the Appellants or under Heading 8504 4010 as classified by the Department

Held:- These drives primary function as conversion of the current from DC to AC and also functions as inverters. Chapter 85 includes all machinery and 8504 specifically includes electric inverter and the drives fall under either Chapter 84 or 85 and they have nothing to do with Chapter 9032. Admittedly, the principal function of the imported item is of an inverter and it is also not under dispute that these drives are being used in those machinery which are classifiable under Chapter 84 or 85 Therefore based on the Section Notes there is no confusion as to the classification of the product. It also says that the machine refers to the machines classifiable under Chapter 84 or 85 so the question of classifying the product under Chapter 90 does not arise. The WCO also for which India is a member decided the classification of the 'frequency converter' under Chapter 8504. Accordingly, in view of the Technical Literature submitted by the appellant and based on the relevant Section Notes, Chapter Notes, HSN Explanatory Notes, General Rules for the Interpretation of Import Tariff and the WCO decision, the products are rightly classifiable under Chapter Heading 8504 as against the classification under Chapter Heading 9032 as claimed by the appellant.

58. The Commissioner of Customs, City Customs- Bangalore Vs. Kronos Systems India Ltd.

Final Order No. 21155/2023 dated 20.10.2023

Issue:- Classification of Kronos 4500 Touch ID terminal chips with an integrated badge reader.

Held:- The device captures the data from the employee's card or the data of the particular employee who key in the PIN into the device. The device does not do anything except for collecting the data at the time of entry or exit and this data is transmitted to a central server for further processing like marking the attendance, preparation of payroll or for other purposes. Based on the General Rules of Interpretation and the Chapter Notes, the item needs to be classified in the heading akin to it or where the specific description is provided. In this case, the data collection device is nothing but a card reader working in conjunction with the server. Thus, this device functions such as proximity readers /badge readers, which are specifically classified under Chapter Heading No.8543. Hence the product is rightly classifiable under chapter 8543.

59. Glass House Vs. The Commissioner of Customs, Cochin

Final Order No. 21259/2023 dated 20.11.2023

Issue:-As per the Notification No.4/2009 Cus. dated 06.01.2009, the imported goods "Dark Green Reflective Float Glass" imported from China were liable for anti-dumping duty.

Held:- In the present case, since Reflective Glass is not found in the Notification No.4/2009- Cus. dated 06.01.2009 for exempting them from anti-dumping duty, question of extending the benefit does not arise. The Appeal is dismissed.

60. The Commissioner of Customs, City Customs- Bangalore Vs. Larson & Tuobro

Final Order No. 21316/2023 dated 30.11.2023

Issue:- Import of G-24 PL 001 GSM Chipset Wavecom (modem) classified under 8517 6230.The Original Authority classified under Chapter Heading 8537 1000.

Held:- Rightly classifiable under Chapter Heading 8537. Consequently, the impugned order is set aside and the appeal filed by the Revenue is allowed.

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61. Woodtech Consultants (P) Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (West)

Final Order No. 21348-21350/2023 dated 13.12.2023

Issue:- Under invoicing the imported goods f wood working machines to the extent of 40%. Demand was confirmed by enhancing the assessable value to Rs.1,56,71,221/- with interest; imposed penalty of Rs.14,97,179/- and equal interest under Section 114A of the Customs Act, 1962; also, he has imposed penalty of Rs.3,00,000/- on Shri T. Gopi, Managing Director and Rs.2,00,000/- on Shri D. Madan Raj under Section 112(b) of the Customs Act, 1962.

Held:- Appeal filed by the appellant-company is dismissed and the appeals of other appellants are partially allowed to the extent that the penalty imposed on Shri T. Gopi, Managing Director is reduced to Rs.2,00,000/- (Rupees Two Lakhs Only) and the penalty imposed on Shri D. Madan Raj, Marketing Director is reduced to Rs.1,00,000/- (Rupees One Lakh Only) under Section 112(b) of the Customs Act, 1962.

62. ABB Ltd. Vs. The Commissioner of Customs, City Customs- Bangalore

Final Order No. 21337/2023 dated 04.12.2023

Issue:- The appellant had filed Bill of Entry No.860886 dated 19.9.2008 declaring goods as inverter unit – frequency converter classifying the same under CTH 9032 9000 and claiming concessional rate of duty. The Department has reclassified the product under CTH 8504 4010 as 'inverter'. Aggrieved by the said assessment, they filed appeal before the learned Commissioner (A), who in turn upheld the order of the adjudicating authority and rejected their appeals

Held:- Hon'ble CESTAT has ordered that they do not find any reason in not following the said order of the Tribunal. Consequently, the product in question merits classification under CTH 8504 instead of CTH 9032 as claimed by the appellant. Consequently, the appeal is dismissed.

63. The Commissioner of Customs, City Customs- Bangalore Vs. Bosch Ltd.

Final Order No. 21336/2023 dated 06.12.2023

Issue:- M/s. Bosch Limited imported Smartra Immobilisers classifying the same under Chapter Heading 8536 5090 as automatic regulating and controlling instrument and apparatus. From the catalogue submitted by the respondent, the C/1774/2010 Page 2 of 15 imported item vehicle immobiliser system consisted of key head with transponder, antenna, Smartra, and engine management system. From the various features of the imported items, it was found that it was an optional item to be fitted to vehicle engine for better security. The engine of the vehicle would not start if any improper starting of the vehicle was attempted and thus, prevented theft. It was an antitheft device and accordingly, the item was classified under chapter heading 8708 9900 as accessories of vehicles by the original authority. However, on appeal, the Commissioner (Appeals) observed that Smartra components are made up of digital circuit with the character interface and the device directs electronic signals between the engine management system and the transponder and once the car engine is stopped the EMS immobilises the vehicle by disabling control of the spark ignition circuit and fuel supply. Going by the Australian Customs Authority's classification, the Commissioner (Appeals) classified the said item under 8536 5090. The department is in appeal against this impugned order.

Held:- Since the Smartra immobiliser is only a security device to prevent a vehicle from being stolen it is rightly classifiable under Chapter Heading 8708 as parts of motor vehicle. When the primary evidences and criteria for classification as discussed supra do not allow classifying the items under Chapter Heading 8536, the question of following the Tariff Advice which is only a persuasive value does not arise. The impugned order is set aside and the appeal is allowed.

64. Enterprise Software Solutions Lab Vs. The Commissioner of Customs, City Customs- Bangalore

Final Order No. 21438/2023 dated 22.12.2023

Issue:- M/s. Enterprise Software Solutions Lab Ltd., Bangalore, had imported T4 Fingerprint Time & Attendance System and K200 Proximity Time & Attendance System under Customs Tariff Heading 8471 4190. The assessing authority C/255/2012 Page 2 of 10 classified them under 8543 and aggrieved by this order the appellant filed an appeal before commissioner appeals who classified them under 8471. The revenue filed an appeal before this Tribunal and the Tribunal vide Final Order dated 11.8.2010 had remanded the matter to re-examine the issue

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Held:- This Tribunal, recently, in the case of Commissioner of Customs, Bangalore vs. M/s. Kronos Systems India Pvt. Ltd. vide Final Order No.21155 of 2023 dated 20.10.2023, in an identical issue held the product to be rightly classifiable under Chapter 8543. 12. Hence, based on the above discussions and by following the decisions of this Bench, we find that the product is rightly classifiable under Chapter 8543.

65. Fobin Poly Glass Vs. The Commissioner of Customs, City Customs- Bangalore

Final Order No. 21423/2023 dated 19.12.2023

Issue:- This is a case of mis-declaration and undervaluation of the goods imported. The authorities below found that the imported item was A-15 Tender Rigid Inflatable Boat of APEX making which was mis-declared as A-15 Open Rigid Inflatable Boat vide Bill of Entry No.2825505 dated 22.2.2011. Shri Harish J Padmanabh, Proprietor of M/s. Forbin Poly Glass (the Appellant) in his statement had clearly admitted that he was not aware of the model as there was no purchase order and hence, accepting the mis-declaration requested vide letter dated 26.3.2011 to adjudicate the case without issuance of show-cause notice and also requested the authorities to take a lenient view.

Held:- There is nothing placed on record to disprove either the mis-declaration or undervaluation of the goods that were imported. In view of the admitted facts on mis- declaration and undervaluation, we find that the redemption fine is only Rs.1,00,000 and penalty imposed is only Rs25,000/- which is 10% of the duty liability, which is reasonable. Therefore, we find no reason to interfere with the impugned order. Consequently, the impugned order is upheld and the appeal is dismissed.

66. Sree Rayalaseema Hi Strength Hypo Ltd. Vs. The Commissioner of Customs- Cochin

Final Order No. 21338/2023 dated 07.12.2023

Issue:- The appellant used to export Chlorine content more than 60" and as per International Maritime Dangerous Goods Code, it was difficult to export the goods under same heading. Thus goods were exported as "Calcium Hypocloride Hydrated". Due to change of description as stated above, the benefit of DEPB denied to be appellant. Thereafter appellant approached DGFT and DGFT issued Public Notice No.96 dated 05.04.2006 for amending description of the product as "Calcium Hypochlorite Hydrated". After issuing amendment, appellant made a request before the respondent to amend the shipping bill for converting free shipping bill to DEPB shipping bill. To support the claim, appellant also produced certificate from "Indian Institute of Chemical Technology" to prove that both the description are one and the same. However adjudicating authority denied the request by this impugned order. Aggrieved by the same, present appeal is filed before this Tribunal

Held:- Though it is admitted that the circular No.36/2010 dated 23.09.2010 fixing time limit of 3 Months is not proper, as held by C/1294/2012, Hon'ble High Court of Delhi in the matter of E.S.LIGHTING TECHNOLOGIES PVT. LTD. (Supra), merely because no time limitation is prescribed under Section 149 for the purpose of seeking amendment/conversion, it does not follow that a request in that regard could be made after passage of any length of time. The request by the appellant was to convert shipping bill from free to advance license shipping bill. The Respondent cannot entertain such request for conversion without examination of the records. It is not fair to expect the department to consider the request for such amendment after 5 long years. Thus there is no infirmity in the impugned order rejecting the request for amending shipping bill for converting free shipping bill to DEPB shipping bill 6 years after export of goods. Considering the above facts, appeal is rejected.

67. Cochin Shipyard Ltd. Vs. The Commissioner of Customs- Cochin

Final Order No. 20055/2024 dated 24.01.2024

Issue:- The refund claim filed by the appellants was rejected on grounds of unjust enrichment. The appellant claimed that the amount received from the buyer was to be paid back on receipt of the refund and shown in balance sheet as such.

Held:- In the present case it is clear that the duty burden was passed on to the buyer. It is settled law that unless and until the importer proves that incidence of duty has not been passed on to the buyer, the question of refund does not arise. The Tribunal relied on the decision of Hon'ble Supreme Court in the case of Union of India Vs. Pesticide Pvt. Ltd. 2000 (116) E.L.T. 401 (S.C.).

The appeal was dismissed.

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68. Lovable Lingerie Ltd. Vs. The Commissioner of Customs (City Customs) Bangalore

Final Order No. 20041/2024 dated 10.01.2024

Issue:- The present appeal is regarding the classification of the goods 'Bra Cups' imported by the appellant during the period from 25.02.2010 to 14.07.2010. The appellant claimed classification under CTH 3926 of the Customs Tariff Act, 1975 as against the classification by the Revenue in the impugned order under CTH 6212.

Held:- We uphold the classification of the imported goods under CTH 6212 and consequently, impugned order is upheld as far as classification is concerned and appeal is remanded to the adjudicating authority to recalculate the duty taking into consideration the unit price for pairs as a single unit price.

69. The Commissioner of Customs Mangalore Vs. RMKS Minerals Exports (P) Ltd.

Final Order No. 20025/2024 dated 04.01.2024

Issue:- What would be the relevant date for payment of duty in case of export of goods. The Original Authority had rejected the refund claim on the ground that the relevant date would be the date of 'Let Export Order'. Commissioner (Appeals) had allowed the refund taking date of loading of goods in the vessel as the relevant date.

Held:- The Tribunal held that the relevant section to determine the rate of duty is Section 16 read with Section 50 of the Customs Act ,1962. As per Section 16, the date of 'let export order' is the date for determining the rate of duty. The reliance placed by the Commissioner (Appeals) on Section 18 & 19 of the Customs Act, 1962 is irrelevant as they relied on the Order of on'ble High court of Bombay in the case of Narayan Bandekar & Sons Pvt. Ltd. Vs. Commr. of Cus. & C. EX, Goa 2010 (259) E.L.T. 362 and C. EX., CUS. & S.T., BBSR- I Vs. Kashvi Power & Steel (P) Ltd. 2018 (364) E.L.T. 332 The impugned order was set aside & Revenue Appeal allowed.

70. The Commissioner of Customs City Customs- Bangalore Vs. Snom Technology India Ltd.

Final Order No. 20026/2024 dated 04.01.2024

Issue:- Classification of Fingerprint Reader- Whether under CTH 8476050 as part of Automatic Data Processing Machines or under CTH 85437099

Held:- The Tribunal observed that the issue was decided in cases of CC vs. Kronos Systems India Pvt. Ltd. Final Order No. 21155/2023 dated 20.10.2023 & Commissioner of Customs, Bangalore vs. Scatia: 2019 (370) ELT 703. Since the specific function of the imported item is to mark attendance hence it is excluded from Chapter 84 by virtue of Chapter Note 5(e) to Chapter 84. Hence the Departmental Appeal was allowed.

71. Nuance Group (India) Pvt. Ltd. Vs. The Commissioner of Customs (ACC) Bangalore

Final Order No. 20042/2024 dated 10.01.2024

Issue:- The appellant was operating Private Bonded Warehouse and Duty free shop at Bangalore International Airport under Section 58 of the Customs Act, 1962, under such conditions as specified in Trade facility No. 50/2005 dated 05.04.2005 issued by Bangalore Customs. The appellant had launched a promotional offer for sale of Johnnie Walker and Smirnoff Brand liquor in terms of " Buy JW centurians 3 for 2, buy JW Black 3 for 2" without any prior information to Customs Authorities. The Appellant had sold one extra bottle of liquor, without payment of duty and thereby violated the provisions of Section 72 of the Customs Act, 1962 and Trade facility No. 50/2005. Admittedly accepting the lapse, the appellant paid duty of Rs. 14,21,751/-. The Original Authority confirmed the demand along with interest and imposed penalty of Rs. 50,000/-. Subsequently, the appellant disputed the duty liabilities on the ground that the duty needs to be collected from the passengers.

Held:- The Hon'ble Tribunal observed that the appellant is bound by the provisions under Section 58 and Section 72 of the Customs Act, 1962 and that permission for running the DFS was granted with the strict conditions that the import of goods such as liquor were allowed duty free only for the purpose of selling the same to the International Passengers and subject to maintenance of specified records. Observing that the license of DFS is liable to pay if the provisions of Sections and Procedures laid down therein are violated, the Hon'ble Tribunal held that the question of passengers paying duty

does not arise. Therefore, Hon'ble Tribunal has upheld the duty confirmed, with interest, however, penalties imposed has been set aside.

72. UDL Logistics (P) Ltd. Vs. The Commissioner of Customs- City Bangalore

Final Order No. 20036/2024 dated 09.01.2024

Issue:- The DRI officers intercepted export consignments pertaining to M/s. TEAC Engineers where the products were declared as "Ductile Industrial Pipes" but on examination of the consignment, it contained red sanders logs which are prohibited items for export. Since the appellant had filed these shipping bills and had violated the Customs Brokers Licensing Regulations (CBLR) 2018 and therefore, they were issued with show-cause notice which culminated into impugned order wherein the Commissioner revoked the license and ordered for forfeiture of entire security deposit and imposed penalty of ₹50,000/-. The appellant is in appeal against this impugned order.

Held:- The Tribunal held that we find no reason for revoking the license of the appellant and for forfeiture of the security deposit. Therefore, we set aside the revocation of license and forfeiture of the security deposit. However, the fact remains that the goods that were declared as 'Industrial Ductile Pipes' were found to be 'red sander logs' and the shipping bills were filed by the appellant. For having violated the Regulations of CBLR in not verifying the genuineness of Mr. Satish Kumar who claims to the authorised representative of the exporter will warrant penalty under CBLR 2018. Accordingly, we uphold the penalty of Rs50,000/- (Rupees Fifty Thousand Only). The appeal is allowed partly.

73. Saraswati Knitwear Pvt. Ltd. vs Commissioner of Customs Ludhiana

Final Order No.A/60376/202313.09.2023

Issue:-Interest on refund filed under section 18 and 27A of the Customs Act, 1962

Held:-The refund was granted within 3 months as prescribed under Section 18 (4) of the Act. Therefore, the appellant is not entitled to any interest.

74. Safe Cargo Clearing Services vs. C. C. Ludhiana

Final Order No.60462/202303.10.2023

Issue:--Revocation of Custom Broker License under Regulation 17 of CBLR 2018.

Held:-Held that revocation of custom broker license of the appellant is not warranted. The revocation was set aside. As far as the imposition of penalty and forfeiture of security deposit are concerned, the Bench was of the opinion that the imposition of penalty of Rs. 50,000/- and forfeiture of security are justified in the facts and circumstances of the case. Adjustment of excess payment of service tax of one period towards the liability of the other period. Appeal dismissed.

75. Narayan Sharma Pardeep Saini Sreet Saini Vaibhav Rai Rakesh Rai Vs. C. C. Amritsar

Final Order No.A/60464-60468/202305.10.2023

Issue:--Recovery of 999.5 gram of smuggled gold at airport, confiscation thereof, and further duty, and penalty imposed.

Held:-Held that
-Absolute confiscation of gold bar weighing 995.5 grams valued at Rs 32,98,350/-, seized, under section 111(d), 111(1), 111(1) and 111(m) of the Customs Act, 1962 was upheld.
- dropped the demand of duty of Rs 11,80,872 under section 28 of the Customs Act, 1962 and order its recovery from Sh. Narayan Sharma.
- the order of the Ld. Commissioner regarding absolute confiscation of Indian currency of Rs 2.20 lacs of Sh. Pardeep Saini, under Section 121 of the Customs Act, 1962 was upheld.
- the penalty on Sh. Pardeep Saini and Shri Rakesh Rai was reduced from Rs. 15,00,000/- to 5,00,000/- under Section 112 of the Customs Act, 1962;
- the penalty of Rs. 1,00,000/- on Sh. Narayan Sharma, under Section 112 of the Act read with section 114 of the Act was upheld.
- The penalty of Rs.5,00,000/- on Sh. Vaibhav Rai, under Section 112 of the Customs Act, 1962 was upheld.
-The penalty of Rs. 50,000/- on Smt. Sreet Saini, under Section 117 of the Act was upheld.

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76. C. C. New Delhi (Import & General) vs Namo Alloys Pvt Ltd

Final Order No.A/60631-60665/2023

Issue:--Import: Value loading of aluminium scrap

Held:-Held that in the case of C. C. (Import), ICD, TKD, New Delhi vs. M/s Sodagar Knitwear Pvt. Ltd. where the Tribunal has held that once the importer voluntarily accepted the enhancement then he is precluded from challenging the same. This judgment of the Tribunal has been upheld by the Hon'ble Apex Court as reported in 2018 (362) ELT A213 (S.C.).

In view of above, the Bench was of the considered view that the impugned order is not sustainable in law and therefore, the same was set aside by allowing the appeals of the department.

77. Royal International Vs Commr. Of Customs, Amritsar

Final Order No.60034/2024 dated 31.01.2024

Issue:- imposition of penalty of Rs. 1,00,000/- under Section 114(i) of the Customs Act, 1962.

Held:- I was held that under Section 114(i) of the Customs Act under which penalty has been imposed in this case, does not require intend to be proved and the only condition that has to be satisfied is that the goods should be liable for confiscation which is clearly satisfied in the present case. In view of this, I do not find any infirmity in the impugned order which I uphold subject to the reduction of the penalty to the extent of Rs. 50,000/-.

78. Nanda Agency House Shipping Service Pvt. Ltd. Vs. Commissioner of Customs, Chennai-II

Customs Appeal No.40160 of 2020
Final Order No.40715/2023

Issue:- Re-assessment of imported "Glass Bottom Boat Looker 350" under CTH. 89011030 at 'Nil' rate of duty. Claim of refund of Customs duty Rs.93,47,327/-paid on 01.09.2015. Delay of 253 days in grant of refund .Demand for interest at higher rate at 9% instead of Notified rate of 6%.

Held: There are no circumstances in the present case warranting to grant increased rate of interest to the appellant. The impugned order is sustained. Appeal is dismissed as being devoid of merits.

79. 1. Ghazzali Trading. 2. N.Akbar Proprietor, Ghazzali Trading Vs. Commissioner of Customs , Chennai Air

Customs Appeal No.42310 of 2013 & 42311 of 2013
Final Order No.40868-40869 of 2023 dt.05.10.23

Issue:- Based on the allegation of misuse of IEC and filing of Bills of Entry under self-clearance, a show Cause Notice dated 28.06.2013 was issued proposing confiscation of goods imported as per bills-of-entry nos. 8761027, 8713098 and 8695651.It was also proposed in the Show Cause Notice as to imposition of penalty under Section 112 (a) of the Customs Act, 1962 on both the assessee as well as his manager.

Held: It is held that the assessee has not proved beyond reasonable doubt that the goods in question imported under the air way bills/bills-of-entry in dispute were in fact filed by him and hence the only natural corollary available to the Revenue is the confiscation of the same. For this, the Revenue need not prove the owner of the goods; when a claimant does not prove that the goods in question belongs to him, it is not for the Revenue to thereafter establish a certain actual owner of the goods. The assessee made the Revenue believe his words, which resulted in the initiation of investigation and thereafter, he also claimed that he was the actual owner of the goods imported. Hence, it is of the opinion that the assessee could be held to be 'any person' within the meaning of Section 112 of the Customs Act, 1962 and therefore, the Revenue is justified in imposing penalty on the assessee- Appellant.

80. HLG Trading Vs. Chief Commissioner, Chennai-IV

Customs Appeal No.40578-40587 OF 2016
Final Order No. 40902-40915 OF 2023 dt. 12.10.23

Issue:- Whether the appellants are entitled to the benefit of Notification No. 34/2015-C.E. dated 17.07.2015 and Notification No.37/2015-C.E. dated 21.07.2015?

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Held:- At the outset, given the undisputed facts, we do not find any reasons at all to interfere with the impugned Orders-in-Appeal since we find that the Hon'ble High Court of Judicature has analysed the law and the change brought about by subsequent Notification Nos. 34/2015 and 37/2015 ibid has been followed. Though the vires of amended Notification Nos.34/2015-C.E. dated 17.07.2015 and 37/2015-C.E. dated 21.07.2015 were challenged before the Hon'ble jurisdictional High Court, the Hon'ble High Court has held that there are no merits in the writ petitions. We also note that in the case of Commissioner of Cus. (Exports), Chennai v. Prashray Overseas Pvt. Ltd. [2016 (338) E.L.T. 44 (Mad.)], the very Hon'ble jurisdictional High Court had gone into the very same issue and allowed the revenue appeal. The Ld. first appellate authority has only followed the binding decision of the Hon'ble High Court (supra) and therefore, we do not find any fault with the impugned orders. In view of the above, we do not find any merit in the contentions of the appellants.

81. Aditya International Ltd. Vs. CC(Air Cargo) , Ch-VII

Customs Appeal No.40578-40587 of 2016
Final Order No. 40902-40915 of 2023 dt. 12.10.23

Issue:- whether the appellants are entitled to the benefit of Notification No. 34/2015-C.E. dated 17.07.2015 and Notification No.37/2015-C.E. dated 21.07.2015?

Held:- At the outset, given the undisputed facts, we do not find any reasons at all to interfere with the impugned Orders-in-Appeal since we find that the Hon'ble High Court of Judicature has analysed the law and the change brought about by subsequent Notification Nos. 34/2015 and 37/2015 ibid has been followed. Though the vires of amended Notification Nos.34/2015-C.E. dated 17.07.2015 and 37/2015-C.E. dated 21.07.2015 were challenged before the Hon'ble jurisdictional High Court, the Hon'ble High Court has held that there are no merits in the writ petitions. We also note that in the case of Commissioner of Cus. (Exports), Chennai v. Prashray Overseas Pvt. Ltd. [2016 (338) E.L.T. 44 (Mad.)], the very Hon'ble jurisdictional High Court had gone into the very same issue and allowed the revenue appeal. The Ld. first appellate authority has only followed the binding decision of the Hon'ble High Court (supra) and therefore, we do not find any fault with the impugned orders. In view of the above, we do not find any merit in the contentions of the appellants.

82. Micro Labs Limited Vs. Commissioner of Customs

Customs Appeal No. 41020 of 2014
Final Order No. 40916 of 2023 dt. 12.10.23

Issue:- whether the appellant/assessee was right in its claim for nil rate of CVD in terms of the Notification No. 12/2012-C.Ex Sl. No. 105, List 1 Sl. No.11

Held: The appellant's claim after clearance of goods from Customs charge that since it imported Hydrocortisone which has a specific entry in List 1, the same attracts 'nil' ate of duty, does not sound to be correct, since the description at Column No. (3) has to be read in full, along with the explanation provided thereunder and, according to us, it is the explanation which controls the 'description of goods' for eligibility for rate of duty at 'nil'. Admittedly, the appellant/assessee has nowhere demonstrated that the goods imported by it did conform to the standards specified under the explanation nor are the goods available for testing as they were cleared from Customs control before making the claim for exemption. We do not have any hesitation in holding the authorities below were absolutely correct in rejecting the claim of the Appellant and thereby the appeal stands dismissed.

83. Balaji Building Technologies (P) Ltd. Vs. Commissioner of Customs (Imports), Chennai

Customs Appeal No.41972/2014
Final Order No. 41121 OF 2023 dt. 13.12.2023

Issue:- Mis-declaration of Clear Float Glass made by the Appellant to avoid anti-dumping duty

Held: Even if the duty paid by the appellant were more than what was demanded, it would not in any way affect the classification as such. There was a fundamental dispute as regards classification since clear float glass attracted Anti-Dumping Duty; the Revenue went by the first check/personal inspection of the cargo and the description label on the goods. The same was adopted since it was never challenged. The appellant, by raising a ground that the duty was paid for Extra Clear Glass, is indirectly trying to justify its classification which cannot be permitted. When there were clearly no doubts in the minds of the Revenue as to what was imported was float glass, then necessary consequences ought to follow, inasmuch as the liability to ADD cannot be overlooked just because the appellant has been magnanimous in remitting more duty. If the said theory is accepted, then the same would affect the classification itself. Hence, the theory of the appellant cannot be accepted as the same lacks any merit.

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84. Tamilnadu Dyes and Chemicals Vs. Commissioner of Customs, Tuticorin

Customs Appeal No.40645/2020
Final Order No. 41124 OF 2023 dt. 14.12.2023

Issue:- Mis-declaration of imports of Superior Kerosene Oil as Low Aromatic White Spirit (LAWS). Whether remand by Commissioner (Appeals) sustainable?

Held: In the light of the above discussion, we do not find any piece of evidence to take a contrary view to the finding of the first appellate authority as to the classification of the imported goods as 'Superior Kerosene Oil' by rejecting the uncorroborated classification as LAWS by the appellant. Hence, as objected to by the appellant, we are also of the view that the Commissioner (Appeals) should have closed the case instead of remanding the matter back to the file of the original authority, which is against the amended provisions of Section 128A of the Customs Act, 1962, which has withdrawn the power of the Commissioner (Appeals) to remand the case for fresh adjudication except for those issues mentioned at Section 128A (3) (b), which does not cover the impugned issue. In that view of the matter, we dismiss the appeal filed by the appellant, however, setting aside that part of the impugned order whereby the first appellate authority has remanded the matter back to the file of the original authority. In the result, the order of the original authority is restored.

85. Commissioner of Customs-IV Vs. Gamesa Wind Turbines Pvt. Ltd.

Customs Appeal No.40275/2016
Final Order No. 40947 OF 2023 dt. 20.10.23

Issue:- The importer had imported parts of Wind Operated Electricity Generators but failed to submit a Certificate from Ministry of Non-Renewable Energy to claim exemption of SAD Notification No.21/2014-Cus. dated 11.07.2014 and hence refund claim of Special Additional Duty (S.A.D) was rejected by the department

Held:- The facts narrated above show that one of the conditions for availing the benefit of the exemption from S.A.D at the time of import of the impugned goods is that the importer has to produce a certificate from the Ministry of New and Renewable Energy, Govt. of India. The respondent has not furnished the certificate while filing the Bills of Entry. There is nothing stated in the notification that the said condition can be condoned even if the respondent does not have the required certificate and have furnished only an office memorandum issued by the Ministry of Non-Renewable Energy(MNRE). We therefore find that the order passed by the Commissioner (Appeals)is not legal and proper. The direction to remand the matter so as to recall and reassess the bills of entry cannot therefore sustain. The impugned order is set aside. The order passed by the original authority is restored. The appeal filed by the Department is allowed.

86. Premier Enterprises Vs. Commissioner of Central Excise & Customs, Coimbatore

Customs Appeal No. 41705 of 2017
Final Order No. 40077 / 2024 dt. 24.01.24

Issue:- Licence renewal by CHA-Misconduct- Regulations of the CBLR.

Held: In the light of our above observations and discussions, we do not find any irregularity or illegality committed by the Commissioner, Regulations of the CBLR authorize the Commissioner to check if there is anything adverse against a firm or company seeking fresh licence and to grant renewal of the same if there are no instances of any complaints of misconduct. Hence, we do not find any merit in the appeal filed by the appellant, for which reason the appeal is dismissed.

87. IQDS Dental India Private Limited Vs. Commissioner of Customs, Chennai-VII

Customs Appeal No. 40737 of 2021
Final Order No. 40075 / 2024 dt. 23.01.24

Issue:- Enhancement of value of Fingertip Pulse Oximeter Blue Colour in terms of Rule 5 of the Customs Valuation Rules, 2007.

Held: Insofar as the enhancement of value of Fingertip Pulse Oximeter is concerned, no specific arguments were advanced before us. Even from the grounds-of appeal as well as the synopsis filed during the course of arguments, we do not find any specific ground to this effect questioning the enhancement of transaction value insofar as the oximeter is concerned. Therefore, the appeal insofar as the enhancement of value of the oximeter is concerned, is dismissed.

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88. Alcock Mcphar Geotech India vs Commr. of customs (admn & Port), Kolkata

Appeal No. C/75462/2014 Final order No. 75087/2024

Issue:--- The appellant exported their goods but rejected by the overseas importer, these goods were re-imported in india and the appellant opted to get the benefit of notification No.27/2002-Cus dated 01/04/2002. As per this notification the re-imported goods have to be re-exported within six months or one year (extended time), but the appellant re-exported the goods after three years. On this ground, the show cause notice was issued and the lower authorities confirmed the demands.

Held:-- Since Notification No. 27/2002-Cus dated 01/04/2002 is a conditional Notification, the conditions specified therin have to be fully complied with by the importer in order to enjoy the exempted benefit. It is seen that the appellant has re-exported the goods after three years, therefore the demand was confirmed.

89. Pankaj Kumar Sharma vs Commr. of Customs, Patna

Appeal No. C/75641/2014 Final order No.75018/2024

Issue:-The OIO dated 09/07/2013 was delivered to the appellant on 15/07/2013 by speed post and the same was informed to the appellant by a letter on 05/11/2013. The appellant submitted that the impugned order was received by them on 29/11/2014 and he filed the appeal on 23/01/2014 after 198 days.

Held:-- After going through the said letter and statement made by the postal authorities it was found that the order in question was dispatched to the appellant by registered post and delivered on 15/07/2013.

90. Saleh Ahmed Vs. Commr. of Customs (Prev), Kolkata, Sanowar Ali Vs. Commr. of Customs (Prev) Kolkata

Appeal No. C/75162/2019 C/75163/2019
Final order No.77722-77723/2023

Issue:-A vehicle having registration no.WB-20z-7017 intercepted by DRI, Shillong at Ghoshpukur toll gate. The three occupants of the intercepted car are Md. Abdul Hannan (Driver), Md. Saleh and Sanowar Ali. On searching the intercepted car four packets wrapped in white cloth each containing 30 pcs of yellow metal(Gold) in biscuit form recovered.

Held:- On going through the investigation, the appellants themselves have admitted that one Ayub bhai has told them that the vehicle is carrying 120 pcs of gold but at the time of interception they have made statement that they were not carrying any contraband goods which shows the malafides of the appellants. Hence they have been imposed penalties of Rs. 10 lakhs and 1 lakh respectively.

91. Pranav Kumar Vs. Commr. of Customs, Patna, Sudhir S. Chamria Vs. Commr. of Customs, patna, Innovagen Compserv Private Ltd. Vs. Commr. of Customs, Patna, Lata S. Chamria W/oShudhir S. Chamria Vs Commr. of Customs, Patna

Appeal No. C/75140/2017 C/75241/2017 C/75242/2017 C/75243/2017

Issue:-The appellant used to export the silk mixed fabrics in guise of old and used garments. On examining the export consignment the goods have been misdeclared and the manufacture found non- existence during the course of investigation.

Held:- As the appellant were actively involved in the export consignment the redemption fine was imposed and penalties on all the appellants were imposed.

92. Suparna Karmakar vs Commr. of Customs (Prev), Kolkata

Appeal No. C/75634/2021 Final order No. 77195/2023

Issue:-The adjudication order was passed on 31/07/2019 and the appellant filed an appeal before the Id. Commissioner (appeals) on 28/11/2019. The Id. Commissioner dismissed the appeal as the appeal has been filed beyond the prescribed period u/s 128(1) of customs act 1962.

Held:- The appellant showed the order of the Hon'ble High court of Calcutta where it is stated that the Hob'ble High court condone the delay in filing the appeal. On going through the order it was found that the Hon'ble High court has never condoned the delay in filing the appeal and only observation is that he is entitled to take alternative remedy against the impugned order.

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93. Manoj Baid vs Commr. of Customs (Port) Kolkata

Appeal No. C/75459/2015 Final order No. 77208/2023

Issue:-The appellant was importing Cigarettes of Indonesian origin inside a consignment declared as dining sets. It was alleged that the appellant has misused name, stamp and signature of a CHA firm in clearance of the said consignment.

Held:- As it was observed that the appellant has deployed his employees to look after the clearance of the import consignment and he also admitted that they have assisted the CHA in clearance of the consignment. He was charged a personal penalty of Rs. 100,000/- in the impugned order in original dated 26/12/2014.

94. Raj kumar vs Commr. of CGST, Patna, Dipender Ji @ Deependra sharaf Vs. Commr. of CGST, Patna.

Appeal no. C/75406/2016 C/75407/2016 Final order No.77160-77161/2023

Issue:-The appellant Shri Raj kumar was seized with 1000grams of gold worth Rs 29 lakhs. The gold is of foreign origin with clear marking "The perth mint Australia". The appellant submitted that he was not directly involved but one Mr. Depender Ji had given the packet to him.

Held:- Under section 112(b) of Customs Act, 1962, Shri Raj kumar was penalized with Rs. 20,000/-. As Mr. Dipender Ji was the mastermind in the entire transaction he was penalized with Rs.5 lakhs.

95. India Potteries Ltd. Vs. Commr. of Customs (Port), Kolkata

Appeal No. C/233/2011 Final order No.77142/2023

Issue:-The appellant imported second hand machinery from Germany. They filed the Bill of entry No. 168061 dated 11/11/2010 enclosing therewith commercial invoice raised by the foreign supplier showing the value of the second hand machinery as Euro 15506. After scrutiny the department enhanced the value to Euro 28280.

Held:- In case of second hand machinery the maximum allowable limit of depreciation is 70%. The adjudicating authority has followed the circular and arrived at the enhanced value to Euro 28280.

96. Shri Madan Kumar Vs. Commr. of Customs, Patna

Appeal No. C/76416/2014 Final order No.76446/2023

Issue:-At Chhapwa which is place between Raxaul and Motihari a truck was intercepted with a consignment of 3420 kgs of betelnut valued at Rs. 342000/-. The learned adocated submits that the authorities relied upon some circumstantial evidence which at best may arouse some doubts but cannot be applied to say that the goods are of foreign origin.

Held:- The appellant failed to answer why the truck has proceeded in the north direction towards Chappwa when Patna was located to the south of Mothihari. The appellant has failed to discharge the onus placed on him.

97. Opel Exports Vs. Commr. of Customs (Port) Kolkata

Appeal No. C/76183/2018 C/76184/2018 Final order No.76275-76276/2023

Issue:-The facts of the case are that initially after importation on filing of the Bill of entry, the goods were seized and the respondent sought the release of the goods provisionally u/s 110A of the Customs Act 1962. The said request were rejected by Deputy Commissioner of Customs, this letter was issued with the approval of customs (Port). The challenged the letter before the Ld. Commissioner (Appeals) and he allowed provisional release.

Held:- As the said letter has been issued to the respondent with the approval of the Ld. Commissioner of customs(port), the Ld. Commissioner(appeals) has no power to entertain the appeals against the order passed by Ld. Commissioner of Customs(port).

98. Beximco International Vs. Commr. of Central Excise & Customs, Bolpur

Appeal No. C/178/2011 Final order No.77144/2023

Issue:-In this case the appellant had filed the Bill of entry stating that the goods are of Chinese origin. On physical inspection of the consignment it was found that the shoes were of Chinese, Italian and Austrian origin. The lower authorities adjudicated fairly and confirmed the demand against the appellant.

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Held:- After going through the OIO passed by the Adjudicating authority it is found that the adjudicating authority has gone into considerable details of the consignment imported and has passed a very considered order justifying all his findings. Since the demand upheld.

99. Container Corporation of India Ltd. Vs Commissioner of Customs, Nhava Sheva

Final Order No.86353/2023 dated 11.09.2023

Issue:-A Shipping Bill No.5807023 dated 05.06.2013 was filed by an export M/s. Krish Exports, Mumbai, before JNCH Customs for export of "household articles of stainless steel, SS Utensils" to Hong Kong. On examination it was found that as against the declared goods of `7454 Kgs, of stainless steel household articles' mentioned in the said Shipping Bill, the goods present in the containers actually were found to be the 'Red Sanders of 12695 Kgs.,' which are prohibited for export.

Held: We find that Section 117 of Customs Act, 1962 provide for imposition of penalty on any person who contravenes any provision of the said Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, to be liable to a penalty not exceeding four lakhs rupees. The maximum amount of penalty prescribed under Section 117 initially at Rs. One lakh was revised upwards to Rs. Four lakhs, with effect from 01.08.2019. The detailed discussions in the preceding paragraphs clearly prove that the appellants not only failed to fulfil the conditions and to abide by the responsibilities reposed on them as CCSP, but also failed to rectify the situation as one another attempt was Trade again for illegal removal of seized red sanders, which was identified by SIIB Customs on 14.08.2014. Hence there are clear violations of the HCCAR and Section 141 (2) of the Customs Act, 1962 by the appellant and thus we do not find any infirmity in the impugned order imposing penalty under section 117 ibid on the appellants.

100. Shashi Dhawal Hydraulics Pvt Ltd Vs Commissioner of Customs (Import), Mumbai

Final Order No. A/86778/2023 dated 11.10.2023.

Issue:- M/s. Shashi Dhawal Hydraulics Pvt Ltd was proceeded against by notice dated 26th September 2006 for recovery of Rs. 20,31,302/- that had allegedly been short paid on import of 'David Brown Hydraulic Pumps' between December 2001 and April 2003 from M/s. S&H Universal, UK upon enhancement of assessable value from GBP 90 to GBP 212 apiece by adopting the value in imports effected by M/s. Shashi Charu Hydraulics Pvt Ltd , a sister concern of the appellant, from the manufacturer themselves.

Held:- The legislative intent of compartmentalization of the two is evident in the incorporation of Section 114A in Customs Act, 1962 that empowered imposition of penalty in consequence of such 'suppression/misrepresentation' and explicitly excluding recourse to the penalty consequential to mis-declaration in proceedings for recovery of 'short paid' duty. We, therefore, find ourselves unable to accept the submission of the appellant that relief from confiscation amounts to relief from being subjected to the 'extended period' for recovery of duty under section 28 of Customs Act, 1962.

101. Srinivas Clearing & Shipping (I) Pvt. Ltd. Vs Commissioner of Customs (General), Mumbai

Final Order No. A/85005/2024 dated 03.01.2024

Issue:- The facts of the case are that the appellants herein is a Customs Broker (CB) holding a regular CB license issued by the Mumbai Customs under Regulation 7(2) of Customs Brokers Licensing Regulations (CBLR), 2018. A specific intelligence was developed by Directorate of Revenue Intelligence (DRI), Mumbai Zonal Unit (MZU), Mumbai regarding smuggling of red sanders for illegal export out of the country in an export consignment in container No. DRYU 2306380 to Jabel Ali Port on the basis of forged documents at Jawaharlal Nehru Customs House (JNCH.

Held:- On the basis of the judgement of the Hon'ble Supreme Court in the case of K.M. Ganatra supra, the appellants did not fulfil their obligation as a Customs Broker for exercising due diligence in terms of the various obligations given to them. The facts brought out in the DRI investigation and the findings in the impugned order, clearly demonstrate that when the documents relating to the export goods were fabricated and declared goods of 'Fabric glue/carpets' was substituted with prohibited 'Red Sanders', a clear attempt to smuggle the goods in an illegal manner in violation of the Customs Act, 1962 and Foreign Trade Policy

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have been orchestrated by the appellants CB. Thus, that revocation of CB license, imposition of penalty and forfeiture of security deposit by the learned Principal Commissioner on account of the appellants' failure in not fulfilling of Regulations (a), (e), (j), (k) and (n) of Regulation 10 ibid CBLR, 2018 is appropriate and justifiable.

102. Shri Arun Kumar Vs. Commissioner of Customs (Preventive), Lucknow

Final Order No. 70020/2023 dated 07.08.2023

Issue:-Confiscation of Foreign Currency.

Held:- The Tribunal held that absolute confiscation of the currency which is over and above the permissible limit for import of foreign exchange into India i.e. US $ 5,000/- as per RBI guidelines under section 111(d) of Customs Act, is sustainable. Further held that Such currencies which are imported in violation of the various provisions of FEMA and other directive of RBI are meant for illegal activities including terror financing in the country and needs to be dealt with severely.

Excise

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1. Agarwal Aluminiums, Varanasi Vs. Commissioner, Central GST & Central Excise Commissionerate

Appeal No. 51157/2020
Final Order 51171/2023 dated 12.09.2023

Issue:- The case of the Revenue is that the appellant had purchased an industrial furnace with accessories from M/s Macro Engineers, Himachal Pradesh under invoice dated 26.03.2010. This consignment crossed the border into Uttarakhand only on 29.03.2010 and therefore it could not have been brought into the factors, installed, commissioned, tested and production commenced by 31.03.2010 An intimation was served upon the Deputy Commissioner of Central Excise and the Range Superintendent of letter dated 29.03.2010 without indicating date of start of commercial production.

Held:- It is also the case of the appellant that the industrial furnace was brought in and installed and used prior to 31.03.2010 and the first invoice for final product was issued on 31.03.2010. An intimation was served upon the Deputy Commissioner of Central Excise and the Range Superintendent of letter dated 29.03.2010.

The date on which the option shall be exercised is indicated as "from the date of start of commercial production (shall be intimated separately)". Since this letter was served upon the Deputy Commissioner on 30.03.2010 and on the Range superintendent on 31.03.2010, it is evident that the appellant had not begun commercial production until 31.03.2010 nor was it able to indicate by then the date on which the commercial production would begin. Therefore, the appellant mentioned that the date will be intimated separately. For this reason itself, the invoice dated 31.03.2010 issued by the appellant for aluminium sections does not appear to be correct or pertain to products manufactured by it. Further, the industrial furnace acquired for manufacturing aluminium ingots from scrap itself was purchased by invoice dated 26.03.2010 and it crossed into the State of Uttarakhand on 29.03.2010. We find it unthinkable that such an industrial furnace with accessories would have reached the factory on the same date and would have been installed, commissioned, tested, trials completed and commercial production also completed and the first invoice for commercially produced goods could have been raised on 31.03.2010 i.e. within two days.

In the absence of any contrary evidence, we accept Revenue's contention that it was impossible for appellant to have produced 430 kg. of sections by consuming 136 kg. of aluminium scrap. Therefore, on the facts of the case we are not convinced that any commercial production was commenced on or before 31.03.2010.

As submitted by the learned Authorized Representative for the Revenue that as per the standard input/out norms notified by the DGFT to manufacture 1 kg. of aluminium extruded products 1.05 kg. of aluminium scrap is required. The consumption of aluminium scrap as per the record is only one-third of the final product manufactured.

It needs to be pointed out that the electricity consumption as per the electricity authorities was nil prior to April, 2010 and we find it hard to believe that the production could have taken place without any electricity at all. The appellant claimed that it had a diesel generator set for a few days, but was unable to provide any evidence to support its claim.

2. **Commissioner, CGST & Central Excise, Jodhpur Vs. Prem Mehandi Center, Distt. Pali, Rajasthan**

Appeal No. 50419/2019, 50420/2019
Final Order 51297-512987/2023 dated 15.09.2023

Issue:- The refund of duty paid is to be governed by provisions of Section 11C of Section 11 of Central Excise Act, 1944. In view of retrospective exemption granted to Heena Powder/Paste levy of Exciesa Duty during the priod 01.10.2007 to 01.03.2023 U/s 11C(1) of CEA Notification No 11/2017-CE(NT) dated 24.04.2017.

Held: - Proviso to sub-section (2) of section 11C only refers to the form contemplated in sub-section (1) of section 11B and not to the time period prescribed in sub-section (1) of section 11B. The time limit for making the application is provided in the proviso to sub-section (2) of section 11C and it provides that the application for refund has to be made before the expiry of the six months from the date of issue of the Notification.

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Addendum to mean "something to be added, esp. to a document; a supplement". The Law Lexicon Dictionary, 3rd Edition defines Addendum to mean "a thing that is added or is to be added". It is true that the two show cause notices that were issued to the respondent did not state that the refund applications were liable to be rejected for the reason that they were not filed within six months from the date of issue of the notification, but the Addendums that were subsequently issued did specifically allege that the refund applications were time barred because they were filed after the expiry of six months from the date of issue of the Notification. The Addendum, as noticed above, was issued to add something to the already issued show cause notices. The show cause notices did mention the issuance of the Notification. The Addendums are based on the facts mentioned in the show cause notices and had only called upon the respondent to show cause as to why the refund application should not be rejected as it was filed beyond the time prescribed under the proviso to section 11C(2).

3. Rajeev Agnihotri, Director, Socrus Pharmaceuticals Ltd., Pithampur, MP Vs. Pr. Commissioner, CEGST, Indore

Appeal No. 50049/2023
Defect Misc. Order 2418/2023 dated 13.10.2023

Issue:- Application filed by Sh. Rajeev Agnihotri, Director, M/s Socrus Pharmaceuticals Ltd. For condoning the delay of about 6 years against imposing a penalty of Rs. 25 lakhs upon him.

Held: - When the appellant is the Director of the Company and he had signed the appeal filed by the Company, there is no good reason as to why the appe4llant should not have taken proper steps at the relevant time to tile the present appeal to assail the imposition of penalty that a separate appeal should be filed, that steps were taken to file the appeal. A general and a casual statement has been made, for it does not even indicate the date on which the appellant was advised that a separate appeal should be filed. The delay that has occurred is about 6 years and 6 months. Such a huge delay cannot be explained by merely stating that when the appellant was advised that a separate appeal should be filed, the present appeal was filed.

In any case, a Director of the Company, the appellant cannot claim ignorance of the fact that a separate appeal was required to be filed by him to assail the imposition of penalty.

Though it is correct that each day's delay is not required to be explained, but when the delay is of more than 6 years it was imperative for the appellant to explain circumstances to the satisfaction of the Tribunal that he was prevented by sufficient cause from filing the appeal within the stipulated time.

Therefore, no good reason to condone the delay.

4. R N Alloys, Haridwar, Vs. Commissioner of Central Goods & Service Tax.

Appeal No. 50333/2021
Final Order 51509/2023 dated 06.11.2023

Issue:- The two issues arise for consideration are:
(i) whether the process of conversion of metal into Engine Components carried out by the appellant amounts to manufacture and if so whether he is entitled to avail exemption from payment of duty under the job work Notification No. 214/86-CE dated 25.30.1986.
(ii) whether the appellant can avail Cenvat credit on the basis of debit notes which are not the prescribed document under Rule 9 of the CCR, 2004.

Held: - We have no issue that Notification No 214/86 grants exemption to job workers from payment of duty, however, the same is subject to the condition of filing of the undertaking by the principle manufacturer.

The principal manufacturer - M/s Rockman supplied the raw material/inputs to the job worker, the appellant herein, as per the challan under Rule 4 (5) (a) of CCR, 2004. If the appellant had to avail the benefit of the exemption from payment of duty under the notification, then it was incumbent upon them to ensure that the principal manufacturer gives an undertaking in terms of the notification that the said goods shall be removed on payment of duty for home consumption from his factory, which they failed to do. There is no dispute that the principal manufacturer had neither given any such undertaking nor paid the excise duty. Consequently, the appellant cannot escape the liability to pay the excise duty on the goods manufactured by them on job work basis.

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5. Rai Bahadur Narain Singh Sugar Mills Ltd., Saharanpur (UP) Vs. Commissioner of Central GST, Dehradun

Appeal No. 50804/2019
Final Order 51568/2023 dated 29.11.2023

Issue:- The issue is as the appellant, having opted for full exemption under area-based exemption notification no. 50/2003, cannot also avail the CENVAT credit on the Capital Goods and input services used in setting up the distillery unit which is also part of the same factory. According to the appellant, the distillery unit is a separate unit and it had paid Central Excise Duty on the denatured alcohol and Carbon-dioxide produced in the distillery unit and therefore, it was entitled to the CENVAT credit.

Held:- In our considered opinion, the treatment of a unit depends on the laws which apply. For instance, if a manufacturer has several factories located across the countries and has its head office in Mumbai, under the Income Tax Act, it will have a single Permanent Account Number and it will be assessed to corporate tax as one entity in Mumbai. On the other hand, every individual manufacturing facility across the country will have a separate central excise registration and will be assessed separately.

In short, various facilities of the company are treated as separate units under some laws and as one by some other laws and the concerned agencies deal with them accordingly. Merely because a separate licence was issued by the State Excise, Pollution Control, etc. for the distillery does not make it a different unit under the Central Excise. In this case, the appellant had obtained a single Central Excise Registration for the sugar factory and set up the distillery plant within its premises. Further, it also filed single returns with the excise department covering both the sugar plant and the distillery. We, therefore, find that the sugar factory and the distillery are one unit as far as the Central Excise is concerned. Central Excise Act, Rules and notifications should be applied accordingly.

6. Total Oil India Pvt Ltd., Rohat, Pali, Raj. Vs Commissioner of Central Excise, Jaipur-II.

Appeal No. 50305/2021, 50554/2022
Final Order 51572-51573/2023 dated 30.11.2023

Issue:- (1) Adjudicating authority had not verified whether the refund was clear from principle of unjust enrichment.

(2) Can Commission (Appeals) remand the matter to the adjudicating authority?

Held: - Unjust enrichment does not apply to the refund claim in the impugned appeal. Unjust enrichment will not apply to refund claim where duty was paid under protest. Hence the refund is allowed.

7. Forward Minerals & Metals Pvt Ltd., Delhi Vs. Directorate General of GST Intelligence, (Adjudication Cell), New Delhi.

Defect Appeal No. 50617/2023
Defect Misc. Order 2852023 dated 15.11.2023

Issue:- The issue is appeal filed without making statutory pre-deposit contemplated under Section 35F of the Central Excise Act, 1944.

Held: - The Hon'ble Tribunal referred to a decision of Hon'ble Delhi High Court in *Dish TV India Ltd. Vs Union of India & Ors*., wherein the requirement of pre-deposit under section 129E of the Customs Act, 1962, which is pari-materia to section 35F of the Central Excise Act, came up for consideration. The High Court held that when the Statue itself has provided waiver of pre-deposit to the extent of 90% or 92.5% of the duty amount and has made it mandatory to deposit 7.5% or 10% of duty amount, as the case may be, the Court cannot waive this requirement of deposit.

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8. **HL Passey Engineering Pvt Ltd. Vs. Commissioner of Central Goods & Service Tax & Central Excise, Bhopal.**

RoM No. 50175/2023
Appeal No. 51111/2019
Final Order 50398/2023 dated 22.12.2023

Issue:- The issue is ROM filed by appellant seeking rectification of mistake.

Held: - It needs to be pointed out that while demands for extended period of limitation cannot be confirmed where there is no fraud, collusion, wilful misstatement or suppression of fact, demand for a short period of say, one year, can be confirmed even when these elements of fraud, collusion, wilful misstatement or suppression of facts, etc., are present. Nothing prevents confirmation of demands for shorter period even if these elements are present. Having found that these elements were present in the case (as recorded by the Commissioner and reproduced in the appeal), if demands are raised or confirmed for a shorter period, it does not mean that these elements are not established.

9. **Dinesh Irrigation Pvt Ltd., Vs. Commissioner of Central Goods and Service Tax, Central Excise, Jaipur.**

Appeal No. 51375/2018
Final Order 50003/2024 dated 03.01.2024

Issue:- The point of dispute is Cenvat credit on the Service Tax paid on the insurance services which it could not vivisect into the dutiable and exempted products as insurance was a common service.

Held:- Once the disputed Cenvat credit on the insurance service which was used both for dutiable and exempted goods has been reversed, nothing survives in the demand which is the assailed in this appeal because the case of the Revenue is that the appellant had taken Cenvat credit on common input services and had not maintained separate accounts.

10. **Progressive Alloys (India) Pvt Ltd., Delhi Vs Commissioner of Central Goods & Service Tax, New Delhi.**

Defect Appeal No. 51455/2023
Misc. Order 02/2024 dated 01.01.2024

Issue:- The issue is of delay of sixty days in filing appeal before the Hon'ble Tribunal.

Held:- The delay condonation application states that the mother-in-law of the ld. Counsel who had to file the appeal was hospitalized from May 04 to May 19, 2023. If that be so, the appeal could still have been filed soon after May 19, 2023 but it was filed on July 11, 2023. The delay after May 19, 2023 has also not ben explained in the application. However, taking into account the facts and circumstances of the case and in the interest of justice, we condone the delay but on imposing a cost of Rs. 2,000/- (Rupees Two Thousand only) upon the applicant, which the applicant shall deposit within a period of four week from today in the Prime Minister's CARE Fund.

11. **Principal Commissioner of Central Goods & Service Tax, New Delhi Vs Som Global Zarda Pvt Ltd., New Delhi**

Appeal No. 52756/2019
Final Order 51138/2023 dated 21.08.2023

Issue:- The issue is as appellant was not paying NCCD and deposited under protest alongwith interest. Later file refund claim on the NCCD paid.

Held:- The decision of the Commissioner (Appeals) is based solely on the decision rendered by the Supreme Court in Bajaj Auto has been held to be per incuriam and the Supreme Court has held that simply because one kind of duty is exempted, other kinds of duties automatically fall cannot be accepted. Therefore, NCCD shall continue to be levied despite the Notification exempting the payment of excise duty.

The impugned order dated November 15, 2019 passed by the Commissioner (Appeals), therefore, cannot be sustained and is set aside.

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12. Honda Motorcycle and Scooter India Pvt Ltd. Vs. Commissioner of CGST, Alwar.

Appeal No. 50804/2019
Final Order 51568/2023 dated 29.11.2023

Issue:- The appellant had availed the input Service Tax credit of Service Tax paid on inland handling charges/transport charges for the transportation of export goods from inland container freight station to sea port of loading. The service of transporting the goods from ICD Garhi Harsaru (Haryana) to sea port (Pipavav) are the service availed beyond the place of removal. The service utilized after granting Let Export hence shall not be covered under Rule 2(1) of Cenvat Credit Rules, 2004.

Held:- Decision relied upon by the appellant are not applicable to the get given set of facts and circumstances as these are based on the Circular which have no bearing in light of the decision of Hon'ble Supreme Court in Ispat Industries Ltd. (supra). Also, for the reason that there is no evidence produced by the appellant that the appellant continued possession even after the Let Export Order as that of inspection or of handling of goods in any other manner. However, Ispat Industries Ltd. decisions falsifies there criteria also.

With this observation, the Hon'ble CESTAT held that the Inland haulage charges were the charges for the service received beyond the place of removal, hence, the appellant has rightly been disallowed the availment of Cenvat credit thereupon. Finding no infirmity in the order under challenge, the same is hereby upheld. As a consequence, the appeal is hereby dismissed.

13. The Divisional Forest Officer, Rishikesh Vs. Commissioner of CGST, Dehradun.

Appeal No. 51058-51061/2021
Final Order 51515-55118/2024 dated 27.02.2024

Issue:- The appellants, who are Divisional Forest Officers in the Government of Uttarakhand, collected Raw Pine Resin from pine trees through contract labour and sold the same to processing units by public auction. It needs to be noted that Exemption Notification No. 24/2005, exempted Resin manufactured without the aid of power from payment of duty, but by a Notification dated 01.03.2006 the said exemption given to Resin manufactured without the aid of power was withdrawn. The appellant thereafter obtained registration and paid central excise duty.

However, two buyers filed Writ Petitions in the Uttarakhand High Court challenging the levy of excise duty. A learned Judge of the Uttarakhand High Court allowed the Writ Petitions by a detailed judgment dated 02.08.2011 and held that that the imposition of Central Excise duty on "Raw Pine Resin" collected and sold by the Uttarakhand Forest Department to the processing units is arbitrary and illegal.

The department filed Special Appeals before the Division Bench of the Uttarakhand High Court. The Uttarakhand High Court allowed the Special Appeals and declare that extraction of Oleo Resin from Pine trees, by the Forest Department of the Government of Uttarakhand, involves human endeavor. Such extraction would amount to "production" of goods on which Central Excise Duty, under Section 3(1)(a) of the Excise Act, can be levied.

Held:- The grounds raised in the Memo of Appeal have been perused and the submissions made by the learned authorised representative appearing for the department have also been considered.

The three basic issues that have been raised by the appellants are as follows:

"(a) Whether an assessee can be made to bear the brunt of duty with interest due to change in order of the High Court or not?
(b) Whether the appellant is required to discharge the burden of duty with interest on clearance of Resin, effected during the period under dispute, because the High Court has now held that the activity pertaining to extraction of Resin from pine trees is production of goods eligible to central Excise Duty?
(c) Whether the appellant is liable for penalties also in such a situation, wherein the appellant has been dragged because of the divergent verdicts of High Court and there is no fault of the appellant?"

It has been stated in paragraph 2.5 of the Memo of Appeal that the appellant has been dragged into a situation where huge 6 demands of central excise duty with interest and penalty have been confirmed "just because the appellant followed the verdict of the Hon'ble High Court".

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As is clear from the statement of facts contained in the Memo of Appeals, once the Notification dated 01.03.2006 was issued withdrawing the exemption earlier granted to manufacture Resin without the aid of power from central excise duty, the appellant obtained registration and paid central excise duty. However, Writ Petitions were filed by two buyers before the Uttarakhand High Court challenging the levy of central excise duty on Resin, which Writ Petitions were dismissed by the Uttarakhand High Court by judgment dated 18.09.2006, but in view of the statement made by the learned counsel appearing for both the parties before the Supreme Court, the matter was remitted to the High Court to decide the Writ Petitions afresh. A learned Judge of the Uttarakhand High Court, by judgment dated 02.08.2011, allowed the Writ Petitions but the Government preferred Special Appeals which were initially admitted and the operation of the judgment passed by the learned Judge was also stayed. The Special Appeals were ultimately allowed by judgment dated 10.07.2019.

The contention of the appellant raised in the Memo of Appeal is that they had stopped collecting central excise duty because of the order passed by a learned Judge of the Uttarakhand High Court on 02.08.2011 and so the appellant should not be asked to pay excise duty. As noted above, Special Appeals were filed by the department and judgment of the learned Judge was stayed. There is, therefore, no reason as to why the appellants should have 7 stopped collecting the excise duty. Ultimately the Special Appeals were also allowed. In any case, the appellant had obtained registration and was paying central excise duty as it believed that excise duty was payable when the exemption notification was withdrawn.

The High Court merely interpreted the provisions of law and it cannot be urged by the appellant that because of the judgment of the learned Judge allowing the Writ Petitions it was not obliged to collect central excise duty. This position is very clear from the judgment of the Supreme Court in Asstt. Commr., Income Tax, Rajkot vs. Saurashtra Kutch Stock Exchange Ltd.3 and the relevant paragraphs are reproduced below:

“42. In our judgment, it is also well-settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a ‘new rule’ but to maintain and expound the ‘old one’. In other words, judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.

43. Salmond in his well-known work states;
“(T) he theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are res judicate or accounts that have been settled in the meantime.”

In this view of the matter when it has been settled that central excise duty would be leviable as Resin is produced, there is no reason to interfere with the impugned orders passed by the Commissioner. The four appeals are, accordingly, dismissed.

14. **Suncity Synthetics Ltd., Jodhpur Vs. The Additional Director General (Adj.), New Delhi.**

Appeal No. 51185/2022
Final Order 55132/2024 dated 12.03.2024

Issue:- Strict interpretation of exemption Notification No. 08/2014-CE dated 11.07.2014.

Held:- Considering the principle of law that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession, we are of the view that the appellant has failed to substantiate the same. Also, if exemption is available on complying with certain conditions, the said conditions have to be complied with and as per the discussion above, it cannot be said that the appellant has complied with the mandatory conditions of the notification. We also reject the contention of the learned Counsel that the terms ‘plastic waste’ in the notification is not specific but is of general nature. The wordings of the condition provided in the notification are absolutely clear and unambiguous and leaves no manner of doubt.

Learned Authorised Representative for the Revenue reiterated the findings of the Adjudicating Authority and relied on the decision of the Supreme Court in Commissioner of Customs (Import), Mumbai Vs. Dilip

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Kumar and Company and Others - 2018 (361) ELT 577 (SC) and State of Gujarat Vs. Arcelor Mittal Nippon Steel India Ltd. – (2022) 6 SCC 459 to say that the notification granting the benefit of concessional rate of duty is subject to the conditions, which has to be strictly complied with and no word can be added or subtracted in the contents of the notification. Since in the present case, the appellant has not complied with the conditions specified in the notification, he is not eligible to avail the benefit of the concessional rate of duty and hence, the appeal needs to be rejected.

We do not find any strong and compelling reasons to differ from the impugned order, which deserves to be upheld. The appeal, is accordingly dismissed.

15. Ruchi Soya Industries Ltd Vs. CCE, Rajkot

Final Order No. A/12253/2023 Dtd. 11.10.2023

Issue:- Whether the appellant is entitled for the refund claim over and above the percentage by which restriction was imposed vide amendment Notification No. 16/2008-CE (NT) dated 27.03.2008 and amendment Notification No. 33/2008-CE dated 10.06.2008 amending the original Notification No. 39/2001-CE dated 31.07.2001

Held:- In the view of Hon'ble Supreme Court Judgement in case of UOI Vs VVF Ltd the appellant are not entitled for the refund rejected by the original authority and upheld by the Commissioner(Appeals).

16. Karimbhai Nanjibhai Shah Vs. CCE, Ahmedabad-II

Final Order No. A/12362/2023 Dtd. 27.10.2023

Issue:-Evasion of excise duty of the manufacturing of "Chhakkdo Rickshaw" by suppressing the production data and making clandestine clearance and imposition of penalty under Rule 26 of the Central Excise Rules, 2002.

Held:- The appellant was fully aware that the goods are getting cleared without proper invoices and manufactures were not having required ARAI registration. The appellant has conscientious by providing his ARAI registration to the manufacturer/buyers of non-duty paid Rickshaw for getting the same registered with RTO.

17. Birla Cellulosic Ltd Vs. CCE, Surat-II

Final Order No. A/12583-12584/2023 Dtd. 10.11.2023

Issue:-The appellant paid duties in terms of Serial No. 2 of Notification No. 23/2003-CE dated 31st March, 2003 under Section 3 of the Central Excise Act 1944. As per the department, the appellant was required to avail CENVAT credit on the procurement as per formula given under sub Rule 7 of Rule 3 of CENVAT Credit Rules, 2004. Also ineligible CENVAT credit of the CVD which has been taken in the prescribed formula and Rule 3 (7) (a) of CENVAT Credit Rules, 2004 by the assessee also included the elements of Education Cess and Secondary Education Cess in it.

Held:- Hon'ble Bench find it wrong on the part of appellant to have re- credited debited amount of the CENVAT Credit on their own and therefore their appeal on this account is being rejected. In view of above we hold that the demand of wrong availment of the CENVAT Credit under formula provided as per Rule 3(7) (A) of Cenvat Credit Rules, 2004 is concerned. We find that the impugned Order-In-Original is without any merit and therefore we set aside the same and appeal in this regard is allowed. The appeal pertaining to the suo-moto re-credit of the CENVAT Credit is concerned an explained in preceding para, same is dismissed.

18. Hitachi Life & Solution India Ltd Vs. CCE, Ahmedabad-III

Final Order No. A/12091/2023 Dtd. 21.09.2023

Issue:-the appellant during the period 10.05.2012 claimed having paid Excise Duty, sought refund from the department as abatement percentage permitted on their product under Notification No. 26/2012 dated 10.05.2012 was varied from 25% to 35%.

Held:- In MRP based assessment, refund of non-claim of abatement cannot be purely treated as a refund of excise duty paid in excess only as per Section 11B. Such information as to what all taxes went into working of abatement is woefully lacking. Party has also not produced the same by procuring the same under R.T.I or otherwise. Further, there is nothing on record from the party as to what happened beyond depot and whether apart from itself, all retailers and wholesaler paid higher tax which was the component of higher abatement or whether consumer was less charged by reducing M.R.P, by way of a discount.

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19. **Prafful Overseas Pvt Ltd Vs. CCE, Vadodara-II**

Final Order No. A/12007/2023 Dtd. 12.09.2023

Issue:-Whether the appellant is entitled for Refund of Education Cess and Secondary aand Higher Education Cess paid against CVD portion of Customs duty.

Held:- The identical issue in the appellant's own case has been decided vide order No. A/10536-10538/22 dtd. 20.05.2022. The issue is settled against the appellant. Accordingly following the decision of this Tribunal, we are of the view that the impugned order is correct and legal hence the same is sustainable. The appeal is dismissed.

20. **PGP Glass Pvt Ltd Vs. CCE, Surat-I**

Final Order No. A/11739-11740/2023 Dtd. 23.08.2023

Issue:- Whether the charges of molds separately recovered by the appellant from their customers, amount flowing of additional consideration to the appellant and should have formed part of transaction value for levy of excise duty or not.

Held:- The mold charges recovered from the buyers need to be included in the assessable value and therefore, The Hon'ble Bench do not find any legal lacunae in the impugned OIO and thus, there is no merit in the appeals. The appeals are dismissed.

21. **Sonic Chain Pvt Ltd Vs. CCE, Rajkot**

Final Order No. A/11788-11789/2023 Dtd. 24.08.2023

Issue:- Issue involved is whether the appellant is eligible for SSI exemption under Notification No. 08/2003-CE dated 01.03.2003.

Held:- The exemption notification shall not apply to specified goods bearing the brand name or trade name that were registered or not of another person. In the present case there is no dispute that the goods namely bracelet manufactured by the appellant bears the brand name which are owned by another person, therefore the appellant is not eligible for exemption Notification No. 08/2003-CE.

22. **Universal Comfort Products Ltd Vs. CCE, Vapi**

Final Order No. A/11831/2023 Dtd. 30.08.2023

Issue:- Matter relates to supplies made to SEZ by DTA unit, specially to SEZ developers, the Cenvat credit was sought to be denied to the supplier under Rule 6 (6) of the Cenvat Credit Rules, 2004 on the ground that during the material time no exemption was available to the appellant and they were required to reverse the credit to the extent the supplies made to SEZ developers.

Held:- Notification No. 50/2008-CE (NT) specifically provided benefit to SEZ, came into existence only on 31.12.2008 and there was no way having its retrospective application. The Court find no merit in the appeal.

23. **Sagar Rolling Mills Pvt Ltd Vs. CCE, Ahmedabad-II**

Final Order No. A/11829-11830/2023 Dtd. 30.08.2023

Issue:- Abatement of duty under compounded levy scheme pertaining to cold rolling iron and steel machines. The appellants, for the part of the period had no operations on certain machines and the same remained idle or dismantled in the factory. The department has denied the abatement of duty under Notification No. 17/2007-CE dated 01.03.2007.

Held:- The issue is no more res-integra and has been decided in the case SS Strips Pvt. Limited vs. CCE, Ahmedabad-II in order No. A/11629-11630/2018 dated 01.08.2018 by the Division Bench of CESTAT Ahmedabad. Having chosen the option of availing the concession on the basis of number of machines installed, the appellants cannot now claim that the benefit of machines which they have declared to have not been used during certain period."

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24. **Special Prints Ltd Vs. CCE & ST-Surat-I**

Final Order No. A/11841/2013 Dtd. 31.08.2023

Issue:- The short issue involved in the matter is that there were certain refunds due to the appellant and same had been adjusted by the department against dues confirmed in adjudication in another matter by the authorities below despite matter being agitated in Hon'ble Gujarat High Court, but stated to be without stay against such confirmed dues.

Held:- Court finds this order of Commissioner(Appeals) is proper in the absence of any stay having been granted against the demand confirmed and being agitated at present before the Hon'ble High Court of Gujarat.

25. **DLM (P) Ltd. Vs. The Commissioner of Central Excise, Customs & ST, Mysore**

Final Order No. 20906/2023 dated 18.08.2023

Issue:-Rejection of refund:-Appellant had filed refund application one year from the date of Hon'ble CESTAT's Order**.**

Held:- It is clear from Section 11B (5)(B) (ec), which reads as: "(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any Court, the date of such judgment, decree, order or direction". Therefore, in this case the appellant had filed a refund application on 28/02/2020 but that is after one year from the date of Hon'ble CESTAT's Order dated 28/01/2019. Hence, the rejection of refund on this ground is legally tenable.

26. **Elvina Pharmaceuticlas Ltd. Vs. The Commissioner of Central Excise- Belagavi**

Final Order No. 21191/2023 dated 30.08.2023

Issue:-Valuation of physician sample.

Held:- Relying upon then Hon'ble Supreme Court in Medley Pharmaceuticals and Tribunal Bangalore's order in the case of Amazon drug the bench held that physician samples cleared adopting Rule 8 of the Central Excise (Valuation) Rules, 2000 is contrary to the law laid down by the Hon'ble Supreme Court and the correct method of valuation is under Section 4 of Central Excise Act, 1944 read with Rule 4 of the Central Excise (Valuation) Rules, 2000.

27. **Kurlon Ltd. Vs. The Commissioner of Central Excise & ST- Bangalore (South)**

Final Order No. 20955/2023 dated 20.09.2023

Issue:- The appellant, M/s. Kurlon Ltd., is the manufacturer of Rubberised Coir products (RCP) and foam products. Apart from the clearance of foam and foam products, they also captively consume foam products in the manufacture of rubberised coir mattresses. From 01.03.2011, the appellant availed the benefit of Notification No. 1/2011 which enabled them to pay duty at the rate of 1% on coir products as against the standard rate of duty of 5% / 6% subject to the condition that no CENVAT credit was availed on the inputs and input services. The appellant had availed CENVAT credit on the inputs and input services used for manufacture of rubberised coir mattress and products and accordingly, notice was issued to deny the benefit of Notification No.1/2011 dated 1.3.2011.

Held:- The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. With regard to invoking Proviso to Section 11A, it is obvious that the appellant was knowing very well that they are not eligible for availing CENVAT credit for the goods that are cleared on concessional rate of duty but still they have availed CENVAT credit for almost three years i.e., from 2011 to 2013. Hence, having suppressed the facts, the Commissioner was right in invoking the Proviso to Section 11A.

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28. BEML Ltd. Vs. The Commissioner of Central Excise, & ST- Mysore

Final Order No. 209999/2023 dated 13.10.2023

Issue:-It has been alleged that, besides manufacturing they were also engaged in the activity of repacking and relabeling of imported and indigenously procured spare parts of Dumpers (Mechanical Drive and Electrical Drive), Water Sprinklers and Motor Graders at their marketing division. The said activity in terms of Section 2(f) of the Central Excise Act, 1944, read with Sl. No 100 of Third Schedule of the Central Excise Tariff Act, 1985 result into "manufacture" and its value for the purpose of excise duty to be determined as per Section 4A after allowing an abatement of 33.5% on the maximum retail price as per Notification No.11/2006 CE (NT) dated 29.5.2006, but it was cleared/sold to various customers without payment of duty.

Held:- Sl. No. 100 of the Third Schedule shall not be applicable to parts and spares of Dumpers repacked and relabeled by the Appellant for the period from January 2008 to February 2010. Also, the said activities do not fall within the scope of 'manufacture' under either clause (i) or (ii) of Section 2(f) of CEA, 1944, hence, not leviable to excise duty. However, for the period from March 2010 to March 2011, the said activities be considered to be 'deemed manufacture' being covered under the amended entry at S. No.100 of the Third Schedule. We do not find reason in not following the judgment of the Tribunal in appellant's own case more or less for a similar period and show-cause notice issued in the same month i.e., April 2013. In the result, invoking of extended period of limitation is bad in law. Accordingly, the demand be confined to the normal period of limitation.

29. Elvina Pharmaceuticals Ltd. Vs. The Commissioner of Central Excise- Belagavi

Final Order No. 21164/2023 dated 31.10.2023

Issue:- The appellants are manufacturers of P & P Medicines falling under Chapter Sub Heading 3003.10.00 of Central Excise Tariff Act, 1985. They E/1665/2011 Page 2 of 4 manufacture the said goods on loan license basis for M/s. Wallace Pharmaceuticals Ltd. During the relevant period i.e. from October 2007 to May 2008, they cleared physician samples by discharging duty @ 110% of the cost of production. Alleging that the method of valuation adopted by the appellant is not correct as the said physician samples cleared attracts valuation under Section 4/4A of Central Excise Act, 1944. Show-cause notices were issued on 20.10.2008 for the period from October 2007 to May 2008 demanding differential duty of Rs. 7,33,036/- with interest and proposal for penalty. On adjudication demands were confirmed. Aggrieved by the said order, they filed appeal before the Commissioner (Appeals).

Held:- The short issue for determination is, whether the valuation of physician sample be in accordance with Rule 8 or Rule 4 of the Central Excise (Valuation) Rules, 2000. We find that the Hon'ble Supreme Court in Medley Pharmaceuticals case (supra) has laid down the principle as follows: "41. Now coming to the valuation of the physician samples for the purpose of levy of excise duty, in our view, this issue need not detain us long in view of the decision of this Court in the case of Commissioner of Central Excise v. M/s. Bal Pharma [Civil Appeal No. 1697 of 2006] [2010 (259) E.L.T. 10 (S.C.)]. This Court has upheld the conclusion of the Tribunal that the physician's samples have to be valued on pro-rata basis. The Tribunal, while arriving at the aforesaid conclusion, had relied upon its earlier decision in the case of Commissioner of Central Excise, Calicut v. Trinity Pharmaceuticals Pvt. Ltd., reported as 2005 (188) E.L.T. 48, which has been accepted by the department. Therefore, we hold that physician samples have to be valued on pro-rata basis for the relevant period." This principle has been followed by this Tribunal in Amazon Drugs Pvt. Ltd. We do not find any reason not to follow the judgment of this Tribunal in Amazon Drugs Pvt. Ltd's case. Consequently, following the said judgment, the impugned order is upheld and the appeal being devoid of merit, accordingly is dismissed.

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30. Flexifoil Packaging (P) Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (West)

Final Order No. 21167/2023 dated 16.10.2023

Issue:-The appellant are engaged in manufacture of Aluminum Foils falling under Chapter Heading 76071995 of the Central Excise Tariff Act, 1985. During the course of audit, it was noticed that the appellant had not paid duty on packaging charges amounting to Rs. 24,586/-
; not maintained records as per Rule 16 of Central Excise Rules, 2002 and also, they have cleared Aluminum Foils discharging concessional rate of duty under Notification No. 9/2003- CE dt. 01.03.2003 @9.6% instead of 16% during the period January, 2004 to May, 2004; further since the processes carried out in respect of Aluminum Foils does not amount to manufacture, they were required to reverse the amount equivalent to credit taken in respect of inputs used therein and the differential duty calculated as Rs. 2,30,887/-.

Held:- The authorities below has confirmed the demand of Rs. 24,586/- on packaging charges being part of the value but no duty was paid claiming it as freight charges. Analyzing the evidences, the adjudicating authority after scrutiny of the relevant invoices placed on record, recorded the findings that even though the appellant have claimed that these are transport charges and not handling charges, however, supporting transport receipt has not been produced. Since no evidence has been produced by the appellant before the lower authorities nor before this Tribunal, thus, duty of Rs. 24,586/- payable on packaging charges is confirmed. Regarding the CENVAT Credit of Rs. 44,469/- on rejected/returned goods, demand was confirmed as the appellant failed to produce the evidences ie. Proper account of receipt and disposal of the same. CESTAT has also found that the appellant had not enclosed any evidences in this regard, thus it is clear that they had not maintained proper records of receipt goods, processes carried out and disposal of the said goods under Rule 16 of CER,2002 on which credit availed; hence, the said demand is also confirmed. From the grounds of appeal mentioned by the appellant, it is found that the processes carried out by the Appellant on the Aluminum Foils received in the factory are described as foil wash and thereafter subjected to nitro cellulose and then slit into different sizes as per requirements of customers. It is not a simple process of merely cutting the foils into different sizes but other processes are involved which would definitely satisfy the definition of manufacture pertaining Section 2(f) of Central Excise Act, 1944. Besides, the appellant have been discharging duty on finished goods treating the said process as manufacture. Hence, denying CENVAT Credit on the inputs, contrary to the principle of law laid down in several cases and relying on the Hon'ble Bombay High Court in the case of Commissioner of Central Excise, Pune-III Vs. Ajinkya Enterprises - 2013 (294) ELT 686 (Bom.), the demand of Rs.2,30,887/- is set aside

31. Maini Precision Products (P) Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (North-West)

Final Order No. 21148/2023 dated 20.10.2023

Issue:-The appellants are engaged in manufacturing of Fork lift truck parts, components for machinery, automobile parts etc. falling under Chapter 84 & 87 of Central Excise Tariff Act, 1985 (in short 'CETA'). During the period from 01.4.2004 to 31.3.2006 the appellant availed CENVAT Credit of Rs. 2,40,75,746/- on the goods received in their factory and subjected to various processes like blackening, buffing, final inspection, packing etc. which were subsequently exported on the Letter of undertaking without payment of duty and also availed suo moto credit of Rs.28,700/- on the rejected inputs. It is alleged that the goods were received by the appellant on which CENVAT Credit was availed were in the nature of finished goods and the processes carried out by the appellant do not result into 'manufacture' in terms of Section 2(f) of Central Excise Act, 1944; hence credit availed is inadmissible to them. Also, it is alleged that the appellants have wrongly availed the CENVAT Credit of Rs. 28,700/- suo moto in respect of rejected goods.

Held:- The processes undertaken by the appellant are necessary to put the product in marketable condition as per the requirement of the customers; the appellants, on the other hand, adduced evidence in the form of rejection letters of the customers rejecting the goods supplied by the Appellant as it did not meet their requirement as per the order placed. Hence, in our opinion various processes blackening, buffing, final inspection, packing etc. carried out on the inputs be considered as processes amounting to manufacture. It was found that more or less similar principle has been laid down by the Hon'ble Apex Court in the case of Flex Engineering Ltd. Therefore, the processes carried by the appellant in their premises result into manufacture and accordingly, CENVAT Credit availed on the duty paid on inputs received is admissible to

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the appellant. On the issue of suo moto credit we find that credit of Rs. 28,700/- is irregular in view of the judgment of Larger Bench of this Tribunal in the case of BDH Industries Ltd vs. CCE, Mumbai – 2008 (229) ELT 364 (Tri. L.B.). In the result, the impugned Order is modified to the extent of setting aside demand of CENVAT credit of Rs.2,40,75,746/- with interest and penalty, however, the recovery of suo moto credit of Rs.28,700/- with interest and penalty is confirmed.

32. Praxair India (P) Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (East)

Final Order No. 20989/2023 dated 09.10.2023

Issue:-The appellants are manufacturers of Industrial gases viz., oxygen, nitrogen, argon gases falling under Chapter Heading 28 of the Customs Tariff Act, 1985. During the relevant period, they entered into an agreement with M/s. Tata Steel Ltd. to build, own and operate 'Air Suspension Plant' at the site of M/s. Tata Steel Ltd. for manufacture and supply of oxygen, nitrogen and argon gases to M/s. Tata Steel Ltd. subject to the conditions stipulated in the said agreement. They have also entered into similar agreement with other customers during the period from November 2006 to October 2007. The learned advocate for the appellant submits that the demand confirmed in relation to clearances to M/s. Tata Steel Ltd. i.e., Rs.1,09,20,900/- has been paid by them with interest. He submits that this amount is not contested in the present appeal. However, the clearances made to other customers, the agreement with them being not in accordance with the agreement entered with M/s. Tata Steel Ltd., therefore, they contest the duty on such facility charges and escalation charges.

Held:- Appellant has not contested inclusion of said charges in the value of the gases in the case of M/s. Tata Steel Ltd.; they have discharged applicable duty with interest. However, they are contesting the payment of duty on facility charges recovered from other customers claiming that the agreements are different. However, they could not place agreements before the original authority nor before us even though sufficient opportunities have been accorded to them. Therefore, we proceed with the case based on the documents available on record. We find that the issue is no more res integra and the issue is covered by the judgment of this Tribunal in the case BOC India Ltd. (supra) which was decided after taking note of the Board Circular dated 10.11.2014 and 24.4.2014. CESTAT did not find any reason not to follow the aforesaid judgment of this Tribunal. Hence, the facility charges, escalation charges, etc., collected from all customers are includable in the value of gases sold/supplied to their customers. However, in the facts and circumstances of the case, CESTAT do not find any reason to confirm the penalty imposed on the appellant. Consequently, the impugned order is modified to the extent of setting aside the penalty of Rs.5,00,000/- under Rule 25 of the Central Excise Rules, 2002 and duty amount confirmed along with interest is upheld.

33. MRO TEK Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (North)

Final Order No. 21250/2023 dated 15.11.2023

Issue:- Appeal filed against Order-in-Appeal No.202/2011-CE (de novo proceedings) dated 15.7.2011 passed by Commissioner of Central Excise (Appeals-I). Upheld the OIO. Issue is division of the total value of Modem viz. value of hardware and value of software separately. Allegation that bifurcation of value is with intention to evade payment of duty as the software was invoiced as "software for PC"

Held:- The appellant who has knowingly split the value of modem artificially as value of Hardware and value of Software so as to evade payment of duty. The impugned OIA is upheld and the appeal is dismissed.

34. MTR Foods Vs. The Commissioner of Central Excise, & ST- Bangalore (South)

Final Order No. 21300/2023 dated 21.11.2023

Issue:-Manufacture and clearance of "Badam Milk Drink - Ready to Drink" at „Nil" rate of duty from October 2007 onwards, classifying under Chapter Sub-Heading 0402 9990.Department has classified the item under Chapter Sub-heading 2202 9030.

Held:- Following the ratio of the decision in Ernakulum Regional Co-operative Milk Producers Union Ltd. (cited supra) of this Tribunal, we do not find any reason to interfere with the impugned order. Hence the appeal filed by the appellant is unsustainable and is rejected.

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35. 3M India Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (South)

Final Order No. 21417/2023 dated 20.12.2023

Issue:-During the period September 2006 to December 2007, they have availed cenvat credit amounting to Rs.1,56,29,750/- on the service tax paid on reverse charge mechanism for receiving 'Management Consultancy Service' from foreign service provider. Subsequently, on the basis of audit of their records, a show-cause notice was issued to them on 08.04.2009 for recovery of the said credit with interest and penalty;

an amount of Rs.79,22,225/- paid along with interest of Rs.15,38,789/- proposed to be appropriated. On adjudication, the demand of Rs.79,22,225/- and interest of Rs.15,38,789/- attributable to trading activities and demand of Rs.15,83,168/- being credit availed at Bangalore pertaining to manufacturing units located at Ahmedabad and Pune was confirmed with a penalty of Rs.95,05,393/- without having ISD registration. Hence the present appeal

Held:- The impugned order is modified to the extent of confirming inadmissible cenvat credit of Rs.79,22,225/- attributable to trading activity and applicable interest of Rs.15,38,789/- paid on the said credit amount; since the cenvat credit and applicable interest is paid much before the issuance of show-cause notice, the appellant is entitled for the benefit of 25% of penalty imposed under Section 11AC of the Central Excise Act read with Rule 15(4) of CENVAT Credit Rules, 2004.
The demand of cenvat credit of Rs.15,83,168/- confirmed with interest and equivalent penalty before ISD registration is hereby set aside.

36. Fouress Engineering (I) Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (North-West)

Final Order No. 21480/2023 dated 08.12.2023

Issue:-The appellant are engaged in manufacture of different types of industrial valves falling under Chapter Heading 84 of CETA, 1985. On the basis of the audit of the records for the period June 2005 to August 2006, show cause notice was issued to the appellant alleging that they have wrongly availed the Cenvat Credit of Rs.76,528/- on security services, Rs.66,420/- on mobile phones provided to the employees and Rs.11,202/- on GTA outwards transportation service; also, it is alleged that they have failed to discharge the duty of Rs.5,126/- on additional testing charges and also the inputs short received involving duty of Rs.61,640/- during the said period. On adjudication, the demand was confirmed with interest and penalty. Against the order of adjudicating authority, the appellant filed appeal before the ld. Commissioner (Appeals), who in turn, rejected their appeal.

Held:- The appeal is partly allowed to the extent of setting aside the confirmation of demand on testing charges; and recovery of Cenvat Credit availed on mobile phones and GTA outwards transportation service. The remaining amount of demands on account of credit on security services, input short received with interest are upheld. However, penalty imposed on the appellant is set aside

37. Karnataka Agro Chemicals Vs. The Commissioner of Central Excise, & ST- Bangalore (West)

Final Order No. 21456-21479/2023 dated 22.12.2023

Issue:-The facts of the case are that the appellant, a partnership firm, are engaged in manufacture of micronutrients fertilizers for soil application and also for foliar application. The appellants have been granted necessary license by the Karnataka State Government under the Fertilizer (Control) Order, 1985 to manufacture and market micronutrient fertilizers in various states. During the relevant period, the appellant had manufactured and cleared micronutrients fertilizers without payment of duty claiming its classification as "other fertilizers" under Chapter Heading 3105 of Central Excise Tariff Act, 1985. On the basis of intelligence and investigation initiated in the year 2000, and on completion of the same, show cause notice was issued to the appellant alleging that the product micronutrient is classifiable as "Plant Growth Regulator" (PGR in short) falling under chapter sub-heading 3808.20 of CETA, 1985 and duty with interest demanded invoking extended period. On adjudication, demands were confirmed with interest and penalty. Aggrieved by the said orders, the appellant approached the Tribunal. E/1364/2010 with 23 others Page 6 of 33 This Tribunal vide Final Order No. 341-347/2007 dated 26.02.2007 set aside the adjudication order and allowed the appeals. The Revenue challenged the said order before the Hon'bles Supreme Court and vide its order dated 15.05.2008, the Hon'ble Supreme Court setting aside invoking the extended period,

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remanded the matter to the adjudicating authority for de novo adjudication. In de novo proceeding, the learned Commissioner re-examined the issue and concluded the classification under chapter sub-heading 3808.20 as "PGR" and confirmed the demands for the normal period. Also, periodical show cause notices issued from time to time for normal period have also been confirmed with interest and penalty in the novo proceeding.

Held:- The finding of the Ld. Commissioner that the impugned goods merit classification under CSH 3808.20 (38089340) of CETA, 1985. Consequently, confirmation of demands with interest is also upheld. Since the issue relates to classification and interpretation of law, imposition of penalty under Rule 25 on the company and personal penalty under Rule 26 CER, 2002 on the Appellant Shri Mahesh G Shetty is unwarranted and accordingly set aside. The impugned orders are modified and the appeals filed by the Company are partly allowed to the extent mentioned above and Appeals filed by Shri Mahesh G Shetty are allowed

38. KEMS Forgings Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (East)

Final Order No. 21362/2023 dated 08.12.2023

Issue:-During the course of audit, it was noticed that they had short paid the total of Rs.5,71,053/- as per the relevant provisions i.e. Rule 3(5) of Cenvat Credit Rules, 2004. Consequently, they paid the entire amount by reversing CENVAT Credit of Rs.3,24,982/- and the balance amount of Rs.2,46,071/- through PLA; also they paid Rs.3,16,880/- as interest by debiting the PLA Account on 25.05.2012. A show cause notice was issued to the appellant proposing penalty and appropriation of the amount paid. After adjudication, the amount paid, has been appropriated. Penalty confirmed. This appeal is for challenging the levy of penalty.

Held:- The show cause notice proposing appropriation of the amount and penalty was adjudicated and penal proceedings dropped. Subsequently, on the basis of the audit objection in 2012, they reversed the CENVAT Credit with interest for normal period of limitation. In these circumstances, imposition of penalty on the appellant under Section 11AC of the Central Excise Act, 1944 read with Rule 15(2) of Cenvat Credit Rules, 2004 is unsustainable in absence of suppression or mis-declaration facts with intent to evade payment of duty. Consequently, the impugned order is modified and imposition/confirmation of penalty is set aside. Appeal is partly allowed to the extent mentioned as above. Miscellaneous application disposed off.

39. Poduval Industries Vs. The Commissioner of Central Excise, & ST- Cochin

Final Order No. 21425/2023 dated 22.12.2023

Issue:-The appellants are engaged in the manufacture of Diesel Generating sets (DG sets) falling under Chapter sub-heading 8502 90 of Central Excise Tariff Act, 1985. On the basis of intelligence and subsequent investigation, a show-cause notice was issued to the appellant on 29/01/2004 alleging that they have manufactured "Acoustic Enclosures" in their factory during the period from 01/04/2000 to 04/06/2002 and cleared the same without payment of duty in the guise of trading of the same, thereby evaded Central Excise duty of Rs.10,52,892/-; it is proposed to recover the said duty with interest and penalty. the appellants are engaged in the manufacture of Diesel Generating sets (DG sets) falling under Chapter sub-heading 8502 90 of Central Excise Tariff Act, 1985. On the basis of intelligence and subsequent investigation, a show-cause notice was issued to the appellant on 29/01/2004 alleging that they have manufactured "Acoustic Enclosures" in their factory during the period from 01/04/2000 to 04/06/2002 and cleared the same without payment of duty in the guise of trading of the same, thereby evaded Central Excise duty of Rs.10,52,892/-; it is proposed to recover the said duty with interest and penalty.

Held:- We find that the submissions advanced by the appellant are of general in nature and devoid of rebuttal of evidences brought on record indicating procurement of raw materials, processing of the same in the factory premises, stock of the glass wool etc. used in the manufacture of acoustic enclosures found in their factory, low conversion charges reflected Excise Appeal No.185 of 2008 in the invoice of job-worker etc. overwhelmingly indicate that the acoustic enclosures were manufactured and cleared without payment of duty from their factory. In the result, the appeal of the appellant is rejected and order of the Commissioner(Appeals) is upheld. (Pronounced in open court.

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40. Rakon India (P) Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (North)

Final Order No. 21416/2023 dated 19.12.2023

Issue:-M/s. Rakon India Pvt. Ltd., appellant, is a 100% EOU who manufacture and export 'Crystal and Oscillators'. They filed a refund claim of unutilized cenvat credit on input and input services. The original authority granted refund partly and rejected the balance amount on the ground that the shipping E/20486/2022 Page 2 of 9 bills were not filed along with the claim.The appellant filed an appeal against this rejection before the Commissioner (Appeals). Since the shipping bills were produced before the Commissioner (Appeals), vide Order-in- Appeal No.375/2017-CT dated 27.10.2017, he remanded for verification of copies of the shipping bills for calculation of the eligible amount of refund. The appellant vide letter dated 01.07.2019 requested for verification of documents and processing of the refund claim by submitting copies of shipping bills on 15.7.2019. The original authority rejected the refund claim on the ground that it was filed beyond the time limit from the date of issue of Order-in- Appeal in accordance with Explanation B(ec) to Section 11B. The Commissioner (Appeals) upheld this order vide the impugned order on which the appellant is in appeal before this Tribunal.

Held:- In view of the decision in their own case by the Tribunal in the case of Rakon India Pvt. Ltd. Vs. Commr. of Central Tax, Bangalore North: 2021 (54) G.S.T.L. 183 (Tri. - Bang.) (which was refund under Section 142(2) of CGST Act) had requested to remand the case. However, The facts are clearly distinguishable in as much as that was not a case of Rule 5 refund; while the present appeal is under Rule 5 of the Cenvat Credit Rules, 2004 and hence the question of refund under Section 142 does not arise. Moreover, as per Section 142, any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse as seen from clause (3) of Section 142 reproduced below: "(3) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 (1 of 1944): Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse, 8. In view of the above discussions, the appeal is dismissed.

41. Ultra Tech Cements Ltd. Vs. The Commissioner of Central Excise, & ST- Belagavi

Final Order No. 21426/2023 dated 22.12.2023

Issue:-The appellants are engaged in the manufacture of cements of various grades falling under Chapter heading 2523 10 00 of the Central Excise Tariff Act, 1985. The appellant captively consume clinker for manufacture of cement in their factory, clear the same to other units of the appellant and also sell some quantity of the same to independent customers (unrelated buyers). In clearing the clinkers to their own sister units, the appellant had determined the cost of the product as per CAS-4 method and accordingly the assessable value as 110% of the cost of the production in accordance to Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (Central Excise Valuation Rules, 2000 for short). Since independent sale to other buyers are also available, show-cause notice was issued to the appellant demanding differential duty by computing the assessable value of clinkers cleared to sister units in terms of Rule 4 read with Rule 11 of Central Excise Valuation Rules, 2000 for the period from March 2011 to November 2013. The differential duty computed accordingly for the said period amounting to Rs.78,17,68,586/- was demanded with interest and penalty by issuing show-cause notice dated 30.01.2014 invoking extended period of limitation. On adjudication, the demand was confirmed by the learned Commissioner with interest and penalty of equal amount under Section 11AC of Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002; further, the amount of Rs.4,93,93,806/- paid by the appellant was appropriated against the said demand. Assailing the impugned order, the present appeal is filed before this Tribunal.

Held:- The impugned order is accordingly modified and appeal is partly allowed setting aside demand for the extended period of limitation and remand the matter to the adjudicating authority to re-determine the assessable value applying the principle of Rule 4 read with Rule 11 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and compute the differential duty, interest

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42. IFB Industries Vs. The Commissioner of Central Excise & ST, Bangalore (East)

Final Order No. 20074-20075/2024 dated 02.01.2024

Issue:-The issue under dispute was whether clearance of electrical motors captively used are required to be followed in terms of Rule 8 of Central Excise (Valuation) Rules, 2000 or in terms of Rule 4 of Central Excise (Valuation) Rules, 2000 adopting the price cleared at the time of removal from the factory. From the amended Rule, the value to be adopted should be the value on which the goods were sold at the nearest time of removal and therefore, for captive consumption also the appellant should have adopted the price at which they had sold to the various customers either in the service centres or as warrant replacement. In view of the above, invoking the proviso to Section 11A, the demand was confirmed under proviso to Section 11A imposing penalty under Section 11AC equivalent to the amount of duty in addition to penalty of Rs.2,000/- under Rule 25. Aggrieved by this order, the appellants are in appeal before us.

Held:- The learned counsel on behalf of the appellant submits that 5 show-cause notices were issued proposing to re-determine the value of motors removed for captive consumption and warranty replacement under Rule 4 of the Central Excise (Valuation) Rules, 2000 adopting the price of motors removed for spares market. It is submitted that in view of the Larger Bench decision in the case of Ispat Industries Ltd. Vs. CCE, Raigad: 2007 (209) ELT 185 (Tri.- LB) the appellant accepts the demand and challenges only on the ground of limitation and allowing computation of duty. In view of the fact that all the assemblies were made on payment of duty and disclosed in their monthly ER-1 returns and the clearances to the spares market was known to the Revenue, the question of wilful suppression cannot be alleged. The benefit of cum-duty which is already a settled issue is also to be extended to the appellant. In view of the decision of the Larger Bench, demands in all the Show cause notices are upheld only to the extent of normal period. Penalty imposed under Section 11AC is set aside. The matter is remanded to the original authority to recomputed the duty by following the above observations.

43. The Himalaya Drug Company Vs. The Commissioner, Central Excise & Service Tax-Bangalore (North-West)

Final Order No. 20065/2024 dated 23.01.2024

Issue:-Classification of Liv 52 Protec- Whether under Chapter 2309 as Animal feed Supplement or under Chapter 3004 as Ayurvedic P or P Medicine.

Held:- Tariff heading 23099010 cover preparation of a kind used in Animal feeding and under other it cover Compounded Animal feed. Tariff Heads 30049011 cover Medicaments mixed or unmixed for therapeutic or prophylactic use and under other- Ayurvedic, Unani, Siddha, Homeopathic or Biochemical systems medicaments, put up for retail sale. The contents of the impugned product have therapeutic or prophylactic properties. Liv 52 Vet Liquid is marketed as Drugs. The contents of the two products are similar except for certain herbs. Animal feed supplements are mixture which provide extra vitamin and minerals to the animals whereas this product does not have any such vitamin or minerals hence cannot be called animal feed supplement. Further 23099010 cover compounded animal feed therefore this is not covered under Chapter 23. It is also a fact that the product is being marketed as Ayurvedic medicine in some media channels. The Tribunal held that the product is rightly classifiable under Chapter 300339 upto February, 2005 and Chapter 30049011 from March, 2005 onward. Demand for normal period was upheld. Being a classification matter and also that the department was fully aware of the practice of assessment of the appellant demand for extended period was disallowed.

44. Minerva Mills Vs. The Commissioner of Central Excise & ST, Bangalore (West)

Final Order No. 20066/2024 dated 08.01.2024

Issue:-The appellant undertakes processing of their own cloth and also receives grey fabrics from other units of NTC for processing like bleaching/dyeing and mercerizing on job work basis. For the goods received on job work basis from Karnataka Handloom Development Corporation (KHDC) a state government undertaking the appellant adopted selling price declared by KHDC while returning the processing cloth to KHDC. However, the Department observed that the value adopted by the appellant was incorrect and therefore, it needs to be re- determined by including the landed cost of the raw materials, processing charges, and all other relevant charges as per Section 4 of the Central Excise Act, 1944.

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Held:- As per the Supreme Court's decision in the case of Ujagar Prints and based on CBEC circular No.619/10 /2002 -CX dated 19.2.2002 and No. 643/34/2002-CX dated 1.7.2002, it is a settled issue that the job worker has to discharge duty based on the landed cost and the processing charges and therefore, on merits the demand is upheld. Since the facts were known to the department and there is no evidence placed on record for wilful evasion of duty with intent to evade, the question of invoking proviso to Section 11A does not arise. The impugned order is allowed to the extent of confirmation of duty only for the normal period. The appeal is allowed partially.

45. Ind Swift Labs Ltd vs. C. CE Chandigarh-II
46. Shree Balaji Alloys vs. C. CE Chandigarh-I
47. Petrofer LLP vs. C. CE Jammu & Kashmir
48. J & K Pigments Pvt Ltd vs. C. CE Jammu & Kashmir
49. PBI Metals Pvt Ltd vs. C. CE Jammu & Kashmir

Final Order No.A/60412-60440/2023 dated 19.09.2023

Issue:-Whether the refund of education cess and secondary and higher education cess which was paid along with excise duty in terms of Notification No. 56/2002-CE dated 14.11.2002 as amended is admissible or not.

Held:-Issue of refund of education cess and secondary and higher education cess is no more res-integra and stands finally decided by the decision of the Hon'ble Supreme Court in the case of M/s Unicorn Industries vs. Union of India reported as 2019 (370) ELT 3 (S.C) wherein the Hon'ble Apex Court, after considering the provisions of Notification No. 71/2003-CE dated 09.09.2003 has held that a notification has to be issued for providing exemption under the said source of power and that in the absence of notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. The provisions of Notification No. 56/2002-CE dated 14.11.2002 are pari-materia to the provisions of Notification No. 71/2003-CE dated 09.09.2003. We uphold the impugned orders by dismissing all the appeals of the appellants.

50. Jammu Pigments Limited vs CCE & ST- Chandigarh-I

Final Order No.60001/2024 dated 03.01.2024

Issue:-Whether the refund of education cess and secondary and higher education cess which was paid along with excise duty in terms of Notification No. 56/2002-CE dated 14.11.2002 as amended is admissible or not.

Held: Issue of refund of education cess and secondary and higher education cess is no more res-integra and stands finally decided by the decision of the Hon'ble Supreme Court in the case of M/s Unicorn Industries vs. Union of India reported as 2019 (370) ELT 3 (S.C) wherein the Hon'ble Apex Court, after considering the provisions of Notification No. 71/2003-CE dated 09.09.2003 has held that a notification has to be issued for providing exemption under the said source of power and that in the absence of notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. The provisions of Notification No. 56/2002-CE dated 14.11.2002 are pari-materia to the provisions of Notification No. 71/2003-CE dated 09.09.2003. We uphold the impugned orders by dismissing appeal of the appellant.

51. Alfred Berg and Co. India Pvt. Ltd. Vs. Chennai Outer GST & C.Ex

Final Order No. 40630/2023 dated 02.08.2023

Issue:-Whether the appellant is eligible for refund of unutilised credit lying in their CENVAT account at the time of closing the factory?

Held:- By following the decision of the Honourable High Court of Bombay in the case of Gauri Plasticulture Pvt. Ltd. , it is opined that the refund cannot be allowed. The appeal filed by the appellant is dismissed.

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52. Innasimuthu Vs. Commissioner of GST & C.EX, Madurai

Final Order No. 40799/2023 dated 14.09.2023

Issue:-Manufacture of Matches by packaging of Machine made dipped Splints in Match Boxes.

Held:- By judicial discipline, following the decision in the appellant's own case in appeal Nos.E/41197,41147,41148/2013 vide Final Order Nos. 40172-40174/2023 dated 17.03.2023 it is of the considered opinion that the impugned order does not require any interference. In the result, the appeal is dismissed.

53. Ankit Ispat Pvt. Ltd. Vs. Commissioner of GST & C.Ex, Trichy

Final Order No. 41084-41088/2023 dated 08.12.2023

Issue:-The appellant had taken credit on imported shredded scrap to the tune of Rs.24,01,371/- on the basis of photocopies of Bills of Entry. It appeared that the aforesaid documents were not eligible and valid documents to avail CENVAT credit in terms of Rule 9(1) of CENVAT Credit Rules, 2004. After due process of law, the original authority confirmed the demand of Rs.24,01,371/- for the above period along with interest and imposed equal penalty. The appellant preferred appeals before Commissioner (Appeals) who vide the impugned order rejected the appeals on the ground of time-bar.

Held:- Unlike the Appellants claim of ignorance of receipt of the impugned documents the Commissioner (Appeals) has shown that all the SCN's were issued prior to the closure of the Appellants factory. Factual details and circumstances show the service of the impugned orders on the Appellant. The inaction on their part bars the Appellant from claiming a remedy of filing an appeal almost a decade after the receipt of the earliest Order in Original No 06/2011–C.Ex. dated 16/03/2012, as evidenced by postal acknowledgement card, there by wrongly alleging non-receipt of orders and violation of the natural justice. Hence the judgment of the Hon'ble Bangalore Tribunal in the case of Venkateswara Power Projects Ltd. Vs. CCE, Central Excise Appeal No. 20007 of 2021 dated 18/01/2021, is also distinguished. From the discussion above the Appellants pleadings fails both on facts and law. The impugned order merits to be upheld and is so ordered. The appeals are dismissed.

54. 1.Vaibhav Metals 2.Bothra Metals and Alloys Pvt. Ltd. 3. Yash Industries 4. Shree Padmavathi Metals 5. Shrinivas Impex Vs. Commissioner of GST & C. Ex, Coimbatore

Final Order No. 41074-41078/2023 dated 14.12.2023

Issue:- Illegal availment of CENVAT credit of CVD paid on the imported goods by the manufacturers of aluminium products without physically receiving the goods i.e. imported aluminium scrap allegedly purchased from the traders on high sea sales basis into their factory.

Held:- M/s Bothra Metals and Alloys Pvt. Ltd. and Yash Industries imported scrap on high sea sales basis and had sold aluminium scrap to Vaibhav Metals by high sea sales through M/s Shree Padmavati Metals. When confronted with documents they agreed that the goods had been diverted. Hence M/s. Bothra Metals and Alloys Pvt. Ltd. and Vaibhav Metals were fully aware of the clandestine activity and its consequences. Shri Padmavathi Metals was trading in scrap purchased locally and importer and had diverted imported scrap in the guise of sale to Vaibhav Metals. .M/s Shrinivas Impex was engaged in the trading of scrap of aluminium, copper, brass, zinc etc. They had sold aluminium scrap to Vaibhav Metals on high seas basis. When confronted with documents he agreed that the goods had been diverted. The discussion in the impugned order has established the role and knowledge of the appellants in the clandestine activity designed to misuse CENVAT credit.

55. M/s Avail Printers private limited Vs. Commissioner of CGST & Excise, Kolkata North

Final Order No. 75055/2024

Issue:-Whether the appellant is entitled to take Cenvat credit on various dutiable products i.e. Box, Tag, Book cover etc. and non dutiable products i.e. poster, Leaflet, etc. The appellant claimed that they have taken the credit on the inputs received for the manufacture of the said goods and were paying duty as applicable.

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Held:- The appellant did not produce necessary documents as required under the provisions of Rules 6(1), 6(2) and 6(3) of the cenvat credit Rules 2004. The documentary evidence tendered in the matter is for the period 01-04-2014 onwards, while the instant case pertains to the period from 2009-10 to February 2014.

56. Asha Engineering Works Vs. Commissioner of Central Excise, Kolkata-II

Final Order No. 77365/2023

Issue:-The appellant were engaged in job work amounting to manufacture in terms of section 2(f)(i) of central Excise Act on behalf of M.s Usha martin Ltd. excise duty was demanded as they were affixing the brand name of m/s usha martin Ltd. in the goods manufactured by them.

Held:- The appellants have been undertaking job-work for M/s Usha Martin Ltd. It is further seen that they are affixing the brand name of M/s Usha Martin Ltd. in the goods manufacture by them in the course of job work. Accordingly, the order-in-original passed is sustained.

57. Klar Sehen pvt Ltd. Vs. Commr. of Central Excise, Kolkata

Final Order No. 76329/2023

Issue:-The department is for the view that the valuation of the impugned goods should have been determined under Rule 4 of the valuation Rules, 2000. However, the appellant cleared the impugned goods by determining the value under Rule 8 of the valuation Rules 2000 and paid duty accordingly. Held:- Relying on the decision of the Hon'ble Supreme Court in the matter of Mafatlal Industries v. Union of India - 1997 (89) E.L.T. 247 (S.C.) = 1996 (9) SCALE 457 which has been followed constantly by the various courts and tribunal, held that the refund claims filed beyond statutory period of limitations prescribed by the statute (Section 11 B of Central Excise Act,1944 or Section 27 of the Customs Act, 1962) are barred by limitation.

Held:- Citing the example in case of Commissioner of Central Excise and Customs, Surat Vs Sun pharmaceuticals Inds ltd and drug manufacturers vs UOI reported in 2008, it has been decided that the valuation of physician samples is to be done as per Rule 4 of the valuation Rules 2000.

58. Bharat Roll Industries Private Ltd. Vs. Commr. of Central Excise, Kolkata IV

Final Order No. 76400-76401/2023

Issue:-The appellants have two units namely unit I and unit II. During the course of audit of unit II, the appellant has cleared the goods from their factory to their other factory. The Id. Authorised representative of the appellants submits that the appellant has cleared the goods on transaction value which is 115% of the cost but the appellants did not give any CAS-4.

Held:- Rule 8 of the Central Excise valuation Rules 200 the whole of the production has been cleared to sister unit then the same is to be determined by paying duty on the cost of the articles at 115% of the cost of production or manufacture of such goods. Admittedly the appellant has not done so. The appellant is required to pay duty in terms of provisions of section 4(1)(b) of the central Excise act 1944 at the rate of 115% of the cost of production or manufacture of such goods.

59. Sri Sai Krishna Health Care Products Vs. Commissioner of Central Tax, Medchal - GST

Final Order No. A/30410/2023 dated 04.12.2023

Issue:-Appellants are engaged in manufacture and supply of mosquito coils to two parties. These mosquito coils were being cleared under the brand name "STOP" and "TODAY". Hence, the SSI exemption benefit under Notification No 08/2003-CE dt.01.03.2003 is denied as they were not meeting the condition No.4 of the notification. The condition No.4 of the said notification provided that the exemption contained in the notification shall not apply to specified goods bearing a brand name or trade name, whether registered or not, of another person.

Held:- It is not disputed that (i) the goods were being manufactured by the Appellant and cleared in packed form; (ii) on packing materials certain details like brand name/trade name etc., were imprinted; (iii) the names of brand owners were appearing as "marketed by" even though the names of the Appellants were also appearing as "manufactured by". It is on the record that the department has recorded the statements of both Appellants as well as brand name owners and has also relied on certain documents including advertisements, trademark application, etc., to establish that the brands viz., "STOP" and "TODAY" were linked to SRCPL and Farmax respectively. The statements have clearly linked that these companies were in the business of both manufacturing and trading and were using these brands in respect of a variety of

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products. The market was already aware of the identity of these brand names, even though they might be in relation to some other products. There is sufficient evidence on record by way of statements and other relied upon documents to the effect that these brand names/trade names were belonging to SRCPL and Farmax and not to the appellants.Further, there is nothing on record to establish that the Appellants were perceived to be the brand name owner for "STOP" and "TODAY" in the market. Hence SSI benefit rightly denied.

60. **JSW Steel (Salav) Ltd. Vs. Commr of Central Excise & Service Tax, Raigad**

Final Order No. A/87197/2023 dated 06.12.2023

Issue:-Recovery of Cenvat Credit of Rs. 1,21,36,223/- taken under Cenvat Credit Rules, 2004 that he applicant was held not entitled to: The appellant, who operates a jetty for captive use at Salav on the banks of Revdanda creek under a thirty year lease agreement with the Maharashtra Maritime Board (MMB) for unloading iron ore lumps and iron ore pellets at last stage of transportation to their factory, had, in order to ensure availability of sufficient depth in the creek, for vessels carrying the raw materials from ships at anchorage to conveniently berth at jetty, been getting the creek bed dredged regularly and, against invoices issued by provider of the service, availed credit to extent of tax on such service.

Held:- It is common ground that the waters, which had been deepened by dredging for approach of barges, did not belong to the appellant. Nor do the waters belong to any particular owner other than the Republic of India. The administrative control over such waters is vested with the Maharashtra Maritime Board (MMB) and any improvement, or enhancement of capability, would render the Maharashtra Maritime Board (MMB) to be recipient of service irrespective of the source of payment for such service. This is an aspect that the appellant has not been able to controvert and it is on this aspect that the eligibility of CENVAT credit must rest for, otherwise, rule 3 of CENVAT Credit Rules, 2004 would be rendered superfluous. It is only by reading definitions into the framework of the scheme, permitting the recipient of the service to avail of credit, that the integrity of the scheme can be maintained; the appellant has not been able to provide any precedent decision which would alter such construct of the CENVAT scheme. In re JSW Jaigarh Port Ltd, the issue for consideration was the entitlement for credit by the port operator that rested upon the area of the port being under the control of the appellant therein. In re JSW Steel (Salav) Ltd, the dispute pertains to the services availed for setting up of, and operation, of the jetty which was under undisputed lease to the appellant. The tax discharged on services performed on such leased property, while the waters and 'creek bed' were not, does conform to the secondary qualification of being the recipient of the service entitling availment of credit of tax paid on 'taxable service' that conform to threshold eligibility by inclusion in definition. The decision of the Tribunal in re Ultratech Cement Ltd arose in similar circumstances of claim by recipient of service and, hence, would not apply to the resolution of the present dispute.

61. **Commissioner, Central Excise & Service Tax, Lucknow Vs. M/s Harsh Traders**

Final Order No. 70175 dtd. 03.11. 2023

Issue:-Penalty equivalent to the duty confirmed under Section 11AC of the Central Excise Act should be imposed.

Held:- where demand has been confirmed invoking extended period of limitation penalty equivalent to duty evaded needs to be imposed and there is no discretion to any authority as held by the Hon'ble Supreme Court in the case of Union of India V/s M/s Rajasthan Spinning &Weaving reported as 2009 (238) E.L.T. 3 (S.C.).

62. **Mamta Steel India Pvt. Ltd., and Lal Padmakar Singh, Director, Vs. CCE, Lucknow**

Final Order No. 70207-70208/2023 dated 21.11.2023

Issue:-Appellants were engaged in manufacture of MS Ingots, falling under Tariff Item No.72061090 of schedule to Central Excise Tariff Act, 1985. Visit was made by the Central Excise Officers, during visit shortage of finished goods was found. On scrutiny of records, it was observed that appellants have been clearing the goods against the same invoice, number of times to various customers and thus clandestinely remove the excisable finished goods and thus was evading central excise duty.

Held:- The Tribunal held that allegation of clandestine removal is sustainable on the basis of statements of various persons and as the appellants have been clearing the goods against the same invoice, number of times to various customers. Penalty on the director is also sustainable due to his active involvement.

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63. **Sachdeva Holdings Pvt. Ltd., Vs CX and CGST, Noida**

Final Order No. 70084/2023 dated 15.09.2023

Issue:-Refund of excess payment of service tax.

Held:- The Tribunal after relying on the decision of the Hon'ble Supreme Court in the matter of Mafatlal Industries v. Union of India - 1997 (89) E.L.T. 247 (S.C.) = 1996 (9) SCALE 457 which has been followed constantly by the various courts and tribunal, held that the refund claims filed beyond statutory period of limitations prescribed by the statute (Section 11 B of Central Excise Act,1944 or Section 27 of the Customs Act, 1962) are barred by limitation.

64. **Simbhaoli Sugar Ltd., Vs CCE, Noida**

Final Order No. 70116/2023 dated 11.10.2023

Issue:-Disallowed the CENVAT Credit in respect of the printer and cartridges used in office.

Held:- The Tribunal Held that credit is not admissible in respect of the printer and cartridges used in office, as they fall within the exclusion clause of the definition. Further upheld the demand of interest and penalty in respect of credit disallowed.

65. **Shri Pintu Tyagi Vs CCE, Ghaziabad**

Final Order No. 70137/2023 dated 19.10.2023

Issue:-Manufacture and clearance of excisable Goods without obtaining registration and without paying duty.

Held:- The entire activities undertaken in the factory were done clandestinely and no formal records were maintained about the operation. The Tribunal Held that demand is sustainable on the basis of statements of the appellant and other persons and in view of the evidences adduced by the Department and also upheld penalties on persons for their active involvement in clandestine activity.

66. **Sumit Nagrath Vs. Commissioner (Appeals) Customs, CGST, Noida**

Final Order No. 70028/2023 dated 09.08.2023

Issue:-Refund of Service Tax paid by mistake.

Held:- Tribunal held that dispute between the appellant and the builder, two contracting parties. This dispute has to be resolved between two parties to the contract and no refund can be made treating the disputed amount as tax which was never paid to the exchequer. Refund claim for the reason above is not maintainable.

Service Tax

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1. **Om Sokhal Builders & Constructions Pvt. Ltd. V/s The Commissioner of Central Excise, Jaipur**

Appeal No. 53517/2015
Final Order 54521/2024 dated 06.02.2024

Issue:- - The demand of service tax for constructing educational institutes as has been confirmed by the authority below on the ground that for any organisation or institutions to qualify as having been established solely for educational, religious, charitable, help, sanitation or philanthropic purposes, for non-commercial status, it is required that same fulfils the condition of being run without any profit making. None of the educational Institutes were observed to have a non-commercial status. We have no reason to differ from these findings because there is no denial apparent on record that the educational institutions for whom appellant constructed the complex, were charging fees from the students. None of these educational Institutes are Government owned institutes. Also there is no evidence to prove that despite collection of fee, there was no profit to these institutes and that these educational institutes were non-profit driven. Hence we confirm the demand of service tax pertaining to construction of educational institute activity.

Held: - The demand of service tax for constructing educational institutes as has been confirmed by the authority below on the ground that for any organization or institutions to qualify as having been established solely for educational, religious, charitable, help, sanitation or philanthropic purposes, for non-commercial status, it is required that same fulfils the condition of being run without any profit making. None of the educational Institutes were observed to have a non-commercial status. We have no reason to differ from these findings because there is no denial apparent on record that the educational institutions for whom appellant constructed the complex, were charging fees from the students. None of these educational Institutes are Government owned institutes. Also there is no evidence to prove that despite collection of fee, there was no profit to these institutes and that these educational institutes were non-profit driven. Hence we confirm the demand of service tax pertaining to construction of educational institute activity.

The value for legal and professional services the same is very much taxable, as it qualifies to be called as service for post negative list period it is not covered under the exclusion clause of section 66 D of Finance Act. Hence, we do not find any infirmity while the demand on this count.

2. **Agriculture Produce Marketing Committee V/s Commissioner (Appeals-I) Central Tax/GST Delhi**

Appeal No. 50931/2018
Final Order 51133/2023 dated 23.08.2023

Issue: -In the present case, admittedly, the order dated 30.01.2017 of the adjudicating authority was received by the appellant on 06.02.2017, but the appeal was presented before the Commissioner on 27.07.2017. It was clearly not presented within the period of two months nor within the extended period of one month. The Commissioner (Appeals) dismissed the appeal after placing reliance on the decision of Supreme Court in Singh Enterprises

Held:-The provisions of section 35 of the Central Excise Act, 1944 relating to appeals before Commissioner (Appeals) had come up for consideration before the Supreme Court in Singh Enterprises. Section 35 of the Central Excise Act provides that any person aggrieved by any decision or order passed under the Act, may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days. The provisions of section 35 of the Central Excise Act are paramateria with section 85(3A) of the Finance Act. The Supreme Court held that the period upto which the prayer for condonation can be accepted is limited by the proviso to sub section (1) of section 35 of the Central Excise Act and the position is crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of thirty days after the expiry period of sixty days. In other words, the appellate authority can entertain the appeal by condoning the delay only upto 30 days beyond the 5 ST/50931/2018 normal period for preferring the appeal, which is 60 days.

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3. Carry Fast Agency Vs Pr. Commissioner, CE & GST, Indore

Appeal No. 53668/2018
51302/2023 dated 15.09.2023

Issue:- Assessee-respondent is engaged in providing "Clearing and Forwarding Agents Services"and has been registered for the same. During the course of audit of their record for the period from2011-12 to 2014-15, it was observed that while discharging the tax liability of C & F Agent Service, the assessee-respondent has not included the freight value received by him in the taxable value account.

Held: -The conclusion which stands finalized to our understanding is that for the service of clearing and forwarding agent to be taxable, the activities of clearing as well as forwarding shall be performed by one and the same agent. To put it otherwise, the service of clearing and forwarding agent will not be taxable if:

(i) The agent outsources the activity of forwarding to a goods transport agency.
(ii) The principle himself hires the GTA to perform forwarding activity and the clearing and forwarding agent is engaged only to perform the clearing activities.

In both the situations the service provider for the forwarding activity since is a person different from C&F agent that the value of freight forwarding shall not be included in the value of taxable C&F Agent Service. If fact, service cannot be taxed as C&F Agent Service.

From these clauses of both the agreements, it is clear that respondent is admitted to be the C&F agent. As already observed above respondent only is providing clearing as well as forwarding service. Hence it is not open to respondent to say that service provided by him is different from C&F Agent Service. Irrespective there are two separate contracts executed by the principle but for appointing one and the same person i.e. respondent to render carrying as well as forwarding service. This fact distinguishes the present case from Kulcip Medicines (supra). Thus, we hold that both the activities rendered by respondent shall constitute one synchronized service of C&F agent. Hence respondent is liable to levy under Section 65(25) of the Finance Act. More so for the reason that appellant is registered as C&F agent and not as GTA. Thus we answer the above question in negative by holding that when one and the same person is providing service of clearing as well as forwarding irrespective under two separate contracts, it shall not amount to be the bifurcation of C&F Service. The agent has to be assessed for rendering C&F Service 65(25) and 65(105) of the Finance Act.

4. Nagar Parishad Vs. Commissioner of Central Excise & C.G.ST – Udaipur

Appeal No. 50002/2016
51493/2023 dated 03.11.2023

Issue:- Assessee-respondent is engaged in providing service namely 'Renting of Immovable Property Services.' It came to the notice of the department that local authorities like appellant are not paying service tax in respect of the charges collected under various heads which are covered under Renting of Immovable Property.

Held:-From the decision as relied upon by learned DR, we observe that initially this Tribunal vide its Final Order No. 53436- 53500/2017 dated 25.05.2017 in the case of M/s. Krishi Upaj Mandi Samiti has decided the issue of taxability. The relevant para is as follows:

"14. We have examined the scope of entry in the negative list along with various clarifications issued by the Government. On harmonious construction of all material facts on record, we find that the appellants are not liable to service tax on shops/ sheds/platforms/land leased out in the notified market area for traders for temporary storage of agricultural produce traded in the market. In respect of shops, premises, buildings, etc. rented/leased out for any other commercial purpose other than with reference to agricultural produce (like bank general shop etc.), the same shall not be covered by the negative list and the appellants shall be liable to service tax."

This decision has been upheld by the Hon'ble Apex Court in Krishi Upaj Mandi Samiti (supra) of Year 2022. Otherwise also, it is observed that the appellant had admitted their tax liabilities. In view of the said settled provision and the admission of the appellant for his liability, we do not find any infirmity in the order confirming the impugned demand. Since the appellant had never declared the fact of the income received

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by renting of immovable property which was purely and admittedly for the purposes of commerce, we do not find any infirmity in the order imposing penalties under Section 75, 76, 77 and 78 of the Finance Act. Though the appellant claimed the benefit under Section 80 but we do not find any reasonable cause with the appellant justifying the non-payment of service tax on the income which was being received for a long period of 5 to 6 years from renting of immovable properties, also the amount of service tax as confirmed against the appellant was not paid along with the interest in full within the stipulated time. Hence, we do not find any reason to extend the benefit of Section 80 of the Act to the appellant. With these findings, we uphold the order under challenge. Resultantly, the appeal stands dismissed.

5. Export Inspection Agency, Delhi, Vs Commissioner of Service Tax, Delhi-I

Appeal No. 52279/2016
51391-51392/2023 dated 05.10.2023

Issue:-The appellant is a body created under Section 7 of Export (Quality Control and Inspection) Act, 1963 and works under the administrative and technical control of Export Inspection Council. The appellant is the field organisation of Export Council under Free Trade Agreement executed between India and foreign nation‟s products, eligible for Certificate of Origin required for preferential treatment in exporting country. This was subject to the said product being certified by certifying authority approved by both the countries. In pursuance to the said FTA, the appellant has been recognised as certificating authority for different food products. The Department alleged that the service provided by the appellant were exigible to service tax. Two show cause notices dated 17.04.2014 and 17.04.2015 3 were issued for the period 2008-09 to November 2013 wherein service tax of Rs. 11,01,17,328/- was demanded.

Held:-In order to understand whether the appellant is discharging sovereign function, it is important to understand the nature of the appellant. It is accepted that the appellant is a body created under Section 7 of Export (Quality Control and Inspection) Act, 1963. The Export Inspection Agency is under the administrative and technical control of the Export Inspection Council. The appellant is the certifying authority for different food products which are to be exported to other countries as per the Free Trade Agreements executed between India and other nations. The appellant collects a fee for the purpose of examination, quality control or inspection. The structure of the fees for testing is fixed by Central Government. However, we note that as per section 10(3) of Export (Quality Control and Inspection) Act, 1963, the Council has its own fund which consist of income and receipts of the Council from other sources and all such money belonging to the fund of the Council is to be deposited in scheduled banks. From the above, we note that though the quantum of fee charged by the appellant is fixed by the Central Government, however the same is not deposited in the Government Treasury. Consequently, this clearly takes the functions of the appellant out of the ambit of para 2 of the aforesaid circular to para 3 of the said circular, which is „provision of service‟. Though the appellant‟s function is essential for inspection of export goods, but the usage of the term „may‟ in Section 3 of the Export (Quality Control and Inspection) Act, 1963, for the establishment of the Export Inspection Council, thus making it NOT a mandatory statutory duty activity of the Government. Consequently, it cannot be said that the appellant is discharging mandatory/statutory obligation.We find that our conclusion is buttressed by the judgement of the Supreme Court in the case of Krishi Upaj Mandi Samiti, Alwar, Vs Commissioner of Central Excise and Service Tax, Alwar [2022 (2) TMI1113- Supreme Court].

6. Berkowits Hair & Skin Clinic Vs. Principal Commissioner of GST & Central Excise, Delhi South Commissionerate

Issue:- On limitation issue the Commissioner has held that these two services were not hit by limitation as these were not undertaken by the appellant at the time of the audit for the financial year 2009-10 to 2013-14.

Held:- the invocation of the extended period under Section 73 of the Finance Act, 1994 is justified and is upheld.

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7. Archna Traders Vs. CCE, Surat-I

Final Order No. A/12360/2023 Dtd. 26.10.2023

Issue:- Denial of benefit of VCES Scheme to the appellant by invoking Section 106 of the Finance Act, 2013.

Held:- The summons was issued to the appellant much prior to the cut off for availing the benefits i.e 01.03.2013 and demand SCN was also issued in the same proceedings.

8. Natural Petrochemicals Pvt Ltd Vs. CCE, Rajkot

Final Order No. A/12059/2023 Dtd. 18.09.2023

Issue:- Non payment of Service Tax under the category of goods Trasport agency, business Auxiliary Service and commission received .

Held:- The appellant had not declared the said income in their monthly returns. Even if the appellant believe that the said income was exempted from service tax, they should have declared the same as exempted income. The appellant have also submit that they have not paid the service tax due to financial Hardship. we find that the appellant are fully aware of their liability and choose not be paid service tax on account of financial Hardship or otherwise.

9. Cadila Pharmaceuticals Ltd Vs. CST, Ahmedabad

Final Order No. A/11758/2023 Dtd. 23.08.2023

Issue:- Whether the payment of fees paid to USFDA for approval of their medicaments can be treated as service as per Finance Act, 1994 and consequently liable to Service Tax on reverse charge basis under Section 66A or otherwise.

Held:- The Hon'ble Bench find that the activity is a service or otherwise that depends on the issue that whether the USFDA should be treated as Government in terms of 'Negative List' under Section 65B(37). Therefore, the activity is service or otherwise is a consequential to the decision, whether the Service provider to the government or other then the Government. Therefore, we do not agree with the appellant that the decision of the activity as service attained finality as per original order, which was not challenged by the department before the Commissioner (Appeals). Accordingly, we do not find any infirmity in the impugned order in appeal whereby the matter was remanded to the commissioner (Appeals). The appellant is at liberty to raise any of the issue in their defence before the Adjudicating authority. Therefore, the remand is not prejudicial to the interest of the appellant. Hence, we are of the view that the impugned order is clearly sustainable and the appeal has no substance. Therefore, the impugned order is upheld and the appeal filed by the appellant is dismissed.

10. Mann & Hummel Filter (P) Ltd. Versus The Commissioner of Central Excise, Customs & ST, Bangalore (North-West)

FinalOrderNo.21242-21243/2023dated28.08.2023

Issue:- The appellants availed services of some of the employees from their parent Company from Germany but did not pay Service Tax on reverse charge basis under the category of Manpower Recruitment or Supply Agency Services.

Held:- It was held that the issue is covered by the judgement of the Hon'ble Supreme Court in the case of M/s Northern Operating Systems Pvt Ltd – 2022 (61) GSTL 129. The demand on merits was upheld for the normal period. The demand for extended period and penaltyunderSection78wassetaside.

11. Ocean Polymers Versus The Commissioner of Central Excise, Customs & ST, Thiruvananathapuram

Final Order No.20892/2023dated18.08.2023

Issue:- The appellant has filed a refund claim under Section 104 of the Finance Act, 1994, inserted by Finance Act 2017, which was not allowed on the grounds that it was filed beyond the stipulated period of six months, there is no nexus between challans filed with the claim, the work sheet showing service tax payments were not authenticated by M/s. Kerala Industrial Infrastructure Corporation Ltd. (KINFRA) and that the disclaimer certificate from KINFRA is not original copy but a Xerox copy.

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Held:- Section 104 of the Finance Act, 1994 inserted by Finance Act, 2017 is a special provision and all the conditions prescribed therein need to be strictly followed and there isno scope for any other interpretation. In this regard in the case of Commr. of C. Ex & S.T., Rajkot Vs. Essar Bulk Terminal Salaya Ltd., reported as 2018 (363) E.L.T. 262 (Tri.-Ahmd.) the Tribunal has held that the ld. Commissioner (Appeals) has erred in condoning the delay in filing there fund claim by the respondent. Since the reason express provision in Section 104(3) of the Finance Act, 1994 prescribing a specific timeline for filing of the refund that time limit need to be strictly adhered respective of what so ever reason may be the cause for delay in filing the refund claim.

12. Holifaith Builders & Developers Pvt. Ltd. Vs. The Commissioner of Central Excise, Customs & ST, Cochin

Final Order No. 20962/2023 dated 22.09.2023

Issue:- The assesse are engaged in providing taxable service under the category of 'Construction of Residential Complex Service' and 'Works Contract Service'. Taking Note of the Circular No. 108/02/2009 dated 29.01.2009, they have filed a refund claim for Rs. 1,39,86,203/- on 17.02.2009 being the service tax paid on 'Construction of Residential Complex Service' and 'Works Contract Service' along with relevant enclosures. On adjudication, refund claim was rejected by the Deputy Commissioner after scrutiny of the few agreements for construction dated 20.11.2006 executed between the respondent and the clients, on the ground of limitation and issue of unjust enrichment. Aggrieved by the said order, the Respondent filed an appeal before the ld. Commissioner (Appeals), who has allowed their appeal;

Held:- The order of the ld. Commissioner (Appeals) is not a reasoned one, inasmuch as ld. Commissioner (Appeals) has not recorded detailed reasoning on the admissibility of refund claim by analysing the relevant agreements considered by the adjudicating authority in rejecting the refund claim. Also, the ld. Commissioner (Appeals) has not recorded any findings on the issue of limitation and detailed reasoning on the issue of unjust enrichment. In these circumstances, we are of the view that the order of ld. Commissioner (Appeals) cannot be sustained.

13. Krishna Bhagya Jala Nigam Ltd. Vs. The Commissioner of Central Excise, & ST- Bangalore (North)

Final Order No. 21162/2023 dated 26.10.2023

Issue:- The appellant is engaged in implementing the ongoing Upper Krishna multipurpose irrigation projects and other related irrigation projects entrusted to it by the Government of Karnataka. They were registered with the Service Tax Department w.e.f. 17/05/2013 for providing 'works contract service' and also discharging service tax under reverse charge mechanism, namely, manpower supply, legal services, rent-a-cab service and director's sitting fee etc. Also, they have separate service tax registration for the activities carried out at Almatti Dam site and Bheemarayanagudi project within jurisdictional Central Excise/Service Tax authorities. It was noticed that though the Appellant paid guarantee commission to the Government of Karnataka for providing unconditional and irrevocable guarantee for raising funds from debt market however, they failed to discharge service tax on the said guarantee commission under reverse charge mechanism and also had not declared the said guarantee commission in the periodical ST-3 returns filed. Consequently, show cause notice was issued to the Appellant for recovery of service tax amount of Rs. 16,31,36,263/- for the period from 01.07.2012 to 30.06.2017 with interest and penalty, which stood confirmed on adjudication.

Held:- It is also not in dispute that post 01.04.2016 to 30.06.2017, the appellant accepting the said services as taxable service discharged service tax on the same and does not dispute the same in the present appeal. However, for the period 01.07.2012 to 31.03.2016, they resisted levy of service tax on the ground that definition of "support service" under Section 65B(49) of the Finance Act, 1994 does not cover the service of guarantee received by the Appellant from Government of Karnataka for raising funds from the debt market. CESTAT do not find merit in the argument of the appellant, in as much as reading the definition of " service" and "support service" in juxtaposition, it is clear that the said definition of 'support service' is exhaustive and takes in its fold all activities of infrastructural, operational, administrative, logistic, marketing or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion,

construction or works contract etc. Thus, raising of finance for day-to-day operations by the appellant is a 'service' in the ordinary course of business operation, squarely falls within the scope of the definition of 'support service'. Therefore, the appellant is liable to discharge service tax on the Guarantee commission paid to Government of Karnataka during the period 01.07.2012 to 31.03.2016 for providing unconditional and irrevocable guarantee in raising funds from the debt market. The impugned order is modified and the demand is confirmed for the normal period of limitation with interest. Penalties imposed are set aside.

14. Bangalore Housing Development & Investments Vs. The Commissioner of Central Excise, & ST- Bangalore (North)

Final Order No. 20992/2023 dated 12.10.2023

Issue:- The appellant had short paid interest on the delayed payment of service tax. They had claimed that the interest rate would be 15% whereas the department claimed that it is 24%

Held:- The appellant have been disputing the said allegation of Revenue at all levels. On being inquired during the course of hearing to place the invoices under which rent was collected from the tenants, the ld. Advocate for the appellant expressed inability to produce a single copy of the invoices. Thus, the appellant could not establish that service tax was not collected earlier, hence could not be deposited before the due date. In these circumstances, I do not find merit in the contention of the ld. Advocate that their case falls under Sl. No. 2 of Notification No. 3/2016-ST dated 01.03.2016. On the other hand, the applicable interest would be @24% on the service tax amount paid belatedly even though collected from service receivers.

15. The Commissioner of Central Excise, & ST- Thiruvananthapuram Vs. Kerala State Electricity Board

Final Order No. 21258/2023 dated 17.11.2023

Issue:- 'Consulting Engineer Service' from overseas firm and paid consultancy charges to them. The Appellants paid the tax but went on appeal up to Supreme Court. Supreme Court rejected the appeal. Paralley appellant had preferred refund claim. Refund claim was rejected in OIO but allowed in OIA. Hence, this appeal.

Held:- The Supreme Court Dismissed their appeal as well as the review application filed by the respondent. Thus, the Order of the adjudicating authority confirming the demand of service Tax merged with the Order of the Hon'ble Supreme Court. OIA is set aside and the order of adjudicating authority is restored. Revenue's appeal is allowed.

16. Embassy Property Developments Ltd. Vs. The Commissioner of Central Excise, Customs & ST- Bangalore (North)

Final Order No. 20052/2024 dated 19.01.2024

Issue:- Appellant during the period 2004-05 to 2007-08, provided certain services to M/s. Golf Links Software Park Pvt. Ltd. and M/s. Manyata Promoters Pvt. Ltd. The appellant claimed that the services provided by them are not Management Consultancy Services since they are executory in nature.

Held:- The appellants are required to manage overall implementation of the project viz., the Software Technology Park for which the agreement had been entered between the appellant and M/s. Manyata Promoters Pvt. Ltd. It states and reveals their obligation and function is implementation of the project and not execution of the project. On a close reading of few stipulations/clauses of the Agreement, in the said context of the recitals, we find that the Appellants are required to supervise and coordinate all aspects of the development, use of reasonable means to see that the development is completed in accordance with plans and specifications, cash management of the project by providing cash flow charts and estimate charts to M/s. Manyata Promoters Pvt. Ltd., approach Municipality and any other authorities in obtaining approvals; Analysing the stipulations of the said Agreement dated 31.3.2005, it cannot be said that the arrangement between the appellant and M/s. Manyata Promoters Pvt. Ltd. for execution of the project as a whole; on the contrary, it reveals that appellant has been engaged to advise/assist M/s. Manyata Promoters Pvt. Ltd. In implementation and completion of the project. the judgment referred by the learned Authorised Representative for the Revenue in the case of Jubilant

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Enpro (supra), the interpretation referred to the definition of 'Management Consultancy Service' can safely be adopted to the present case. Besides the statements of various persons recorded from time-to-time, reveal that the activities by the appellant acknowledge to be in the nature of managerial service rendered to M/s. Manyata Promoters Pvt. Ltd. Besides, we find that the appellant had collected Service Tax as per Clause

5.2.1 of the Agreement in few instances from M/s. Manyata Promoters Pvt. Ltd. but not paid the same to the department. Thus, the Project Development Management Fee collected by the Appellant squarely fall under the category of 'Management Consultancy Service' and taxable service during the period under dispute. Invocation of extended period and imposition of penalty under Section 78 is also upheld by the Tribunal.

17. IBP Auto Service Vs. The Commissioner of Central Excise & ST, Calicut

Final Order No. 20051/2024 dated 18.01.2024

Issue:- Condonation of delay

Held:- In view of the principle laid down by the Hon'ble Supreme Court in the case of Singh Enterprises (supra), the ld. Commissioner (Appeals) could not have condoned the delay beyond 90 days, nor this Tribunal has jurisdiction also to condone the delay occurred beyond the said period. In the result, the impugned order is upheld and the appeal is dismissed.

18. The Kerala Minerals & Metals Ltd. Vs. The Commissioner of Customs (Prev.) Cochin

Final Order No. 20040/2024 dated 09.01.2024

Issue:- Classification of 'Huy glass1105 M-Membrane Bags' (Filter Bags)- Whether under CTH 5911909 or under CTH 8421.

Held:- The filter bags are made of 100% fibre glass material. Section Note 1(r) to Section (XI) (Textile & Textile Articles), exclude such articles. Chapter 8421 specifically includes air purifiers. Hence the goods are rightly classifiable under Chapter 8421 as per the view of the Department. However, the demand was set aside on limitations.

19. The Commissioner, Central Excise & Service Tax- Belagavi Vs. Vicat Sagar Cement Ltd.

Final Order No. 20050/2024 dated 02.01.2024

Issue:- Whether Cenvat Credit is available on GTA outward in case of clearance of Cement when the transaction value is determined under Section 4(1) (a) of Central Excise Act, 1944. The demand had been dropped by the adjudicating authority basing on Range Officer's report that the sales are on FOR Basis. Department filed the appeal on the ground that in there cases the transaction value did not include freight outwards, hence the order was not correct.

Held:- The appeal was allowed by way of remand with a direction to the adjudicating authority to ascertain the place of removal in accordance with the observation of Larger Bench of Tribunal in case of The Ramco Cements Limited Vs. CCE, Puducherry.

20. Lovely Autos vs Commissioner of Central Excise, Ludhiana

Final Order No.60233/2023 dated 01.08.2023

Issue:-Demand of Service Tax on "Lovely Service Club" subscription fees of Rs. 474/-.

Held:- The demand of duty is confirmed along with interest and penalty under Section 78. Penalty imposed under Sections 76 and 77are set aside. The extended period is rightly invoked.

21. General Manager Punjab Roadways vs. C. CE & ST Ludhiana

Final Order No.60253/202314.08.2023

Issue:-Condonation of delay in filing the application before the Commissioner (Appeals)

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Held:- Commissioner (Appeals) has power to condone the delay upto maximum period of three months whereas in the present case, the appeal was filed on 29.05.2014 after the delay of more than one and half years. Hence, tribunal finds that there is no infirmity in the impugned order passed by the Ld. Commissioner (Appeals) which we uphold by dismissing the appeal of the appellant. Tribunal relied upon Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur – 2008 (221) ELT 163 (S.C.)

22. Laxmi Pipes Ltd. vs. C. CE & ST, Rohtak

Final Order No.60270/202321.08.2023

Issue:-Demand of Service tax on Commission and Brokerage service under "Business Auxillary Service.

Held:- An agreement, oral or written, is the source to understand the type of service rendered. In the instant case, it is understood from the contracts or the offer letter that the appellants rendered services with reference to the main work of their principals i.e. provision of support for logistics. This being the case, tribunal is not inclined to accept the argument of the appellant that the services rendered were “Business Support Service”. Therefore, Appeal Dismissed.

23. Competent Constructions vs. C. CE & ST Chandigarh

Final Order No.60441/202321.09.2023

Issue:-Adjustment of excess Service tax paid in subsequent period.

Held:- Appellant contention that the service tax liability for 01.07.2012 to 31.03.2013 was discharged in the year 2013-14 is not tenable as the service tax return for the financial year 2013-14 filed by the appellant has never been challenged nor the revise return was filed by the assessee. Further, if the contention of the appellant is accepted that they have paid excess service tax in the returns filed for the period 2013-14 then the only course left to him is to seek refund of the same. There is no provision of adjustment of excess payment of service tax of one period towards the liability of the other period. Appeal dismissed.

24. H B Securities Ltd vs. C. CE & ST Delhi-IV

Final Order No.60493-60494/202313.10.2023

Issue:-The appellants have not paid service tax on the transaction charges recovered, from their clients along with brokerage, from their customers.

Held:- That transaction charges are payable by the Stock Brokers in terms of the Regulations issued by SEBI andthese are not any fee or statutory levy that is payable by the customers of the Stock Brokers. In effect, the Stock Broker/Appellants are recovering the fee or charges payable by them to SEBI for the conduct of business and are paying the same to SEBI.
We are of the considered opinion that these charges recovered from the customers are in the nature of consideration towards the taxable service rendered by the appellant as far as the customers are concerned. Tribunal has already goneinto the issue of the includability of transaction charges in the service tax in the case of Sriram Insight Share Brokers Ltd.- 2019 (26) GSTL231 (Tri. Kolkata). No case made by appellants. Hence appeal rejected.

25. Canon India Private Limited vs. C. CGST Gurgaon-I

Final Order No.60601-60602/202321.11.2023

Issue:-Whether the expenses incurred towards payment of gross amount to expats by the appellant to the foreign company, were taxable under category of “Manpower recruitment & supply Agency Service” (Upto 30.06.2012) and thereafter with effect from 01.07.2012 under Service as defined under 65B(4) of the Finance Act, 1994.

Held:- The matter referred to third member due to difference in opinion and the third member upheld that the expats are the employees of the foreign company and the appellant is liable to pay Service Tax under reverse charge mechanism on the salary paid to expats in foreign currency.

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26. Goodyear India Limited Vs CCEx & ST Delhi

Final Order No.60725-60726/2023 dated 22.12.2023

Issue:-Commission paid by the appellants is chargeable to service tax under the Reverse Charge Mechanism for engaging commission agents abroad.

Held:- We find no infirmity in the findings of the OIO and OIA to the extent that the appellants have received services from foreign agents who have procured order outside India against which they had supplied the goods and thus have rendered themselves liable to pay service tax on Reverse Charge Mechanism in terms of Section 66A of Finance Act, 1944 and the Taxation of Service (Provided from Outside India and Received in India) Rules, 2006. Extended period cannot be invoked to this extent. Both the appeals are partially allowed to the extent of limitation.

27. GS Promoters an Developers Vs Comm. of CGST Ludhiana

Final Order No.60703/2023 dated 11.12.2023

Issue:-Demand of Interest on Refund by Appellant, Rate of interest and time from which interest is to be calculated..

Held:- When a statute prescribes a certain rate of interest, it is not free for the Courts and Tribunals to increase the same. The provisions regarding interest as provided in the Central Excise Act prevail and this Tribunal cannot intervene as regards the date from which the interest is payable or as regards the rate of interest, so far as refunds under Central Excise Act, 1944 are concerned. Accordingly, I reject the appeal.

28. Sigma Moulds Nad Stampings Pvt Ltd vs Gurgaon II.

Final Order No.60026/2024 dated 30.01.2024

Issue:-Refund of service tax paid on the specified services used for export of goods.

Held:- I find that admittedly, the appellant has filed the refund claim beyond the stipulated period of one year as prescribed under the law and consequently, the Original Authority as well as the Appellate Authority have rejected the refund claim only on the ground of limitation. Further, I find that both the Notification No. 52/2011-ST dated 30.12.2013 and the subsequent Notification No. 41/2012-ST dated 29.06.2012 clearly provides that the refund claim shall be filed within one year from the date of export of goods and in the present case, admittedly, the refund has been filed after the limitation period is over. The prayer of the Learned Counsel for the appellant that he may be allowed to take the cenvat credit at this stage, cannot be entertained because it would amount to allowing rebate which is not provided in the notification.

29. Coswain Technologies Ltd. Vs. Commissioner of Central Excise, Chennai-III

STA. No. 41567 of 2013 Final Order 40651/2023

Issue:-Suppression and Mis-representation of the facts of providing broadcasting service by deliberately declaring it as unlinking facility and also resorting to misclassification of the service as 'Business Support Service' with an intention to evade payment of service tax.

Held:- The appellant has totally suppressed facts and has tried to create confusion so as to escape the liability to pay tax. The agreement entered by M/s. Coxswain Technologies Ltd. with M/s Fortune Media Pvt. Ltd. and M/s. Mindscape Creations Pvt. Ltd. has to be considered as a sham document to cover up the 'broadcasting service' rendered by the appellant. Proceedings before quasi-judicial authority is not tied up in the heavy shackles of Procedures and Evidence Act. The same should not be taken advantage by parties to misrepresent facts and furnish fabricated and sham documents. Taking note of these aspects into consideration, it is viewed that the demand invoking extended period and imposition of penalties are legal and proper. In the result, the impugned order is upheld. Appeal is dismissed.

30. Surin Automotive Pvt. Ltd. Vs. Commissioner of Central Excise, Chennai-III

Service Tax Appeal 40074 of 2014
Final Order 40652/2023

Issue:- Whether the Bill Discounting Facility rendered by the appellant was amenable to Service Tax under the category of 'banking and other financial services' within the meaning of Section 65(12)(a)(ix) ibid?

Held:- From the definition of Banking and Financial Services, it is found that sub-clause (ix) covers even 'bill discounting facility' and as such, the appellant being a limited company, is also covered under the said definition. The definition makes it clear that such bill discounting facility could be offered not only by a banking company or a financial institution, but also by a body corporate. We find that our above view is

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supported by the decision in the case of M/s. Hind Filters Ltd. In view of the above discussions there is no justifiable reasons to interfere with the impugned order and hence appeal is dismissed.

31. Upshot Utility Services Vs. Commissioner of Central Excise, Chennai-III

Service Tax Appeal 40601 of 2014
Final Order 40665/2023

Issue:- Appellants availed exemption to an extent of Rs.43,12,932/- from the gross amount received towards the services rendered by them to the units located inside the SEZ and have short-paid service tax demand of Rs.4,44,232/- for the month of March 2009.

Held:- The demand of duty and interest made in the impugned order is as per law. We have also set aside the penalty for reasons stated. However, with regard to the issue of time bar as per the normal time limit i.e. the matter regarding the receipt of Show Cause Notice by the appellant within normal time or whether time-barred alone is remanded to the Original Authority to be decided after giving sufficient opportunity to the appellant.

32. Alstom T & D India Ltd. Vs. Commissioner of Central Excise, LTU, Chennai

Service Tax Appeal 40092 of 2014
Final Order 40688/2023

Issue:- Demand of Service Tax on Royalty and Technical Knowhow fees. Whether interest chargeable on the Service Tax?
Held: The appellant, admittedly, has not challenged the levy of tax, but only questioned the interest which, according to us, does not merit consideration. We find that interest under Section 75 is necessarily linked to the duty payable, such liability arises automatically by operation of law, as held by the Hon'ble Apex Court in the case of Commissioner of Central Excise, Pune v. M/s. SKF India Ltd. [2009-TIOL-82-SC-CX], which is also applicable to belated payment of interest even under the Service Tax Act. In view of the above, we do not find any merit in the appellants case and the same is dismissed.

33. Tamil Nadu Medical Services Corporation Ltd. Vs. Commissioner of GST & Central Excise, Chennai North Commissionerate

Service Tax Appeal 41820 of 2013
Final Order 40784/2023

Issue:- The appellant who is a State Government Public Limited Company engaged in procurement and distribution of drugs and medicines for Tamil Nadu State Government Hospitals failed to pay Service Tax on Storage and Warehousing Services and Cargo handling Services.

Held:- We are of the opinion that in the absence of a specific notification by the Central Government exempting their activities from service tax, like that issued by the State Government in the case of sales tax reproduced above, the appellant will not be eligible to claim exemption from service tax citing the 'sovereign function' principle. To decide the issue of 'Cargo Handling Services' only, matter is remanded to the Original authority. The impugned order is otherwise upheld except for the matter remanded.

34. KRSS Manpower Service Vs. Commissioner of GST & Central Excise, Salem

Service Tax Appeal 40811/2014
Final Order 40782/2023

Issue:- Non-payment of Service Tax on work of collection, cleaning, segregation and stacking of blasted raw magnesite within the mining area.

Held:- Held that the activity of collection, cleaning, segregation and stacking of blasted raw magnesite is classifiable under the category 'Mining Services' classifiable under section 65(105)(zzzy) of the Finance Act, 1994 and the demand is restricted to the period from 01/06/2007 onwards. Duty and interest may be worked out accordingly. Since duty was payable only from 01/06/2007 late fee and penalties are set aside.

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35. M/s. International School for Management Studies Vs. Commissioner of Service Tax, Chennai-600035.

STA No. 40590/2013 & 41046/2013
Final Order 40810-40811/2023

Issue:- Non-payment of Service tax under the category of "commercial training or coaching centre".

Held:- In view of the findings in the judgement of the Larger Bench in Sri Chaitanya Educational Committee, there is no merits in the appeal filed by the assessee and the same is dismissed.

36. Kaveri Warehousing Pvt. Ltd. Vs. Commissioner of GST & Central Excise, Chennai

Service Tax Appeal 40966/2014
Final Order 40797 /2023

Issue:- Non-Payment of Service Tax on storage and Warehousing Services - Part- Payment of Service Tax by debit of Cenvat Credit account irregular as the Appellant did not receive the service.

Held:- The subjective satisfaction of the adjudicating authority cannot be interfered with as the impugned order is not shown to be demonstratively perverse based on no evidence or misreading of evidence or which a reasonable person could not form. The penalty imposed is mandatory in nature and as held by the Hon'ble Supreme Court in UOI Vs. Dharmendra Textile Processors (2008) 13 SCC 369, the section prescribing mandatory penalty should be read as penalty for a statutory offence and the authority imposing penalty has no discretion in the matter in such cases and was duty bound to impose penalty equal to the duties so determined. Having regard to the discussions above the impugned order merits to be upheld and is so ordered.

37. International Seaport Dredging Limited Vs. Commissioner of GST & Central Excise, Chennai

Service Tax Appeal Nos. 40452 and 40453 of 2013
Final Order No. 40803-40806/2023 dt.15.09.2023

Issue:-(i)Whether the services offered to Dredging Corporation of India was „Dredging Services‟ or „Supply of Tangible goods‟ service?
ii. Whether the services offered to Dhamra Port Company were „Dredging Services‟ or otherwise?
iii. Whether ISDL were liable to pay service tax for maintenance, repair services rendered by Foreign Service provider? And
iv. Whether service tax was payable on manpower supply services received from M/s. Bellsea?"

Held:- By judicial discipline, we follow the decision of the Hon'ble Apex Court in the case of M/s. Northern Operating Systems Pvt. Ltd. (supra) and hold that the demand under this category is sustainable, and uphold the same. The demand of Service Tax on anpower Recruitment and Supply Agency services is upheld along with interest.

38. Orient Flights Pvt. Ltd.Vs. Commissioner of Service Tax, Chennai

Service Tax Appeal No.41399/2014
Final Order No. 40864 OF 2023 dt. 04.10.23

Issue:-The assesse had leased an aircraft to M/s SG Air Leasing Ltd.for their exclusive use. On perusal of the copy of invoice raised it was observed that the assessee had not charged any tax either VAT or Service Tax. Not charging of tax under VAT, according to the Revenue, implied that there was no transfer of legal right of possession and effective control, but however, the description in the invoice was "towards charter flight charges". This was understood by the Revenue as aircraft having been leased out to M/s. SG Air Leasing Ltd. for their exclusive use and not just for transportation of passengers which activity prompted the Revenue to assume that there was 'supply of tangible goods for use' service and a demand notice was issued.

Held:- It is clear from the very fact that the appellant is contesting the issue of invoking larger period of limitation, that the rendering of service under the 'supply of tangible goods' is accepted; but for survey, persuasion, etc., by the officials, the tax would have remained unpaid ,amounting to evasion of duty. The other fact that the rendering of service and the receipt is not shown in the ST-3 return thus clearly amounts to suppression of facts; and hence, it is a clear case of suppression of facts with intent to evade tax payment. In view of the above, we do not see any justifiable reasons to interfere with the invocation of extended period of limitation and hence, the same is held to be in order, for which reason we dismiss the appeal.

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39. Green House Promoters Pvt. Ltd. Vs. Commissioner of GST & C.Ex, Chennai South Commissionerate

Service Tax Appeal No. 40955 of 2014
Final Order No. 40658 dated 08.08.23

Issue:- A) Whether on the land purchased outright by the appellant from the landowners and where site formation etc. is done after purchasing the land but before selling it, service tax is payable under the classification heading 'Site formation and clearance' service.
B) Whether on the land sold by the appellant as per the GPA obtained from the landowners and where site formation etc. is done after obtaining GPA but before selling the land, service tax is payable under the classification heading 'Site formation and clearance' service.

Held: A) Hence, when land is purchased outright by the appellant from the landowners and where it is self-developed by site formation etc. after purchasing the land but before selling it, and the development work is not done for or on behalf of any person involving a consideration being collected, service tax is not payable by the landowner. The judgements cited by the appellant are in accordance with the views stated above
B) Based on the discussions above it is held that, even on the land sold by the appellant as per the GPA obtained from the landowners and 24 ST/40955/2014 where site formation etc. is done after obtaining GPA but before selling the land, service tax is payable under the classification heading 'Site formation and clearance' service. It is now well settled that fraud vitiates all solemn acts. Any advantage obtained by practicing fraud is a nullity. Hence the extended period of time has been rightly invoked in this case. Moreso the very process of using GPA to claim principle-to-principle sale is a fraudulent act as highlighted in the Apex Court's judgment in Suraj Lamp & Industries Pvt. Ltd. (supra). Hence not only has the extended period been correctly invoked so also has penalty been correctly imposed. In the circumstances the imposition of penalty is justified as per law.With regard to the discussions above, we hereby reject the appeal filed by the appellant and uphold the impugned order.

40. N.M. Zackriah & Co. Vs. Commissioner of Service Tax, Chennai-III

Service Tax Appeal No. 40955 of 2014
Final Order No.40748 dt.11.08.23

Issue:-The appellant had filed Form EXP-1 dated 20.11.2009 to avail exemption from payment of Service Tax relating to two specified services, under Notification No. 18/2009-S.T. dated 07.07.2009. The appellant filed Form EXP-2 dated 31.12.2010, based on which they claimed exemption from payment of Service Tax. The Revenue appears to have noticed that the appellant had claimed exemption from payment of Service Tax in respect of 52 shipping bills, out of which 51 shipping bills related to the period from 08.12.2009 to 31.03.2010 for which the details were submitted only on 31.12.2010 instead of the due date i.e., 15.10.2010. The Revenue also appears to have noticed that the appellant had not complied with the stipulated condition that original documents reflecting actual payment of commission along with a copy of the contract must be enclosed in terms of paragraph 4 under Col. (4) of Sl. No. 2 of the said Notification. The same thus resulted in the issuance of Show Cause Notice dated 11.08.2011.

Held:- Neither from the pleadings before the lower authorities nor before us, either in the statement of facts or in the grounds of appeal, do we see any effort being made by the appellant to dislodge the above factual findings of the original authority. Though they have contended inter- alia that the details of exemption paid could not be furnished within the time-limit prescribed for filing EXP-2 return, the issue was only procedural factor and no exporter can fulfil the above condition, the exemption was claimed on Service Tax payable on commission paid to foreign commission agents, etc., the fact however remains that the production of shipping bills showing commission paid, agreement with such foreign agents and original documents, which were necessary documents, are not filed by the appellant. It is therefore clear that the appellant has not fulfilled the conditions of the exemption Notification. In this regard, following the observations of the Hon'ble Supreme Court in the case of Dilip Kumar & Company and based on the above discussions we do not find any merit in the appellant's case and consequently, the appeal is dismissed.

41. King Network Vs. Commissioner of CGST & C.EX, CGST, Salem

Service Tax Appeal No. 42699 of 2014
Final Order Nos. 40036-40037 / 2024 dated 10.01.24

Issue:- Whether invocation of extended period in terms of proviso to Section 73(1) of the Finance act, 1994 is maintainable or not considering the facts of the case?

Held:- The non-payment of Service Tax collected along with the link charges from the cable operators had resulted in undue financial accommodation and therefore the suppression indulged has all necessary elements to be considered as having been resorted to with intent to evade payment of Service Tax. In such a situation extended proviso is rightly invokable as held by the CESTAT, Mumbai in the case of M/s. Safe

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& Sure Marine Service Pvt. Ltd. Vs. Commissioner of Service Tax, ST/40232&42699/2014Mumbai [2012 (28) STR (Tri.-Mumbai)] wherein it was held interalia "that the appellant, after having collected the tax from their customers, have never informed the Department of the same and have suppressed facts from the Department and, therefore, the extended period of time has been rightly invoked in the instant case. The above ratio is squarely applicable in this case". Considering the facts and circumstances of this case and relying upon the above decision, we have no hesitation to hold that the extended period of limitation in terms of the proviso to Sub-Section (1) of Section 73 of Chapter V of the Finance Act, 1994 is rightly invokable in this case.

42. Aban Offshore Ltd. Vs. Commissioner of CGST, Chennai North

Service Tax Appeal No.41287 to 41290 of 2013
Final Order NO. 40078 to 40081/2024 dt. 24.01.24

Issue:-Non-payment of Service Tax on engineering consultancy, management consultancy, testing & inspection and banking service. (i) Jurisdiction of ADG DGCEI to issue SCN (ii)Consulting Engineering Services Vs.Manpower Recruitment Service(iii) Management Consultancy Services Vs.Intellectual Property Service(iv) Banking and Financial Service

Held:- Whether DGCEI officers are "Central Excise Officers" or not was examined by the Hon'ble Madras High Court in M/S. Redington (India) Limited (supra). It was held that without doubt, the officers from the Directorate are "Central Excise Officers" as they have been vested with the powers of Central Excise officers. The Appellants action cannot be said to be caused by a bonafide dispute, on technical grounds because the sections are clear and the appellant is also one who has been availing of legal and consultative advice in various matters and have not shown that they were in receipt of contrary advice not to pay tax or sought clarification from the department. Hence we do not find any demerit in the impugned order covering the extended period of demand and imposition of penalty.

43. Panjab National Bank vs Commr. of CGST & CX, Patna

ST/244/2012 Final order No. 77717/2023

Issue:- The appellant claimed refund of Rs. 405934/-. As per them they were recovering telephone and courier charges from customs and have paid service tax on such receipts. They submitted that they are of not required to pay service tax on such amounts.

Held:- As the appellant did not file documentary evidence in support of their refund claim and not been able to satisfy the fact that the service tax in question was not passed on to their clients.

44. S. Ranjan & Associates vs Commr. of Central Excise & service tax, Patna

ST/76481/2014 Final order No. 77185/2023

Issue:-The facts of the case are that the appellant is a service provider under the category of 'Clearing and Forwarding agency service' was issued a show cause notice for short payment of service tax. The case of the revenue is that the appellant is required to pay service tax at the time issuance of bill for the service provided by the appellant irrespective of the amount received.

Held:- On going through the records the bench is of the view that the appellant was required to pay service tax at the time of issuing invoice to the service recipient not on the receipt basis.

45. Nizam Club Vs. CCE & STax, Hyderabad - II

Final Order No. A/30280/2023 dtd. 13.09.2023

Issue:-The Appellant is a club. Demand is on account of (i) letting out space for advertisement and hoardings; and (ii) On account of receiving rental income from the shop leased out for commercial purpose – Rs.29,775/-.

Held:- Demand on account of hoarding services and on account of renting of immovable property services is upheld. These amounts are required to be paid along with interest.

46. Chaitanya Industrial Service Vs. Commissioner of Central Tax Visakhapatnam – II

Final Order No. A/30287/2023 dtd. 22.09.2023

Issue:-Manpower Supply Services - Demand on a registered Society - Extended Period.

Held:- As per the definitions relating to Manpower Recruitment or Supply Agency Services, the manpower supply services provided by a commercial concern are liable to service tax during the period 16.06.2005 to 30.04.2006 and services provided by 'a person' are liable to service tax with effect from 01.05.2006. The

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word 'Person' in the context of taxation refers to a juristic person. Relied on MN Dastur and Co. Ltd. vs Union of India (2006 (4) STR 3 (Cal)). Section 3(42) of the General Clauses Act, 1897 defines that a "person" "shall include any company or association or body of individuals, whether incorporated or not". In the present case, the co-operative society being a registered body and a juristic person, it would be falling within the meaning of' person' for the purpose of taxation as defined under the provisions chapter V of the Finance Act, 1994. Also, the society is providing the services on commercial basis at commercially agreed upon terms and conditions. Also, the invocation of extended period is upheld.

47. L & T Infocity Ltd Vs. CCE & STax, Hyderabad - IV

Final Order No. A/30303-30304/2023 dtd. 27.09.2023

Issue:-Appellant is providing service of 'renting of immovable property' and maintenance of common areas of the building under separate Agreements. Demand is on amounts collected by the Appellant towards - electricity, diesel charges for DG sets, water and parking charges under the category of 'Management, Maintenance or Repair Service'.

Held:- The amount collected towards water, electricity and diesel are in the nature of reimbursable expenses and therefore, not liable for inclusion in the taxable value towards provision of Management, Maintenance or Repair services by the Appellant. The Appellants were required to provide parking space and it's clearly part of maintenance service. Hence the amount collected also needs to be included in the gross value. Also, the same cannot be treated as reimbursable expenses.

48. Adani Gangavaram Port Ltd Vs. Commissioner of Central Tax, Visakhapatnam – II

Final Order No. A/30417/2023 dtd. 05.12.2023

Issue:-Appellant had taken credit during the period April 2007 to September 2007, which was reversed by the Appellant in the month of April 2008. Demand for interest is in issue.

Held:- Appellant urges that there has been subsequent amendment in Rule 14, wherein it has been provided that interest is chargeable on Cenvat credit taken and utilized. This amendment was brought vide Finance Act 2012 w.e.f. 17.03.2012. He relies on the ruling in Bill Forge Pvt Ltd [2012 (26) STR 204 (Kar.)]. On the other hand, AR relies on the ruling of Hon'ble Chattisgarh High Court in CCE & C vs Vandana Vidyut Ltd [2016 (331) ELT 231 (Chattisgarh)], wherein, after considering the ruling of Hon'ble Karnataka High Court in Bill Forge Pvt Ltd. (supra) and the ruling of the Hon'ble Apex Court in Ind-swift Laboratories Ltd [2011 (265) ELT 3 (S.C.)], it was held that interest is payable even when the credit is taken and reversed prior to the utilization of the same. Considering the Apex Court ruling, demand of interest is upheld.

49. Akash Engineering Services Vs. Commissioner of Central Tax, Visakhapatnam – I

Final Order No. IO/25/2023 dtd. 10.11.2023

Issue:-Whether sub-contractor is liable to pay Service Tax under Works Contract Service when the main contractor has paid the same.

Held:- It is held that the Appellant/sub-contractor is liable to pay service tax under the head 'Works Contract Service' in spite of the fact that the main contractor has paid service tax on the whole contract value including the turnover achieved by this Appellant/sub-contractor.

50. BNG Contractors Pvt. Ltd., Vs CCE, Lucknow

Final Order No. 70203/2023 dated 20.11.2023

Issue:-Condonation of Delay

Held:- The Tribunal after relying the decision of Singh Enterprises V/s CCE Jamshedpur reported in 2008 (221) ELT 163 (SC) of the Hon'ble Supreme Court held that the delay before the First Appellate Authority beyond the condonable period cannot be condoned by the Tribunal.

51. M/s Origin Advertising Pvt. Ltd., Vs. Commissioner of Central Excise & Service Tax, Lucknow

Final Order No. 70227/2023 dtd. 29.11. 2023

Issue:-Appellants are engaged in providing "Advertising Agency Services" to the clients which falls under the taxable category as defined under Section 65(105)(e) read with Section 65(3) of the Finance Act, 1994.

Held:- Demand of service tax on services provided by the appellant as sub-contractor to the contractor on which service tax liability has been discharged by the contractor, is sustainable.

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52. Patanjali Yogpeeth Trust, VS. Commissioner of Central Excise, Meerut-I

Final Order No. 70104/2023 dated 05.10.2023

Issue:-Health and Fitness Services - teaching yoga and meditation by way of organizing Yoga Camp.

Held:- Appellant has in fact collected the entry fee to event organized as Yoga camp - both residential and non-residential from the participants, disguising it as "Donation". They issued the entry ticket of various denominations. The holder of the ticket was granted different privileges depending on the denomination of the ticket. In return the appellant provided the person entry to camp where, Swami Baba Ramdev would give instructions in respect of Yoga and Meditation. Hon'ble Tribunal held that the amounts received by the appellant as donation, was nothing but the consideration for the provision of service taxable under the category of Health and Fitness services and upheld the demand of Service Tax. Further held that the appellant has suppressed the fact that they have received consideration for the provision of these services and collected the same from the participants in residential and non-residential camps by reflecting the same as donation on the receipts and the book of accounts. This suppression was clearly with the intent to evade payment of service tax. Also upheld interest as well as penalties.

Single Member Benc

Back

1. **Hakim Singh Contractor Vs. CCE &ST, Alwar**

Final Order No. 51645/2023 dated 16.11.2023

Issue:-Invoking the extended period-no misrepresentation nor there is any evidence proving same.

Held:- No relevant documents provided by the appellant. No reason has been brought on record by the appellant nor has been submitted by making submissions even today about the delay on part of the appellant and about the reason as to why none of those documents were never been provided, The delay for the entire period is held to be appellant's fault. Hence benefit cannot be extended in favour of the appellant for the said fault.

2. **VKV Exports Pvt Ltd Vs. Commissioner of Customs (Delhi)**

Final Order No. 50046/2024 dated 11.02.2024

Issue:-Imposition of redemption fine and penalty

Held:- In this case the main allegation against the appellant is that export goods are of inferior quality and highly over valued goods. To ascertain the value of goods, the Revenue has done marked survey in the presence of the representative of the appellant and in the market survey, it was found that the export goods are overvalued and the appellant has accepted the same.

3. **Petro Lubes India Vs. Commissioner of Customs, Delhi**

Final Order No. 51655/2023 dated 15.12.2023

Issue:-Applicability of Test Reports whether samples been tested on all parameter- mis-declaration of description of goods in Bill of Entries reg

Held:- The controversy that the goods have not been tested on all 21 parameters would not really make any difference and even on the basis of limited parameters the identity of goods stand established in view of cogent and substantive evidence in the form of test reports by the two independent Government laboratories. The issue is squarely covered by the decision of the High Court of Gujrat in the case of Raj Kumar Industries-2022 (2) TMI 264, where after detailed discussion, it was observed that testing even on limited parameters by three laboratories independently clearly established that the goods were nothing but HSD. Absolute confiscation of goods and imposition of penalty under both sections 112(a) and Section 114A of Customs Act, 1962, upheld. Shri Sumit Nagrath Vs. Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida

4. **Lupin Limited Vs. Commr. Customs Indore**

Final Order No. 54694/2023 dated 29/11/2023

Issue:-Whether the goods removed from SEZ to DTA (initially procured from DTA) are chargeable to custom duties in terms of section 30 of SEZ Act, 2005 read with rule 47 of SEZ Rules,200- Refund request of the same was denied.

Held:- Section 30 specifically provides for clearance of goods from SEZ to DTA on payment of customs and other duties, the submission sought to be made by the appellant that rule 48(3) carves out a deeming fiction of non leviability of BCD and SWS on the imported goods is not correct on the simple principle that the rules cannot go contrary to the substantive provisions of the Act. When section 30 in clear terms says that goods cleared from SEZ units shall be chargeable to duties of customs etc., and though the same are subject to the conditions specified in the rules made by the central Govt. in that regard, yet the interpretation given by the appellant is unsustainable. However appellant has raised contention that he has been wrongly denied exemption notification No. 45/2017-Cus. The appellate authority has failed to examine this issue of exemption notification. Therefore appeal is partly dismissed and matter is remanded to consider the issue of exemption notification.

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5. Harjeet Singh Johar Vs. Commissioner of Customs Delhi, ICD Patparganj.

Final Order No. 52073/2022 dated 20/12/2023

Issue:-Harjeet Singh Johar is CHA. Case of mis-declaration. Measuring tapes imported instead of rubber sheets as declared. KYC norms not complied with.

Held:- The offending goods which had been imported were measuring tapes whereas they were declared as plain rubber sheets, therefore the goods were mis-declared. CHA has not submitted verified KYC for importation of goods. Admittedly, KYC was not verified by CHA. Such Lapse on the part of CHA makes it liable to penalty under section 112(a) as the good are liable to confiscation under section 111.

6. Genuine Filter & Fabrics vs Commissioner CGST & Central Excise Indore

Final Order No. 50023/2024; Date of hearing: 08.01.2024

Issue:-Service Tax under Section 66(E) (e) of Finance Act, 1994 for an act of tolerance by the appellant when they received compensation for poor quality of goods received.

Held:- Appellant requested for the case to be decided on merits. It was held that 'On going through the credit note, this amount is shown as claim raised by the appellant on account of poor quality of the material supplied which is in nature of compensation received by the appellant for receiving poor quality of goods.''In that circumstances, I find that the said act is covered under declared service under sub-section (e) of section 66 (E) of the Finance Act, 1994 as it is an act of tolerance by the appellant'. The appeal was accordingly dismissed by upholding the impugned order.

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCPAL BENCH - COURT NO. IV

Customs Appeal No. 51402 of 2019

(Arising out of Order-in-Original No. 49/MK/REVOCATION/POLICY/2019 dated 26.03.2019 passed by the Commissioner of Customs (Airport & General), New Delhi)

M/s Sanjay Prabhakar **Appellant**
GH-1/142, Paschim Vihar,New Delhi - 110063

VERSUS

Commissioner of Customs, Airport & General, **Respondent**
New Custom House, New Delhi-110037

APPEARANCE:

Ms. Reena Rawat & Shri Rajat Mishra , Advocates for the AppellantShri Rakesh Kumar, Authorized Representative of the Department **CORAM :**

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 02.08.2023
Date of Decision: 05.09.2023

FINAL ORDER NO. 51158/2023

HEMAMBIKA R. PRIYA

This appeal has been filed to assail the order in original dated26.03.2019 passed by the Commissioner of Customs, New Delhi

2. The present appeal is being preferred by Sanjay Prabhakar, GH-1/142, Paschim Vihar, New Delhi, a Customs Broker (hereinafter referred to as the appellant) against Order-in-Original No. 49/MK/REVOCATION/POLICY/2019 dated 26.03.2019 passedby the learned Commissioner of Customs, (Airport & General).

3. The appellant is a Customs Broker and is engaged in customsclearance of export and import of goods. During his usual course ofbusiness, appellant filed a Shipping Bill No. 7549865 dated 24.07.2017 in the name of M/s Navrang Jewel and Export at the port ICD Loni wherein goods were declared as Pan Masala andother house hold products such as comb, sofa, broom brush etc. The goods were examined and Let Export Order was passed by the proper officer and goods were thereafter dispatched from ICD Loni to Gateway port of Pipavav for further export. However, on information, DRI stopped and further examined the goods at Pipavav, wherein as against the declared pan masala, DRI allegedlyfound 42,00,000 number of Gutkha pouches – a prohibited item. During the course of investigation, appellant in his statement dated06.08.2017 stated that on the instructions of Shri Mehmood (a middleman) and Shri Shubham Garg (the exporter), appellant prepared invoice and other documents and filed the said Shipping Bill, that he had agreed to clear the goods on payment of Rs.5,000/- as clearing charges while other logistic charges were separate and that appellant was not informed by said Shri Mehmood and Shri Shubham Gard, that the goods being exported contained Gutkha and thus the appellant was not in the knowledge of real content of the consignment. It is claimed that since the saidstatement dated 06.08.2018 was not as per wishes of DRI, they detained the appellant and pressurized and threatened him of dire consequences. Under the pressure caused by DRI,

appellant in his later statement dated 07.08.2017 stated that during their meeting, Shri Shubham Garg and Shri Mehmood had told him that they wanted to export Gutkha and other house hold items to Kuwait andthus appellant knew that there was Gutkha in the consignment which was being cleared from customs by his firm. Similar statement was given by appellant on 08.08.2017.

4. Upon completion of inquiry, DRI issued a show cause notice on 05.02.2018 proposing penal action against the appellant. Taking into account the said show cause notice of DRI to be an offence report, Commissioner (Airport & General) suspended the licence of the appellant and issued a show cause notice on 08.10.2018 proposing to hold the appellant responsible for contravention of various provisions under Regulation 10 of CustomsBrokers Licensing Regulations, 2013 (hereinafter referred to asCBLR, 2013) and revocation of their Customs Broker (C.B.) licence, forfeiture of security and penalty under Regulation 18 of CBLR, 2013. An Inquiry Officer was appointed to enquire into the matter. The appellant vide his letter dated 17.12.2017 requested the Inquiry Officer for cross examination of certain persons relying upon whose statements, the appellant was implicated in the matter. However, the said request of the appellant was not accededto by the Inquiry Officer. A detailed reply to the show cause notice was filed negating all the charges levelled against the appellant, but the impugned order dated 26.03.2019 was passed based on thefindings in the report of the Inquiry Officer. The CB licence of the appellant which was valid till 29.12.2021 was revoked, his security deposit of Rs. 75,000/- was forfeited and a penalty of Rs. 50,000/- was imposed on the appellant.

5. The learned counsel submitted that the impugned order is biased and had relied on the report of Inquiry Officer. The appellant had requested for granting cross examination of Shri Shubham Garg, the exporter, Mehmood @ Guddu, Shri Manoj Srivastava, Inspector and Shri Dayashankar, Superintendent, to bring to the fore true and correct facts of the case. However, the same was denied on the ground that appellant was adopting the dilatory tactics. He submitted that the aforesaid persons were involved in the said smuggling offence, and had implicated the appellant to avoid punishment. It is pertinent to mention that the appellant had requested for cross examination on 17.12.2018 wherein the due date for completion of inquiry was 07.01.2019.This indicates that the Inquiry Officer had sufficient time to permit cross examination of the said persons. The Inquiry Officer instead finalised the inquiry report on 01.01.2019 in haste. He submitted that in this manner, the Inquiry Officer had contravened the provisions of Regulation 17(4) of CBLR 2018.

6. He further submitted that Shri Shubham Garg, the exporter, in his statement dated 18.08.2017 has accepted the fact that he along with Shri Mehmood alias Guddu (a middleman) met theappellant in 1st week of July 2017 at Karol Bagh, to seek details of documents required for export. He once again met the appellant around 16/17th July, 2017 to furnish documents asked for by appellant for export. The appellant was fully aware as to who was the real exporter and that there is a middleman also. It was Shri Shubham Garg, the exporter who had signed the Shipping Bill. He relied on the CESTAT judgment in **K.S. Sawant & Co. Vs. Commissioner of Customs (General), Mumbai – 2012 (284) ELT 363 (Tri.-Mumbai),** wherein it was held that "signing of import documents by importer, amounts to authorization." Further,in the matter of **Dominic & Co. Vs. Commissioner of Customs (General), Mumbai – 2013 (296) ELT 494 (Tri.-Mumbai)** CESTAT has held that "if authorization not asked for by thecustoms officers at the time of clearance and Bills of Entry duly signed by CHA, authorization by importer implied." He stated that the appellant had obtained an authorization from the exporter and had therefore not contravened the provisions of Regulation 10(a) ofCBLR, 2018 (erstwhile 11(a) of CBLR, 2013). He added that the appellant had advised the exporter to comply with the provision of the Customs Act, 1962. In his statement dated 06.08.2018, the appellant had in unequivocal terms, stated that at the time of filing the Shipping Bill, that he had no knowledge about the presence of Gutkha in the export consignment. He was informed by the exporter and Shri Mehmood that goods being exported were Pan Masala. In this context, he relied on the judgment in **Dominic & Co.** (supra), wherein CESTAT has held that "as no discrepancy found in the documents filed, so question of advice does not arise". In view of aforesaid, appellant had advised his client to comply withthe provisions of the Act and had not contravened the provision of Regulation 10(d) of CBLR, 2018 (erstwhile 11(d) of CBLR, 2013).

7. The learned Counsel submitted that the appellant"s statementdated 15.12.2017 was obtained by the DRI by force which had been duly retracted. Further, the appellant had no prior knowledgeas to presence of Gutkha in the instant export consignment. In this regard, the counsel relied on **Kunal Travels (Cargo) Vs. CC (I&G), IGI Airport, New Delhi– 2017 (354) ELT 447 (Del.),**of the Tribunal, wherein it was held that "if goods did not corroborate with declaration in Shipping Bills, it cannot be deemed to be mis- declaration by Customs House Agent." The statements dated 07.08.2017,

08.08.2017 and 15.12.2017 of the appellant are contrary to that of his statement dated 06.08.2017. He submitted that contradictory and retracted statements have no evidentiary value. He stated that the appellant had duly verified the antecedents of the exporter and IEC number before taking up the assignment of impugned goods. He had obtained the PAN and IEC documents from the exporter and had duly verified the same on thesites of Income Tax Department and Directorate General of Foreign Trade. It is a matter of record that the exporter had used the said address for the purpose of correspondence and obtaining of IEC. Besides, the exporter Shri Shubham Garg in the present case was duly found to be existent and appeared before the Customs authorities and it is not a case of the Department that his credentials were found to be wrong. He relied on Tribunal‟s decisionin the matter of **Setwin Shipping Agency Vs. CC (General), Mumbai – 2010 (250) ELT 141 (Tri.-Mumbai)**which held that there is no requirement for the CHA (Customs Broker) to verify physically the premises of importer/exporter. In the matter of **HimLogistics Pvt. Ltd. Vs. Commissioner of Customs, New Delhi – 2016 (338) ELT 725 (Tri.-Del.),**the Tribunal held that there is no stipulation or legal requirement for physically verifying business or residential premises of importer. The CB cannot be held responsible for fraudulent IEC by importer. Once the CB has carriedout verification as per KYC norms, the extreme punishment of revocation of licence was not sustainable. The said order of the CESTAT has been upheld by the Hon‟ble High Court of Delhi – 2017 (348) ELT 625 (Del.). He relied on the following decisions where similar view was taken:

(i) Global Linkerz United Agencies Vs. CC, New Delhi – 2009 (238) ELT 76;

(ii) ThawerdasWadhoomal Vs. CC, Mumbai – 2008 (221) ELT252;

(iii) R.N. Lall & Bros. Vs. CC, Calcutta – 2001 (137) ELT 723;

(iv) J.G. Exports Vs. CC, New Delhi – 2000 (121) ELT 754.

In view of aforesaid appellant had verified the antecedents of the exporter and, therefore, had not contravened the provisions of Regulation 10(n) of CBLR, 2018 (erstwhile 11(n) of CBLR, 2013). The Ld Counsel submitted that since the beginning of his businessof customs clearance in 2012, the appellant had never been issued show cause notice on account of any violation of any provisions of Customs Act, 1962. Therefore, the revocation of the CB license wasvery harsh punishment.

8. The learned authorised representative submitted that the appellant had not followed the requirements as per Clause 10(a) of CBLR, 2018. He stated that the fabricated documents were prepared in the office of the F card holder. It is on record that Sh. Shubham Garg had sublet his IEC for monetary consideration and the Customs broker was aware of the same. The appellant failed to inform the customs authorities about this and had contravened the provisions of CBLR. Such wilful omission on part of the F card holder to verify the authenticity having a prior knowledge of verifying the genuineness of the importer/exporter, address, identity proves beyond doubt the circumstantial evidence of the connivance of the appellant. In his statement the appellant had categorically accepted that he had connived out of greed for easy money and had been paid ₹ 1.5 lakh. He further submitted that the appellant had violated the provisions of Clause 10(b) of the CBL Regulation as it was revealed that during stuffing of the goods atan unspecified place and during examination, the customsclearances were attended by a person authorised by the appellant. This has also been accepted by the appellant in his statement. Thus, when proper authorisation was not obtained as per Clause 10(a), the question of exercising due diligence under Clause 10(e) and advising his clients about the provisions of the Act and Rules asper Clause 10(d) is not satisfied. The appellant had violated the provisions of Clause 10(f) as he had knowingly withheld the information that the IEC had been sublet and counterfeit prohibited goods were attempted to be exported. The appellant did not undertake any KYC verification of the exporter by using reliable independent authentic documents, data or information and thuswas involved in submitting fabricated documents before the customs authorities. The appellant had connived with fraudsters and had failed his duties as a customs broker required under CBLR, 2018. There was no infirmity in the order of the Commissioner in revoking the customs broker license. The authorised representativerelied on the following decisions in support of his arguments:

(i) Bhaskar Logistic Services Vs UOI [2016 (340) ELT-17 (Pat)]

(ii) Commissioner of Customs Vs K.M. Ganatra [2016 (332) ELT- 15(SC)

(iii) Jasjeet Singh Marwaha Vs UOI [2009 (239) ELT-407(Del)

(iv) M/s Falcon India Vs Commissioner of Customs, Delhi [2022 (3)TMI-CESTAT-NEW

DELHI]

9. We have heard the learned counsel for the appellant and the learned authorised representative for the Department. The issue before us for decision is whether there were sufficient grounds for the adjudicating authority to revoke the CB license of the appellant.

10. We find that the learned counsel for the appellant has laid emphasis on the fact that the appellant had retracted his three statements, and therefore the same will not have any evidentiary value. However, we find that there are statements of others, which corroborates the involvement of the appellant in the current case.In this regard we find that the adjudicating authority has clearly held that the confessional statements of the appellant clearly indicate that he was aware that actual exporter was Shri Salim Dolawhereas the IEC being used was in the name of Shri ShubhamGarg, proprietor of Navrang Jewel and Exports. Sh. Garg in his statement accepted that he had allowed Mehmood, alias Guddu to use his IEC for ₹50,000 per consignment. Mehmood, alias Guddu inhis statement also accepted that Sh Salim Dola had offered him rupees one lakh to export viz., Shubham Garg, Mehmood alias Guddu, Salim Ismail Dola, Shri Jaibir etc. Vimal Gutka to Kuwait. Inorder to complete the customs formalities, he contacted the appellant for the same. Therefore, the obligation of obtaining the authorisation from the actual exporter was not discharged by the appellant. This is corroborated by the statements of others involved in this smuggling endeavour. Thus there is sufficient corroboration to the confessional statement of the appellant. Therefore mere retraction of his statement cannot negate the action of the appellant. Otherwise also, the confessional statement was recorded by the Custom officer which is different from the police officer. In this context, we note that the Apex Court in its judgment in the case of **Surjeet Singh Chhabra Vs UOI [1997(89) ELT 646 (SC)]** held as follows:

"3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a Kara. In thissituation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross- examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses wererequired to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from theconfession. Therefore, he is entitled to cross-examine thepanch witnesses before the authority takes a decision on proof of the offence. **We find no force in this contention. The Customs officials are not policeofficers. The confession, though retracted, is anadmission and binds the petitioner. So there is no need to call panchwitnesses for examination and cross-examination by the petitioner.**"

In view of the above, we hold that the retraction by the appellant cannot negate the evidentiary value of his confessional statements.Further, the denial of request for cross examination, in the face of the said statement of the appellant, cannot be a violation in view ofthe above. It is also interesting to note that other than the appellant, none of the others investigated in this offence have retracted their statements.

11. The learned counsel has submitted before us that the appellant was not aware of the nature of the consignment that was being exported. We find that this contention is not correct, as Shri Salim Dola in his statement dated 07.08.2017 recorded underSection 108 of the Customs Act, 1962 has admitted that the container no. MRKU6319529 was stuffed with Vimal Gutka forexport at the rented premises of Kanjhawala, Delhi under thesupervision of Jaibir, Mehmood alias Guddu, himself and one representative of the CHA. This clearly establishes that the appellant was fully aware of the contents of the container. He wasalso aware that there was no factory/godown stuffing permission accorded to this unit. It is also established that the invoice and the packing list were prepared in the appellant"s office. Shri Shubham Garg in his statement dated 08.09.2017 has categorically stated that he had never authorised any person to sign and submit on his behalf the invoice cum packing list no. NJE/EXP/17-18/001 and the same had been fabricated by Mehmood alias Guddu and the appellant.

The contention of the learned counsel that the appellant had duly verified the correctness of the IEC and other KYC documents is negated by the statement of the appellant himself. The appellant has stated that the customs clearance work of Navrang Jewel and Export was received through a forwarding firm Atlas, Noida and Mr Mehmud and Shubham Garg. The KYC documents of Navrang Jewel and Export were provided by ShriGarg but the dealing was done by Mehmood who advised the appellant to file free Shipping Bills for export. The appellant had fullknowledge that the IEC of Shubham Garg was being used by Salim Dola for export of Gutka and other household items to Kuwait. It is apparent that the appellant had failed to verify the antecedent, correctness of the IEC, the identity of his client and functioning of his client and had in fact facilitated in the attempt to smuggle counterfeit Vimal Gutka in plastic pouches. It is very clear that the customs broker had contravened the provisions of CBLR, 2018 and erstwhile CBLR, 2013. We note that the Commissioner, in theimpugned order has discussed in great detail each and every violation of the appellant, along with all the evidence tosubstantiate each of these violations. We do not find any reason to differ from that.

12. We find that the Delhi High Court in the case of **Jasjeet Singh Marwaha** (supra) has held that the CHA can be held responsible for the violation of the Customs Act, and not only the violation of CHALR (now referred to as CBLR). The relevant para of the judgment is reproduced herein below:

"**6.3** The provisions referred to hereinabove make it clear that an owner or importer can act through an agent. In theinstant case, the appellant who is admittedly the CHA of the importers, both filed as well as filled up the contents ofthe bill of entry, a fact which is not denied, on behalf of thethree importers referred to hereinabove. In view of these facts and the provisions referred to hereinabove, it cannot be said that the agent cannot be held to be liable for violation of the provisions of the Act. **The purpose of providing for appointment of an accredited agent, that is, an agent who has been issued a licence under the Regulations framed under the Act, is not only to facilitate the clearance of goods, but in doing so, to hold either one of them or both accountable for the actions which they take, based on which the clearance of goods imported into the country is brought about.** The contention that the licence of a CHA can be suspended only for violation of the Regulations framed under the Act i.e., CHALR, 2004 is clearly untenable given the purpose for which the licence is issued and the provisions of the Act."

13. The Tribunal in **M/s Falcon India Vs Commissioner of Customs, New Delhi** held as under:
"33. The above decisions lay down that the Customs Broker (or Custom House Agent) is a very important person in the transactions in the custom House and it is appointed as an accredited broker asper the regulations and is expected to discharge all its responsibilities under them. Violations even without intent are sufficient to take action against the appellant. While it is true, as has been decided on a number of cases, that the customs broker is not expected to do the impossible and is not expected to physically verify the premises of the importer or doughty documents issued by various governmentalauthorities for KYC, it is equally true that the Customs Broker is expected to act with great sense ofresponsibility and take care of the interests of both the client and the Revenue. It is expected to advise the client to follow the laws and the client is not complying,it is obligated under the regulations to report to theAsst Commissioner of the Deputy Commissioner.Fulfilling such obligations is a necessary condition forthe CB license and cannot be termed as „spying for the Department" as argued by the appellant before us. It has also been argued that if it spies for the department,it will lose its business. It is evident from the facts of this case that the appellant was not only aware of the benami Bills of Entry but has actually filed them with the full knowledge that they were benami and they were filed by Anil after case of under evaluation has been booked by DRI against him. It is afraid of losing business because it has built its more business model on violators, who it does not want to upset by reportingto the department. Therefore we find no reason toshow any leniency to as the appellant. At any rate,once violation is noticed, it is not for the Tribunal to interfere with the punishment meted out by the disciplinary authority, viz., the Commissioner unless it shocks our conscience. In this case, it does not."

14. We agree with the submissions of the learned AR that forgerynullifies everything. It is an admitted fact that the documents such as the invoice and the packing list was prepared by the appellant inhis office. This is corroborated by Sh Shubham Garg, the IECholder. The export consignment was

packed and stuffed in the presence of the representative of the appellant. This has been corroborated by others in their respective statements. The appellant was aware that the IEC of Shubham Garg of M/s Navrang Jewel and Export was being used by Salim Dola for export of Gutka,which is a prohibited item. It has to be concluded that the appellantwas very much aware of the nature of the consignment and aware of the fact that the IEC did not belong to the actual exporter of the consignment. He had indulged in this offence for monetary gains. The Apex Court in **Commissioner of Customs Vs Aafloat Textiles (P) Ltd., [2000 (235) ELT 587]** held on principle that fraud and collusion vitiated even the most solemn proceedings in any civilised system of jurisprudence. We note that similar views have been expressed by the Supreme Court in **Munjal Showa Ltd Vs Commissioner of Customs and Central Excise** wherein it held,

"16. In that view of the matter and on principle that fraud vitiates everything in such forged or fake DEPB licenses/Scrips are void ab initio, it cannot be said that the department acted illegally in invoking the extended period of limitation. In the facts and circumstances, thedepartment was absolutely justified in invoking the extended period of limitation."

15. In view of the aforesaid facts and circumstances, we find no reason to interfere with the findings in the impugned order. The appeal is accordingly dismissed.
(Pronounced in open Court on 5.9.2023)

(Dr. Rachna Gupta)Member (Judicial)

(Hemambika R. Priya)Member (Technical)

RM

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH

Customs Appeal No. 52491 of 2019

[Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/ICD/PPG/PALWAL/2699- 2737/2018 dated 16/11/2018 passed by the Commissioner of Customs (Appeals), New Delhi.]

M/s Sumridhi Aluminium (P) Ltd., **…Appellant**

Devoli Mandkol near Balaji Dharam Kanta,Vill Bhagola, Palwal

Haryana-121102

Versus

The Commissioner of Customs **…Respondent**

ICD Parparganj, Gazipur,Delhi – 110096.

WITH

C/52492/2019	C/52493/2019	C/52494/2019	C/52495/2019	C/52496/2019
C/52497/2019	C/52498/2019	C/52499/2019	C/52500/2019	C/52501/2019
C/52502/2019	C/52503/2019	C/52504/2019	C/52505/2019	C/52506/2019
C/52507/2019	C/52508/2019	C/52509/2019	C/52510/2019	C/52511/2019
C/52512/2019	C/52513/2019	C/52514/2019	C/52515/2019	C/52516/2019
C/52517/2019	C/52518/2019	C/52519/2019	C/52520/2019	C/52521/2019
C/52522/2019	C/52523/2019	C/52524/2019	C/52525/2019	C/52526/2019
C/52527/2019	C/52528/2019	C/52529/2019	C/52556/2019	C/52557/2019
C/52558/2019	C/52559/2019	C/52560/2019	C/52561/2019	C/52562/2019
C/52563/2019	C/52564/2019	C/52565/2019	C/52566/2019	C/52567/2019
C/52568/2019	C/52569/2019	C/52570/2019	C/52571/2019	C/52572/2019
C/52573/2019	C/52574/2019	C/52575/2019	C/52576/2019	C/52577/2019
C/52578/2019	C/52579/2019	C/52580/2019	C/52581/2019	C/52582/2019
C/52620/2019	C/52621/2019	C/52622/2019	C/52623/2019	C/52624/2019
C/52625/2019	C/52626/2019	C/52627/2019	C/52628/2019	C/52629/2019
C/52630/2019	C/52655/2019	C/52656/2019	C/52657/2019	C/52658/2019

C/52659/2019 C/52660/2019 C/52661/2019 C/52662/2019 C/52663/2019
C/52664/2019 C/52665/2019 C/52666/2019 C/52667/2019 C/52668/2019
C/52669/2019

APPEARANCE:

Shri N.L. Jangir, Advocate for the appellant

Shri Rakesh Kumar, Authorized Representative of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51191-51282/2023

DATE OF HEARING: 30.08.2023

DATE OF DECISION: 13.09.2023 JUSTICE DILIP GUPTA

M/s Sumridhi Aluminium (P) Limited, Palwal[1] imported various kinds of scrap of aluminium like zorba, tally and twitch during the period from June 2018 to October 2018 and filed 92 Bills of Entry. The assessing officer enhanced the assessable value on thebasis of contemporaneous imports data, which value was accepted by the appellant in writing with a further statement that the appellant would not want a speaking order to be issued nor it would require any show cause notice to be issued or opportunity of personal hearing to be granted. The appellant also deposited customs duty on the enhanced value accepted by the appellant and thereafter out of charge order was also issued by the department. It is thereafter that the appellant filed appeals before the Commissioner (Appeals) challenging the enhancement by the assessing officer of the value mentioned by the appellant in the Bills of Entry. These appeals have been dismissed by the Commissioner (Appeals) by four separate orders namely the order dated15.11.2018 covering 39 appeals; the order dated 07.12.2018 covering 15 appeals; the order dated 15.11.2018 covering 27 appeals; and the order dated 07.12.2018 covering 11 appeals. The Commissioner (Appeals) has upheld the order of reassessment and rejected the appeals primarily for the reason that the appellant had accepted the re-determined enhanced value of the imported aluminium scrap in writing and thereafter cleared the imported goods after paying duty on the enhanced value. The Commissioner (Appeals) also found as a fact that the re-determined value had been arrived at in accordance with internationally accepted London Metal Exchange prices with reasonable discounts. It is these four orders passed by the Commissioner (Appeals) covering 92 appeals that have been assailed by the appellant.

2. Shri N.L. Jangir, learned counsel appearing for the appellant made the following submissions:

i. The assessing officer has not given any specific instance of contemporaneous import wherein the declared value ofaluminium scrap is higher than the value declared by the appellant in the Bills of Entry;

ii. The assessing officer did not elaborate the reasons for rejecting the declared value and, therefore, there was no occasion to enhance the value of goods declared by appellant on the basis of contract price or commercial invoice under section 14 of the Customs Act 1962[2];

iii. The value declared by the appellant did not fall under the exceptions provided under the Customs Valuation (Determination of Value of Imported Goods) Rules 2007[3] and , therefore, could not have rejected under rule 12 of Valuation Rules;

iv. The appellant had not submitted letters of acceptance ofthe enhanced value nor the appellant had submitted any letter stating that show cause notice should not be issued or a speaking order should not be passed;

v. In support of the contentions, learned counsel for the appellant placed reliance upon a decision of the Supreme Court in C.C.E & S.T., Noida vs Sanjivani Non-Ferrous Trading Pvt. Ltd.[4] and other cases to which reference shall be made at the appropriate stage.

3. Shri Rakesh Kumar, learned authorized representative appearing for the Department made the following submissions:

i. The Assessing Officer had reason to doubt the accuracy of the value declared in the Bills of Entry submitted by the importer as they were grossly undervalued as compared to the contemporaneous import data and since the importer had submitted letters clearly stating that it agreed for enhancement of the value and did not require any personal hearing or a speaking order, the Assessing Officerenhanced the value. Thus, once having accepted the value of the goods in writing and cleared the goods on payment of duty it was not open to the importer to subsequently challenge the value of the goods;

ii. The finding of the Commissioner (Appeals) that the importer had accepted the enhanced value does not suffer from any illegality as it is based on records and the appellant has made an incorrect statement that lettersaccepting the enhanced value were not submitted by the appellant;

iii. The out of charge was given only after the appellant had deposited customs duty on the enhanced value and all the appeals have been filed by the appellant before the Commissioner (Appeals) after the out of charge order was given; and

iv. The submission of the appellant that the valuation of the cleared goods has to be first rejected under rule 12 of the Valuation Rules is not correct in the facts and circumstances of the present case.

4. The submissions advanced by the learned counsel appearing forthe appellant and the learned authorized representative appearing for the Department have been considered.

5. Section 14 of the Customs Act deals with „Valuation of Goods" and is reproduced below:

"**Section 14. Valuation of goods.** - (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

6. It would be seen that section 14 of the Customs Act provides that the transaction value of goods shall be the price actually paid orpayable for the goods when sold for export to India where the buyer and the seller of the goods are not related and the price is the sole consideration for the sale, subject to such other conditions as may be specified in the rules made in this behalf. The Valuation Rules have been framed in exercise of the powers conferred by section 14 of the Customs Act. Rule 12 deals with rejection of the declared value and is reproduced below:

"Rule 12. Rejection of declared value. - (1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information includingdocuments or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracyof the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule(1) of rule 3.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported bysuch importer and provide a reasonable opportunity of being heard,before taking a final decision under sub-rule

Explanation.-(1) For the removal of doubts, it is hereby declared that:-

(i) This rule by itself does not provide a method for determinationof value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

(ii) The declared value shall be accepted where the proper officer issatisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include –

(a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

(b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;

(c) the sale involves special discounts limited to exclusive agents;

(d) the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) the non declaration of parameters such as brand, grade, specifications that have relevance to value;

(f) the fraudulent or manipulated documents."

7. Rule 12 provides that when the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shallbe deemed that the transaction value of such imported goods cannot be determined under the provisions of rule 3(1). Explanation (iii) to rule 12 provides that the proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons, which may include any of the six reasons contained therein, one of which is that there is a significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed.

8. It would also be useful to reproduce the relevant portion of section 17(5) of the Customs Act and it is as follows:

"Section 17. Assessment of duty.- (1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided insection 85, selfassess the duty, if any, leviable on such goods.

(2) The proper officer may verify the entries made under section 46or section 50 and the self-assessment of goods referred to in sub- section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary. Provided that the selection of cases for verification shall primarilybe on the basis of risk evaluation through appropriate selection criteria.

(3) For the purposes of verification under subsection (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly,the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any re-assessment done under subsection (4) is contraryto the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment inwriting, the proper officer shall pass a speaking order on the re- assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

9. It would be seen that though in a case where re-assessmenthas to be done under sub-section (4) of section 17 of the Customs Act, the proper officer is required to pass a speaking order on the re-assessment, but if the importer or exporter confirms his acceptance of the re-assessment, a speaking order is not required tobe passed.

10. Though the learned counsel for the appellant submitted thatthe appellant had not submitted any letter accepting the enhanced value on the basis of the contemporaneous NIDB data or that it did not require any speaking order on the reassessment or any show cause notice or personal hearing to be

provided, but the learned authorized representative appearing for the Department has placed such letters of the appellant accepting the enhanced value in respectof all the appeals, except a few.

11. The letters submitted by the appellant which have been produced by the learned authorized representative appearing for thedepartment are similarly worded and one such letter dated 21.06.2018 submitted by the appellant to the Deputy /Assistant Commissioner of Customs signifying acceptance of value in respect of goods covered by Bill of Entry number 6791989 dated 14.06.2018is reproduced below:-

SUMRIDHI ALUMINIUM PRIVATE LIMITED

(AN ISO/TS 16949 : 2009 CERTIFIED COMPANY)

Works DEVALI-MANDKOL ROAD, VILLAGE-BHAGOLA DISTT: PALWAL (HARYANA)
Phone: 09254370829-37, Fax: 011-46570836

SuperintendentPlease Allow

Date: 21.06.2018

To,

The Deputy/Assistant Commissioner of CustomsICD Palwal

Sir,

Subject: Acceptance of value in respect of goods covered vide Bill of entryno. 6791989 Dtd. 14.06.2018 regarding.

We M/s Sumridhi Aluminium Pvt. Ltd have imported Twitch (code/grade of Aluminum scrap) Aluminum scrap under bill of lading no MSCUWK710587 dtd 28.04.2018 and have filed a bill of entry no 6791989 dtd 14.06.2018 for clearance of the same declaring value therein @1475/mt(CIF/CSF/CI). We were shown the contemporarious Import ofthe said Aluminum scrap from the NIDB date and LME price of prime Aluminum for the corresponding period @/mt Having taken intoconsideration factors like insurance, freight, landing charges etc, to arriveat the assessable value of said Twitch (code/grade) Aluminum scrap a discount of 25% on the said LME price of prime Aluminum is correct and appropriate. Accordingly, in view of the said contemporarious NIDB date and discount from LME price of prime Aluminum, we voluntarily accept the assessable value of the said@$ 1801/mt.

2. Since we are voluntarily accepting the price of said Twitch (code/grade) Aluminum scrap, we do not want any speaking order on the re-assessment of the same. We also do not want any Show Cause Notice and opportunity of personal hearing as provided under Section 124 of the Customs Act 1962.

3. It is requested to urgently release our consignment at the above mentioned rate.

Yours faithfullyCont. no. 011 46570835

IEC no. 0510080626

FOR SUMRIDHI ALUMINIUM PVT. LTD.

Sd-

Auth Signatory

12. The aforesaid letter clearly mentions that though the appellant had filed the said Bill of Entry for clearance of twitch grade aluminium scrap by declaring the value as 1475 dollars per MT but on being shown the contemporaneous import data of the aluminium scrap from the NIDB data and Lucknow Metal Exchange Price, the appellant has voluntarily accepted the assessable value of the goodsat the rate of 1801 dollars per MT. The letter also specifically states that the appellant would not want any speaking order to be passed on the re-assessment nor would the appellant require a show cause notice to be issued or opportunity of personal

hearing to be provided. In fact, the appellant also requested that the consignmentshould be released urgently at the above mentioned rate.

13. It is not possible to accept the bald submission made by learned counsel for the appellant that the appellant had not submitted the letters. The Commissioner (Appeals) has recorded a categorical finding of fact that the appellant had accepted the redetermined and enhanced value in the letters submitted by the appellant and the finding recorded by the Commissioner (Appeals) isas follows:-

5.9 In addition, it is on record that the appellant have from time to time accepted the re-determination and enhanced values of the impugned Bills of Entry and cleared the imported goods after paying duty on enhanced values. Vide letters submitted to the jurisdictional Asstt./Deputy Commissioner of Customs, the appellant have agreed for accepting the values of the goods as re- determined by the Department and voluntarily relinquished their right to issuance of Show Cause Notices and personal hearings too. Thus, it is evident that the appellant have accepted the method of re-determination of value and also the enhanced prices for purpose of assessment.

14. This finding has not been challenged in the appeals since such a ground has not been taken in the memo of appeal. It is also seen that it is only after the submission of such letters by the appellant and after payment of customs duty on the enhanced value accepted by the appellant that the out of charge orders were issued and the goods were cleared. The appeals were filed by the appellant before the Commissioner (Appeals) much after the out of charge orders were issued. If the appellant had actually not submitted the letters there was no reason for the appellant to pay customs duty on the enhanced value that was accepted by the appellant. It is more than apparent that after having accepted the enhanced value and after having paid customs duty and after having received the out of charge orders and after having cleared the goods, that the appellantfiled the appeals before the Commissioner (Appeals) to challenge the enhancement of the value of the goods.

15. As noted above, it is because of the letters submitted by the appellant that the goods were cleared after the appellant deposited the requisite customs duty on the enhanced value. There was no reason for the appellant to pay the customs duty on the enhanced value if the appellant was actually contesting the enhanced value and had not submitted any letters accepting the enhanced value.

16. A chart containing Customs Appeal Number, Bill of Entry Number with date, date of acceptance of valuation and out of chargeorder date, as provided by the department, is reproduced below:-

S. No.	**Customs Appeals**	**Bill of Entry No.**	**Date**	**Date of Acceptanceof valuation**	**Out of charge**
1.	C/52556/2019	6791989	14.06.2018	21.06.2018	02.07.2018
2.	C/52557/2019	6975350	23.06.2018	02.07.2018	02.07.2018
3.	C/52558/2019	6964317	26.06.2018	05.07.2018	05.07.2018
4.	C/52559/2019	6897576	21.06.2018	03.07.2018	04.07.2018
5.	C/52560/2019	6961334	26.08.2018	05.07.2018	05.07.2018
6.	C/52561/2019	6961300	26.08.2018	05.07.2018	06.07.2018
7.	C/52562/2019	6963921	26.06.2018	05.07.2018	06.07.2018
8.	C/52563/2019	6897566	21.06.2018	09.07.2018	10.07.2018
9.	C/52564/2019	6897605	21.06.2018	11.07.2018	12.07.2018
10.	C/52565/2019	6897493	21.06.2018	11.07.2018	12.07.2018
11.	C/52566/2019	7008983	29.06.2018	16.07.2018	17.07.2018
12.	C/52567/2019	7008973	29.06.2018	23.07.2018	24.08.2018
13.	C/52568/2019	7256797	18.07.2018	24.07.2018	24.07.2018
14.	C/52569/2019	7299781	20.07.2018	25.07.2018	25.07.2018
15.	C/52570/2019	7299793	20.07.2018	27.07.2018	28.07.2018
16.	C/52571/2019	7257211	18.07.2018	30.07.2018	30.07.2018

17.	C/52572/2019	7429175	30.07.2018	09.08.2018	10.08.2018
18.	C/52573/2019	7257259	18.07.2018	01.08.2018	01.08.2018
19.	C/52574/2019	7256860	18.07.2018	01.08.2018	01.08.2018
20.	C/52575/2019	7299818	20.07.2018	31.07.2018	01.08.2018
21.	C/52576/2019	7678583	17.08.2018	29.08.2018	29.08.2018
22.	C/52577/2019	7634298	17.08.2018	23.08.2018	23.08.2018
23.	C/52578/2019	7619834	13.08.2018	23.08.2018	24.08.2018
24.	C/52579/2019	7597448	11.08.2018	20.08.2018	21.08.2018
25.	C/52580/2019	7442344	31.07.2018	14.08.2018	14.08.2018
26.	C/52581/2019	7492194	03.08.2018	13.08.2018	14.08.2018
27.	C/52582/2019	7443354	31.07.2018	20.08.2018	20.09.2018
28.	C/52620/2019	8195579	25.09.2018	01.10.2018	03.09.2018
29.	C/52621/2019	8341007	05.10.2018	06.10.2018	10.10.2018
30.	C/52622/2019	8338828	05.10.2018	09.10.2018	09.10.2018
31.	C/52623/2019	8355054	06.10.2018	15.10.2018	16.10.2018
32.	C/52624/2019	8355028	06.10.2018	11.10.2018	11.10.2018
33.	C/52625/2019	8443739	13.10.2018	15.10.2018	16.10.2018
34.	C/52626/2019	8341586	05.10.2018	15.10.2018	16.10.2018
35.	C/52627/2019	8033253	13.09.2018	07.09.2018	17.09.2018
36.	C/52628/2019	7958476	07.09.2018	14.09.2018	14.09.2018
37.	C/52629/2019	8115690	19.09.2018	24.09.2018	25.09.2018
38.	C/52630/2019	8195623	25.09.2018	26.09.2018	26.09.2018
39.	C/52655/2019	8182085	24.09.2018	01.10.2018	24.09.2018
40.	C/52656/2019	8095885	18.09.2018	24.09.2018	25.09.2018
41.	C/52657/2019	8056815	15.09.2018	24.09.2018	25.09.2018
42.	C/52659/2019	8089709	17.09.2018	19.09.2018	20.09.2018
43.	C/52660/2019	7845115	30.08.2018	10.09.2018	10.09.2018
44.	C/52661/2019	8443534	13.10.2018	16.08.2018	16.10.2018
45.	C/52663/2019	8443543	13.10.2018	16.08.2018	16.10.2018
46.	C/52664/2019	8334909	05.10.2018	11.10.2018	11.10.2018
47.	C/52666/2019	8332783	05.10.2018	09.10.2018	10.10.2018
48.	C/52667/2019	8182088	24.09.2018	05.10.2018	06.10.2018
49.	C/52668/2019	8226718	27.09.2018	05.10.2018	05.10.2018
50.	C/52669/2019	8181996	24.09.2018	05.10.2018	05.10.2018
51.	C/52665/2019	8197321	25.09.2018	10.10.2018	11.10.2018
52.	C/52662/2019	8463038	15.10.2018	16.10.2018	17.10.2018
53.	C/52658/2019	7904777	04.09.2018	11.09.2018	12.09.2018
54.	C/52491/2019	6876247	20.06.2018	29.06.2018	29.06.2018
55.	C/52492/2019	6992279	25.06.2018		03.07.2018
56.	C/52493/2019	6910334	12.06.2018		06.07.2018
57.	C/52494/2019	6866620	19.06.2018	05.07.2018	05.07.2018

58.	C/52495/2019	6961347	26.06.2018		12.07.2018
59.	C/52496/2019	6994615	28.06.2018		12.07.2018
60.	C/52497/2019	7022860	30.06.2018		13.07.2018
61.	C/52498/2019	7075587	04.07.2018		18.07.2018
62.	C/52499/2019	7075584	04.07.2018		18.07.2018
63.	C/52500/2019	7089403	05.07.2018		18.07.2018
64.	C/52501/2019	7026477	30.06.2018		19.07.2018

65.	C/52502/2019	7107473	06.07.2018		24.07.2018
66.	C/52503/2019	7006914	29.06.2018		24.07.2018
67.	C/52504/2019	7008465	29.06.2018		28.07.2018
68.	C/52505/2019	2063210	03.07.2018		26.07.2018
69.	C/52506/2019	7678521	17.08.2018	28.08.2018	17.08.2018
70.	C/52507/2019	7606191	13.08.2018		27.08.2018
71.	C/52508/2019	7492096	03.08.2018		23.08.2018
72.	C/52509/2019	7557797	08.08.2018	23.08.2018	25.08.2018
73.	C/52510/2019	7259809	18.07.2018		02.08.2018
74.	C/52511/2019	7544498	07.08.2018		25.08.2018
75.	C/52512/2019	7620015	13.08.2018	28.08.2018	31.08.2018
76.	C/52513/2019	7492213	03.08.2018		21.08.2018
77.	C/52514/2019	2442227	31.07.2018		21.08.2018
78.	C/52515/2019	7384589	27.07.2018		17.08.2018
79.	C/52516/2019	7538992	07.08.2018		14.08.2018
80.	C/52517/2019	7597515	11.08.2018		27.08.2018
81.	C/52518/2019	2538893	07.08.2018	13.08.2018	14.08.2018
82.	C/52519/2019	2538954	07.08.2018		08.08.2018
83.	C/52520/2019	2443064	31.07.2018		07.08.2018
84.	C/52521/2019	2384339	27.07.2018		08.08.2018
85.	C/52522/2019	7346406	24.07.2018		07.08.2018
86.	C/52523/2019	2305961	21.07.2018		08.08.2018
87.	C/52524/2019	7262581	18.07.2018		06.08.2018
88.	C/52525/2019	7257175	18.07.2018	06.08.2018	07.08.2018
89.	C/52526/2019	7257208	18.07.2018		06.08.2018
90.	C/52527/2019	7294941	20.07.2018		07.08.2018
91.	C/52528/2019	7294936	12.07.2018		03.08.2018
92.	C/52529/2019	7178317	29.06.2018	31.07.2018	28.07.2018

17. It is seen from a perusal of section 17(4) of the CustomsAct that the proper officer can re-assess the duty leviable, if it is found on verification, examination or testing of the goods or otherwise that the self-assessment was not done correctly.Subsection (5) of section 17 provides that where any re-assessmentdone under sub-section (4) is contrary to the self-assessment done by the importer, the proper officer shall pass a speaking order on the re-assessment, except in a case where the importer confirms hisacceptance of the said re-assessment in writing.

18. In the present case, as noticed above, the proper officer doubted the truth or accuracy of the value declared by the appellantfor the reason that contemporaneous data had a significantly higher value. It was open to the appellant to require the proper officer to intimate the grounds in writing for doubting the truth or accuracy of the value declared and seek a reasonable opportunity of beingheard, but the appellant did not do so. On the other hand, the appellant submitted in writing that though it had declared the value of the imported goods at a particular price, but on being shown contemporaneous data, it agreed that the value of the goods shouldbe enhanced to that value indicated by the proper officer. Theappellant also specifically stated that it did not want any show cause notice to be issued or personal hearing to be provided or a speaking order to be passed on the Bills of Entry. It needs to be noted that section 124 of the Customs Act provides for issuance of ashow cause notice and personal hearing, and section 17(5) of the Customs Act requires a speaking order to be passed on the Bills of Entry, except in a case where the importer/exporter confirms the acceptance in writing.

19. It is no doubt true that the value of the imported goods shall be the transaction value of such goods when the buyer and theseller of goods are not related and the price is the sole consideration, but this is subject to such conditions as may be specified in the rules to be made in this behalf. The

Valuation Rules have been framed. A perusal of rule 12(1) indicates that when the proper officer has reason to doubt the truth or accuracy of the valueof the imported goods, he may ask the importer to furnish further information. Rule 12(2) stipulates that it is only if an importer makes a request that the proper officer shall, before taking a final decision, intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared and provide a reasonableopportunity of being heard. To remove all doubts, Explanation 1(iii)(a) provides that the proper officer can have doubts regarding the truth or accuracy of the declared value if the goods of a comparable nature were assessed at a significantly higher value at about the same time.

20. Explanation (1)(i) to rule 12 of the Valuation Rules, however, provides that the rule only provides a mechanism and procedure for rejection of declared value and does not provide a method for determination of value and if the declared value isrejected, the value has to be determined by proceeding sequentially in accordance with rules 4 to 9.

21. In **Century Metal Recycling Pvt. Ltd.** vs **Union of India**[5], the Supreme Court summarized the provisions of rule 12 of the Valuation Rules and the observations are as follows :
"15. The requirements of Rule 12, therefore, can be summarisedas under :

(a) The proper officer should have reasonable doubt as to the transactional value on account of truth or accuracy of thevalue declared in relation to the imported goods.
(b) Proper officer must ask the importer of such goods further information which may include documents orevidence.
(c) On receiving such information or in the absence of response from the importer, the proper officer has to apply his mind and decide whether or not reasonable doubt as to the truth or accuracy of the value so declared persists.
(d) When the proper officer does not have reasonable doubt, the goods are cleared on the declared value.
(e) When the doubt persists, sub-rule (1) to Rule 3 is not applicable and transaction value is determined in terms of Rules 4 to 9 of the 2007 Rules.
(f) The proper officer can raise doubts as to the truth or accuracy of the declared value on certain reasons whichcould include the grounds specified in clauses (a) to (f) in clause (iii) of the Explanation.
(g) The proper officer, on a request made by the importer, has to furnish and intimate to the importer in writing the grounds for doubting the truth or accuracy of the valuedeclared in relation to the imported goods. Thus, the proper officer has to record reasons in writing which have to be communicated when requested.
(h) The importer has to be given opportunity of hearing before the proper officer finally decides the transactional value in terms of Rules 4 to 9 of the 2007 Rules.

16. Proper officer can therefore reject the declared transactional value based on certain reasons to doubt the truth or accuracy of the declared value in which event the proper officer is entitled to make assessment as per Rules 4 to 9 of the 2007 Rules. What is meant by the expression grounds for doubting the truth or accuracy of the value declared has been explained and elucidated in clause (iii) of Explanation appended to Rule 12 which sets out some of the conditions when the reason to doubt exists. The instances mentioned in clauses (a) to (f) are not exhaustive but are inclusive for there could be other instanceswhen the proper officer could reasonably doubt the accuracy or truth of the value declared."

22. Despite the specific requests made by the appellant in the letters submitted by it, it was sought to be contended by the learned counsel for the appellant that the transaction value of the imported goods alone should have been treated to be the value of the goods, as provided for under rule 3(1) of the Valuation Rules, since none of the conditions stipulated in the proviso to sub-rule (2) of rule 3 were attracted and in any case, if the declared value could not be determined under sub-rule (1) of rule 3, it wasrequired to be determined by proceeding sequentially through rules4 to 9.

23. Rule 3 of the Valuation Rules is, therefore, reproducedbelow:

"**Rule 3. Determination of the method of valuation.-**

(1) Subject to rule 12, the value of imported goods shall be the transaction value adjusted in accordance with provisions ofrule 10;

(2) Value of imported goods under sub-rule (1) shall be accepted: Provided that –

(a) there are no restrictions as to the disposition or use of thegoods by the buyer other than restrictions which –

(i) are imposed or required by law or by the publicauthorities in India; or

(ii) limit the geographical area in which the goods may beresold; or

(iii) do not substantially affect the value of the goods;

(b) the sale or price is not subject to some condition orconsideration for which a value cannot be determined in respect of the goods being valued;

(c) no part of the proceeds of any subsequent resale, disposalor use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of rule 10 of these rules; and

(d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below:

(3) If the value cannot be determined under the provisions of sub- rule (1), the value shall be determined by proceeding sequentiallythrough rule 4 to 9."

24. The very fact that the appellant had agreed for enhancement of the declared value in the letters submitted to the assessing authority, itself implies that the appellant had not accepted the value declared by it in the Bills of Entry. The value declared in the Bills of Entry, therefore, automatically stood rejected. Further, once the appellant had accepted the enhanced value, it was really not necessary for the assessing authority to undertake the exercise of determining the value of the declared goods under the provisions of rules 4 to 9 of the Valuation Rules. This is for the reason that it is only when the value of the imported goods cannot be determined under rule 3(1) for the reason that the declared value has been rejected under sub rule 2, that the valueof the imported goods is required to be determined by proceeding sequentially through rules 4 to 9. As noticed above, the appellant had accepted the enhanced value. There was, therefore, no necessity for the assessing officer to determine the value in the manner provided for in rules 4 to 9 of the Valuation Rules sequentially.

25. The aforesaid views find support from the decision of the Tribunal in **Commissioner of Customs, Delhi** vs **Hanuman Prasad & Sons[6].**

26. In this connection, it would also be useful to refer to a decision of this Tribunal in **Advanced Scan SupportTechnologies** vs **Commissioner of Customs, Jodhpur[7]**, whereinthe Tribunal, after making reference to the decisions of the Tribunalin **Vikas Spinners** vs **Commissioner of Customs, Lucknow[8]** and **Guardian Plasticote Ltd**. vs **CC (Port), Kolkotta[9]** , held that as the appellant therein had expressly given consent to the value proposed by the Revenue and stated that it did not want any show cause notice or personal hearing, it was not necessary for theRevenue to establish the valuation any further as the consented value became the declared transaction value requiring no further investigation or justification. Paragraph 5 of the decision is reproduced below:

"**5. We have considered the contentions of both sides. We find that whatever may be the reasons, the appellant expressly gave its consent to the value proposed by Revenue and expressly stated that it did not want anyShow Cause Notice or personal hearing. Even the duty was paid without protest. By consenting to enhancement of value and thereby voluntarily foregoing the need for a Show Cause Notice, the appellant made it unnecessary for Revenue to establish the valuation any further as the consented value in effect becomes the declared transaction value requiring no further investigation or justification.** To allow the appellant to contest the consented value now is to put Revenue in an impossible situation as the goods are no longer available for inspection and Revenue rightly did not proceed to further collect and compile all the evidences/basis

into a Show Cause Notice as doing so, in spite of the appellant having consented to the enhancement of value and requested for noShow Cause Notice, could/would have invited allegation of harassment and delay in clearance of goods. When Show Cause Notice is expressly foregone and the valuation is consented, the violation of principles of natural justice cannot be alleged. In the present case, while value can be challenged but such a challenge would be of no avail as with the goods not being available and valuation earlier having been consented, the onus will be on the appellant to establish that the valuation as per his consent suffered from fatal infirmity and such onus has not been discharged. Further, valuation of such goods requires their physical inspection and so reassessment of value in the absence ofgoods will not be possible. The case of Eicher Tractors v. Union of India (supra) cited by the appellant is not relevant here as in that case there was no evidence that the assessee had consented to enhancement of value."

27. In **Vikas Spinners**, the Tribunal dealing with a similarsituation, observed as under :

"7. **In our view in the present appeal, the question of loading of the value of the goods cannot at all be legally agitated by the appellants.** Admittedly, the price of the imported goods declared by them was US $ 0.40 per Kg. but the same was not accepted and loaded to US $ 0.50 per Kg. **This loading in the value was done in consultation with Shri Gautam Sinha, the Representative and Special Attorney of the appellants who even signed an affirmation acceptingthe loaded value of the goods on the back of the Bill of Entry dated 7-5-1999**. After loading of the value, the appellants produced the special import licence and paid the duty on thegoods accordingly of Rs. 4,22,008/- on 19-5-1990. **Having once accepted the loaded value of the goods and paid duty accordingly thereon without any protest or objection they are legally stopped from taking somersault and to deny the correctness of the same.** There is nothing on record to suggest that the loaded value was accepted by them only for the purpose of clearance of the goods and that they reserved their right to challenge the same subsequently. They settled their duty liability once for all and paid the duty amount on the loaded value of the goods. The ratio of the law laid down by the Apex Court in Sounds N. Images, (supra) is not at all attracted to the case of theappellants. The benefit of this ratio could be taken by them only if they had contested the loaded value at the time when it was done,but not now after having voluntarily accepted the correctness of loaded value of the goods as determined in the presence of their Representative/Special Attorney and paid the duty thereon accordingly."

28. In **Guardian Plasticote**., the Tribunal after placing reliance on the decision of the Tribunal in **Vikas Spinners**, also observed as follows :

"4. The learned Advocate also cites the decision of the Tribunal in the case of **M/s. Vikas Spinners** v. **C.C., Lucknow**[10] - in supportof his arguments. We find that the said decision clearly holds that enhanced value once settled and duty having been paidaccordingly without protest, importer is stopped from challenging the same subsequently. **It also holds that enhanced value uncontested and voluntarily accepted, and accordingly payment of duty made discharges the burden of the department to establish declared value to be incorrect.** In view of the fact that the Appellants in this case have not established that they had lodged any protest and on the contrary their letter dated 21-4-1999 clearly points to acceptance of the enhanced value by them, the cited decision advances the cause of the department rather than that of the Appellants contrary to the claim by the learned Counsel."

29. In **BNK Intrade (P) Ltd**. vs **Commissioner of Customs,Chennai**[11] , the Tribunal observed as follows :

"2…..... It is also to be noted that the importer had also agreed

for enhancement of the price based on contemporaneous prices available with the Department. We, therefore, find no merit in the contention raised in the appeal challenging the valuation andseeking the refund of the differential duty paid by the appellants on enhancement."

30. The following position emerges from the aforesaid decisionsof the Tribunal:

(i) When an importer consents to the enhancement of value, it becomes unnecessary for the revenue to establish thevaluation as the consented value, in effect, becomes the declared transaction value requiring no further investigation;

(ii) When an importer accepts the loaded value of the goods without any protest or objection, the

importer cannot be permitted to deny its correctness; and

(iii) The burden of the Department to establish the declared valueto be in correct is discharged if the enhanced value is voluntarily accepted.

31. What, therefore, follows is that once the appellant had accepted the enhanced value it was not necessary for the revenue to determine the valuation as the consented value, in effect, became the declared transaction value. Further, once the appellant accepted the enhanced value it would not be open to the appellant to now contend that the procedure as contemplated under rule 12of the Valuation Rules should have been complied with.

32. Learned counsel for the appellant has placed reliance upon certain decisions.

33. In **Sanjivani Non-Ferrous Trading**, the Supreme Court observed that it was necessary for the assessing officer to give reasons as to why the transaction value declared in the Bills ofEntry was rejected. This decision would not come to the aid of the appellant for the reason that in the present case the appellant had accepted the enhanced value of the imported goods.

34. In **Century Metal Recycling Pvt. Ltd**. vs **Union of India[12],** the Supreme Court again emphasized what was stated in **Sanjivani Non-Ferrous Trading**.

35. In **Guru Rajendra Metalloys India Pvt. Ltd.** vs **C.C.- Ahmedabad, Gujarat[13]**, the enhancement that was made was found to be not in consonance with the consent letter given bythe appellant. This decision would also, therefore, not come tothe aid of the appellant.

36. In **M/s Sunland Alloys** vs **C.C.,- Ahmedabad[14]**, theTribunal found that the assessing authority had reassessedthe Bills of Entries by enhancing the value not on the basis of the any material evidence but on the basis of Director Generalof Valuation guideline letter dated 15.11.2018. The Tribunal held that the assessing officer should have followed the provisions of the Valuation Rules and should not have made the reassessment only on the basis of the Director General of Valuation guideline. The reason would, therefore, not help theappellant.

37. There is, therefore, no good reason to interfere with the orders passed by the Commissioner (Appeals) upholding the ordersof reassessment. All the aforesaid 92 appeals filed to assail the order dated 15.11.2018 covering 39 appeals; the order dated 07.12.2018 covering 15 appeals; the order dated 15.11.2018 covering 27 appeals; and order dated 07.12.2018 covering 11appeals are, accordingly, dismissed.

(order pronounced in the open Court on **13.09.2023**)

(JUSTICE DILIP GUPTA)
RESIDENT

(P.V. SUBBA RAO)MEMBER (TECHNICAL)

Rekha

14. Customs Appeal No. 12505 of 2019 decided on 01.06.2020

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI
PRINCIPAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 52804 OF 2019

[Arising out of Order-in-Appeal No. CC (A) CUS/D-II-ICD-TKD-605 TO 608/19-20 dated 28.08.2019 passed by the Commissioner of Customs (Appeals), New Delhi]

M/S SUNLIGHT OVERSEAS **Appellant**
1/73, WHS Kirti Nagar, New Delhi

Vs.

COMMISSIONER, CUSTOMS- (ICD TKD)(IMPORTS) NEW DELHI **Respondent**
Commissioner of Customs, Import Commissionerate, ICD, Tughlakabad,New Delhi

WITH

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Commissioner of Customs, Import Commissionerate, ICD, Tughlakabad,New Delhi

WITH

CUSTOMS APPEAL NO. 52806 OF 2019

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M/S SUNLIGHT OVERSEAS **Appellant**
1/73, WHS Kirti Nagar, New Delhi

Vs.

COMMISSIONER, CUSTOMS- (ICD TKD)(IMPORTS) NEW DELHI **Respondent**
Commissioner of Customs, Import Commissionerate, ICD, Tughlakabad,New Delhi

AND

CUSTOMS APPEAL NO. 52807 OF 2019

[Arising out of Order-in-Appeal No. CC (A) CUS/D-II-ICD-TKD-605 TO 608/19-20 dated 28.08.2019 passed by the Commissioner of Customs (Appeals), New Delhi]

M/S SUNLIGHT OVERSEAS **Appellant**
1/73, WHS Kirti Nagar, New Delhi

Vs.

COMMISSIONER, CUSTOMS- (ICD TKD)(IMPORTS) NEW DELHI **Respondent**
Commissioner of Customs, Import Commissionerate, ICD, Tughlakabad,New Delhi

Appearance:

Ms. Anjali Gupta with Shri Rajatdeep Sharma, Advocates for theAppellant

Shri Rajesh Singh, Authorized Representative of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NOS. 51328-51331 /2023

Date of Hearing : 21/08/2023

Date of Decision: 20/09/2023

P V SUBBA RAO:

1 M/s. Sunlight Overseas filed these four appeals to assail the Order in Appeal[1] dated 28.8.2019 passed by the Commissioner of Customs (Appeals) Delhi whereby he rejected the appellant's appeals and upheld two orders in original[2] dated 13.1.2017 and two Orders in original dated 8.2.2022 passed by the Joint Commissioner.

1. The appellant had filed four Bills of Entry No. 7732792 dated 05.12.2017, 7831426 dated 15.12.2016, 8216202 dated 17.01.2017 & 8216204 dated 17.01.2017 self-assessing the dutyin the Indian Customs Electronic Data Interface System[3]to clear imported "Misc. Furniture of Different Types etc" imported from M/s Hong Kong Overseas, China. The details of consignments areas under

S.No	B/E No.	B/L No.	Declared weight (kg)	Weight found (kg)	Difference (kg)
1	8216204/17.01.2017	9582375650/9.11.16	15760	24090	8330
2	7831426/15.12.2016	CGZ0755773/03.11.16	15630	23510	7880

3	7732792/ 05.12.2017	958149486/0 1.11.16	15650	24590	8940
4	8216202 /17.01.201 7	GGZ0753599 /27.10.16	15760	26720	10960

2. Receiving specific intelligence that the quantity of the goods was mis-declared in these four Bills of Entry, the Directorate of Revenue Intelligence[4] placed an alert, acting on which, the assessing officer ordered first check examination, i.e., directed the goods to be examined first before assessing the Bills of Entry. It was specifically indicated that the weight of the goodsmust be checked. Examination of the goods revealed mis-declaration of the quantity of the goods in terms of weight as indicated above.

3. Through its Customs Broker, the appellant submitted letters dated 23.12.2016 and 02.02.2017 stating that it did not want any show cause notice or personal hearing in the matterand that it was ready to pay re-determined Customs duty as wellas fine and penalty.

4. Accordingly, the Joint Commissioner, Inland Container Depot, Tughlakabad, passed OIOs rejecting the transaction value under Rule 12 of the Customs Valuation(Determination of Valueof imported goods) Rules, 2007[5]and re-determining the value on the basis of contemporaneous imports of similar goods under Valuation Rule 5. He demanded the differential duty, confiscated the goods under section 111(l) and 111 (m) for mis-declaration, allowed their redemption on payment of fine under Section 125 and imposed penalties. The details of the duty fine and penalties in the OIOs were as follows.

Bill of Entry	Value of goods confiscated (Rs.)	Duty assessed (Rs.)	Redemption fine (Rs.)	Penalty (Rs.)
7831426 dated 15.12.2016	17,16,230	5,05,275	4,00,000	2,00,000
8216204 dated 17.1.2017	15,66,312	7,02,141	5,00,000	3,00,000
7732792 dated 7.12.2016	10,76,361	5,06,768	4,00,000	2,00,000
8216202 dated 17.1.2017	15,17,826	7,55,197	5,00,000	3,00,000

On appeal, the Commissioner (Appeals) passed theimpugned order upholding the four OIOs passed by the Joint Commissioner.

5. Aggrieved, the appellant filed this appeal. We have heard learned counsel for the appellant and the learned authorised representative for the Revenue and perused the records. The fourquestions to be answered in these four appeals are:

(a) Can the rejection of the declared transaction value and re- determination of the duty by the original authority and its affirmation in the impugned order be sustained?

(b) Can the confiscation of the imported goods in the four Bills of Entry under section 111(l) and (m) on the ground of mis-declaration of the quantity and their release on payment of redemption fine be sustained?

(c) If the confiscation of the goods is sustained, are the amounts of redemption fine imposed correct or excessive?

(d) Are the amounts of penalty imposed under section 112 correct or excessive?

Rejection of transaction value under Rule 12 of the Valuation Rules and its re-determination under Rule based on the NIDB data

6. Learned counsel for the appellant submitted as follows:

(a) the imported goods were furniture which are not traded by weight but by number;

(b) the appellants had themselves approached the customsauthorities for first check, i.e., requested the authorities to first examine the goods and so it cannot be alleged that there was mis-declaration or suppression of the descriptionor weight of the imported goods;

(c) the Customs authorities failed to verify if the number of pieces imported were the same as in the invoice, which was possible even though the imported goods were insemi-knocked down (SKD) condition;

(d) the allegation of mis-declaration therefore fails and any excess weight found during examination does not change the value declared by the appellant;

(e) it was wrong on the part of the assessing officer to reject the transaction value under Rule 12; for this purpose they place reliance on:

(i) Abhiman Impex vs CC (Import) Nhava Sheva[6]

(ii) Nilkamal Ltd. vs Commissioner of Customs (Import) Nhava Sheva[7]

(f) since the appellant had filed the Bills of entry as per the invoices and other documents, no mis-declaration can be alleged on its part and they place reliance on:
Scorpian International vs CC[8]

CC Excise vs Akshay Aluminum Alloys Pvt Ltd.[9]

(g) there is no evidence of any undeclared flow-back to the exporter or any evidence of underhand payment and therefore, there is no reason to discard the transaction value;

(h) the appellant was forced to apply for waiver of show cause notice as they had suffered huge warehousing & shipping line demurrages and could not afford to continue the goodsin custom warehouse and wanted to avoid these damages;

(i) the assessment was done on the basis of the weight reflected in the weighment slip issued by the CONCORwhich is against the statute;

(j) the decision of this Tribunal in **Final Order dated 20.10.2020 in the case of Hanuman Prasad & Sons is not applicable** to this case because in that case, the importer accepted the enhancement and in this case, there was no acceptance of undervaluation by the appellant; the values of the contemporaneous imports under NIDB were not shown by the proper officer;

(k) the very act of filing of an appeal against an order imposingcustoms duty is a protest against the duty assessed as heldin

(i) Principal Commissioner of Customs vs CiscoSystems India Pvt. Ltd.[10]

(ii) Mafatlal Industries vs Union of India[11]

(iii) Mohan Textile Mills vs Commissioner[12]

(iv) Commissioner of Customs vs Ganesh Trading Company[13]

(v) Bayshore Glass Trading Pvt. Ltd. vs CC Kolkata[14]

(vi) S&H Gears Pvt. Ltd. vs Commissioner[15]

(l) in **UOI vs Kamlakshi Finance Corporation Ltd.[16]**it has been held by the Hon'ble Apex Court that Departmentshould pay utmost regard to judicial discipline and give effect to orders of higher authorities which are binding on them.

7. Learned authorised representative for the Revenue submitted that the quantity of the imported goods was checked in terms of weight in this case for the reason that the unique quantity code (UQC) prescribed for furniture is weight. He explained that the quantity of any consignment of goods can be indicated in variety of ways- kg, tons, litres, number, running length, etc. depending on the nature of the goods. Often, the quantity of the same goods can be indicated in more than one ways and commercial transactions can be on any terms. However, in order for ICES to make meaningful compilation of the data and comparison of values and the customs Risk Management System[17] to determine the risk, a unique quantity code is necessary. For this reason, a unique quantity code (UQC) is fixed for each type of goods and the importer is required to indicate the quantity in that code. For furniture, it is weight in kg.The appellant grossly mis-declared the quantity of the goods and the excess quantity found was between

50 and 70% of thedeclared quantity in the four bills of entry. Therefore, the adjudicating authority was fully justified in rejecting the transaction value and re-determining it.

8. On the question of the appellant itself requesting for a first check, i.e., requesting for the goods to be examined first before assessment, he asserts that this submission of the appellant is not true. While filing the Bills of Entry, the importer has an optionto request for first check and the importer can get the goods examined before self- assessing the bills of entry and the appellant had not opted for it but self-assessed the Bills of Entry mis-declaring the quantity of the goods.

9. DRI received specific intelligence that the appellant had mis-declared the quantity of goods and put an alert in the system and accordingly, the assessing officer directed the examining officer to conduct 100% examination of the goods which exposed the mis-declaration.

10. When confronted with the examination report, the appellant had not disputed either the mis-declaration or that the value should accordingly be re-determined. It had also not contested the re-determination of value in any manner. It had, infact, waived the SCN and the personal hearing thereby precluding the possibility of the proper officer indicating how he proposed to re-determine the duty before issuing the OIO. The appellant undertook to pay the differential duty and fine and penalty.

11. Having accepted the re-assessment of the Bills of Entry,the appellant cannot now contest it. The appellant's contention that it was forced to accept the re-assessment to avoid demurrages has no force because nothing in its letters indicated that it was accepting the re-assessment only to avoid demurrages. He places reliance on **Hanuman Prasad**

12. We have considered the submissions on both sides. As per section 17(1), the importer is required to self-assess duty on the imported goods and as per section 17(4), the proper officer can re-assess it. As per section 12, the value for assessing the dutyis the transaction value subject to some conditions. However, there are situations in which the transaction value can be rejected and the value can be re-determined as per Rule 12 ofthe Valuation Rules by the proper officer. It reads as follows:

"Rule 12. Rejection of declared value. –

(1) When **the proper officer has reason to doubt the truth or accuracy of the value declared** in relation to any importedgoods, he may ask the importer of such goods to furnish furtherinformation including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, **the proper officer still has reasonable doubt about the truth or accuracy of the valueso declared,it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule(1) of rule 3.**

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation.- (1) For the removal of doubts, it is hereby declaredthat:-

(i)This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent thetransaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9. The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(ii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include –

(a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction wereassessed;

(b) the sale involves an abnormal discount or abnormal reduction from the ordinary

competitive price;

(c) the sale involves special discounts limited to exclusive agents;

(d) the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) the non-declaration of parameters such as brand, grade, specifications that have relevance to value;

(f) the fraudulent or manipulated documents."

13. As can be seen, as per Valuation Rule 12, if the proper officer, has reason doubt the truth or accuracy of the value declared, he can call for information and if no information is provided by the importer or after receiving the information, if he still has a reasonable doubt, then it shall be deemed that the value cannot be determined as per the transaction value. Thus, in the first stage, it is sufficient if the officer has some reason to doubt to call for information but at the second stage to reject thetransaction value, he should have reasonable doubt. No restrictions have been placed on the proper officer in this Rule onraising doubts. However, explanation 1(iii) to the Rule lays down six conditions, which may be the reason for the officer to doubt the transaction value. However, the use of the words "*raise doubts on the truth or accuracy of the declared value based on certain reasons which may include*" in this explanation shows that the officer's power to raise doubts is not limited to the six conditions listed therein and can raise doubts for other reasonsas well. One of the six reasons listed is **the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production.** In this case, there was a specific intelligence that the quantity of the goods were mis-declared in these consignments to evade duty. Due diligence required the officer to check the consignment. On examination, it was indeed, found that the quantity of the goods in terms of weight (which is the unique quantity code for furniture) was mis-declared. The proper officer, therefore, had very good reason to doubt the transaction value because what was imported was 50% to 70% more than what was declared in the Bill of Entry, invoice and other documents.

14. Having found the mis-declaration, the proper officer could call for information from the appellant. No specific method has been prescribed for calling for the information- it could be in writing or across the counter. The appellant submitted two lettersin which it nowhere disputed that the quantity of the goods imported was more than what was declared. It also did not dispute that the value should therefore, be re-determined. It hadalso not provided any documents or explanation for the excess quantity of the goods found. On the contrary, it agreed to paythe differential duty and fine and penalty. Under such circumstances, the proper officer had a reasonable doubt about

the transaction value and therefore, he correctly rejected the transaction value under Valuation Rule 12.

15. Having rejected the transaction value, the proper officer re-determined the value based on the value of contemporaneous imports of similar goods. Since the appellant had also waivedboth the Show Cause Notice and Personal hearing, neither was an SCN issued with the relied upon documents indicating how theduty was proposed to be re-determined nor was a personalhearing held in which the appellant could have put forth its defence orally or in writing. We find that the goods which were imported were miscellaneous furniture and therefore, assessmentof the value as per the value of contemporaneous imports of similar goods is fair and proper.

16. Learned counsel for the appellant submitted that determination of the quantity of the goods based on the weight taken at the CONCOR was not proper. She also argued that since furniture is not sold by weight but by numbers, the quantity should have been determined as per the number of articles, which, even though the imported goods were in SKD condition, was possible. Neither of these arguments can be accepted. If the appellant had any doubt or reservation about the weight taken, itcould have asked the weight to be re-checked on another

weigh bridge but the appellant had not done so. If the appellant wantedto contest that the quantity of the goods was the same even ifthe weight was more, it could have said so and these factual aspects could have been verified. It could also have been ascertained as to why the weight was more-whether it wasbecause more furniture was imported or stronger and heavier furniture was imported while invoices were issued for lighter furniture. Insofar as this case is concerned, the fact that excess quantity of 50 to 70% was imported in the Bills of Entry was not disputed. Therefore, the assertion of the learned counsel that thequantity of the goods was not more in the Bills of Entry cannotbe accepted.

17. Learned counsel also argued that even if the excess quantity is imported, it makes no difference to the value and the transaction value should have been accepted. This submission cannot be accepted. When the transaction value shown in the invoice and other documents was for a certain quantity and what was actually imported was 50% to 70% more, the value in the documents cannot be treated as the value for the total quantity actually imported. While it is true that generally furniture is sold by pieces and not by weight, it is equally true that heavier and stronger furniture costs more than lighter and weaker ones.Therefore, there was no error in the transaction value being rejected. Learned counsel placed reliance on **Abhiman Impex and Nilkamal Ltd.** Both these cases are distinguishable inasmuch as there is nothing in either of these cases to indicate that the importer had accepted the quantity of the goods was more as is it in the present case.

18. Learned counsel also submitted that there is no evidence ofany undeclared flow-back to the exporter or any evidence or any evidence or underhand payment and therefore, there is no reason to discard the transaction value. However, to rejecttransaction value under Rule 12, what is required is the reasonable doubt of the officer. Evidence of flow back to exporteror underhand payment are not necessary.

19. Learned counsel for the appellant also stated that theywere forced to apply for waiver of show cause notice as they had suffered huge warehousing & shipping line demurrages and couldnot afford to continue the goods in custom warehouse to avoid these damages. This submission cannot be accepted since, in thefirst place, there is no evidence of the appellant being forced to waive the SCN or personal hearing. Secondly, the argument is inherently contradictory. Demurrages are generally steep and arelevied by the custodian (Port Trust or CFS, etc.) to discourage the imported goods blocking the space which can be used by other importers. Goods in the Customs warehouse, however, do not suffer any demurrages and all one is required is to pay the rent to the warehouse keeper. Often, importers keep their goods in the Customs bonded warehouse for months or years. If the goods in these cases were in the Customs bonded warehouse, there cannot be any demurrages at all.

20. Learned counsel also submitted that the very act of filing ofan appeal against an order imposing customs duty is a protest against the duty assessed. Reliance was placed on **Cisco Systems India Pvt. Ltd., Mafatlal Industries, Mohan Textile Mills, Ganesh Trading Company, Bayshore Glass Trading Pvt. Ltd. vs CC Kolkata, and S&H Gears Pvt. Ltd.**We find that all these decisions were in the context of refund of duty paid but which was, on appeal, set aside, could be denied on the ground that the assessee had not paid it under protest. These do not carry the case of the appellant any further.

21. This appeal is against re-assessment in which the appellantwaived, in writing, the SCN and personal hearing and in which it had not even disputed that the goods which were imported were much more than what was declared. The question is whether the appellant can, after the goods have been cleared after paying duty, fine and penalty, now dispute the assessment of duty on facts which are now impossible to recheck but which could have easily be re-checked before clearance. We find that similar case up before this Tribunal in the case of **Hanuman Prasad.** Relevant extracts of this order are below:

2. The records indicate that Hanuman Prasad had submitted 27 Bills of Entry declaring the value of the goods at 1.2 USD per kg and Niraj Silk had submitted 9 Bills of Entry declaring the value of the goods at 1.2USD per kg. The Assessing Officer believed that he had reason to doubt the accuracy of the value so declared, since it was lesser than the contemporaneous export data. On being confronted with such data, both Hanuman Prasad and Niraj Silk submitted identical letters in connection with the Bills of Entry. Hanuman Prasad specifically

stated that though it had declaredthe value of the goods at 1.2 USD per kg but on contemporaneous data having been shown, it agrees forenhancement of the value to 1.80 USD per kg and thatit did not want any show cause notice to be issued to it or personal hearing to be provided, nor did it want any speaking order to be passed on the aforesaid Bills of Entry. It further stated that it was voluntarily relinquishing the rights provided to it under sections 124 and 17(5) of the Customs Act, 1962**5**. **The letter written by Niraj Silk is identically worded, except for agreeing to the enhancement of the value of the declared goods to 1.94 USD per kg**.

***

5. The value of the declared goods was thereafterenhanced by the Assessing Officer to 1.80 USD per kg. in the case of Hanuman Prasad and to 1.94 USD per kg.in the case of Niraj Silk.

6. However, Hanuman Prasad and Niraj Silk challenged the order passed by the Assessing Officer on the Bills of Entry by filing 36 appeals before the Commissioner (Appeals).

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42. It has to be noted that the two importers, HanumanPrasad and Niraj Silk, had not made any statement thatthey have accepted the value of the goods proposed by the Revenue to save demurrage charges nor did they state in the letter that the value was being accepted by them under protest and they would agitate the matterin appeal. It is only in this appeal that it has been suggested that the value was accepted to save demurrage charges, perhaps prompted by theobservations made by the Tribunal in **Artex Textile Private Limited.**

43. Learned Counsel for the Respondent also reliedupon the decision of the Tribunal in **Commissioner of Customs, New Delhi (ICD TKD) vs M/s UniexcelPolychemPvt. Ltd.** The Tribunal observed that:

4. On the merit of enhancement of value, we are in agreement with the findings in the impugned order. **No detailed reason has been given by the Original Authority for rejection of the transaction value. Apparently he was guided only by DRI alert whichformed basis of enhancement of value**. It has been repeatedly held by this Tribunal as well as Hon'ble High Courts that the transaction value cannot be rejected mechanically based on suspicion or general alert without supporting evidence to the effect that the invoice value does not reflect the transaction valuerequired for assessment. In the present case, we find that no evidence of any nature has been brought out or discussed before such enhancement. Evencontemporaneous value of similar or identical goodshave not been examined and discussed"

44. This decision also does not indicate that the importers had accepted the value of the goodsproposed by the Revenue in writing or that the importers had waived their right to a speaking order. Infact, it was the DRI alert that formed the basis ofenhancement of value.

45. The Supreme Court observed in **Eicher Tractors Ltd.,** which decision has also been relied upon by the learned counsel for the Respondent, that it is only whenthe transaction value under rule 4 of the ValuationRules is rejected that the transaction value is required to be determined by proceeding sequentially through rules 5 to 8. The decision of the Supreme Court in **Century Metal Recycling** also holds that if the declared transaction value is rejected, then it has to be determined in accordance with the procedure prescribedin rules 4 to 9. These decisions of the Supreme Court, for the reasons stated above, do not help therespondent.

46. Learned counsel for the respondent has also emphasized that NIDB data cannot be the sole basis to reject the transaction value without any cogent reasons. As seen above, the importers had in writing accepted the transaction value and it is perhaps for this reason that they did not require any show cause notice to be issued to them or a personal hearing to be granted to them. The respondent is, therefore, not justified in asserting that the transaction value has beendetermined on the basis NIDB data. It was their acceptance of the value that formed the basis for determination of the value. The decisions relied upon bythe respondent to support the

contention sought to be raised are, therefore, of no benefit to them.

47. The general observations made the Commissioner (Appeals) in the impugned order that the value declaredin the Bills of Entry were being enhanced uniformly by the Department for a considerable period of time was uncalled for. The Commissioner (Appeals) completely failed to advert to the crucial aspect that the importers had themselves accepted the enhanced value. The Commissioner (Appeals) in fact, proceeded to examine the matter as if the assessing officer had enhanced the declared value on the basis of other factors and not on the acceptance by the importers. This casual observation is not based on the factual position that emerges from the records of the case.

48. Thus, for all the reasons above, the Commissioner (Appeals) was not justified in setting aside the orders passed by the assessing officer on the Bills ofEntry.Recycling also holds that if the declared transaction value is rejected, then it has to be determined in accordance with the procedure prescribedin rules 4 to 9. These decisions of the Supreme Court, for the reasons stated above, do not help therespondent.

48. Thus, for all the reasons above, the Commissioner (Appeals) was not justified in setting aside the orders passed by the assessing officer on the Bills of Entry.

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22. The only difference between this appeal and the one in **Hanuman Prasad** is that in this case, the re-valuation had to bedone because more goods were imported than what were declared which fact has been accepted by the appellant and which it had not disputed during assessment whereas in the caseof **Hanuman Prasad** the re-assessment became necessary because the declared value was much lower than the contemporaneous values and the enhanced value itself was accepted by the importer. In **Hanuman Prasad,** after accepting the enhanced value and clearing the goods for home consumption, the importer assailed the re-assessment. In this case, after not disputing mis-declaration of the quantity of goods imported, the appellant did not even ask as to on what value the goods would be assessed or the basis for taking that value. **By waiving the SCN and also the personal hearing, the appellant made it both unnecessary and impossible for thedepartment to show the basis of re-determining the value of the goods.** The assessing officer, having rejected the value under Valuation Rule 12, re-determined it on the basis of contemporaneous imports of similar goods based on the information available in the National Import Database (NIDB). The appellant, having waived the SCN, personal hearing, and having paid the re-assessed duty and clearing the goods forhome consumption cannot now ask for the evidence or basis for re-assessment all of which it had waived, thus, putting the department in an impossible situation.

23. Learned counsel submitted that the appellant had not violated any provisions of customs law and even assuming that the differential duty as adjudicated in the impugned orders was correct, there was no case to confiscate the goods under section

111. It is her submission that since the appellant filed the Bills ofEntry as per the invoices and other documents, no mis- declaration can be alleged. It is also her submission that the appellant itself had sought first check of the consignment. Therefore, there was no mis-declaration in the Bills of Entry.

26. According to the learned authorised representative, theappellant had not sought first check of the consignment althoughsuch a facility was available in the ICES. First check was undertaken along with 100% examination of the consignment forthe reason that there was a specific alert in the system by DRI regarding the mis-declaration of the quantity of the goods in this case. The appellant had self-assessed duty as per its declaration in the Bills of Entry. The actual quantity of goods imported was much more than what was declared and hence confiscation undersection 111(m) was fully justified.

27. We have considered the submissions on this aspect. It is not possible to accept the submission of the learned counsel that so long as the declaration in the Bills of Entry is as per

the invoices, no mis-declaration can be alleged. The charge of dutyof Customs and all the restrictions and prohibitions are **on the goods imported into India** and NOT on **the goods said to be imported into India in the invoices or other documents. Usually, the documents match the goods actually importedand it provides a convenient way of assessing and clearinggoods. However, in case of differences, what is important is the goods which are actually imported and not just what have been indicated in the invoices.** Relevant legal provisionsare reproduced below:

" Section 11. Power to prohibit importation orexportation of goods.-

(1) If **the Central Government** is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it **may,** by notification in the Official Gazette, **prohibit either absolutely or subject to such conditions** (to be fulfilled before or after clearance) as may be specified in the notification, **the import or exportof goods** of any specified description.

Section 12. Dutiable goods. -

(1) Except as otherwise provided in this Act, or any other law for the time being in force, **duties of customs shall be levied** at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, **on goods imported into, or exported from, India**.

(2) The provisions of sub-section (1) shall apply in respectof all goods belonging to Government as they apply in respect of goods not belonging to Government.

Section 111. Confiscation of improperly imported goods, etc. -
The following **goods brought from a place outside India shall be liable to confiscation**: -

(m) **any goods which do not correspond in respect ofvalue or in any other particular with the entry made under this Act** or in the case of baggage with the declaration made under section 77 in respect thereof, or inthe case of goods under trans-shipment, with thedeclaration for trans-shipment referred to in the proviso tosub-section (1) of section 54;"

Thus, it is the goods which must correspond to the declaration and if they do not, they will be liable to confiscation undersection 111(m). The declaration in the Bills of Entry matching theinvoices, bills of lading, etc. is of no avail. The importer isresponsible for what is imported and how much is imported.

28. Reliance was placed by the appellant on **Scorpian International vs Commissioner of Customs**[18]and **Commissioner of Central Excise vs Aluminium Alloys Pvt. Ltd.**[19]**.** In **Scorpian International,** a learned Member of the Tribunal held as follows:

" 8. We find that in this case during the course of physical verification, the goods were not found as declared. Therefore,the appellant contended that it is an inadvertent mistake of the supplier of the goods. In that circumstances, the revenue has alleged that it is an afterthought. We find that in that such situation, the *mala fide* intention of the appellants are missing. As the appellant has placed order to the foreign supplier and he has filed the bills of entry as per the packing list and declaration made by the supplier in invoices. The appellant is not known about the correct declaration, description, quantity and value of the goods. **It is a fact on record that the appellant has declared the description, quantity and value of the goods as per the invoice/packing list, therefore, the benefit of doubtgoes in favour of the appellant that it is an inadvertent mistake of the supplier by non- supplying the goods as per the invoice/order/packing list. In that circumstances, the goods cannot be held liable for confiscation and consequently, the penalty is not imposable on the appellant**.

In **Aluminum Alloys Pvt. Ltd.,** a learned Member of this Tribunal held as follows:

6. In this case, it is a fact on record that respondent has purchased the impugned goods on high seas sale basis from M/s. Sage Global, New Delhi. As per the Packing List, Pre- Inspection

Report, Bill of Lading, Invoice, Bill of Entry &Description of Goods are shown as "Aluminium Scrap". In that circumstance, it cannot be alleged against the respondent that he had deliberately misdeclared the goods. Moreover, from any stretch of means it is impossible to ascertain the goods contained in the container are not such goods as declared in the documents."

29. We respectfully disagree with the learned Member's findingthat if the declaration was as per the invoice, packing list, etc. and the goods actually imported were different, no mis-declaration can be alleged. If it is held that it is sufficient if the declaration in the Bills of Entry match the invoices or Bills of Lading even if it does not match the goods which are actually imported, it will open the floodgates for smuggling and mis- declaration. For instance, one can get an invoice for say, paracetamol and file a Bill of Entry accordingly and actually import heroin and claim that he has not mis-declared. One can get an invoice for iron and actually import gold. One can get an invoice for and declare, in the Bill of Entry, say 100 kg and actually import 1000 kg. The importer is responsible for what he has imported and it is not sufficient if he files Bills of Entry corresponding to the documents. The declaration in the Bills of Entry must match with the goods actually imported. We therefore, find no infirmity in the confiscation of the imported goods in this case. It also needs to be pointed out that the appellant had not contested before the adjudicating authority that the goods were liable for confiscation. In fact, it had, in writing agreed to pay the redemption fine.

30. Learned counsel submitted that even if the confiscation is upheld, the quantum of redemption fine was excessive and not proportionate to the alleged mis-declaration. Learned authorised representative for the Revenue asserted that the quantum of redemption fine is fair and proper. The value of the goods confiscated and the redemption fine and penalties imposed in thefour Bills of Entry was as follows.

31. Section 125 does not prescribe how much redemption fine must be imposed but only places the upper limit of market value of the goods. It reads as follows:

"Section 125. Option to pay fine in lieu ofconfiscation. -

(1) Whenever confiscation of any goods is authorised bythis Act, the officer adjudging it may, in the case of anygoods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that where the proceedings are deemed to beconcluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are notprohibited or restricted, no such fine shall be imposed:

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, **such fine shall not exceed the market price ofthe goods confiscated, less in the case of imported goods the duty chargeable thereon.**

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1),shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is notpaid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.
Explanation .-For removal of doubts, it is hereby declared that in cases where an order under sub-section

(1) has been passed before the date** on which the Finance Bill, 2018 receives the assent of the President and no appeal is pending against such order as on that date, the option under said

sub-section may be exercised within a period of one hundred and twenty days from the date on which such assent is received."

32. Thus, in terms of the second proviso to Section 125, themaximum redemption fine in case of imported goods shall be the market value of the goods minus the duty chargeable thereon. The redemption fine imposed in each of the four Bills of Entry is way below this limit. In the factual matrix of this case, we find that amount of redemption fine imposed is fair and proper and calls for no interference.

33. Learned counsel for the appellant submitted that even ifthe demand of differential duty and confiscation of the goods is upheld, the penalties imposed upon the appellant are excessive. Learned authorised representative for the Revenue supports the penalties imposed in the impugned order. Considering the factualmatrix of this case, we find that the penalties under section 112 are a small fraction of the market value of the goods confiscated which is fair and proper and calls for no interference.

34. The impugned orders are upheld and the four appeals are dismissed.

[Order pronounced on **20.09.2023**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)MEMBER (TECHNICAL)

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI. PRINCIPAL BENCH – COURT NO.III

Customs Appeal No.54929 of 2023 with Customs Misc. Application No.50334 of 2023
(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

M/s. Bright Metal India Pvt. Ltd. **Appellant**
F-671, Road No.9F2, VKI Area,
Jaipur, Rajasthan.

Versus

Commissioner of Customs, Central Excise & CGST, **Respondent**
NCRB, Statue Circle, Jaipur,Rajasthan-302 005.

With

Customs Appeal No.54930 of 2023

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Sanjay Porwal, Director **Appellant**
of M/s. Bright Metal India Pvt.Ltd.
C-5, Krishna Marg, Shyam Nagar,Ajmer Road, Jaipur,
Rajasthan.

Versus

Commissioner of Customs, Excise and CGST, **Respondent**
NCRB, Statue Circle, Jaipur,Rajasthan-302 005.

With

Customs Appeal No.55115 of 2023

With Customs Stay Application No.50448 of 2023
(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Commissioner of Customs (Preventive) **Appellant**
NCRB, Statue Circle, "C" Scheme,Jaipur, Rajasthan-302 005.

Versus

M/s. Hub & Links Logistics (I)Pvt. Ltd. **Respondent**
Suite No.101,Rishabh Arcade, Near to GST Bhawan, Plot No.83,Sector-8, Ghandhidham-370 201.

With

Customs Appeal No.55116 of 2023

With Customs Stay Application No.50449 of 2023

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed bythe Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Commissioner of Customs (Preventive) **Appellant**
NCRB, Statue Circle, "C' Scheme,Jaipur, Rajasthan-302 005.

Versus

Shri Abdul Kadir S/o Ismail, **Respondent**
Prop. of M/s. Reliable Agencies,

Karim Industrial Estate, Opp. Dada Mill,Near Dream Honda Showroom,

Udhna, Surat, Gujarat-394 210.

With

Customs Appeal No.55117 of 2023

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Commissioner of Customs (Preventive) **Appellant**
NCRB, Statue Circle, "C" Scheme,Jaipur, Rajasthan-302 005.

Versus

M/s. Bright Metal India Pvt. Ltd. **Respondent**
F-671, Road No.9F2, VKI Area,

Jaipur, Rajasthan.

And

Customs Appeal No.55118 of 2023

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Commissioner of Customs (Preventive) **Appellant**
NCRB, Statue Circle, "C" Scheme,Jaipur,Rajasthan-302 005.

Versus

Shri Sanjay Porwal, Director of **Respondent**
of M/s. Bright Metal India Pvt. Ltd.,
C-5, Krishna Marg, Shyam Nagar,Ajmer Road, Jaipur,

Rajasthan.

APPEARANCE:

Shri S.L. Poddar and Shri J.P. Singh, Advocates for the assessees.Shri Rakesh Kumar, Authorised Representative for the Revenue.

CORAM:

2. That as the Customs officials alleged that the goods originated from Pakistan instead of UAE, the importer company had submitted applications dated 20.12.2021, 02.03.2022 and 30.12.2022 to the customs authoritiesto cancel the bill of entry under Section 149 of the Customs Act, 1962 and they may be allowed to re-export the goods back to the UAE at the earliest to avoid any detention/demurrage/ground rent charges.

3. On scrutiny of the Bills of Entries submitted by the appellant in respect of the past imports, it was found that same modus operandi was adopted as the container tracking on PICT divulged that the containers had actually originated from Pakistan, the details of 6 Bills of Entries filed and cleared is as under :-

S. N	B.E. No.	BE date	Total Ass.Value
1.	2643706	06.02.202	8985522
2.	2797226	17.02.2021	8747005
3.	5063295	16.08.2021	8808842
4.	5173059	24.08.2021	7412945
5.	5407130	11.09.2021	7443238
6.	6430842	27.11.2021	8715980

4. That in follow-up action, premises of Mr. Abdul Kader Bombaywala, Indenter of the importer company was searched and statements of Mr.Abdul Kader and Shri Kailash Vittal Mhatre, Sr. Manager, M/s. Hub and Links India Pvt., Ltd. were recorded. As the Importer Company was found tohave mis-declared the country of origin as UAE instead of Pakistan with intent to evade customs duty and mis-classified the goods under CTH 74040022 instead of 98060000, the goods imported were seized by the Customs officers under Section 110 of the Customs Act, 1962 (the Act). Accordingly, show cause notice dated 15.06.2022 was issued to the ImporterCompany and its Directors, which was duly replied by them.

5. Having examined the matter, the Adjudicating Authority passed the order-in-original dated 24.02.2023, whereby the imported goods were confiscated under Section 111(m) and the Importer Company was allowed to redeem the goods for re-export on payment of redemption fine of Rs.10 lakhs under Section 125 of the Act and also imposed penalty of Rs.3 lakh each under Section 112(a)(ii) and Section 114 AA of the Act on the ImporterCompany. Penalty of Rs.1,50,000/- each under Section 112 (a)(ii) andSection 114 AA of the Act imposed on Shri Sanjay Porwal, Director of the Company. Penalty of Rs.3 lakh each was imposed on Mr. Abdul Kadir under Section 112(a)(ii) and 114 AA of the Act. Similarly penalty of Rs. 3 lakh eachwas imposed on M/s. Hub and Links India Pvt. Ltd. under Section 112 (a)(ii)and Section 114 AA of the Act. The said order was challenged, both by the Revenue as well as by the Importer Company and its Directors. TheCommissioner (Appeals) affirmed the order of confiscation, allowing of redemption of the goods for re-export of payment of redemption fine of Rs.10 lakh. However, the penalty amount was enhanced on the Importer Company from Rs.3 lakh to Rs.10 lakh under Section 112 (a)(ii) and Rs.3 Lakh to Rs.15 Lakhs under Section 114 AA of the Act. Penalty on Shri Sanjay Porwal was enhanced from Rs. 1,50,000/- to Rs.5 Lakh under Section 112 (a)(ii) and from Rs.1,50,000/- to Rs.15 Lakh under Section 114AA of the Act. Hence, the present appeals have been filed before this Tribunal both by the Revenue as well as by the Importer Company and its Director.

6. We have heard Shri Rakesh Kumar, Authorised Representativefor the Revenue and the learned Counsel for the appellant, Shri S.L. Poddar.

We have examined the records of the case and the legal provisions, as interpreted in catena of judgements.

7. Since we are considering the appeal filed by the ImporterCompany as the lead matter, we would refer to the contentions raised by them, which are as under:-

(a) Investigation and inquiry were inadequate andincomplete as no investigation was conducted with theirsupplier in UAE or the original supplier in Pakistan.

(b) There is no allegation in the show cause notice that therewas acute shortage of Brass Scrap in the international market at the material time or they have purchased at less than the prevailing price in the international market forcing them to procure the goods from Pakistan. In other words, there is no allegation that there was incentive for the company to import the goods of Pakistan origin. Thus, there is no evidence that the Importer Company knowingly and intentionally mis-declared the country of origin.

(c) That all the relevant documents, as submitted by their suppliers in UAE were duly filed by them before the CustomsAuthorities.

(d) The information obtained from PICT website is not authentic and reliable and relied on the decision of the ApexCourt in **M/s. Hewlett Packard India Pvt. Ltd. – 2023 (1) TMI 700,** which says that online sources such as Wikipedia should be used with due caution to support the conclusion of the investigation.

(e) Re-exporting the goods would serve the purpose sought to be achieved by the Government of India in imposing BCDat 200% on the goods originating in Pakistan and referred tothe decision in **M/s. Raj Grow Impex LLP & Ors. – 2021 (377) ELT 145,** whereby the Apex Court allowed re-export of the imported beans, peas and pulses, though they were held to be prohibited. The redemption fine and penalty in case of re-export of the goods is not imposable.

(f) The goods are not liable to confiscation under Section111 (m) of the Act.

(g) Penalty under Section 112(a)(ii) and Section 114 AA of the Act are not sustainable.

8. The learned Authorised Representative for the Revenue has seriously challenged the decision of the lower authorities both on account of allowing re-export of the goods on payment of meagre amount of redemption fine as well as on the quantum of penalty under section 112 (a) and 114AA being not commensurate with the gravity of the case or in terms of the provisions thereof. The submission in this regard is that prerequisite for the import of unshredded metal scrap is restricted by the condition of proper Pre Shipment Inspection Certificate and therefore the goods have to be treated as 'restricted goods'. In the present case the goods have been imported on the basis of fake PSIC certificate which means import is without any certificate. The other limb of the argument is that in the show cause notice there is no proposal for re-export of the impugned goods and therefore the adjudicating authority had no jurisdiction to order re-export. The proposal of re-export are separate from the adjudication proceedings. Referring to the provisions of section 112 (a) (ii)of the Act the learned AR contended that the penalty recommended therein is not exceeding 10% of the duty sought to be evaded whereas the amount of duty, which is sought to be evaded here is Rs. 2,97,73,709/ and therefore maximum penalty was imposable. Similarly, the penalty under section 114AA has to be five times the value of the goods and the value of the declared consignment was Rs. 1,14,15, 967/- and, therefore, penalty imposed by the authorities does not commensurate with that.

9. Before adverting to the controversy involved in these Appeals itis necessary to notice that the Central Government issued Notification No05 of 2019-Cus., dated 16.02.2019 under section 8A of the Customs Tariff Act, 1975 (hereinafter referred to as CTA) amending the first schedule of CTA, thereby inserting a new entry CTH 9806 0000 for all goods originating in or exported from Pakistan and levied BCD @ 200% on them. The entry relating thereto reads as:-

(1)	(2)	(3)	(4)	(5)
"9806 0000	All goods originating from the Islamic Republic of Pakistan	--	200%	

Country of Origin:

10. The first and the foremost question to be considered is whether the goods in question

originated in or were exported from Pakistan. The goods in question were shipped in container No. SVWU9892740/40. On the basis of the information from the Additional Director General, National Customs Targeting Centre (NCTC), New Delhi that the said container was at high risk as it had originated from Pakistan investigations were carried out. Accordingly, the container No SVWU9892740/40 with seal No. 017410 relating to Bill of Entry No. 6601963 dated 9.12.2021 was verified from the website of Pakistan International Container Tracking Portal (PICT) https:/pict.com.pk/en/online-Tracking and it revealed that the seal No. affixed on the said container was the same as originated from Pakistan. Further, on physical examination of the goods some worn and torn PP bags filled with brass scrap were found on which the words Karachi, Pakistan, Government of Punjab, Korangi Industrial Area etc. were found printed. Coupled with this, the tracking details also revealed the actual arrival date of the said container, i. e. the B/L from Karachi to JEBEL ALI wasissued on 18.11.2021 at Karachi and B/L from JEBEL ALI to Nhava Shevawas issued on 28.11.2021 and the container was found to be intact with the same seal throughout from Pakistan to India. This only reflects that there could not have been any inspection at Sharjah, UAE as per the PSIC Certificate dated 13.11.2021 issued by PSIA and therefore the necessary corollary is that the PSIC was fake and forged. This also points to the fact that the container in question originated from Pakistan.

11. We also find that statement of Shri Kailash Vitthal Mhatre, Senior Manager, M/s HUB & Links Logistics (I) Pvt. Ltd., the delivery agent, was recorded wherein he explained the container wise chart as:

Column No. 1 gives the details of container number.

Column No. 2 provides the details of B/L number anddate issued from Karachi.
Column No. 3 refers to the container seal number at Karachi.

Column No. 4 gives the name of goods as perB/L and quantity.

Column No. 5 shows destination as per B/L issued at Karachi.

Column No.6 provides name of the vessel and reaching at destination as per B/L issued at Karachi.

Column No.7 shows B/L number and date issuedat JEBEL ALI.

Column No.8 shows container seal number as perB/L issued at JEBEL ALI.
Column No.9 gives the name of goods and quantityas per B/L issued at JEBEL ALI.
Column No.10 shows destination as per B/L issue atJEBEL\ ALI.

Column No. 11 shows name of vessel as per B/L issued atJEBEL ALI.

The aforesaid container wise chart details clearly show that the initial details pertain to Karachi and it is the later ones which relates to JEBEL ALI. This itself proves that the country of origin of the containers is Pakistan andnot UAE where the containers have been shown to have arrived later on withthe sole object of misleading the country of origin. This conclusion of ours gets further fortified by the earlier six imports managed by the importer company by following similar modus-operandi that the goods in question were loaded in these containers in Karachi Port and were then transported toJEBEL ALI and from there it was transported to Indian ports. The goods onceloaded at Karachi were not unloaded from the containers at JEBEL ALI and only B/L date of these containers were changed and all other details, i.e.,B/L No., description of the goods, quantity, container number and seal number remained the same. There is no reason to disprove and disregardthe aforesaid modus-operandi mentioned in the statement of Shri Kailash Vitthal Mhatre recorded under section 108 of the Customs Act, 1962. The documents showing the movement of the container with goods from Karachi to JEBEL ALI, container wise sheet, container wise tracking details obtained from PICT website clearly indicated that the containers originated from Pakistan. We also do not agree with the reliance placed by the learned Counsel for the appellant on the decision of the Apex Court in Hewlett Packard (supra) which is clearly distinguishable from the facts of the presentcase. The department having found that the goods originated from Pakistan was not wrong in re-classifying the goods under CTH 98060000 asper Notification No. 5 /2019-Cus dated 16.2.2019. Nothing further was required to be done at the end of the department as pleaded by the importer company. The justification or non-justification of procuring thegoods i. e., Brass scrap

"Pallu" from Pakistan was on the importer company which they failed to substantiate by any valid supporting evidence. The burden was exclusively on the importer company and not on the revenue to place on record positive evidence in support of their submissions. ***Responsibility of the Importer Company:***

12. Having determined the country of origin of the containers in question we would now examine the defence taken by the learned Counsel for the appellant that they had no knowledge about the country of origin being Pakistan and that they have no connection with the supplier in Pakistan and therefore they have neither mis-declared nor misled the department. In fact the importer company had gone to the extent of saying that they have no means to find out the country of origin of the goods as they do not directly deal with the suppliers rather there are intermediary agents / indenters who process the imports. We do not agree with the submissions of the appellant for the simple reason that the appellant claims to be a very reputed company in the business of manufacturing of brass and copper items for which they have been importing raw material namely, brass/copper scrap from different places outside India. The importer company on the one hand is claiming to be a 'one star export house' and on other hand is pleading ignorance of such basic facts. Declaring the Countryof Origin is an essential part of the Bill of Entry and the assessment, *inter alia*, depends on the Country of Origin. Duty could be exempted or increased (as in this case) depending on the Country of Origin. Restrictions on imports and exports could also depend on the Country of Origin. The Country of Origin Certificate also has to be obtained from the authorized agency of that country. Pre-shipment inspection certificates have to be obtained from the agency, which is authorized to issue such certificate in the country, where they are exported from. Thus, it is impossible that any importer would not know both the Country of Origin and the Country of Export of every single consignment. The appellant being an importer, who seems to be well versed with the import-export policy is responsible for the import and is answerable for any violation of the statutory provisions, mis-declaration or any issues relating to the nature, quantum or valuation of the goods, factum of country of origin etc. and cannot plead ignorance thereof. The appellant has attributed the burden of mis-declaration of the country of origin as UAE on the supplier or theindenter, however the same is not believable as the appellant is a regular importer of these goods and during the investigation of the live consignmentthe past imports were also unearthed which were also routed in similarfashion.

The Handbook of Procedures 2015-2020, Para 2.56 (b) also makes theimporter and exporter responsible as under:-

"2.56 Responsibility and Liability of PSIA, Importerand Exporter

(a) ……..

(b) The importer and exporter would be jointly and severally responsible for ensuring that the material imported is in accordance with the declaration given in PSIC. In case of any mis-declaration, they shall be liable for penal action under Foreign Trade (Development & Regulation) Act, 1992, as amended."

13. The next contention of the appellant is that they have submittedall the requisite documents showing the country of origin as UAE. As noted above, there is complete discrepancy as the PSI Certificate dated 13.11.2021shows the date of inspection as 11.11.2021 at Sharjah, UAE whereas the containers itself departed from Pakistan on 18.11.2021 as per the B/L from Karachi to JEBELALI, therefore the only logical conclusion is that the certificate is fake or has been forged and no inspection was actually conducted at Sharjah, UAE. We find that the authorities below have rightly observed that in terms of Para 2.32 of FTP 2015-2020 read with para 2.54 of Handbook of Procedures, such PSI Certificate is not valid and no reliance can be placed thereon.

Confiscation of Goods:

14. We now come to the issue whether goods are liable to confiscation under section 111 (m) of the Act. Having considered in extenso that the country of origin of the containers in question is Pakistan, the same are covered by the notification No. 05/2019, specifically issued to provide high rate of duty for all goods originating in or exported from the Islamic Republic of Pakistan. As discussed above, the PSI Certificate submitted bythe appellant having been found

to be fake, the import is violative of the Foreign Trade Policy and Rule 13 of the Rules which makes it mandatory to submit the pre shipment inspection certificate for clearance of the brass scrap, however in the present case there is no valid PSIC in respect of the imports in question. The issue needs to be examined in the light of the provisions of section 46 under which the appellant had filed the bill of entry for home consumption as the provisions thereof makes it obligatory on the part of the importer to make a declaration as to the truth of the contents of such bill of entry and shall in support of the same produce to the proper officer the invoice relating to the goods under import. The appellant has submitted commercial invoices along with bill of lading etc showing the country of origin of the goods as UAE, however as discussed above, country of origin of the goods herein is Pakistan. In that view, the goods are liable for confiscation under section 111 (m) of the Act, which categoricallyprovides any goods which do not correspond in respect of value or 'in any other particular' with the entry made under this Act. Thus the order of confiscation passed by the authorities is held to be in accordance with law.

Penalty under Section 112 (a)(ii) and 114AA of the Act:-

15. Both the importer company and its Director has challenged the levy of penalty under section 112 (a) (ii) and 114 AA of the Act on the ground that they were neither aware of the origin of the goods from Pakistannor had any intent to import the goods having their origin in Pakistan and hence they cannot be penalised. We are afraid we do not agree with this submission in view of the entire discussion above which prima-facie points to the acts of omission and commission on the part of the importer, M/s. Bright Metal (India) Pvt. Ltd., who imported the goods vide bill of entry No. 6601963 dated 9.12.2021 and Sanjay Porwal being the active director of theimporter company who looks after all the work of import of the goods and was fully responsible for purchase of the said goods and its clearance thereof, are liable to penalty under section 112 (a) (ii) and 114AA of the Actfor contravention of the provisions of the Customs Act, 1962 read with FTP 2015-20. The conclusions arrived at by us gain support from the decision in **Collector of Customs, Bombay Vs. M/s Elephanta Oil & Industries 2003 (152) ELT 257 (SC)**, wherein the Apex Court distinguishing the provisions of section 112 (a) imposing penalty and section 125 providing for redemption fine, upheld the imposition of penalty under section 112 of the Act, observing :

"10. From the aforesaid two sections, it is apparent that both operate in different fields, namely, one requires imposition of penalty and other provides for confiscation of improperly imported goods. Section
111 provides that goods brought from the place outside India are liable to confiscation if the goods are improperly imported as provided therein. In cases where goods are liable to confiscation, discretion is given to the authority to impose penalty. Further, Section 125 empowers confiscation of such goods and thereafter, confiscated goods vest in the Central Government. The Section further empowers the authority to give an option to the owner or the person from whom goods are seized to pay fine in lieu of such confiscation for return of the goods and the fine is also limited up to the market price of the goods. Therefore, levy of fine in lieu of confiscation is in addition to levy of penalty imposable under Section 112."

16. We are also of the view that the quantum of penalty imposed by the impugned order is justifiable. Section 112 (a)(ii) provides for dutyrelated penalty, i.e., penalty not exceeding ten percent of the duty sought tobe evaded. Thus the outer limit or the maximum amount of penalty that could be levied could not be more than ten percent of the duty. Similarly,the penalty under section 114AA is value related, i.e., penalty not exceeding five times the value of goods. Here also the Commissioner has proportionallyincreased the penalty and we find no reason to interfere with the same. Normally, the principle in levying penalty by way of punishment has to commensurate in terms of the provisions providing the penalty. As against the penalty imposed by the adjudicating authority, the appellate authority has considerably increased the penalty amount on all counts both against the importer company and also its director which is not only sufficient to penalise them but would also act as a deterrent in future. Henceno interference is called for by us. The reliance placed by the Revenue on the decision of the Apex Court in **CC, Mumbai Vs. Mansi Impex - 2011(270) ELT 631** is of no assistance in the present case, where the Court dealt with the levy of redemption fine and penalty without determination

of the market price of the goods confiscated and therefore reduction of the same by the Tribunal was not interfered with.

Re-export & Redemption Fine with Penalty:

17. We find that immediately after the seizure of the goods on19.12.2021 the appellant on the very next day made an application dated 20.12.2021 requesting to re-export the goods back to UAE. The appellant repeated the request on 2.03.2022 and subsequently on 30.12.2022. Accordingly, the adjudicating authority vide order in original dated 24.04.2023 confiscated the goods under Section 111(m) and gave an optionto the appellant to redeem the goods and re-export them on payment of redemption fine under section 125 of the Act. The said order has been maintained by the Commissioner (Appeal) by the impugned order relying on the decisions of the Supreme Court and the Tribunal holding that request of the importer for re-export is in consonance with the underline object of issuing the notification dated 16.02.2019 under section 8A of the Customs Tariff Act. We may now consider whether the request of re-export has been rightly allowed by the authorities below as well as on the issue of imposition of redemption fine when the goods are allowed to be re-exported back. The department has raised an objection that permission for re-export on arequest made by the importer company is not within the purview of the adjudication proceedings in view of the decision of the Tribunal in **Hemant Bhai R. Patel V Commissioner of Customs 2003 (153) ELT 226 (Tri. - LB).** We find that the goods declared as Brass Scrap "Pallu" are neither restricted nor prohibited goods and are freely available for import. We wouldlike to refer to the relevant part of Para 2.54 of Handbook of Procedures 2015-2020, which reads as :-

“2.54 Import of Metallic Waste and Scrap Import

Import of any form of metallic waste, scrap will be subject to the condition that it will not contain hazardous, toxic waste, radioactive contaminatedwaste / scrap containing radioactive material, any typeof arms, ammunition, mines, shells, live or used cartridge or any other explosive material in any form either used or otherwise.

(a) Import of following types of metallic waste and scrap will be free subject to conditions detailed below:

Sl. o.	Exim Code	Item description
9.	74040010	Copper Scrap
10.	74040022	Brass scrap

The show cause notice proposed confiscation of these goods under section 111(m) of the Act on the ground that the country of origin has been mis-declared by the importer company as UAE instead of Pakistan andconsequently mis-classified the goods under CTH 7404 0022 instead ofcorrect classification in terms of the notification as CTH 9806 0000 by submitting false and incorrect documents. It is only after the proposed charge is made for confiscation of goods, the provisions of section 125 of theAct comes into play whereby the adjudicating authority is empowered tooffer an option to the owner of the goods to pay fine in lieu of confiscation. Therefore, proposal in the show cause notice is restricted to confiscation of goods under the respective provisions and it is then within the jurisdiction of the adjudicating authority to order confiscation and at the same time exercising its powers under Section 125 allowing the importer to redeem the goods on payment of fine as ordered. At the stage of issuing the show cause notice, it is not within the jurisdiction of the department to invoke the provisions of section 125 of the Act but that does not restrict the powers of the adjudicating authority to impose redemption fine in terms of section 125 of the Act. Once the goods are ordered to be confiscated they vest in the Central Government as per section 126 of the Act, however, if the importer exercises the option to redeem the goods on payment of fine as ordered by the adjudicating authority in terms of section 125 of the Act and a request ismade for re-export, as noticed by this Tribunal in **K & K Gems V Commissioner of Customs, Mumbai-I 1998 (100) ELT 70 (Tribunal),** such re-export

is a post redemption facility allowed to the importer at his request. Further, with reference to section 125, Tribunal observed that, "the fine envisaged thereunder is only to get over the order of confiscation irrespective of whether the goods are cleared for home consumption or for re-export."

18. The learned Authorized Representative vehemently opposed the permission for re-export granted by the authorities below, however, we havealready held that the same cannot be accepted. We, in arriving at the conclusion that the appellant having paid the redemption fine is entitled to redeem the goods and it is permissible to seek re-export thereof, aresupported by the decisions of this Tribunal as well as of the superior Courts.

Our view is substantiated by the decision in **Escorts Herion Ltd. – 1997 (107) ELT 599 (Tribunal),** referred to by the learned Authorized Representative, where the Tribunal specifically stated –

"**5.** The other contention is not of any significance to the fact of the present case. By applying the ratio of thedecision in *Padia Sales Corporation* v. *C.C.* all that would happen is that the permission granted for re- export to be set aside. The goods in other words would have to be cleared on payment of fine for home consumption. We are however told that the goods have already been exported. Apart from this, we do not findit possible to say that there is no provision in the law to permitting goods to be re-exported subsequent to their confiscation.

6. Section 125 of the Act does not specifically provide that an option may be given to redeem the goods for re-export. It empowers an adjudicating officer in case ofgoods the import of which is not prohibited and directing him, in the case of other goods, to give the owner of the goods, or where the owner is not known tothe person from whose possession or custody the goods have been seized, an option to pay in lieu ofconfiscation such fine as the said officer thinks fit. The section applies equally to export goods as well as imported goods. Where goods which have been tendered for export are ordered to be confiscated and an option to redeem them is given under that section, itwould follow that option is for the export of the goods. This is no doubt different from re-export. However, re- export is a facility permitting export of goods which have already been permitted to be imported. Except in cases where export is prohibited by any law, thosegoods which have been imported may be permitted to be exported. The formal procedure of filing a shipping bill and observing other formalities relating to export of goods would have to be followed. There is nothing in the law prohibiting the Collector from permitting re- export of goods. This long standing practice only simplifies the procedural requirement of a complex and time consuming requirement. Therefore, when anadjudicating authority after ordering confiscation of imported goods permits their re-export the goods he is in effect first ordering the redemption for home consumption and thereafter permitting them to be re- exported. Each of these two actions is permitted by law.An order whereby both are combined therefore is not contrary to law."

In addition, we would like to point out the objections raised by the department in the case **Hemant Bhai R. Patel (supra),** which clearly reflects that the department accepts re-export as an option. The relevant paras from the decision in **Hemant Bhai R. Patel (surpa)** are as under:-

"6. The learned DR would on the other hand submit that a permission granted for re-export is irrelevant for exercise of the power to impose redemption fine when goods are confiscated. Once the goods are confiscated unless the importer redeems the goods by paying redemption fine he is not reacquiring the ownership of the goods which would entitle him either to clear for domestic consumption or for re-export.

7. The learned DR brought to our notice a decision of the Apex Court in ***M.J. Exports Ltd.*** **v.** ***CEGAT,*** **1992 (60) E.L.T. 161** where the Supreme Court has affirmed re-export of imported goods. After rejecting the contention of the Revenue that if an importer intends to export the goods imported he should clear them for warehousing and then proceed in terms of Section 69…"

Similarly, the case law referred by the Revenue of **Preeti Exim Vs. CC, New Delhi – 2007 (214) ELT 555 (Tribunal-Delhi),** wherein the contention of the Revenue was that importer has to first redeem the goodsby paying redemption fine and, thereafter, the customer can re-export the goods. The Tribunal observed as under:-

"**5.** I find that the issue raised by the appellant whether the imported goods are liable for fine and penalty in case the order regarding re-export was granted is answered by the Larger Bench of the Tribunal in the case of *A.K. Jewellers* (supra), after relying upon the decision of Hon'ble Supreme Court in the case of *Collector* v. *Elephanta Oil & Industries Ltd.* reported in 2003 (152) E.L.T. 257 held that power to levy the penalty under Section 112 of Customs Act for improper importation of goods is different from the power of confiscation of goods under Section 125 of Customs Act. The same view istaken by the Tribunal in the case of *Hemant Bhai R. Patel* (supra)."

24. In **MJ Exports Ltd., V CEGAT 1992 (60) ELT 161**, the revenue had raised an objection that law does not permit an import just for the purposes of export and goods once imported can be only for home consumption or warehousing. The Apex Court rejected the contention of the revenue and held:

"17. The above general consideration apart, there are other indications in the statute which show that the Act does not prohibit the export of imported goods. TheAct provides that goods which are cleared from the customsarea for warehousing can be cleared from the warehousefor home consumption (S. 68) or exportation (S. 69). At first blush, this may seem to support the Revenue's interpretation that clearance for exportation and clearance for home consumption are two different things. It is indeed suggested by State counsel that, if an importer intends to export the imported goods, he should clear them for warehousing and then proceed in terms of S. 69. But a littlethought would show this interpretation cannot be correct. In the first place, where an importer, even at the time of the import purchase has decided to sell the goods in another country (as in the present case), he may, as pointed out earlier, easily ask the goods to be transmitted or transhipped to the country of sale and thus avoid any necessity for their being at all cleared in India. But where, for one reason or other, he wants to import the goods into India and then sell them to the foreign country or wherethe importer decides on an export sale only after he has arranged for the import of the goods into India, the Act prescribes no form of a Bill of Entry under which he can clear such goods intended for re-export. It would not be correct to insist that he must clear them for warehousing and then export them by clearing from the warehouse. Whether to deposit the goods in a warehouse or not is an option given to the importer. If he is able to pay the import duties and has his own place to stock the goods, he is entitled to take them away. But, where he has either some difficulty in payment of the duties or where he has no ready place to stock the goods before use or sale, he cannot clearthe goods from the customs area. The warehouse is only a place which the importer, on payment of prescribed charges, is permitted to utilise for keeping the goods wherehe is not able to take the goods straightaway outside the customs area. There is nothing in the provisions of the Act to compel an importer even before or when importing the goods, to make up his mind whether he is going to use or sell them in India or whether he proposes to re-export them. Again, there may be cases where he has importedthe goods for use or sale in India but subsequently receivesan attractive offer which necessitates an export. It would make export trade difficult to say that he cannot accept theexport offer as the goods, when imported, had been clearedfor home consumption. S. 69, therefore, should be only read as a provision setting out the procedure for export of warehoused goods and not as a provision which makes warehousing an imperative pre-condition for exporting the imported goods. The second reason for not reading Ss. 68 and 69 as supporting the Revenue's interpretation is even more weighty. That interpretation would mean thatimported goods can be re-exported after being warehousedfor some time (even a day or few hours) but that they cannot be exported otherwise. Such an interpretation has no basis in logic or sense and makes mincemeat of the broader principle contended for by the Revenue that imports are intended for use in the country and not for export. Incidentally, we may observe that even this principle contended for by Revenue may itself be of doubtful validity as it is based on an erroneous assumption that a re-export of imported goods will always be detrimental to the country. It is true that, in the present case, the appellant has been criticised for having utilised valuable hard currency for the purchases and reselling the goods only for rupee consideration. But, conceivably, there may be cases where an importer is able to import goods from a soft-currency area and sell them in a hard-currency area earning foreign exchange for the country. It is also possible to think of cases where, though economically unremunerative, the re-exports can be justified on considerations of international amity and goodwill such as for example, where the goods are

exported to a country which is in dire need of help and assistance. The principle isalso non-acceptable on the ground of vagueness as to the extent of its application to exports made after an interval orafter changing several hands inside the country by way of sale. We are, therefore, unable to read Ss. 68 and 69 as supporting the Revenue's contention.

18. On the other hand, there are provisions which indicate that export of imported goods is very much envisaged under the statute. The provisions contained in S.74 fully reinforce this interpretation. Indeed S. 74 would beredundant if the Department's stand that imported goods cannot be exported were to be accepted as correct. As pointed out by counsel for the appellant, para 174(1) of thePolicy which reads :

"No REP benefits are admissible in the case of imported goods which are re-exported in the same State without undergoing any processing or manufacturing operations in India."

24. In **K & K Gems** (supra), the Tribunal while considering the issuethat redemption fine cannot be levied for re-export as section 125 does not empower such a levy, distinguished the fine under section 125 as a conditionfor re-export and fine in lieu of confiscation under section 125 referring tothe earlier decision in **Allen Bradley India V Collector 1992 (58)ELT 268**, where the Tribunal held that the goods need not have been subjected to confiscation and levy of fine in lieu of confiscation in view of clear findings that wrong goods had been shipped because of suppliers mistake and the importer had disclosed the fact to the department even before the examination of the goods. Thus, fine in lieu of confiscation has been found tobe in consonance with the provisions of section 125 of the Customs Act,1962 as an option to the importer to redeem the goods which have been confiscated and has not been made as a condition for re-export which had been allowed in response to the request made by the appellant therein.

25. The Apex Court in **Elephanta Oil and Industries** (supra) rejected the contention of the appellant therein that once the imported article is re-exported there is no question of levying any penalty or redemption fine holding that confiscation of goods and thereafter permitting the respondent to re-export the same would not mean that penalty under section 112 of the Act cannot be levied. Following the said decision of the Apex Court, the Larger Bench of the Tribunal in **A.K. Jewellers V Commissioner of Customs, Mumbai, 2003(155)ELT 585** dealt with similar issue:-

"Whether while passing an order under section 125 of the Customs Act the authorities can direct confiscation of goodsand payment of fine in lieu of confiscation together with a direction to re-export the goods.The Tribunal decided the issue in affirmative as under:-

"10. After going through the provisions of Section 125 of the Customs Act, we find that provisions of this section do not specifically provide that an option may be given to redeem the goods for re-export. It empowers an adjudicating authority in case of goods the import or export of which is prohibited under Customs Act or under any law in force, to grant an option to pay in lieu of confiscation such fine as the said authority thinks fit. The provisions of this section equally apply to the goods to be exported as well as imported goods. Where the goods which have been tendered for export are ordered to be confiscated and an option to redeem the goods on payment of fine, it would follow that option is for the export of the goods. This is no doubt different from re-export. Re-export isa facility permitting export of goods which have already been permitted to be imported. Except in cases where import is prohibited by any law, those goods which have been imported may be permitted to be exported. The formal procedure of filing a shipping bill and observing other formalities relating to exportof goods would have to be followed. There is no prohibition on the adjudicating authority from permitting re-export of the goods. When an adjudicating authority after ordering confiscation ofimported goods permits their re-export, he is in effect first ordering the redemption of the goods on payment of fine and thereafter permitting them to be re- exported. Each of these two actions is independent andis permitted by law. An order whereby both are combined, therefore, is not contrary to law.

11. If we take up the issue from another anglethat where the adjudicating authority allows re-export of the prohibited goods and in such a case, by holding that the order of confiscation

and redemption fine isnot justifiable, this will make the provisions of Section 125 of the Customs Act redundant which specifically empowers the adjudicating authority to exercise his powers in respect of prohibited goods. As confiscation and redemption fine in lieu of confiscation and re-export are two independent actions, hence the view taken that in case the assessee is allowed to re-export,the confiscation and redemption fine is not justified, is not a correct view. Further, we find that this view is also taken by the Hon'ble Supreme Court in the case of *C.C.* v. *Elephanta Oil & Industries Ltd.* reported in2003 (152) E.L.T. 257 (S.C.) rejected the contention ofthe importer that once the imported article is re- exported as directed by the department, there is no question of levying any penalty or redemption fine. The Hon'ble Supreme Court held that power to levy thepenalty under Section 112 of the Customs Act for improper importation of goods is different from the power of confiscation of goods under Section 125 of the Customs Act. The question of law referred to the Larger Bench is answered accordingly."

24. Another Larger Bench of this Tribunal in **Hemant Bhai R Patel V Commissioner of Customs, Ahmedabad** (supra)distinguished the decisions of the Apex Court in **Siemens Ltd V Collector 1999 (113) ELT 776** on the ground that the issue whether redemption fine could be imposed when goods are liable to be confiscated even when re-export is permitted was not an issue before the Apex Court. Agreeing with the decision in **K & K Gems** (Supra), **Escorts Herion Ltd V Commissioner 1999(107) ELT 599, Kothari Filaments V Commissioner 2002 (144) ELT 80** and **Smt. Kusumbhai Dahyabhai Patel V Collector 1995 (79) ELT 292**, and alsoon the decision of the Apex Court in **M. J. Exports** (supra) the Tribunal decided the issue in affirmative holding that it is open to the adjudicating authority to impose redemption fine as well as penalty even when permissionis granted for re-exporting the goods. The Department has relied on the observations of the Tribunal in the case of **Hemant Bhai R. Patel (supra)** that, " A permission granted for re-export on the basis of a request made by the owner of the goods is outside the purview of the adjudication proceedings, as mentioned above". We are of the view that the issue before the Tribunal was not whether the Adjudicating Authority had power to order for re-export or not rather the issue formulated for their reference related to power under Section 125 to impose redemption fine when confiscation is established and permission for re-export is granted. Therefore, the aforesaid observations relied on by the Department is erroneous as it amounts to obiter dicta and is, therefore, not binding. Moreover, once the Tribunal agrees with the view taken in the cases of **K & K Gems,** etc. (referred above), the logical conclusion is that it upholds the view that option to the importer to redeem the confiscated goods on payment of fine is in consonance with the provisions of Section 125 and is not a condition for re- export. In so far as the decision of the Apex Court in **C.C., Kolkata Vs. Grand Prime Ltd. – 2003 (155) ELT 417** referred by the Revenue is clearly distinguishable as the goods were imported on the condition of re- export of finished/semi-finished goods qua the imports made.

Thus the issue is no longer *res integra* and hence we are of the considered view that re-export of the goods is permissible and both redemption fine as well as the penalty under section 112 and 114AA of the Act are leviable even if the goods on redemption are allowed to be re-exported.

25. The learned Counsel for the appellant has placed on record the latest decision of the Delhi High Court in **Ajay Kumar Gupta vs Commissioner ofCustoms 2023 (5) TMI 207**, inter-alia observing, that there is no provision under the Customs Act which entitles the revenue to retain the goods after the concerned party has paid the redemption fine as well as the penalty as determined. The Court further held that merely because the revenue seeks to challenge the order passed by the appellate authority is no ground for non compliance of the said orders.

Here, the appellant hassubmitted that pursuant to the order in original, they have paid the redemption fine of Rs. 10,00,000/- and penalty of Rs. 6,00,000/-towards penalty on 3.04.2023, however the department has not permitted them to re-export the goods. In view of the decision in **Ajay Kumar Gupta** (supra) we have no hesitation in directing the department to allow the appellant to re-export the goods once they deposit the enhanced amount of penalty as directed in the impugned order. The importer company, namely M/s Bright Metal (India) Pvt. Ltd., and its Director, namely Sanjay Porwal may deposit the balance of the enhanced amount towards penalty under section 112 (a)(ii) and under section 114AA of the Act in terms of the impugned order within a period of three weeks and on such deposit being made, the department shall forthwith release the goods for the purpose of re-export.

26. We would now like to refer to the decision of the Apex Court in the case of **Union of India versus Raj Grow Impex LLP – 2021 (377) ELT 145 (SC),** which has been referred to both by the learned Counsel for the appellant as well as by the revenue. One of the issue considered was whether the exercise of discretion for absolute confiscation was justified. TheCourt while appreciating the relevant considerations and the principles for exercise of such discretion observed as :

"82. The sum and substance of the matter is that as regards the imports in question, the personal interests of the importers who made improper imports are pitted against the interests of national economy andmore particularly, the interests of farmers. This factor alone is sufficient to find the direction in which discretion ought to be exercised in these matters. Whenpersonal business interests of importers clash with public interest, the former has to, obviously, give wayto the latter. Further, not a lengthy discussion is required to say that, if excessive improperly imported peas/pulses are allowed to enter the country's market, the entire purpose of the notifications would be defeated. The discretion in the cases of present nature, involving far-reaching impact on national economy, cannot be exercised only with reference to the hardship suggested by the importers, who had made such improper imports only for personal gains. The imports in question suffer from the vices of breach of law as also lack of *bona fide* and the only proper exercise of discretion would be of absolute confiscation andensuring that these tainted goods do not enter Indian markets. Imposition of penalty on such importers; and rather heavier penalty on those who have been able to get some part of goods released is, obviously, warranted.

84. Hence, on the facts and in the circumstances of the present case as noticed and dilated hereinabove, the discretion could only be for absolute confiscation with levy of penalty. At the most, an option for re-export could be given to the importers and that too, on payment of redemption fine and upon discharging other statutory obligations. This option we had already left open in the order dated 18-3-2021, passed during the hearing of these matters."

27. Considering the aforesaid decision, we are of the considered opinion that the exercise of discretion both by the adjudicating authority as well asby the appellate authority in not ordering absolute confiscation and allowing the importer to redeem the goods on payment of redemption fine and penalty with permission to re-export the goods is in consonance with the object and purpose with which the notification was issued, i.e. to dissuade commercial transactions with Pakistan byimposing extremely high penalty of 200%.

28. Suffice it to say, that Notification No 05/ 2019 dated 16.2.2019in simple words provides that the goods imported having country of origin as Islamic Republic of Pakistan shall be classified under the new entry CTH 98060000 and BCD @200% shall be applicable on them. It nowhere says thatsuch goods shall not be allowed to be re-exported. It is a settled principle of law that the words of the notification has to be read as they are and the contents thereof cannot be added or expanded by way of implication. Since there is no express bar for re-export of such goods in the notification, we uphold the impugned order allowing the appellant to re-export the goods.

Conclusion

29. We, therefore conclude that the country of origin of the containers in question is Pakistan and therefore, the same are classifiable under the Notification No.5/2019 as per CTH 980060000. Since the goods have been imported on the basis of fake PSIC, they are liable to be confiscated in terms of Section 111(m). In the event of confiscation, the redemption fine under Section 125 has been rightly levied. As the importer company and its directorare responsible for the import having been made in violation of the statutory provisions and FTP 2015-2020, they are liable to penalty both under Section 112 (a)(ii) and also under 114 AA. We are also in agreement with the quantum of penalty levied on the importer company and its director under the impugned order. In view of our findings, the appeals filed by the importer company and its director are devoid of any merits. The consequential relief of re-export, in the facts of the case, needs to be affirmed on payment of redemption fine and also enhanced penalty both under Section 112 (a)(ii) and Section 114AA of the Act. Thus, the appeals filed by the Department also deserves to be dismissed.

30. We do not see any reason to interfere with the impugned order.

Accordingly, all the four appeals filed by the department as well as the appeals filed by the importer company and its director needs to be dismissed. The miscellaneous application and the applications for stay standdisposed of.

31. The appeals stand dismissed. [Order pronounced on 26.09.2023]

(Binu Tamta)Member (Judicial)

(P. V. Subba Rao)Member (Technical)

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI. PRINCIPAL BENCH – COURT NO.III

Customs Appeal No.54929 of 2023 with Customs Misc. Application No.50334 of 2023

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

M/s. Bright Metal India Pvt. Ltd. — Appellant
F-671, Road No.9F2, VKI Area,

Jaipur, Rajasthan.

Versus

Commissioner of Customs, Central Excise & CGST, — Respondent
NCRB, Statue Circle, Jaipur, Rajasthan-302 005.

With

Customs Appeal No.54930 of 2023

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Sanjay Porwal, Director — Appellant
of M/s. Bright Metal India Pvt.Ltd.
C-5, Krishna Marg, Shyam Nagar, Ajmer Road, Jaipur,

Rajasthan.

Versus

Commissioner of Customs, Excise and **CGST,** — Respondent

NCRB, Statue Circle, Jaipur, Rajasthan-302 005.

With

Customs Appeal No.55115 of 2023

With Customs Stay Application No.50448 of 2023

Commissioner of Customs (Preventive) — Appellant
NCRB, Statue Circle, “C’ Scheme, Jaipur, Rajasthan-302 005.

Versus

Shri Abdul Kadir S/o Ismail, — Respondent
Prop. of M/s. Reliable Agencies,

Karim Industrial Estate, Opp. Dada Mill, Near Dream Honda Showroom,

Udhna, Surat, Gujarat-394 210.

With

Customs Appeal No.55117 of 2023

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Commissioner of Customs (Preventive) Appellant
NCRB, Statue Circle, "C" Scheme, Jaipur, Rajasthan-302 005.

Versus

M/s. Bright Metal India Pvt. Ltd. Respondent
F-671, Road No.9F2, VKI Area,

Jaipur, Rajasthan.

And

Customs Appeal No.55118 of 2023

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Commissioner of Customs (Preventive) Appellant
NCRB, Statue Circle, "C" Scheme, Jaipur,Rajasthan-302 005.

Versus

Shri Sanjay Porwal, Director of Respondent
of M/s. Bright Metal India Pvt. Ltd.,
C-5, Krishna Marg, Shyam Nagar, Ajmer Road, Jaipur,

Rajasthan.

APPEARANCE:

Shri S.L. Poddar and Shri J.P. Singh, Advocates for the assessees. Shri Rakesh Kumar, Authorised Representative for the Revenue.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL) HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NOS.51371-51376 /2023

DATE OF HEARING:27.07.2023 DATE OF DECISION:26.09.2023

BINU TAMTA:

All the six appeals, four filed by the Department and the remaining two by the importer company and its Director, arise out of the common order, being Order-in-appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023. The parties are referred to in their capacity as in Appeal No.54929 of 2023, titled as M/s. Bright Metal (India) Pvt. Ltd., Jaipur Vs. Commissioner of Customs, Central Excise and CGST, Jaipur.

2. The facts of the present case are that the importer company had imported Brass Scrap "Pallu" for its business vide Bill of Entry (BOE) No.6601963 dated 09.12.2021, which was filed at ICD (Inland Containers Depot), Concor, Kanakpura, Jaipur under the provisions of Section 46 of the Customs Act, 1962 through Kodiak Containers Lines Pvt. Ltd., Code No.AADCK2481PCH001 having assessable value of Rs.90,23,371/- as the tariff value fixed for Brass Scrap (all grades) under CTH 74040022 @ 5691 USD/MT vide Notification No.95/2021 – Customs (N.T.) dated 30.11.2021 and classification of the same was made under CTH (Customs Tariff Heading) 74040022 and duty was self-assessed BCD(Basic Customs duty) @ 2.5% + SWS (Social Welfare Surcharge) @ 10% + IGST @ 18%.

3. The importer company had uploaded documents regarding its BOE No.6601963 i.e. Bill of Lading bearing reference no.SASLNH21715 dated 28.11.2021, Container No.SVWU9892740/40, Seal No.017410, Port of Lading JEBEL ALI (UAE) along with Pre-Shipment Inspection Certificate (PSIC) issued by Pre-Shipment Inspection Agency (PSIA) bearing certificate No.WFZE/SHJO/9959/2021 dated 13.11.2021, which duly mentioned type of scrap – unshredded, Country of Origin – UAE, Place of Inspection – Sharjah and duly enclosed Commercial Invoice, Packing List, Sales Contract, Certificate of Origin and Form 6 (Transboundary movement document) mentioning country of import/export as UAE issued by M/s. Aden Scrap Trading (LLC), UAE.

4. The said BOE was given first check by faceless assessing officer and received on the port, i.e. ICD, Concor, Kanakpura for examination first. However, the container tracking on PICT (Pakistani International Container Terminal) divulged that the container had actually originated from Pakistan as the seal numbers mentioned for the container on PICT matched with those mentioned in the Indian Customs EDI (Electronic Data Interface) Systems (ICES).

5. The importer company submitted to the officers of the Customs that they had imported the goods from UAE with complete documents (as required for import) and that they had no knowledge about the discrepancy of goods as the importer company has no connection with the supplier in Pakistan. They further submitted that the importer company had never contacted any person in Pakistan for importing brass scrap or any other commodity and they always imported the goods through middleman
i.e. Indenter, and the goods mentioned in BOE No.6601963 was imported through Indenter Mr. Abdul Kader Bombaywala, who is based in Surat. However, the Customs Officers were not convinced about the averments made by the importer company that time and thereafter seized the goods vide BOE 6601963 vide seizure memo dated 19.12.2021.

6. That as the Customs officials alleged that the goods originated from Pakistan instead of UAE, the importer company had submitted applications dated 20.12.2021, 02.03.2022 and 30.12.2022 to the customs authorities to cancel the bill of entry under Section 149 of the Customs Act, 1962 and they may be allowed to re-export the goods back to the UAE at the earliest to avoid any detention/demurrage/ground rent charges.

7. On scrutiny of the Bills of Entries submitted by the appellant in respect of the past imports, it was found that same modus operandi was adopted as the container tracking on PICT divulged that the containers had actually originated from Pakistan, the details of 6 Bills of Entries filed and cleared is as under :-

S. No.	B.E. No.	BE date	Total Ass.Value
1.	2643706	06.02.202	8985522
2.	2797226	17.02.2021	8747005
3.	5063295	16.08.2021	8808842
4.	5173059	24.08.2021	7412945
5.	5407130	11.09.2021	7443238
6.	6430842	27.11.2021	8715980

8. That in follow-up action, premises of Mr. Abdul Kader Bombaywala, Indenter of the importer company was searched and statements of Mr. Abdul Kader and Shri Kailash Vittal Mhatre, Sr. Manager, M/s. Hub and Links India Pvt., Ltd. were recorded. As the Importer Company was found to have mis-declared the country of origin as UAE instead of Pakistan with intent to evade customs duty and mis-classified the goods under CTH 74040022 instead of 98060000, the goods imported were seized by the

Customs officers under Section 110 of the Customs Act, 1962 (the Act). Accordingly, show cause notice dated 15.06.2022 was issued to the Importer Company and its Directors, which was duly replied by them.

9. Having examined the matter, the Adjudicating Authority passed the order-in-original dated 24.02.2023, whereby the imported goods were confiscated under Section 111(m) and the Importer Company was allowed to redeem the goods for re-export on payment of redemption fine of Rs.10 lakhs under Section 125 of the Act and also imposed penalty of Rs.3 lakh each under Section 112(a)(ii) and Section 114 AA of the Act on the Importer Company. Penalty of Rs.1,50,000/- each under Section 112 (a)(ii) and Section 114 AA of the Act imposed on Shri Sanjay Porwal, Director of the Company. Penalty of Rs.3 lakh each was imposed on Mr. Abdul Kadir under Section 112(a)(ii) and 114 AA of the Act. Similarly penalty of Rs. 3 lakh each was imposed on M/s. Hub and Links India Pvt. Ltd. under Section 112 (a)(ii) and Section 114 AA of the Act. The said order was challenged, both by the Revenue as well as by the Importer Company and its Directors. The Commissioner (Appeals) affirmed the order of confiscation, allowing of redemption of the goods for re-export of payment of redemption fine of Rs.10 lakh. However, the penalty amount was enhanced on the Importer Company from Rs.3 lakh to Rs.10 lakh under Section 112 (a)(ii) and Rs.3 Lakh to Rs.15 Lakhs under Section 114 AA of the Act. Penalty on Shri Sanjay Porwal was enhanced from Rs. 1,50,000/- to Rs.5 Lakh under Section 112 (a)(ii) and from Rs.1,50,000/- to Rs.15 Lakh under Section 114 AA of the Act. Hence, the present appeals have been filed before this Tribunal both by the Revenue as well as by the Importer Company and its Director.

10. We have heard Shri Rakesh Kumar, Authorised Representative for the Revenue and the learned Counsel for the appellant, Shri S.L. Poddar.

We have examined the records of the case and the legal provisions, as interpreted in catena of judgements.

11. Since we are considering the appeal filed by the Importer Company as the lead matter, we would refer to the contentions raised by them, which are as under:-

(a) Investigation and inquiry were inadequate and incomplete as no investigation was conducted with their supplier in UAE or the original supplier in Pakistan.

(b) There is no allegation in the show cause notice that there was acute shortage of Brass Scrap in the international market at the material time or they have purchased at less than the prevailing price in the international market forcing them to procure the goods from Pakistan. In other words, there is no allegation that there was incentive for the company to import the goods of Pakistan origin. Thus, there is no evidence that the Importer Company knowingly and intentionally mis-declared the country of origin.

(c) That all the relevant documents, as submitted by their suppliers in UAE were duly filed by them before the Customs Authorities.

(d) The information obtained from PICT website is not authentic and reliable and relied on the decision of the Apex Court in **M/s. Hewlett Packard India Pvt. Ltd. – 2023 (1) TMI 700,** which says that online sources such as Wikipedia should be used with due caution to support the conclusion of the investigation.

(e) Re-exporting the goods would serve the purpose sought to be achieved by the Government of India in imposing BCD at 200% on the goods originating in Pakistan and referred to the decision in **M/s. Raj Grow Impex LLP & Ors. – 2021 (377) ELT 145,** whereby the Apex Court allowed re-export of the imported beans, peas and pulses, though they were held to be prohibited. The redemption fine and penalty in case of re-export of the goods is not imposable.

(f) The goods are not liable to confiscation under Section 111 (m) of the Act.

(g) Penalty under Section 112(a)(ii) and Section 114 AA of the Act are not sustainable.

12. The learned Authorised Representative for the Revenue has seriously challenged the decision of the lower authorities both on account of allowing re-export of the goods on payment of meagre amount of redemption fine as well as on the quantum of penalty under section 112 (a) and 114AA being not commensurate with the gravity of the case or in terms of the provisions thereof. The submission in this regard is that prerequisite for the import of unshredded metal scrap is restricted by the condition of proper Pre Shipment Inspection Certificate and therefore the goods have to be treated as 'restricted goods'. In the present case the goods have been imported on the basis of fake PSIC certificate which means import is without any certificate. The other limb of the argument is that in the show cause notice there is no proposal for re-export of the impugned goods and therefore the adjudicating authority had no jurisdiction to order re-export. The proposal of re-export are separate from the adjudication proceedings. Referring to the provisions of section 112 (a) (ii)of the Act the learned AR contended that the penalty recommended therein is not exceeding 10% of the duty sought to be evaded whereas the amount of duty, which is sought to be evaded here is Rs. 2,97,73,709/ and therefore maximum penalty was imposable. Similarly, the penalty under section 114AA has to be five times the value of the goods and the value of the declared consignment was Rs. 1,14,15, 967/- and, therefore, penalty imposed by the authorities does not commensurate with that.

13. Before adverting to the controversy involved in these Appeals it is necessary to notice that the Central Government issued Notification No 05 of 2019-Cus., dated 16.02.2019 under section 8A of the Customs Tariff Act, 1975 (hereinafter referred to as CTA) amending the first schedule of CTA, thereby inserting a new entry CTH 9806 0000 for all goods originating in or exported from Pakistan and levied BCD @ 200% on them. The entry relating thereto reads as:-

(1)	(2)	(3)	(4)	(5)
"9806 0000	All goods originating from the Islamic Republic	--	200%	

	of Pakistan			

Country of Origin:

14. The first and the foremost question to be considered is whether the goods in question originated in or were exported from Pakistan. The goods in question were shipped in container No. SVWU9892740/40. On the basis of the information from the Additional Director General, National Customs Targeting Centre (NCTC), New Delhi that the said container was at high risk as it had originated from Pakistan investigations were carried out. Accordingly, the container No SVWU9892740/40 with seal No. 017410 relating to Bill of Entry No. 6601963 dated 9.12.2021 was verified from the website of Pakistan International Container Tracking Portal (PICT) https:/pict.com.pk/en/online-Tracking and it revealed that the seal No. affixed on the said container was the same as originated from Pakistan. Further, on physical examination of the goods some worn and torn PP bags filled with brass scrap were found on which the words Karachi, Pakistan, Government of Punjab, Korangi Industrial Area etc. were found printed. Coupled with this, the tracking details also revealed the actual arrival date of the said container, i. e. the B/L from Karachi to JEBEL ALI was issued on 18.11.2021 at Karachi and B/L from JEBEL ALI to Nhava Sheva was issued on 28.11.2021 and the container was found to be intact with the same seal throughout from Pakistan to India. This only reflects that there could not have been any inspection at Sharjah, UAE as per the PSIC Certificate dated 13.11.2021 issued by PSIA and therefore the necessary corollary is that the PSIC was fake and forged. This also points to the fact that the container in question originated from Pakistan.

15. We also find that statement of Shri Kailash Vitthal Mhatre, Senior Manager, M/s HUB & Links Logistics (I) Pvt. Ltd., the delivery agent, was recorded wherein he explained the container wise chart as:

Column No. 1 gives the details of container number.

Column No. 2 provides the details of B/L number and date issued from Karachi.

Column No. 3 refers to the container seal number

at Karachi.

Column No. 4 gives the name of goods as per B/L and quantity.

Column No. 5 shows destination as per B/L

issued at Karachi.

Column No.6 provides name of the vessel and reaching at destination as per B/L issued at Karachi.

Column No.7 shows B/L number and date issued at JEBEL ALI.

Column No.8 shows container seal number as per B/L issued at JEBEL ALI.

Column No.9 gives the name of goods and quantity as per B/L issued at JEBEL ALI.

Column No.10 shows destination as per B/L issue at JEBEL\ ALI.

Column No. 11 shows name of vessel as per B/L issued at JEBEL ALI.

The aforesaid container wise chart details clearly show that the initial details pertain to

Karachi and it is the later ones which relates to JEBEL ALI. This itself proves that the country of origin of the containers is Pakistan and not UAE where the containers have been shown to have arrived later on with the sole object of misleading the country of origin. This conclusion of ours gets further fortified by the earlier six imports managed by the importer company by following similar modus-operandi that the goods in question were loaded in these containers in Karachi Port and were then transported to JEBEL ALI and from there it was transported to Indian ports. The goods once loaded at Karachi were not unloaded from the containers at JEBEL ALI and only B/L date of these containers were changed and all other details, i.e., B/L No., description of the goods, quantity, container number and seal number remained the same. There is no reason to disprove and disregard the aforesaid modus-operandi mentioned in the statement of Shri Kailash Vitthal Mhatre recorded under section 108 of the Customs Act, 1962. The documents showing the movement of the container with goods from Karachi to JEBEL ALI, container wise sheet, container wise tracking details obtained from PICT website clearly indicated that the containers originated from Pakistan. We also do not agree with the reliance placed by the learned Counsel for the appellant on the decision of the Apex Court in Hewlett Packard (supra) which is clearly distinguishable from the facts of the present case. The department having found that the goods originated from Pakistan was not wrong in re-classifying the goods under CTH 98060000 as per Notification No. 5 /2019-Cus dated 16.2.2019. Nothing further was required to be done at the end of the department as pleaded by the importer company. The justification or non-justification of procuring the goods i. e., Brass scrap "Pallu" from Pakistan was on the importer company which they failed to substantiate by any valid supporting evidence. The burden was exclusively on the importer company and not on the revenue to place on record positive evidence in support of their submissions. ***Responsibility of the Importer Company:***

16. Having determined the country of origin of the containers in question we would now examine the defence taken by the learned Counsel for the appellant that they had no knowledge about the country of origin being Pakistan and that they have no connection with the supplier in Pakistan and therefore they have neither mis-declared nor misled the department. In fact the importer company had gone to the extent of saying that they have no means to find out the country of origin of the goods as they do not directly deal with the suppliers rather there are intermediary agents / indenters who process the imports. We do not agree with the submissions of the appellant for the simple reason that the appellant claims to be a very reputed company in the business of manufacturing of brass and copper items for which they have been importing raw material namely, brass/copper scrap from different places outside India. The importer company on the one hand is claiming to be a 'one star export house' and on other hand is pleading ignorance of such basic facts. Declaring the Country of Origin is an essential part of the Bill of Entry and the assessment, *inter alia*, depends on the Country of Origin. Duty could be exempted or increased (as in this case) depending on the Country of Origin. Restrictions on imports and exports could also depend on the Country of Origin. The Country of Origin Certificate also has to be obtained from the authorized agency of that country. Pre-shipment inspection certificates have to be obtained from the agency, which is authorized to issue such certificate in the country, where they are exported from. Thus, it is impossible that any importer would not know both the Country of Origin and the Country of Export of every single consignment. The appellant being an importer, who seems to be well versed with the import-export policy is responsible for the import and is answerable for any violation of the statutory provisions, mis-declaration or any issues relating to the nature, quantum or valuation of the goods, factum of country of origin etc. and cannot plead ignorance thereof. The appellant has attributed the burden of mis-declaration of the country of origin as UAE on the supplier or the indenter, however the same is not believable as the appellant is a regular importer of these goods and during the investigation of the live consignment the past imports were also unearthed which were also routed in similar fashion.

The Handbook of Procedures 2015-2020, Para 2.56 (b) also makes the importer and exporter responsible as under:-

"2.56 Responsibility and Liability of PSIA, Importer and Exporter

(a) ……..

(b) The importer and exporter would be jointly and severally responsible for ensuring that the material imported is in accordance with the declaration given in PSIC. In case of any mis-declaration, they shall be liable for penal action under Foreign Trade (Development & Regulation) Act, 1992, as amended."

17. The next contention of the appellant is that they have submitted all the requisite documents showing the country of origin as UAE. As noted above, there is complete discrepancy as the PSI Certificate dated 13.11.2021 shows the date of inspection as 11.11.2021 at Sharjah, UAE whereas the containers itself departed from Pakistan on 18.11.2021 as per the B/L from Karachi to JEBELALI, therefore the only logical conclusion is that the certificate is fake or has been forged and no inspection was actually conducted at Sharjah, UAE. We find that the authorities below have rightly observed that in terms of Para 2.32 of FTP 2015-2020 read with para 2.54 of Handbook of Procedures, such PSI Certificate is not valid and no reliance can be placed thereon.

Confiscation of Goods:

18. We now come to the issue whether goods are liable to confiscation under section 111 (m) of the Act. Having considered in extenso that the country of origin of the containers in question is Pakistan, the same are covered by the notification No. 05/2019, specifically issued to provide high rate of duty for all goods originating in or exported from the Islamic Republic of Pakistan. As discussed above, the PSI Certificate submitted by the appellant having been found to be fake, the import is violative of the Foreign Trade Policy and Rule 13 of the Rules which makes it mandatory to submit the pre shipment inspection certificate for clearance of the brass scrap, however in the present case there is no valid PSIC in respect of the imports in question. The issue needs to be examined in the light of the provisions of section 46 under which the appellant had filed the bill of entry for home consumption as the provisions thereof makes it obligatory on the part of the importer to make a declaration as to the truth of the contents of such bill of entry and shall in support of the same produce to the proper officer the invoice relating to the goods under import. The appellant has submitted commercial invoices along with bill of lading etc showing the country of origin of the goods as UAE, however as discussed above, country of origin of the goods herein is Pakistan. In that view, the goods are liable for confiscation under section 111 (m) of the Act, which categorically provides any goods which do not correspond in respect of value or 'in any other particular' with the entry made under this Act. Thus the order of confiscation passed by the authorities is held to be in accordance with law.

Penalty under Section 112 (a)(ii) and 114AA of the Act:-

19. Both the importer company and its Director has challenged the levy of penalty under section 112 (a) (ii) and 114 AA of the Act on the ground that they were neither aware of the origin of the goods from Pakistan nor had any intent to import the goods having their origin in Pakistan and hence they cannot be penalised. We are afraid we do not agree

with this submission in view of the entire discussion above which prima-facie points to the acts of omission and commission on the part of the importer, M/s. Bright Metal (India) Pvt. Ltd., who imported the goods vide bill of entry No. 6601963 dated 9.12.2021 and Sanjay Porwal being the active director of the importer company who looks after all the work of import of the goods and was fully responsible for purchase of the said goods and its clearance thereof, are liable to penalty under section 112 (a) (ii) and 114AA of the Act for contravention of the provisions of the Customs Act, 1962 read with FTP 2015-20. The conclusions arrived at by us gain support from the decision in **Collector of Customs, Bombay Vs. M/s Elephanta Oil & Industries 2003 (152) ELT 257 (SC)**, wherein the Apex Court distinguishing the provisions of section 112 (a) imposing penalty and section 125 providing for redemption fine, upheld the imposition of penalty under section 112 of the Act, observing :

"10. From the aforesaid two sections, it is apparent that both operate in different fields, namely, one requires imposition of penalty and other provides for confiscation of improperly imported goods. Section
111 provides that goods brought from the place outside India are liable to confiscation if the goods are improperly imported as provided therein. In cases where goods are liable to confiscation, discretion is given to the authority to impose penalty. Further, Section 125 empowers confiscation of such goods and thereafter, confiscated goods vest in the Central Government. The Section further empowers the authority to give an option to the owner or the person from whom goods are seized to pay fine in lieu of such confiscation for return of the goods and the fine is also limited up to the market price of the goods. Therefore, levy of fine in lieu of confiscation is in addition to levy of penalty imposable under Section 112."

20. We are also of the view that the quantum of penalty imposed by the impugned order is justifiable. Section 112 (a)(ii) provides for duty related penalty, i.e., penalty not exceeding ten percent of the duty sought to be evaded. Thus the outer limit or the maximum amount of penalty that could be levied could not be more than ten percent of the duty. Similarly, the penalty under section 114AA is value related, i.e., penalty not exceeding five times the value of goods. Here also the Commissioner has proportionally increased the penalty and we find no reason to interfere with the same. Normally, the principle in levying penalty by way of punishment has to commensurate in terms of the provisions providing the penalty. As against the penalty imposed by the adjudicating authority, the appellate authority has considerably increased the penalty amount on all counts both against the importer company and also its director which is not only sufficient to penalise them but would also act as a deterrent in future. Hence no interference is called for by us. The reliance placed by the Revenue on the decision of the Apex Court in **CC, Mumbai Vs. Mansi Impex - 2011(270) ELT 631** is of no assistance in the present case, where the Court dealt with the levy of redemption fine and penalty without determination of the market price of the goods confiscated and therefore reduction of the same by the Tribunal was not interfered with.

Re-export & Redemption Fine with Penalty:

21. We find that immediately after the seizure of the goods on 19.12.2021 the appellant on the very next day made an application dated 20.12.2021 requesting to re-export the goods back to UAE. The appellant repeated the request on 2.03.2022 and subsequently on 30.12.2022. Accordingly, the adjudicating authority vide order in original dated 24.04.2023 confiscated the goods under Section 111(m) and gave an option to the appellant to redeem the goods and re-export them on payment of redemption fine under section 125 of the Act. The said order has been maintained by the Commissioner (Appeal) by the impugned order

relying on the decisions of the Supreme Court and the Tribunal holding that request of the importer for re-export is in consonance with the underline object of issuing the notification dated 16.02.2019 under section 8A of the Customs Tariff Act. We may now consider whether the request of re-export has been rightly allowed by the authorities below as well as on the issue of imposition of redemption fine when the goods are allowed to be re-exported back. The department has raised an objection that permission for re-export on a request made by the importer company is not within the purview of the adjudication proceedings in view of the decision of the Tribunal in **Hemant Bhai R. Patel V Commissioner of Customs 2003 (153) ELT 226 (Tri. - LB).** We find that the goods declared as Brass Scrap "Pallu" are neither restricted nor prohibited goods and are freely available for import. We would like to refer to the relevant part of Para 2.54 of Handbook of Procedures 2015-2020, which reads as :-

"**2.54 Import of Metallic Waste and Scrap Import**

Import of any form of metallic waste, scrap will be subject to the condition that it will not contain hazardous, toxic waste, radioactive contaminated waste / scrap containing radioactive material, any type of arms, ammunition, mines, shells, live or used cartridge or any other explosive material in any form either used or otherwise.

(a) Import of following types of metallic waste and scrap will be free subject to conditions detailed below:

Sl.No.	Exim Code	Item description
9.	74040010	Copper Scrap
10.	74040022	Brass scrap

The show cause notice proposed confiscation of these goods under section 111(m) of the Act on the ground that the country of origin has been mis-declared by the importer company as UAE instead of Pakistan and consequently mis-classified the goods under CTH 7404 0022 instead of correct classification in terms of the notification as CTH 9806 0000 by submitting false and incorrect documents. It is only after the proposed charge is made for confiscation of goods, the provisions of section 125 of the Act comes into play whereby the adjudicating authority is empowered to offer an option to the owner of the goods to pay fine in lieu of confiscation. Therefore, proposal in the show cause notice is restricted to confiscation of goods under the respective provisions and it is then within the jurisdiction of the adjudicating authority to order confiscation and at the same time exercising its powers under Section 125 allowing the importer to redeem the goods on payment of fine as ordered. At the stage of issuing the show cause notice, it is not within the jurisdiction of the department to invoke the provisions of section 125 of the Act but that does not restrict the powers of the adjudicating authority to impose redemption fine in terms of section 125 of the Act. Once the goods are ordered to be confiscated they vest in the Central Government as per section 126 of the Act, however, if the importer exercises the option to redeem the goods on payment of fine as ordered by the adjudicating authority in terms of section 125 of the Act and a request is made for re-export, as noticed by this Tribunal in **K & K Gems V Commissioner of Customs, Mumbai-I 1998 (100) ELT 70 (Tribunal),** such re-export is a post redemption facility allowed to the importer at his request. Further, with reference to section 125, Tribunal observed that, "the fine envisaged thereunder is only to get over the order of confiscation irrespective of whether the goods are cleared for home consumption or for re-export."

22. The learned Authorized Representative vehemently opposed the permission for re-

export granted by the authorities below, however, we have already held that the same cannot be accepted. We, in arriving at the conclusion that the appellant having paid the redemption fine is entitled to redeem the goods and it is permissible to seek re-export thereof, are supported by the decisions of this Tribunal as well as of the superior Courts.

Our view is substantiated by the decision in **Escorts Herion Ltd. – 1997 (107) ELT 599 (Tribunal),** referred to by the learned Authorized Representative, where the Tribunal specifically stated –

"**5.** The other contention is not of any significance to the fact of the present case. By applying the ratio of the decision in *Padia Sales Corporation* v. *C.C.* all that would happen is that the permission granted for re- export to be set aside. The goods in other words would have to be cleared on payment of fine for home consumption. We are however told that the goods have already been exported. Apart from this, we do not find it possible to say that there is no provision in the law to permitting goods to be re-exported subsequent to their confiscation.

6. Section 125 of the Act does not specifically provide that an option may be given to redeem the goods for re-export. It empowers an adjudicating officer in case of goods the import of which is not prohibited and directing him, in the case of other goods, to give the owner of the goods, or where the owner is not known to the person from whose possession or custody the goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit. The section applies equally to export goods as well as imported goods. Where goods which have been tendered for export are ordered to be confiscated and an option to redeem them is given under that section, it would follow that option is for the export of the goods. This is no doubt different from re-export. However, re- export is a facility permitting export of goods which have already been permitted to be imported. Except in cases where export is prohibited by any law, those goods which have been imported may be permitted to be exported. The formal procedure of filing a shipping bill and observing other formalities relating to export of goods would have to be followed. There is nothing in the law prohibiting the Collector from permitting re- export of goods. This long standing practice only simplifies the procedural requirement of a complex and time consuming requirement. Therefore, when an adjudicating authority after ordering confiscation of imported goods permits their re-export the goods he is in effect first ordering the redemption for home consumption and thereafter permitting them to be re- exported. Each of these two actions is permitted by law. An order whereby both are combined therefore is not contrary to law."

In addition, we would like to point out the objections raised by the department in the case **Hemant Bhai R. Patel (supra),** which clearly reflects that the department accepts re-export as an option. The relevant paras from the decision in **Hemant Bhai R. Patel (surpa)** are as under:-

"6. The learned DR would on the other hand submit that a permission granted for re-export is irrelevant for exercise of the power to impose redemption fine when goods are confiscated. Once the goods are confiscated unless the importer redeems the goods by paying redemption fine he is not reacquiring the ownership of the goods which would entitle him either to clear for domestic consumption or for re-export.

7. The learned DR brought to our notice a decision of the Apex Court in ***M.J. Exports Ltd.*** **v.** ***CEGAT,*****1992 (60) E.L.T. 161** where the Supreme Court has affirmed re-export of imported goods. After rejecting the contention of the Revenue that if an importer intends to export the goods imported he should clear them for warehousing and then proceed in terms of Section 69…"

Similarly, the case law referred by the Revenue of **Preeti Exim Vs. CC, New Delhi – 2007 (214) ELT 555 (Tribunal-Delhi),** wherein the contention of the Revenue was that importer has to first redeem the goods by paying redemption fine and, thereafter, the customer can re-export the goods. The Tribunal observed as under:-

"**5.** I find that the issue raised by the appellant whether the imported goods are liable for fine and penalty in case the order regarding re-export was granted is answered by the Larger Bench of the Tribunal in the case of *A.K. Jewellers* (supra), after relying upon the decision of Hon'ble Supreme Court in the case of *Collector* v. *Elephanta Oil & Industries Ltd.* reported in 2003 (152) E.L.T. 257 held that power to levy the penalty under Section 112 of Customs Act for improper importation of goods is different from the power of confiscation of goods under Section 125 of Customs Act. The same view is taken by the Tribunal in the case of *Hemant Bhai R. Patel* (supra)."

24. In MJ Exports Ltd., V CEGAT 1992 (60) ELT 161, the revenue had raised an objection that law does not permit an import just for the purposes of export and goods once imported can be only for home consumption or warehousing. The Apex Court rejected the contention of the revenue and held:

"17. The above general consideration apart, there are other indications in the statute which show that the Act does not prohibit the export of imported goods. The Act provides that goods which are cleared from the customs area for warehousing can be cleared from the warehouse for home consumption (S. 68) or exportation (S. 69). At first blush, this may seem to support the Revenue's interpretation that clearance for exportation and clearance for home consumption are two different things. It is indeed suggested by State counsel that, if an importer intends to export the imported goods, he should clear them for warehousing and then proceed in terms of S. 69. But a little thought would show this interpretation cannot be correct. In the first place, where an importer, even at the time of the import purchase has decided to sell the goods in another country (as in the present case), he may, as pointed out earlier, easily ask the goods to be transmitted or transhipped to the country of sale and thus avoid any necessity for their being at all cleared in India. But where, for one reason or other, he wants to import the goods into India and then sell them to the foreign country or where the importer decides on an export sale only after he has arranged for the import of the goods into India, the Act prescribes no form of a Bill of Entry under which he can clear such goods intended for re-export. It would not be correct to insist that he must clear them for warehousing and then export them by clearing from the warehouse. Whether to deposit the goods in a warehouse or not is an option given to the importer. If he is able to pay the import duties and has his own place to stock the goods, he is entitled to take them away. But, where he has either some difficulty in payment of the duties or where he has no ready place to stock the goods before use or sale, he cannot clear the goods from the customs area. The warehouse is only a place which the importer, on payment of prescribed charges, is permitted to utilise for keeping the goods where he is not able to take the goods straightaway outside the customs area. There is nothing in the provisions of the Act to compel an importer even before or when importing the goods, to make up his mind whether he is going to use or sell them in India or whether he proposes to re-export them. Again, there may be cases where he has imported the goods for use or sale in India but subsequently receives an attractive offer which necessitates an export. It would make export trade difficult to say that he cannot accept the export offer as the goods, when imported, had been cleared for home consumption. S. 69, therefore, should be only read as a provision setting out the procedure for export of warehoused goods and not as a provision which makes warehousing an imperative pre-condition for exporting the imported goods. The second reason for not reading Ss. 68 and 69 as supporting the Revenue's interpretation is even more weighty. That interpretation would

mean that imported goods can be re-exported after being warehoused for some time (even a day or few hours) but that they cannot be exported otherwise. Such an interpretation has no basis in logic or sense and makes mincemeat of the broader principle contended for by the Revenue that imports are intended for use in the country and not for export. Incidentally, we may observe that even this principle contended for by Revenue may itself be of doubtful validity as it is based on an erroneous assumption that a re-export of imported goods will always be detrimental to the country. It is true that, in the present case, the appellant has been criticised for having utilised valuable hard currency for the purchases and reselling the goods only for rupee consideration. But, conceivably, there may be cases where an importer is able to import goods from a soft-currency area and sell them in a hard-currency area earning foreign exchange for the country. It is also possible to think of cases where, though economically unremunerative, the re-exports can be justified on considerations of international amity and goodwill such as for example, where the goods are exported to a country which is in dire need of help and assistance. The principle is also non-acceptable on the ground of vagueness as to the extent of its application to exports made after an interval or after changing several hands inside the country by way of sale. We are, therefore, unable to read Ss. 68 and 69 as supporting the Revenue's contention.

18. On the other hand, there are provisions which indicate that export of imported goods is very much envisaged under the statute. The provisions contained in S. 74 fully reinforce this interpretation. Indeed S. 74 would be redundant if the Department's stand that imported goods cannot be exported were to be accepted as correct. As pointed out by counsel for the appellant, para 174(1) of the Policy which reads :

"No REP benefits are admissible in the case of imported goods which are re-exported in the same State without undergoing any processing or manufacturing operations in India."

25. In **K & K Gems** (supra), the Tribunal while considering the issue that redemption fine cannot be levied for re-export as section 125 does not empower such a levy, distinguished the fine under section 125 as a condition for re-export and fine in lieu of confiscation under section 125 referring to the earlier decision in **Allen Bradley India V Collector 1992 (58)ELT 268**, where the Tribunal held that the goods need not have been subjected to confiscation and levy of fine in lieu of confiscation in view of clear findings that wrong goods had been shipped because of suppliers mistake and the importer had disclosed the fact to the department even before the examination of the goods. Thus, fine in lieu of confiscation has been found to be in consonance with the provisions of section 125 of the Customs Act, 1962 as an option to the importer to redeem the goods which have been confiscated and has not been made as a condition for re-export which had been allowed in response to the request made by the appellant therein.

26. The Apex Court in **Elephanta Oil and Industries** (supra) rejected the contention of the appellant therein that once the imported article is re-exported there is no question of levying any penalty or redemption fine holding that confiscation of goods and thereafter permitting the respondent to re-export the same would not mean that penalty under section 112 of the Act cannot be levied. Following the said decision of the Apex Court, the Larger Bench of the Tribunal in **A.K. Jewellers V Commissioner of Customs, Mumbai, 2003(155)ELT 585** dealt with similar issue:-

"Whether while passing an order under section 125 of the Customs Act the authorities can direct confiscation of goods and payment of fine in lieu of confiscation together with a direction to re-export the goods.
The Tribunal decided the issue in affirmative as under:-

"10. After going through the provisions of Section 125 of the Customs Act, we find that provisions of this section do not specifically provide that an option may be given to redeem

the goods for re-export. It empowers an adjudicating authority in case of goods the import or export of which is prohibited under Customs Act or under any law in force, to grant an option to pay in lieu of confiscation such fine as the said authority thinks fit. The provisions of this section equally apply to the goods to be exported as well as imported goods. Where the goods which have been tendered for export are ordered to be confiscated and an option to redeem the goods on payment of fine, it would follow that option is for the export of the goods. This is no doubt different from re-export. Re-export is a facility permitting export of goods which have already been permitted to be imported. Except in cases where import is prohibited by any law, those goods which have been imported may be permitted to be exported. The formal procedure of filing a shipping bill and observing other formalities relating to export of goods would have to be followed. There is no prohibition on the adjudicating authority from permitting re-export of the goods. When an adjudicating authority after ordering confiscation of imported goods permits their re-export, he is in effect first ordering the redemption of the goods on payment of fine and thereafter permitting them to be re- exported. Each of these two actions is independent and is permitted by law. An order whereby both are combined, therefore, is not contrary to law.

11. If we take up the issue from another angle that where the adjudicating authority allows re-export of the prohibited goods and in such a case, by holding that the order of confiscation and redemption fine is not justifiable, this will make the provisions of Section 125 of the Customs Act redundant which specifically empowers the adjudicating authority to exercise his powers in respect of prohibited goods. As confiscation and redemption fine in lieu of confiscation and re- export are two independent actions, hence the view taken that in case the assessee is allowed to re-export, the confiscation and redemption fine is not justified, is not a correct view. Further, we find that this view is also taken by the Hon'ble Supreme Court in the case of
C.C. v. *Elephanta Oil & Industries Ltd.* reported in 2003 (152) E.L.T. 257 (S.C.) rejected the contention of the importer that once the imported article is re- exported as directed by the department, there is no question of levying any penalty or redemption fine. The Hon'ble Supreme Court held that power to levy the penalty under Section 112 of the Customs Act for improper importation of goods is different from the power of confiscation of goods under Section 125 of the Customs Act. The question of law referred to the Larger Bench is answered accordingly."

27. Another Larger Bench of this Tribunal in **Hemant Bhai R Patel V Commissioner of Customs, Ahmedabad** (supra)distinguished the decisions of the Apex Court in **Siemens Ltd V Collector 1999 (113) ELT 776** on the ground that the issue whether redemption fine could be imposed when goods are liable to be confiscated even when re-export is permitted was not an issue before the Apex Court. Agreeing with the decision in **K & K Gems** (Supra), **Escorts Herion Ltd V Commissioner 1999(107) ELT 599, Kothari Filaments V Commissioner 2002 (144) ELT 80** and **Smt. Kusumbhai Dahyabhai Patel V Collector 1995 (79) ELT 292**, and also on the decision of the Apex Court in **M. J. Exports** (supra) the Tribunal decided the issue in affirmative holding that it is open to the adjudicating authority to impose redemption fine as well as penalty even when permission is granted for re-exporting the goods. The Department has relied on the observations of the Tribunal in the case of **Hemant Bhai R. Patel (supra)** that, " A permission granted for re-export on the basis of a request made by the owner of the goods is outside the purview of the adjudication proceedings, as mentioned above". We are of the view that the issue before the Tribunal was not whether the Adjudicating Authority had power to order for re-export or not rather the issue formulated for their reference related to power under Section 125 to impose redemption fine when confiscation is established and permission for re-export is granted. Therefore, the aforesaid observations relied on by the Department is erroneous as it amounts to obiter dicta and is, therefore, not binding. Moreover, once the Tribunal agrees with the

view taken in the cases of **K & K Gems,** etc. (referred above), the logical conclusion is that it upholds the view that option to the importer to redeem the confiscated goods on payment of fine is in consonance with the provisions of Section 125 and is not a condition for re-export. In so far as the decision of the Apex Court in **C.C., Kolkata Vs. Grand Prime Ltd. – 2003 (155) ELT 417** referred by the Revenue is clearly distinguishable as the goods were imported on the condition of re- export of finished/semi-finished goods qua the imports made.

Thus the issue is no longer *res integra* and hence we are of the considered view that re-export of the goods is permissible and both redemption fine as well as the penalty under section 112 and 114AA of the Act are leviable even if the goods on redemption are allowed to be re- exported.

28. The learned Counsel for the appellant has placed on record the latest decision of the Delhi High Court in **Ajay Kumar Gupta vs Commissioner of Customs 2023 (5) TMI 207**, inter-alia observing, that there is no provision under the Customs Act which entitles the revenue to retain the goods after the concerned party has paid the redemption fine as well as the penalty as determined. The Court further held that merely because the revenue seeks to challenge the order passed by the appellate authority is no ground for non compliance of the said orders. Here, the appellant has submitted that pursuant to the order in original, they have paid the redemption fine of Rs. 10,00,000/- and penalty of Rs. 6,00,000/-towards penalty on 3.04.2023, however the department has not permitted them to re-export the goods. In view of the decision in **Ajay Kumar Gupta** (supra) we have no hesitation in directing the department to allow the appellant to re-export the goods once they deposit the enhanced amount of penalty as directed in the impugned order. The importer company, namely M/s Bright Metal (India) Pvt. Ltd., and its Director, namely Sanjay Porwal may deposit the balance of the enhanced amount towards penalty under section 112 (a)(ii) and under section 114AA of the Act in terms of the impugned order within a period of three weeks and on such deposit being made, the department shall forthwith release the goods for the purpose of re-export.

29. We would now like to refer to the decision of the Apex Court in the case of **Union of India versus Raj Grow Impex LLP – 2021 (377) ELT 145 (SC),** which has been referred to both by the learned Counsel for the appellant as well as by the revenue. One of the issue considered was whether the exercise of discretion for absolute confiscation was justified. The Court while appreciating the relevant considerations and the principles for exercise of such discretion observed as :

"82. The sum and substance of the matter is that as regards the imports in question, the personal interests of the importers who made improper imports are pitted against the interests of national economy and more particularly, the interests of farmers. This factor alone is sufficient to find the direction in which discretion ought to be exercised in these matters. When personal business interests of importers clash with public interest, the former has to, obviously, give way to the latter. Further, not a lengthy discussion is required to say that, if excessive improperly imported peas/pulses are allowed to enter the country's market, the entire purpose of the notifications would be defeated. The discretion in the cases of present nature, involving far-reaching impact on national economy, cannot be exercised only with reference to the hardship suggested by the importers, who had made such improper imports only for personal gains. The imports in question suffer from the vices of breach of law as also lack of *bona fide* and the only proper exercise of discretion would be of absolute confiscation and ensuring that these tainted goods do not enter Indian markets. Imposition of penalty on such importers; and rather heavier penalty on those who have been able to get some part of goods released is, obviously, warranted.

84. Hence, on the facts and in the circumstances of the present case as noticed and dilated

hereinabove, the discretion could only be for absolute confiscation with levy of penalty. At the most, an option for re-export could be given to the importers and that too, on payment of redemption fine and upon discharging other statutory obligations. This option we had already left open in the order dated 18-3-2021, passed during the hearing of these matters."

30. Considering the aforesaid decision, we are of the considered opinion that the exercise of discretion both by the adjudicating authority as well as by the appellate authority in not ordering absolute confiscation and allowing the importer to redeem the goods on payment of redemption fine and penalty with permission to re-export the goods is in consonance with the object and purpose with which the notification was issued, i.e. to dissuade commercial transactions with Pakistan byimposing extremely high penalty of 200%.

31. Suffice it to say, that Notification No 05/ 2019 dated 16.2.2019 in simple words provides that the goods imported having country of origin as Islamic Republic of Pakistan shall be classified under the new entry CTH 9806 0000 and BCD @200% shall be applicable on them. It nowhere says that such goods shall not be allowed to be re-exported. It is a settled principle of law that the words of the notification has to be read as they are and the contents thereof cannot be added or expanded by way of implication. Since there is no express bar for re-export of such goods in the notification, we uphold the impugned order allowing the appellant to re-export the goods.

Conclusion

32. We, therefore conclude that the country of origin of the containers in question is Pakistan and therefore, the same are classifiable under the Notification No.5/2019 as per CTH 980060000. Since the goods have been imported on the basis of fake PSIC, they are liable to be confiscated in terms of Section 111(m). In the event of confiscation, the redemption fine under Section 125 has been rightly levied. As the importer company and its director are responsible for the import having been made in violation of the statutory provisions and FTP 2015-2020, they are liable to penalty both under Section 112 (a)(ii) and also under 114 AA. We are also in agreement with the quantum of penalty levied on the importer company and its director under the impugned order. In view of our findings, the appeals filed by the importer company and its director are devoid of any merits. The consequential relief of re-export, in the facts of the case, needs to be affirmed on payment of redemption fine and also enhanced penalty both under Section 112 (a)(ii) and Section 114AA of the Act. Thus, the appeals filed by the Department also deserves to be dismissed.

33. We do not see any reason to interfere with the impugned order.

Accordingly, all the four appeals filed by the department as well as the appeals filed by the importer company and its director needs to be dismissed. The miscellaneous application and the applications for stay stand disposed of.

34. The appeals stand dismissed. [Order pronounced on 26.09.2023]

(Binu Tamta) Member (Judicial)

(P. V. Subba Rao) Member (Technical)

Ckp.

Back

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI
PRINCIPAL BENCH, COURT NO. 4

CUSTOMS APPEAL NO. 50241 OF 2021WITH
CUSTOMS CROSS NO. 50167 OF 2021

[Arising out of Order-in-Original No. 83/MK/Policy/2020 dated 05.10.2020passed by the Commissioner of Customs (Airport & General), New Delhi]

COMMISSIONER, CUSTOMS (AIRPORT & GENERAL)NEW CUSTOMS HOUSE-NEWDELHI-110037 **Appellant**

Vs.

M/S ARADHYA EXPORT IMPORT CONSULTANTS PVT LTD **Respondent**

103, 1st Floor, Park View Plaza, Plot No. 9 LSC-3, Sector-6, Dwarka, New Delhi-110075

Appearance:

Present for the Appellant :Shri Munshi Ram Dhania, Authorised RepresentativePresent for the Respondent: Shri Ram Awatar Singh, Advocate

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL) HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 51380 /2023

DR. RACHNA GUPTA:

Date of Hearing : 03/08/2023

Date of Decision: 03/10/2023

1. Present is the common order for the aforementioned Customs Appeal No. 50241 of 2021 and cross objections filed by the respondent/assessee. The present appeal has been filed, pursuant to Review Order No. 116/2020-21 dated 04.01.2021, assailing the order-in-original bearing no. 83/2020 dated 05.10.2020 vide whichthe order of suspension of the respondent's licence was revoked.

2. The facts relevant for the present adjudication are as follows:

(i) There was an investigation report dated 28.07.2020 prepared by Nhava Sheva Preventive Unit (NSPU), Mumbai against an exporter M/s Fine Overseas having IECNo. BREPS9544C to have fraudulently availed IGST drawback and refund by using bogus manufacturing registration, GST invoice, where no GST duty was being paid to the exchequer but inadmissible refund was being claimed, on the basis of the said bogus invoices which were being disbursed equally to the FOB value of the shipping bill. It was revealed that the said exporterhaving declared IEC address as Barwalan, Shiv Shakti Ganga Mandir, Moradabad-

244001, had filed 08 shipping bills during the period August and September, 2018 with FOB amount of Rs. 2,10,14,834.8/- and claimed the IGST refund of Rs. 54,90,378/- for the export of goods i.e. "Clutch Plates & Glass Items, decor glass". The appellant also got it disbursed from the Government Exchequer.The said amount has been withdrawn to the current bank accounts of appellant with M/s Kotak Mahindra Bank Limited, Muradabad and M/s Allahabad Branch, Civil LinesMuradabad.

(ii) The exporter had two consignees/buyers based in UAE. Itwas also revealed that all the said 8 shipping bills were filed through the Customs Broker, namely, M/s Aradhya Exporter & Import Consultant Pvt. Ltd., the present respondent. The said customs broker was holding a customs broker licence bearing no. 33/2017 issued by New Delhi Customs valid upto 12.04.2027. However,based upon the said licence, he was also issued licence bearing no. 11/2439 to work in Mumbai Customs also. The Mumbai licence was also revoked vide order no. 15/202021 CBS dated 07.09.2020 and pursuant to the said order the Delhi Commissionerate also vide Order No. 73/2020 dated 15.09.2020 had suspended the CB licence No. 33/2017. Subsequently, vide Order-in-Original No.
83 dated 05.10.2020 the said suspension has been revoked and the same was reviewed vide the aforementioned review order. Pursuant to the said order, the impugned appeal has been filed by the Department with the prayer for setting aside the said Order-in-Originaldated 05.10.2020. The respondent CB have also filed theCross Objections in this appeal on 16 March, 2020 prayingfor the dismissal of the Department's appeal.

3. The arguments on both sides have been heard.

4. It is mentioned by Ld. Departmental representative (DR) that the present case is pursuant to a specific intelligence received by NSPU Mumbai about the specific exporter M/s Fine Overseas. When NSPU, Mumbai wrote a letter dated 18.1.2019 to CGST, Meerut requesting to conduct verifications and search at the office premises of the said exporter and also to serve the summons to the Director of the exporter asking him to appear before the NSPU, Mumbai. The Meerut Commissionerate vide letter dated 04.02.2019 responded thatthe exporter, M/s Fine Overseas, was not found existing at the given address and on inquiry about the said addressee, nobody could tell about the present whereabouts. Resultantly, the summons could not be served. It is impressed upon by Ld. DR that the said report was sufficient evidence proving the non-existence of the exporter at the address declared in IEC.

5. Learned DR further impressed upon that as per RBI remittance report, expected realization of exports by M/s Fine Overseas was Rs. 2,10,14,836/- against 8 shipping bills but the remittance of only41,575 USD against one shipping bill was realized, as per the RBI data integrated in ICES. It is impressed upon that these observationswere sufficient to hold that the exports vide the above mentioned shipping bills were made not to realise the export proceeds, but to claim IGST refund by using bogus GST registration, bogus GST invoices and IEC. The exporter had already fraudulently claimedIGST refund, despite the fact that the same was ineligible and moreso because there is non-realization of full amount of export proceeds from the foreign buyer. Investigations have sufficiently proved that the exporter firm was existing only on papers. It was created in the name of one Shri Sirajul Kallu, the IEC was obtained and the bank account was also opened in the name of said Shri Sirajul Kallu, who had never appeared before the authorities. One Shri Zoheb Moin, had appeared for the exporter as its authorized representative and twice his statement was recorded. It is submitted that he could not satisfactorily explain the findings of the investigation report. The customs broker also failed to appear except that his G-Card, Shri Vinay B. Rane appeared and got his statement recorded. Perusal of these statements is sufficient to show that the customs broker has failed to exercise the due diligence and to verify the correctness ofIEC and GSTN. The licence was rightly suspended vide order dated 15.09.2020. The suspension has wrongly been revoked vide the impugned order-in-original dated 05.10.2020. The said order is, accordingly, liable to be set aside for the ground mentioned in the Review Order dated

04.01.2021 and the grounds taken in the impugned appeal.

6. Learned authorized representative has relied upon followingauthorities;

(i) K M Ganatra [2016-TIOL-13-SC-CUS]

(ii) Millenium Express Cargo Pvt Ltd. Vs. Commissioner ofCustoms, New Delhi [2017 (346)ELT 471 (Tri.-Del)]

7. While rebutting these submissions, Ld. Counsel of the respondent CB mentioned that the exporter's authorized representative Shri Zoheb Moin/ the Manager appeared before the Mumbai Customs on 04.04.2019. He tendered his statement along with rent agreement of his firm's premises supplier's tax invoices, supplier's e-way bills and also stated that his firm is regularly filling GST returns.

8. As regard to the remittances, it is impressed upon that remittance of only one shipping bill has been realized. It is very much apparent from the statement of the G-Carg holder of CB Shri Vijay B. Rane that CB got KYC documents from the exporter. Hence, the order dated 15.09.2020 has wrongly held that CB has failed to comply with Regulation 10(e) and 10(n) of CBLR, 2018. Ld. Counsel impressed upon that based on both these statements, the suspension has rightly been revoked vide order dated 15.10.2021 order under challenge.

9. It is submitted that the report of Meerut GST about non-existence of the exporter is a false report which is evident from the letter of Meerut GST dated 25.10.2019 served to the exporter at the same address pursuant whereto exporter appeared before the customs on 04.04.2019. It is impressed upon that otherwise also customs broker is not liable to physically verify the exporter's premises. Learned counsel further brought to the notice the other evidences as were produced by the customs broker before the adjudicating authority during personal hearing as was held in terms ofRegulations 16 (2) of CBLR, 2018. These include the record of postal authorities of delivering customs broker's speed post to the exporter at the same address as mentioned in IEC. Also the proof from Blue Dart courier which picked up a parcel from the said exporter's addressand delivered the same to the customs broker's Delhi address. Otherwise also the respondent CB has taken PAN Card, bank account statement from the exporter which is sufficient KYC, compliance as prescribed in Board Circular No. 09/2010 dated 08.04.2010. It is thus impressed upon that the allegations that CB handled exports of non-existent exporter involving inadmissible IGST refund of morethan Rs. 54.90 lakhs was wrongly been made the basis for suspensionof the CB's licence by the Mumbai Commissionerate. The suspension has rightly been revoked for want of non-involvement of the customs broker who duly complied with the KYC norms and exercised requisite due diligence. Thus, it has rightly been held in the order under challenge that CB has not violated Regulation 10(e) and 10(n) of CBLR, 2018. While relying upon the decision of this Tribunal in the case of **Commissioner of Custom, New Delhi vs. M/S CRM Logistics Pvt Ltd.** vide **Final Order No. 52053-52054/2021** dated**03.12.2021** the appeal is prayed to be dismissed.

10. Having heard the rival contentions and perusing the entirerecord, we observe and hold as follows.

11. The question to be adjudicated is:

(i) whether the respondent customs broker M/s Aradhya Export has violated Regulation 10(e) and 10(n) of CBLR, 2018. To adjudicate the same we observe following to be admitted and apparent facts on record;

(ii) Respondent CB was granted licence initially by Delhi Customs under Regulation 9 of CBLR, 2018. Based on the said licence he was issued licence by Mumbai Customs also to

function at Mumbai ports.

(iii) The CB has cleared 8 shipping bills for M/s Fine Overseas that too during a short period of August,2018 to September, 2018 with FOB amount of Rs. 2,10,14,836/-

(iv) The IGST refund of Rs. 54,90,378/- with respect to 8 shipping bills has already been claimed and availed from the Government Exchequer.

(v) Remittance of Rs. 41,575 USD against one shipping billwas realized as per RBI data integrated in ICES.

(vi) The exporter could not be served as was not found existing when summons were issued by the Meerut Commissionerate pursuant to the letter dated 18.01.2019 from NSPU Mumbai.

(vii) The director of the exporter Shri Sirajul Kallu hadnever ever appeared before the customs authority.One Shri Zoheb Moin represented himself as the manager of the exporter in Mumbai Customs who appeared on 04.04.2019 and got his statementrecorded on 04.04.2019 and on 12.07.2019 also.

(viii) The proprietor of the customs broker, namely, Shri Rajesh Gupta, also had never appeared either before the Mumbai Customs or before the Delhi Customs. It is only his G-carg holder, namely, Shri Vijay B. Rane who got his statement recorded.

(ix) The G-card holder, Shri Vijay B. Rane stated about receiving the documents of M/s Fine Exports from theiragent Shri Imran Khan who also did not appear before the authorities.

(x) In paragraph 14 of order dated 15.09.2020 it is also found recorded that Mr. Vijay B. Rane acknowledged that he was consciously and intentionally involved in assisting the impugned fraudulent exports in the name of bogus exporter firm to claim ineligible IGST refund amount.

(xi) Based on these apparent/ admitted facts that the licence of respondent CB was suspended vide order dated 15.09.2021 passed under Regulation 16(1) of CBLR, 2018. However, the said suspension has been revoked vide the order under challenge dated 05.10.2021 passed under Regulation 16(2) to CBLR, 2018.

Two obligations of CB are in question in the present case. The obligation under Regulation 10 (e) andobligation under 10(n). In view of above admitted facts Regulation vise findings of ours are as follows:

REGULATION 10 (e)

Regulation 10(e) reads as follows:

10(e) exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearanceof cargo or baggage;

12. For the violation of this Regulation what is important to be brought on record is that there was certain information imparted by the customs broker to the exporter and that the said information was incorrect. We do not find from the above facts nor from the other record of the impugned appeal that there was any such information given by the CB to the exporter which was later found false. These observations are sufficient for us to hold that violation of Regulation 10(e) of CBLR, 2018 is not apparent against the CB. The original adjudicating authority in paragraph 25.1.1 of order under challenge has appreciated the reply of the customs broker where it was stated that CB has never imparted any incorrect information

to the exporter nor even it is apparent from the statement of the G-card holder of CB that certain information was imparted to the exporter which was later found false. Once there is nothing on record to show not even in the show cause notice as to what information was imparted by CB to the exporter alleging violation of Regulation 10(e) has no meaning. Hence, we have no reason to differ from the findings of the order under challenge with respect to the alleged violation of 10(e) CBLR- 2018. In the cross objections filed by the respondent/assessee it has been conceded that there is no basis for alleged violation of Regulation 10(e) of CBLR. Findings to that extent in the order under challenge are confirmed.

Regulation 10(n) reads as follows:

10(n) verify correctness of importer Exporter Code (IC) number, goods and service tax identification number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information;

As per Board Circular No. 09/2010-Cus dated 08.04.2010 it is mandatory for the CHA to verify the genuineness of the Exporters/ firms at the declared address by using reliable, independent, authentic documents, data or information by submitting any twodocuments listed in the Annexure of the said Circular.

13. This regulation mandates a vigilant duty upon the customs broker that whosoever the exporter and importer reaches him for facilitating the respective import or export, he is supposed to verify the correctness of their import export code (IEC), Goods and Service Tax Identification number (GSTIN) along with other identity proofs. Additionally he has to ensure that the said importer/exporter is existing at a declared address. No doubt, there have been catena of decisions holding that customs broker is not liable to physically inspect the premises existing at the address given in IEC. But from the above quoted provision & circular, it is clear that the customs broker has to use reliable independent and authentic information to ascertain the correctness of the particulars of IEC more particularly address mentioned therein.

14. As apparent from the above noted facts of this case, it is coming as an admission of CB's, G-card holder about the address as mentioned in IEC that the premises of the exporter was never visited by the customs broker. The documents required for export were also used to be received from the agent of the exporter, namely, Shri Imran Khan. Exporter has never appeared. Said Shri Imran Khan hasnot been produced either by the exporter or by the CB. The onus wasof CB to prove that the exporter was conducting its business through Shri Imran Khan at the premises as mentioned in IEC or at least to prove that he has verified the authority of exporting firm in favour of Shri Imran Khan. Nothing has been produced by CB to prove the same except the postal receipts between the two addresses. Otherwise also merely because CB obtained requisite documents does not tantamount to fulfillment of requirement of the Regulations relating to the features to be verified. The CB has not even claimed that it verified the existence of importer except stating about receiving documents from one Shri Imran Khan. There is apparent violation of Regulation 10(n). We draw our support from the decision of this Tribunal in the case of **Millenium Express Cargo Pvt Ltd. Vs. Commissioner of Customs[2017 (346) ELT 471 (Tri.-Del.)].**

15. Further, we observe that it is also coming from the apparent admission in the statement of G-card holder of CB that the CB was consciously and intentionally involved in assisting the fraudulent exports, to our opinion the delivery/ the service receipts from or at the address given in IEC has no meaning. It was more so required forCB to bring on record the cogent evidence when so named Shri ImranKhan failed to appear before the investigating

agency and Adjudicating authorities. There is no evidence produced by CB to show that Shri Zoheb Moin was ever authorized by M/s Fine overseas or that CB himself was ever in touch with said Shri Zoheb Moin. The statement of G-card holder, as has been taken as basis by the adjudicating authority while revoking the suspension, is also silent about Shri Zoheb Moin to ever been the authorized person of the exporter. Exporter has also not appeared to acknowledge Shri Zoheb Moin as its authorized person. Nor any authority in favour of Shri Imran Khan has been produced by respondent CB. Mere courier receipts to & fro CB and exporter address are not sufficient to prove existence of exporter at the address mentioned in IEC. In such circumstances, communication from Meerut Commissionerate dated 04.02.2019 informing that M/s Fine Overseas is not found existing at the given address not even the director of the firm could be found as none could tell about the name of the units and summons could not be served stands unrebutted. In the absence of the cogent evidence by the CB to prove the verification done at his end as required under Regulation 10(n), we have no reason to differ from the response of the Meerut Commissionerate about M/s Fine Overseas to be a non-existing exporter.

16. We further observe that there is the sufficient admission in statement of Shri Vijay B. Rane that CB had never visited exporter office/ factory located at Muradabad. CB was operating from Delhi as well as from Mumbai, there is nothing to produce on record to show the need as to why an exporter in Muradabad is exporting through Mumbai ports instead of Delhi ports which are much in proximity to the place called Muradabad. Absence of such reasoning is alsosufficient for us to hold that the customs broker was consciously involved in alleged fraudulent exports which otherwise has beenadmitted by his G-Card holder as observed above.

17. The Adjudicating authority while recording the extract of the statement of Shri Zoheb Moin has recorded that M/s Fine Overseas isa merchant exporter who purchased goods from various traders M/s Sai Enterprises, M/s Sai Traders and M/s SD Trading but the authorityhas ignored that the details of these traders have not at all been produced either by the exporter or the custom broker. Paragraph
25.2.5 of the order under challenge is silent to this effect. Once an exporting firm is alleged as fake/ non-existent and the CB is also alleged to have connived, the onus was of CB respondent to bring on record all requisite details to prove a valid chain of supplier, importer,CB and consignees abroad. Absence of such details on recordsupports our opinion to hold that the adjudicating authority has wrongly exonerated the CB from allegations of violating of Regulation 10(n). From the above discussion, we hereby accept all the grounds raised by the respondent/assessee in their cross-objection. We, accordingly, hold that the order under challenge, to that extent, is liable to the set aside.

18. At this stage comes the question of proportionality of punishment as to whether the revocation of customs broker licence will be proportionate punishment to the alleged violation by said CB ofRegulation 10(n).

19. For the purpose it is foremost necessary to appreciate the role of custom broker. Hon'ble Supreme Court in the case of **K M Ganatra**. Hon'ble High Court of Calcutta in the case of **Welcome Air Express Pvt Ltd. Vs. Commissioner of Customs. (Airport & Administration)[2022 (380) ELT 544 (Cal)** while considering the decision of Hon'ble Supreme Court in the case of Shri Kamashki Agency has hold as follows:

"19. Thus, any contravention of the obligations cast on the CHA even without intent would be sufficient to invite upon the CHA the punishments listed in the Regulations.

20. In Shri Kamakshi Agency the role of the CHA had been set out in the following terms:- The very purpose of grantinga license to a person to act as Custom House Agent is for transacting any business relating to the entry or departure ofconveyance or the import or export of goods at any customs station. For that purpose, under Regulation 9 necessary examination

is conducted to test the capability of the person in the matter of preparation of various documents, determination of value procedures for assessment and payment of duty, the extent to which he is conversant with the provisions of certain enactments etc.

Therefore, the grant of licence to act as a Custom House Agent has got a definite purpose and intent. On a reading of the Regulations relating to the grant of licence to act as Custom House Agent, it is seen that while Custom House Agent should be in a position to act as agent for the transaction of any business relating to the entry or departureof conveyance or the import or export of goods at anycustoms station, he should also ensure that he does not act as an Agent for carrying on certain illegal activities of any of the persons who avail his services as Custom House Agent.In such circumstances, the person playing the role of CustomHouse Agent has got greater responsibility. The very prescription that one should be conversant with the various procedures including the offences under the Customs Act to act as a Custom House Agent would show that while actingas Custom House Agent, he should not be a cause for violation of those provisions. A CHA cannot be permitted to misuse his position as a CHA by taking advantage of his access to the Department. The grant of licence to a person toact as Custom House Agent is to some extent to assist the Department with the various procedures such as scrutinizing the various documents to be presented in the course oftransaction of business for entry and exit conveyance or the import or export of the goods. In such circumstances, great confidence is reposed in a Custom House Agent. Any misuse of such position by the Custom House Agent will have far reaching consequences in the transaction of business by the Custom House officials.

20. In the present case from the above discussion it has come on record that M/s Fine Overseas is a firm existing only on the papers which was created in the name of Shri Sirajul Kallu. The exporter was not existing at the address mentioned in the IEC. The IEC and bank accounts were obtained for facilitating the fraudulent exports to avail ineligible IGST refund / drawbacks. From the RBI remittances report regarding accepted realization of exports by M/s Fine Overseas during the relevant period it has come on record that remittance of Rs. 41,575 USD against one shipping bill was realized as against an amount of Rs. 2,10,14,836/- for 8 shipping bills. To our opinion and in light of the unretracted admission of respondents/ CB's G-card Holder about involvement of CB in this transaction we hold that this isa case of not merely the violation of Regulation 10(n) but a case of fraud committed by CB and fraud vitiates everything. The cardinal principal which is enshrined in section 17 of the Limitation Act is that fraud nullifies everything.

21. This Tribunal in the case of **M/s Swastic Cargo Agency Limited vs. Commissioner of custom 2023 (2) TM 677(Tribunal-Delhi)** has held that this being a case of facilitating the fraudulent exports carried out and it being duly proved during the enquiry proceedings that the exporter were non-existent. CB isrightly held to have failed to verify the correctness of the document thereby violating its obligation as a customs broker even forfeiture of security deposit has rightly been ordered. In the light of the obligations conferred upon the CB by the Regulations CBLR, 2018 andthe proven fraudulent act and conduct of CB on record, we hold that suspension of his licence is quite a proportionate penalty. The order under challenge is upheld to this extent. In the light of the entire above discussion, holding that there is no violation of Regulation 10(e) has been set aside but violation of Regulation 10(n) of CBLR, 2018 by the appellant has been confirmed with confirmation that CB licence, in given circumstances is proportionate penalty. Hence, the appeal stands party allowed and cross-objections stands allowed,consequently licence stands suspended.

(Order pronounced on **03/10/2023**)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 53676 of 2018 [DB]

[Arising out of Order-in-Appeal No. 237(SM)CUS/JPR/2018 dated 10.08.2018 passed by the Commissioner of Central Excise & Central Goods and Service Tax (Appeals), Jaipur]

M/s. Vaibhav Global Ltd. **…Appellant**
E-68, EPIP, RIICO Industrial Area, Sitapura, Sanganer, Jaipur, Rajasthan - 302022

VERSUS

Commissioner of Central Excise and Customs, Central Goods and Service Tax, Jaipur I **…Respondent**

NCR Building, Statue Circle, C-Scheme, Jaipur, Rajasthan - 302005

APPEARANCE:

None for the Appellant

Shri Rakesh Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 04.10.2023 DATE OF DECISION: 04.10.2023

FINAL ORDER No. 51442/2023
DR. RACHNA GUPTA

None is present for the appellant. Perusal of appeal shows that the appeal is pending adjudication since the Year 2018. The authorized counsel for the appellant had once appeared in the Year 2019. There is no presence for the appellant w.e.f. July, 2019. Several notices of hearing subsequently have also been served upon the appellant. On the last date of hearing i.e. 12.09.2023, the appellant was warned with the last opportunity to cause its presence. Today's absence and the above observed circumstances are sufficient for us to hold that the appellant is not interested in pursuing the impugned appeal. Accordingly, the same is ordered to be dismissed for want of prosecution as well as presence.

[Dictated and pronounced in the open Court]

(DR. RACHNA GUPTA) MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH, COURT NO. IV

CUSTOMS APPEAL NO. 51896 OF 2018

[Arising out of the Order-in-Original No. DLI/CUSTOM/PRE/MKV/PR. COMMR/ 16/2016 dated 06/10/2016 passed by The Principal Commissioner of Customs (Preventive), New Customs House, New Delhi.]

M/s Planet Green Retail, Appellant
House No. 95, Aaron Ville, Sector – 45, Sohna Road, Gurgaon.

VERSUS

Principal Commissioner (Preventive), Respondent of Customs
New Customs House, Near I.G.I. Airport, New Delhi – 110 037.

APPEARANCE

Ms. Saksham Garg, Advocate – for the appellant.

Shri Rajesh Singh, Authorized Representative for the Department.

CORAM:
HON'BLE DR. MS. RACHNA GUPTA, MEMBER (JUDICIAL) HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 51390/2023

DATE OF HEARING : 03.08.2023. DATE OF DECISION : 04.10.2023.

RACHNA GUPTA

Present is an appeal assailing the order-in-original bearing No. 16/2016 dated 06.10.2016. The facts, in brief, relevant in the impugned adjudication are as follows :

"The Officers of Customs (Preventive) got a specific information about two Strong Glue Smearing Machines Model "CS 901" to have been lying in the godown of CELEBI, the custodian of import goods, which has been sold as unclaimed and un- cleared in e-auction held by CELEBI on 17 and 18 March 2015, that the machines had gold concealed therein. Pursuant to said information, the said officers, on 25.03.2015, detained both the said machines in CELEBI godown itself vide panchnama of the even date. The machines got unpacked after removal of upper metallic layer and were examined on 06.04.2015 in the presence of the independent witnesses. Some object wrapped in a black adhesive paper was found. It was reveled to be a yellow metal with the inscriptions "EMIRATES Gold, gold 1 kg., 999.9, EGO, Sl. No. 280748. From the other machine similarly wrapped three bars of yellow metal with similar inscriptions were recovered except, different Sr. No. i.e. 260767, 280762 and 270760 were found.

2. Six of metal bars got examined from the jewellery appraisal Mr. Ashok Jherwal who vide his report dated 06.04.2015 confirmed all the bars to be the foreign marked gold bars of 1 kg. each with 999.9 purity collectively valued at Rs. 1,45,99,200/-. The matter was subsequently investigated. Statements of all concerned from CELEBI and even from Air India and from M/s Planet Green Retail, Chattarpur, the consignee in both the airway bills for import were recorded. It was alleged that the six gold bars of foreign origin have been illicitly smuggled without any valid documents. Hence the Customs officers seized all six bars of 1 kg. each vide the panchnama dated 06.04.2015. The show cause notice bearing No. 86/5 dated 03.07.2015 under section 124 of Customs Act, 1962 was served upon the appellant proposing the confiscation of 6 kg. of gold valued at Rs. 1,45,99,200/-, the seizure of machines and of the packing material, which was used for concealing the aforesaid gold and the imposition of penalty upon the appellant. Three opportunities of personal hearing were being given to the appellant who failed to appear. Resultantly the impugned order was passed ex-parte confirming the said proposal.

3. Appellant vide letter dated 03.04.2018 conveyed to the Department about not receiving the copy of order-in-original and requested for the copy of the impugned order-in-original. The copy was made available to the appellant vide letter dated 03.04.2018. Being aggrieved of the said order, the appeal has been filed thereafter.

4. We have heard Ms. Saksham Garg, learned counsel for the appellant and Shri Rajesh Singh, learned authorized representative for the Department.

5. Learned counsel for the appellant has mentioned he had wrongly been roped into the present investigation, he has no connection with the impugned consignment. No document related to the impugned consignment is available with him. The appellant never received any communication as that of show cause notice or notices of personal hearing nor even the order-in-original. It is only after he received the notice of recovery that he applied for the copy of order under challenge and filed the present appeal thereafter. The ex-parte order is prayed to be set aside on this ground itself.

6. Per contra, learned departmental representative has mentioned that appellant had full knowledge of his IEC obtained from DGFT having the said address as was mentioned in IGM and Air Way Bill (AWB). He had never contested that IEC to have been obtained by others on forged KYC of the appellant. As per DGFT record, the IEC has been taken on the registered

address mention the address from IEC in the year 2013, whereas the appellant in his statement dated 30.08.2018 has stated that he had left the premises in the year 2005. Based upon the said IEC department passed the opinion it is appellant only who is involved into the import of 6 kg. of gold that too getting it concealed into machines. Apparently none ever appeared in Customs House to claim the import of impugned AWB arrived at IGI import cargo. Consignee for both the consignments is apparently the appellant. It is impressed upon that the Adjudicating Authority has meticulously examined the evidence on record before holding the appellant guilty, penalizing him and before ordering the confiscation of seized machines and the gold which was found concealed in the said machines. Thus there is no infirmity. Learned Departmental Representative relied upon

Carpenter classic Exim Pvt. Ltd. versus Commissioner of Customs, Bangalore[1].

7. Having heard the rival contentions, we observe and hold as follows :-

The present case is regarding smuggling of 6 kg. gold of purity 999.99 Carat concealed in a machine which was arrived vide Import General Manifest (IGM) No. 562341 dated 28.02.2015 AWB No. 098-76924635 & 098-76824661 from Hong
Kong vide flight No. AI317 dated 28.02.2014. The consignee name on the IGM and AWB is M/s Planet Green Retail with address as Shop No. 6, Sharma Complex, Chattarpur, New Delhi – 110 074. This address admittedly belongs to appellant.

The investigation was conducted by Customs Dept. and it was found that the said address i.e. Shop No. 6, Sharma Complex, Chatterpur, New Delhi – 110 074 is the registered address in the IEC of the Appellant, M/s Planet Green Retail and the address of Shri Sumeet Jain – Prop. of the Appellant firm was found as 1480, Sector 21, Gurgaon, Haryana. However, **both the said addresses were left by the Appellant in 2014 and 2015**. It has came on record that the present address of the appellant is House No. 95, Aaron Ville, Sector – 45, Sohna Road Gurgaon ; Adjudicating Authority observed that as the shipments were not got cleared by the consignee a notice in terms of Section 48 of the Customs Act, 1962 for clearance of un-clear import consignment was issued by CELEBI on 27.03.2014 to consignee through courier M/s First Flight. No Bill of Entry for import of goods under AWB Nos. 098-76824661 and 098-7682635 was filed by the consignee; after receiving no response from consignee, the said two machines were placed for auction under lot No. 48775 and 49069 and e-auctioned on 17 & 18.03.2015 through bid. But Both the machines were detained from CELEBI warehouse on 25.03.2015 during examination whereof revealed the impugned 6 kg. gold allegedly the smuggled gold. At the premises (shop No. 6, Lower Ground Floor, Sharma Complex, Chattarpur, New Delhi – 110 074) of consignee as shown in AWB5 no firm was found in existence in the name & Style of M/s Planet Green Retail. Smt. Indu Sharma was found to be the owner of said property. The son of the owner told that the premises No. 1480, Sector 21, Gurgaon, Haryana belonged to Shri R.K. Grover, resident of C-427, 1st Floor, C.R. Park, New Delhi and the said owner did not rent out the premises of Sh. Sumeet Jain the Prop. of appellant at any time.

8. The above facts it stands clear that the circumstances under which the said six gold bars each weighing 1 kg. were recovered from two machines imported in the name of fictitious and non-existing firm i.e. M/s Planet Green Retail and that none came to claim the said consignment despite that the CELEBI issued a notice for hearing are suo-moto sufficient to accept that the gold has been smuggled getting concealed in two machines imported from Hong Kong.

9. It is apparent from the statement of Manager CELEBI dated 22.04.2015 that he looked after the disposal of un-claimed and un-cleared consignment of cargo; that their system

automatically generated the report of un-claimed and un-cleared cargo after 30 days and they immediately on receipt of list of un-claimed and un-cleared cargo sent a notice to the consignee, airline, consolidator and customs disposal section; that if no reply was received within the stipulated period of the notice, an advertisement is given in the daily newspaper under Section 48 of the Customs Act, 1962 and if no claimant came forward to claim the goods, the goods were then got valued from the government approved valuer. After valuation, the list of goods less than one year old was sent to Customs for approval. Port clearance from Customs, goods were put for disposal through e- auction.

10. In the present case the goods detained by the Customs (Preventive) arrived at the Air Cargo (Import) on 28.02.2014 by Air India Flight No. AI-317 from Hong Kong and notice for clearance of un-cleared Import consignment was issued on 27.03.2014 to M/s Planet Green Retail, Lower Ground Floor, Shop No. 6, Sharma Complex, Chattarpur, New Delhi – 110 074 through courier M/s First Flight vide receipt no. 0991B0037570 and 0991B0037571 both dated 28.03.2014 respectively. He also stated that the machines mentioned in Panchnama dated 06.04.2015 were same as mentioned in the list of e-auction and which were taken into custody from the disposal godown of CELEBI Air India Operation Manager provided a photocopy of the manifest dated 28.02.2015 showing that the consignor in both the AWB booked from Hong Kong to New Delhi was M/s Power House International, Ground Floor, Yuet Kwong Buildings, 34, Fui Kok Str., Isuen Wan, Hong Kong and consignee in both the AWBs was M/s Planet Green Retail, Lower Ground Floor, Shop No. 6, Sharma Complex, Chattarpur, New Delhi – 110 074 and that the value of the consignment was declared as "NVD means No value declared.

11. We observe that the appellant did not respond to the said CELEBI notice it did not respond to the show cause notice issued under Section 124 the appellant also fail to respond three notices of personal hearing where after the impugned order was passed ex-parte.

12. We also observe that the recovery notice which is mentioned to be a source of knowledge to the appellant about the impugned proceedings has also been issued on the same address on which were issued the earlier notices including the show cause notice. We observe that during investigation it was revealed that the address mentioned on both AWB is of the premises belonged to one Mrs. Indu Sharma Statement of Shri Saurabh Sharma son of Mrs. Indu Sharma was recorded under section 108 of the Customs Act, 1962 on 09.06.2015 in which he, interalia, stated that said shop was rented out to Shri Sumeet Jain S/o Shri S.C. Jain, resident of 1480 Sector 21, Gurgaon from October 2013 to May 2014 which belonged to Shri R.K. Grover, resident of C-427, 1st Floor, C.R. Park, New Delhi who vide his statement dated 10.06.2015 stated that he was owner of premises 1480, Sector 21, Gurgaon. Shri Subhash Jain was his tenant at his property 1480, Sector 21, Gurgoan from 2003- 2006.

13. These facts when seen with IEC it becomes clear that the registered person of that IEC i.e. Shri Sumeet Jain the Proprietor of present appellant is the only person connected to the impugned AWB. He has not produced any evidence to show that the IEC has been forged in his name without his knowledge. He has not produced any document.

14. Learned Departmental Representative has also placed on record the communication received from Assistant Commissioner of Customs review dated 17.12.2019 showing that the department has made sufficient compliance of Section 123 of Customs Act, 1962. We also observe in paragraph 25 of the order under challenge that the Adjudicating Authority has meticulously summarized the grounds for order absolute confiscation of the gold and the packing machines seized and to order penalty on the appellant. We do not have any reason to differ from those

findings. Resultantly we hereby upheld the said order. Consequent thereto, the appeal stands dismissed.

(Order pronounced in open court on 04/10/2023.)

(DR. RACHNA GUPTA) MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH – COURT NO.III

Customs Appeal No.55040 of 2023

[Arising out of common impugned Order-in-Appeal No.CC(A)CUS/D-II/Import/ICD/TKD/119-120/2023-24dated 02.06.2023 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi]

M/s. Globe Impex **Appellant**
Shop No.1, WZ-32, Asalat Pur,Janak Puri,New Delhi-110 058.

Versus

Commissioner of Customs (Imports), **Respondent**

ICD, Tughlakabad,New Delhi.

AND

Customs Appeal No.55035 of 2023

[Arising out of common impugned Order-in-Appeal No.CC(A)CUS/D-II/Import/ICD/TKD/119-120/2023-24dated 02.06.2023 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi]

Shri Gagan Uppal, **Appellant**
Shop No.1, WZ-32, Asalat Pur, Janak Puri, New Delhi-110 058.

Versus

Commissioner of Customs (Imports), **Respondent**

ICD, Tughlakabad,New Delhi.

APPEARANCE:

Shri R.K. Hasija, Advocate for the appellants.
Shri M.K. Shukla, Authorised Representative for the Respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL) HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NOS.51407-51408/2023

DATE OF HEARING:28.07.2023 DATE OF DECISION:09.10.2023

BINU TAMTA:

Separate appeals have been filed by M/s. Globe Impex and Shri Gagan Upal challenging the order-in-appeal no.CC(A)CUS/D-II/Import/ICD/TKD/119- 120/2023-24 dated 2.6.2023, whereby the Commissioner (Appeals) rejected the appeals filed by the importer and upheld the Order-in-Original classifying the products under CTH 08028090 and rejected the classification declared by the importer under 21069030 as "scented sweet supari – Betel Nut".

2. The facts of the case are that the importer had filed bill of entryno.9145367 dated 16.06.2022 for clearance of the goods declared as "Scented Sweet Supari – Betel Nut product known as supari (cutting menthol supari)" under CTH 21069030 at USD 1.5 per kg (Rs.117.75/- per kg. approx.), whereasDGFT vide Notification No.20/2015-20 dated 25.07.2018, as amended, has fixeda Minimum Import Price of Rs.251/- per kg. for Areca Nuts. The said consignment was investigated on the ground that the importer had obtained an advance ruling from the Customs Authority for Advance Ruling, New Delhi (CAAR) regarding classification of betel nut items, whereas self-declaration in the said Bill of Entry was different from the ruling pronounced in CAAR. It was found that the appellant had claimed benefit under the Notification No.96/2008 dated 13.08.2008 providing for 100% exemption from BCD in respect of goods falling under Heading 2106, whereas the exemption benefit under the said notification in respect of the goods falling under CTH 080280 was only 60% of BCD. As M/s. Globe Impex had obtained an Advance Ruling under Section 28 H of the Customs Act, 1962 (hereinafter referred to as the "Act"), the correct classification of the goods was held to be under CTH 080280.

3. In the course of enquiry the statement of Shri Gagan Uppal was recorded, wherein stated that there are two firms with the same name M/s Globe Impex having separate registration of GST, Pan cards and have different IECs. However, both are managed and controlled by Shri Gagan Uppal. He explained the process wherein the product is made after cutting the supari and adding menthol and saccharin.

4. The sample of the product was sent for testing and the report by FSSAI dated 14.07.2022 showed presence of fungus hyphae and moisture percentage of 9.14% and, therefore, the sample was held to be unsafe under section 3 (1) (zz) (x) of the FSSAI Act, 2006. The second report by FSSAI dated 30.08.22 although stated that the sample of Betel Nut pieces scented and sweet does not contravene the standard laid down under the Food Safety and Standard Regulations, 2011 but it does not mention the microscopic examination (for fungal hyphae). Further, there are two reports by CRCL dated 18.10.22 and 26.12.2022, which indicate only the presence of menthol and also say that the goods do not meet the criteria of safety and standards for Betel Nut as perFSSR, 2011.

5. As the appellant was found to have mis-declared the description and classification of the goods, show cause notice dated 09.12.2022 was issued to the appellant as to why the declared classification of the goods imported videbill of entry no. 9145 367 dated 16.06.2022 and 7724532 dated 3.3.2022 underCTH 2106 30 should not be rejected and the same should be reclassified under sub-heading 08028090 and consequently, the benefit of the exemption notification No. 96/2008 should not be rejected and the differential duty of Rs 46,95,133/ should not be recovered from the importer under section 28A (4)of the Act and in respect of BE dated 3.3.2022 along with section 28 AA. Also the confiscation of the goods under section 111 (d), 111(m) and 111(o) and penaltyunder section 112 (a) (ii) and 114A should not be imposed. On adjudication, theproposal in the show cause notice was affirmed. The option to redeem thegoods was not granted to the appellant as they did not conform to the FSSAI standards. Challenging the adjudication order dated 27.2.2023 in appeal before the Commissioner (Appeals), the same was affirmed vide order dated 2.06.2023. Hence the present appeal has been filed by the appellant before this Tribunal.

6. We have heard the learned Counsel for the appellant and also the Authorised Representative for the Revenue and have perused the records.

7. The case of the appellant is that the goods in question are 'Scented Sweet Supari'. He relied upon the test report dated 10.10.2022 from AGSS Analytical and Research Lab Private Limited, Delhi, which shows presence of menthol and saccharine and also absence of Insect Infested Units and Mould Infestation. He also relied upon the CRCL report on the presence of sweetening agent and that the sample is a preparation of betel nut. He seriously refuted theapplicability of the Advance Ruling sought by M/s Globe Impex on the ground that the same was a different entity, i.e. the proprietorship firm and it was not in respect of the product in question. The Counsel also referred to Section 28 J to say that the Advance Ruling is not applicable as there is change in law, referring to the Circular issued after the Advance Ruling that the product in question falls under Chapter 21 and also the DRI alert circular. The learned Counsel sought to distinguish the decision of the Apex Court in **Crane Betel Nut Powder Works Vs Commissioner of Customs, Tirupathi - 2007 (210) ELT 171 (SC)** as the same was rendered in the context of Central Exciselaw and the provisions were amended in the year 2009 by including Note 6 to chapter 21 of Central Excise Tariff Act, 1985 to declare certain processes in respect of betel nut, as processes of manufacture and also amendment made in chapter 8 and hence, the judgement in the case of **Crane Betel Nut (supra)** isnot relevant. The learned Counsel for the appellant has relied on the Circular No. 163/19/2021-GST dated 06.10.2021 issued by CBIC on the applicability of GST on scented sweet supari and flavoured and coated elaichi, whereby they were classified under Tariff Item 2106 9030 as "Betal Nut product" known as "Supari" and the same is applicable to Customs in as much as IGST is payableon the imported goods in terms of Section 3(7) of Customs Tariff Act, 1975. Referring to the Rules of Interpretation, the learned Counsel submitted that specific entry in Chapter 2106 under T.I.9030 clearly provides for classificationof the item in question therein. In terms of Rule 1 itself classification stands determined under T.I. 2106 9030 and going by Rule 3, since 2106 9030 occurslast in numerical order, classification would be preferred under Tarrif Item 2106 9030 instead of Chapter 8. Lastly, the learned Counsel submitted that the demand against the previous consignment under bill of entry no.7724 532 dated3.03.2022 is incorrect as it was allowed after NOC was given by the SIIB and the appellant had paid the Customs duty as assessed and if the department is aggrieved, the same should have been reviewed under section 129D(2) of the Customs Act, 1962 and an appeal should have been filed before the Commissioner (Appeals). Reliance was placed on the decision in **ITC Ltd. Vs Commissioner of Central Excise, Kolkatta - 2019 (368) ELT 216 (SC), Axiom Cordages Ltd. Vs. Commissioner of Customs, Nhava Sheva-II 2020 (9)TMI 478 (CESTAT-Mumbai)** and **Shri Rumen Dey Vs. Commissioner Customs (PREV.), Shillong - 2023 (7) TMI 70 (CESTAT-Kolkata).**

8. The stand of the Revenue is that Areca Nuts are covered under CTH 080280 and further subheadings include whole / split /ground / others. They referred to Note 3 of Chapter 8 which provides that even if nuts are partially rehydrated or treated for preservation or stabilization and if vegetable oil or glucose syrup is added to improve or maintain its appearance and yet the goodsretain the character of dried fruits and nuts, the same would be classifiable under this Chapter. In support of their contention that areca nuts in question do not fall in Chapter 21 as claimed by the appellant, they relied on Supplementary Notes to Chapter 21, which suggests that betel nut preparation resulting in new or distinct product are covered under this chapter and the addition of ingredients like cardamom, copra or menthol does not affect its classification. In so far as the test reports were concerned, the majority of themindicate absence of saccharine and do not meet the standards for betel nuts as per FSSR 2011 and, therefore, the goods are liable for absolute confiscation.The Revenue also relied on the decision of the Apex Court in **Crane Betel Nut Powder Works Vs. Commissioner Customs, Tirupati - 2007 (210) ELT 171 (SC)**, followed by the Tribunal in **M/s Azam Laminators Pvt. Vs. Commissioner – 2019 (367) ELT A-22 (Tribunal-Madras).** On Advance Ruling obtained in respect of 'flavoured supari' classified under CTH 0802 though related to a different firm, however, the same was owned by Shri GaganUppal and, therefore, the principles laid down therein would also apply to the goods in question, which are identical.

9. The main issue for our consideration is whether the goods "Scented Sweet Supari "is classifible under CTH 2106 9030 as claimed by the importer orunder CTH 08028090, as per the Department and, therefore, would be entitle to the exemption of 100% BCD by virtue of the Notification No. 96 of 2008 or is entitle to exemption to only 60% BCD by virtue of the classification by the Revenue.

10. Before considering the legal submissions made on behalf of both the parties, it is appropriate that the relevant entries along with the relied upon Chapter Notes and the HSN are reproduced below :-

Chapter 8 of the Customs Tariff Act, 1975:

0802 Other Nuts, Fresh or Dried, whether or notShelled or peeled

080280	--	Areca nuts:
08028010	--	Whole
08028020	--	Split
08028030	--	Ground
08028090	--	Other

1…….……

2…….

3. Dried fruit or dried nuts of this Chapter may be partially rehydrated, or treated for the following purposes:-

(a) For additional preservation or stabilization (for example, by moderate heat treatment, sulphuring, the addition ofsorbic acid or potassium sorbate);

(b) To improve or maintain their appearance (for example, by the addition of vegetable oil or small quantities of glucose syrup), provided that they retain the character of dried fruit ordried nuts."

HSN Explanatory Notes – Chapter 8

"This head also covers areca (betel) nuts used chiefly as a masticatory, cola (kola) nuts used both as a masticatory and as a base in the manufacture of beverages, and an edible, nutlike, spiny-angled fruit."

Chapter 21 of the Customs Tariff Act, 1975:

"Chapter 21 of the Customs Tariff covers goods viz. miscellaneous edible preparations.

2106	Food preparation not elsewhere specified or included.
2106 90 30	Betel Nut product known as Supari.

Supplementary Notes:

1. In this Chapter "Pan Masala" means any preparation containing betel nuts and anyone or more of the following ingredients, namely: lime, katha (catechue) and tobacco whether or not containing any other ingredient, such as cardamom, copra or menthol.

2. In this Chapter "**Betel Nut product known as Supari"**means any preparation containing **Betal Nuts**, but not containing any one or ore of the following ingredients, namely;lime, katha an tobacco whether or not containing any other ingredients, such as cardamom, copra or methanol."

11. From Note 3 of Chapter 8, it is clear that if the areca nuts are even partially rehydrated or

treated for preservation or stabilization and even if vegetable oil or glucose syrup is added to improve or maintain its appearance the goods retain the character of dried fruits and nuts and hence, the same are classified under this chapter. Also the cutting / crushing / splitting of areca nuts do not change the basic character of betel nuts as these are only basic processes of enhancing the presentation and addition of flavour or sweetening of betel nuts with essential or non-essential oils, menthol, sweetening agents and do not result in any new and distinct product to be classified elsewhere. In the present case, as per the statement of Shri Gagan Uppal no further processes have been undertaken on the raw betel nuts or areca nuts apart from mere breaking / splitting /cutting them and adding menthol.

12. On the contrary, if we see the very heading of Chapter 21, it speaks of "Food preparation not elsewhere specified or included", which denotes exclusionof areca nuts even if they are in the form of Flavoured Supari, from this Chapter. From Supplementary Note 2 to Chapter 21, we find that this Chapter covers 'Betel Nut product known as Supari' which means any preparationcontaining betel nuts and as noticed above the process involved herein is only ofbreaking /cutting /splitting of areca nuts and thereafter, only menthol is added. There is no concept of preparation in the process referred to by the appellant itself and ,therefore, the goods proposed to be imported are not preparation. They are not products of betel nuts but are only betel nuts. On that basis itself,the same are not classifiable under Chapter 21.

13. In view of our discussion regarding the two entries, it would be advisableto refer the judgements, wherein the legal position as to the classification of theproduct in question has been dealt with.

14. The first judgement on the point is **M/s Crane Betel Nut Powder Works (supra),** where the assessee was engaged in marketing betel nuts in different sizes after processing them by adding essential or non essential oils, menthol, sweetening agent etc. and were clearing them under CTH 2107,however they filed a revised classification under sub-heading 080100contending that the crushing of Betel nuts into smaller pieces and sweetening the cut pieces did not amount to manufacture in view of the fact that mere crushing of betel nuts into smaller pieces did not bring into existence a different commodity, which had a distinct character of its own. The Apex Court observed that the process of manufacture employed by the appellant company did not change the nature of the end product, which in the words of The Tribunal, was that in the end product "the betel nut remains the betel nut". Though the said judgement of the Apex Court was rendered in the context of manufactureunder the central excise, however, the principle laid down therein is still relevant for the present controversy and the same have been followed by the Tribunal in various decisions. The Tribunal in the case of **Azam Laminates Pvt Ltd Vs Commissioner (supra)** dealt with the issue whether scented betel nut manufactured by cracking of dried betel nut into small pieces and, thereafter, gently heating with adding vanaspati oil and flavouring agents and marketing in small pouches is classified under 8029019 of CET and not under Tariff Item 21069030 as Supari following the decision of the Apex Court in **Crane Betel Nut Powder Works** (supra).

15. Subsequently, the Chennai Bench in **S.T. Enterprises Vs Commissioner of Customs, Chennai 2021 (378) ELT 514,** following the decision of the Apex Court in the case of **Crane Betel Nut Powder Works** (supra), **Satnam Overseas Vs Commissioner 2015 (318) ELT 538 (S.C.)** and **Servo-Med Industries Pvt Ltd Vs Commissioner 2015 (319) ELT 578 (S.C.)** decided the issue of classification of betel nut (areca nut) 'whole' under Tariff Item 08028010 of CTA, 1975, referring to the Chapter Notes, it was observed as :

"14. From above Note 3, it can be seen that even if some stage of drying or rehydrating or treatment is done for preservation/stabilization or maintaining the appearance, as long as the nuts retain the character of dried nuts, they fall under Chapter 8. The Counsel for appellants had placed before us samples of dried whole betel nut (without husks) aswell as sample of the imported goods. We were able to see that the imported goods are also whole but more dried.

15. Ld. Counsel for appellants has referred to Chapter Note 2 of Chapter 21 to strongly contend that the goods would fall under CTH 2106 90 30. From the table reproduced earlier, it can be seen that CTH 2106 90 30 takes in the items *"betelnut product known as supari"*. To be more clear what is described therein is 'betel nut product' and not betel nut 'whole' as seen in Chapter 8. Chapter Note 2 of Chapter 21 also speaks about 'betel nut product' and not betel nut 'whole'. As per Chapter Note 2 of Chapter 21 'betel nut product' means any preparation containing betel nut, but not containing lime, katha and tobacco. It may or may not contain cardamom, copra, or menthol. The appellants do not have a case that their goods contain cardamom, copra or menthol or any additives. Counsel for appellants has made much effort to contend that after boiling though 'whole' the betel nut becomes 'betel nut product'. In our view, since betel nut has retained its character of being whole and itdoes not contain any other ingredients such as cardamom, copra or menthol, it cannot be said that impugned goods are 'preparations containing betel nut' or 'betel nut product/supari' so as to fall under Tariff Heading 2106 90
30. (Emphasis laid)."

16. The Chennai Bench in **S. T. Enterprises** (supra) rejected the contention of the appellant with reference to the decision of the Apex Court in **Crane BetelNut Powder Works (supra)** that subsequent to the said judgement, an amendment was introduced in Chapter 21, whereby Supplementary Note 2 to Chapter 21 was introduced and also the product known as 'Supari' is excluded from Chapter 8 and, therefore, the judgement of the Apex Court would not haveany bearing as on date on the issue of classification. The Tribunal took the view that even after such amendment the position of law settled by the Apex Court in**Crane Betel Nut (supra)** would still be applicable, inter-alia observing :

".....The amendment relied upon by the appellants only clarified what 'supari' would be and as such would not be of much help in deciding the classification of impugned goods. Moreover , it can be seen that the impugnedproducts in the case of Crane Betel Nut Powder Works (supra) have undergone much more elaborate processes like cutting into different sizes; adding essential /non- essential oils, menthol, sweetening agents etc. Even whenthe physical appearance undergoes a change, Apex Court held that the processes undertaken do not amount to manufacture "

17. The decision of the Tribunal in **S.T Enterprises** (supra) has been affirmed by the Apex Court by dismissing the appeal filed by the party, in **Ayush Business Overseas Vs. Commissioner - 2021 (378) ELT A142**.

18. We may now deal with the submissions made by the importer relying on the CBIC Circular No. 163/19/2021 dated 6.10.2021 to say that IGST is payableon the imported goods in terms of section 3 (7) of Customs Tariff Act, 1975. On the face of it, the said Circular provides for, " Applicability of GST on scented sweet Supari and flavoured and coated elaichi " and would, therefore, not be applicable to the issue at hand. Section 3 of CTA provides for levy of additional duty equal to excise duty, sales tax, local taxes and other charges and clause 7 thereof reads as :

"**Section 3(7) --** Any article which is imported into India shall, in addition, be liable to integrated tax at such rate,not exceeding forty per cent. as is leviable under section 5of the Integrated Goods and Services Tax Act, 2017 on alike article on its supply in India, on the value of the imported article as determined under sub-section (8) [9][or sub-section (8A), as the case may be".

The provisions of section 3(7) of CTA does not support the case of the appellant as put forth by him and hence the applicability of the Circular No.163 /19 /2021
– GST dated 6.10.2021 is not sustainable in the present case.

19. On going through the Alert Circular No. 4 of 2022 dated 25.08.2022 issuedby DRI, referred to by the learned Counsel for the appellant, we find that the same has been issued to overcome mis-declaration and mis-classification of areca nuts, which were being imported through several ports under Chapter 21 so as to pay customs duty at lesser rates and to avoid floor price restrictions imposed by DGFT vide notification No. 20/ 2015-2020 dated 25.07.2018 and in that backdrop, the field department was sensitized and asked to exercise due diligence while clearing the import of areca nuts. Referring to the decision of the Supreme Court in **M/s Ayush Business Overseas Vs. Commissioner of Customs (Supra)**, it was stated that only the "preparations of betel nuts" would fall under Chapter

21 and the goods imported as "boiled areca nut" wouldmerit classification under Chapter 8 of the Customs Tariff. We do not find that the said Circular, in any manner, supports the importer and, therefore, on that basis, no reliance can be placed in favor of the appellant.

20. We now deal with the submission relating to the earlier Bill of Entry dated3.03.2022, which according to the appellant, has been assessed and duty is paid. We do not agree with the submissions made by the learned Counsel forthe appellant and we are fully supported by the decision of the Apex Court in **ITC Ltd – 2019 (368) ELT 216 (SC)**, where it accepted the principle laid down in their earlier decision in **Priya Blue Industries Ltd Vs. Commissionerof Customs (Prev)**, that the order of assessment can be reviewed under Section 28 and/ or modified in an appeal. Here the department has exercised this option by issuing show cause notice under Section 28 of the Customs Act. The relevant provisions of section 28 (4) of the Customs Act as well as the relevant paragraph of the judgement in **I.T.C. Limited** (supra) are quoted below:

"Section 28 (4) -- Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,—

(a) collusion; or

(b) any wilful mis-statement; or

(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years fromthe relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not paythe amount specified in the notice."

Para 40 of the ITC Ltd. reads as :-

"40. In *Priya Blue Industries Ltd.* v. *Commissioner of Customs (Preventive)* - 2004 (172) E.L.T. 145 (S.C.) =

(2005) 10 SCC 433, the Court considered unamended provisionof Section 27 of the Customs Act and a similar submission was raised which was rejected by this Court observing that so long as the order of assessment stands, the duty would be payable as per that order of assessment. This Court has observed thus :

"6. We are unable to accept this submission. Just such a contention has been negatived by this Court in **Flock(India)** case **(2000) 6 SCC 650**. *Once an order of assessment is passed the duty would be payable as perthat order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an appeal, that order stands. So long as the order ofassessment stands the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding.* The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. *The officer considering the refund claim cannot also review an assessment order."*

The above findings squarely covers the issuance of show cause notice dated 9.12.2022 under section 28(4) read with section 124 of the Customs Act with reference to the bills of entry dated 3.03.2022 and 16.06.2022.

21. Both the sides have referred to various Advance Rulings to support the classification, as claimed by them. We are conscious of the principle of law that the Advance Ruling is binding on the respective parties therein with reference tothe product concerned and cannot be treated as a binding precedent for future cases. However, on examining the Advance Ruling relied upon by the Revenue in respect of the same product, i. e., " Flavoured Supari "classified under CTH 0802, we are of the view that it not only relates to identical goods and though itis in respect of a different company, M/s. Globe Impex being a proprietorship company owned by Shri Gagan Uppal and now it is a partnership company i.e., M/s. Globe Impex, however, the fact is that both the companies not only have the same 'name', M/s Globe Impex, where Shri Gagan Uppal is one of the partners and is responsible for

the day-to-day working of the company and is, therefore, fully aware of the classification of the goods in terms of the Advance Ruling sought by him as the Proprietor of the company. The contention of the appellant is limited that the Advance Ruling had been sought by the proprietorship company and is, therefore, not binding on the partnership company, which is a distinct entity but he has nowhere stated as to how the product classified under the Advance Ruling was distinct from the presentgoods. Hence, in the present facts and circumstances, the classification of Flavoured Supari under CTH 0802, as held in the Advance Ruling, would equally apply in the present case.

CONCLUSION

22. The goods imported by the appellant are neither product of betel nut nor preparation containing betel nut but are only betel nuts in cut pieces and are excluded from Chapter Heading 2106 and the same are classifiable under chapter Heading 0802. Consequently, the benefit of Notification No 96/2008 dated 13.8.2008 of 100% exemption from BCD is not available to the appellant.Similarly, in terms of Notification No.20/2015-2020 dated 25.07.2018, the import of areca nuts at less than the minimum price of Rs.251/- per kg. are prohibited goods. Moreover, in view of the test reports (referred above) the areca nuts imported are unsafe according to Section 3 (1)(zz)(x) of FSS Act, 2006 and as they do not conform to the standards prescribed under Food Safety and Standard Regulations, 2011, the same are liable for absoluteconfiscation under Section 111(d), 111(m) and 111(o) of the Act. Consequently,the appellant is liable to pay the differential duty of Rs.46,95,133/- alongwith interest.

23. We agree with the Adjudicating Authority that the appellant had attempted to import areca nuts in guise of betel nut products by mis-declaring and mis-classifying under Chapter 21 so as to avail the benefit of 100% exemption of BCD and thereby evade payment of legitimate customs duty. In view thereof, M/s. Globe Impex and also Shri Gagan Uppal are liable to penalty under Section 112(a)(i) of the Act.

24. We find no reason to interfere with the decision arrived at by the authorities below and the same deserves to be affirmed. Accordingly, the appeals stand dismissed.
[Order pronounced on 09.10.2023]

(Binu Tamta)Member (Judicial)

(P. V. Subba Rao)Member (Technical)

Ckp.

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CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI

COURT No. IV

Customs Appeal No. 53193 of 2018

(Arising out of Order-in-Original No.25/2017 dated 23.11.2017 passed by the Commissioner of Customs (Exports), ICD, Tughlakabad, New Delhi)

Container Corporation of India LTD.
ICD, Tughlakabad, New Delhi-110019 **Appel**

Vs.

Commissioner of Customs (Exports),
ICD, Tughlakabad, New Delhi-110019 **Respon**

APPEARANCE:

Shri Usman Khan, Advocate for the Appellant

Shri Nagendra Yadav, Authorised Representative for the Respondent

CORAM:

HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)

HON'BLE MS. HEMAMBIKA R.PRIYA, MEMBER (TECHNICAL) FINAL ORDER NO. 51422/2023

Date of Hearing: 03/08/2023 Date of Decision: 10.10.2023

DR.RACHNA GUPTA:

Present appeal is arising out of Order-in-Original No.25/2017 dated 23.11.2017.

2. The brief facts of the case are as follows:

3. M/s.Pico Trading Co. had filed Bill of Entry No.028721 dated 27.10.2011 for the clearance of goods imported in container No.CLHU 8612196. The goods stuffed in different containers were declared as steep glass bowl and deep cut glass bowl with declared valued of Rs.8,12,745.6/- Based on specific intelligence, the container was examined on 02.11.2011/03.11.2011, in the presence of independent witnesses/panchas and Shri Sanjay Arora, proprietor M/s.Pico Trading Co. Representative of CHA, namely, Shri Nandan of Excellent Cargo was also initially present. In addition to declared products, there were found
45 other different kinds of branded products including ladies purses, branded liquor etc., found, the details of which were mentioned in the annexure to panchnama prepared during the said examination. The total value was assessed at Rs.3,24,93,750/-. Since contents of the container were highly misdeclared and undervalued, the examining officer seized the goods of the said container/alongwith the container and handed over the same to the Manager of Container Corporation of India Limited[1](hereinafter referred as CONCOR).

4. After recording the statements of all concerned including that of proprietor of importer, Shipping line personnel, CHA and his representative, officers of CONCOR, overseas enquiries were also made in the matter. Based thereupon show cause notice bearing C.No.VIII/ICD/10/TKD/SHB-

Imp/Inv/31 Cont./111/2012/Pt.III/25266 dated 5.12.2015 was served upon 17 noticees including CONCOR, the present appellant. It has been proposed that the Customs duty amounting to Rs.1,00,36,067/- be recovered from CONCOR in terms section 45 of Customs Act, 1962[2] read with Regulation 6 of Handling of Cargo in Customs Area Regulations,2009[3] (herein after referred as HCCAR,2009) Penalty was also proposed to be imposed on the appellant. With respect to other co-noticees, there were respective several proposals in the show cause notice. The proposal qua appellant has been confirmed vide order under challenge Order-in-Original bearing No.25/2017 dated 23.11.2017. Being aggrieved, the appellant is before this Tribunal.

5. We have heard Shri Usman Khan, ld. Advocate for the appellant and Shri Nagendra Yadav, ld. DR for the Department.

6. It is submitted on behalf of Appellant that the Appellant is a public sector undertaking under administrative control of Ministry of Railways, Government of India, which is engaged in the business of providing Inland transportation of containers having larger undertaking inland container depot[4]. CONCOR, the appellant is the custodian of all goods lying in the import shed Area in terms of section 45 of Customs Act, 1962.

7. While challenging order, in question, ld.Counsel has mentioned that ld. Commissioner has failed to take note of the fact that the appellant is not a party to the panchnama and security of container was the responsibility of Central Industrial Security Force[5] whose personnel were deployed in the ICD Tughlakabad[6]. The appellant had no knowledge of the contents of the container No.CLHU 8612196. Panchnama dated 2.11.2011 does not bear signature of any one on behalf of the CONCOR, as is apparent from the two panchnamas dated 2.11.2011 and 3.11.2011. The appellant's insurance surveyor signed panchnama only on 15.12.2012. The appellant had engaged highly skilled security force i.e. CISF for guarding the area. Once container got handed over to said CISF, its safety and security becomes the duty of CISF. Hence it is CISF who should be held responsible for the alleged movement of container from its original location to another location, without any proper authorization and also for customs' seal to have been found tampered with. In the given circumstance, the responsibility cannot be fastened on CONCUR just for being the custodian under section 45 of Customs Act, 1962.

8. Ld. Counsel also mentioned that the matter was investigated by police and enquiry held by DIG Commissioner and nothing was found against CONCOR. The order under challenge is set aside accordingly prayed to be set aside and appeal is prayed to be allowed.

9. While rebutting the submissions made on behalf of appellant, ld.DR has mentioned that examination of the container No.CLHU 8612196 and contents therein was conducted in the presence of independent witnesses with the representatives of all concerned i.e. the representative from shippingline of CHA of importer. A proper inventory of goods found stuffed into the container was prepared in their presence. The contents were found contrary to the declarations in Bill of Entry. Even second time examination of the said container on 15.10.2012 when customer's seal was found tampered, was also done in presence of all the above mentioned persons in the premises of appellant itself. Such proceedings were sufficient to fix the liability of custodian, CONCOR under Regulation 6 HCCAR,2009 and section 45 of Customs Act, 1962. It is impressed upon that the presence of custodian in examination proceeding is not mandatory except where there is a prior indication or doubt about pilferage of goods. It is brought to the notice that joint survey was conducted in the presence of surveyor of the appellant when seal on the container was found tampered/altered in unauthorized manner and container was found shifted from the original location without permission from proper officer. Till this stage there was no indication about any pilferage from the said container. The goods were found pilfered after the second time examination. However, on being asked the reason for replacement/tampered, customs seal on the container, the appellant not only showed ignorance, but tried to shift their responsibility upon the security agency i.e. CISF, despite statutory mandate of section 45 of the Act.

10. Ld.DR further mentioned that when the goods are unloaded into customs area, these have to remain in custody of approved person, CONCOR is admittedly the approved custodian. In case of

any shortage/pilferage of such goods, tampering of seal or even movement of container from its location, liability has to be fastened on the custodian only. It is brought to notice that after first examination of container on 02/03.11.2011 customs new seal No.594385 was affixed and CONCOR was requested to keep the container No.CLHU 8612196 in safe custody. Letter of Superintendent (Admn) (Import Shed) to the Manager, CONCOR dated 02.11.2011 is impressed upon. Though CONCOR, while trying to prove their bonofide, have contended about lodging FIR on 17.10.2012 reporting theft of goods from customs area but the said act also cannot absolve them from their liability of being custodian. With these submissions, it is mentioned that there is no infirmity in the order under challenge and appeal is liable to be dismissed.

11. Having heard rival contentions and perusing the record, we observe following as admitted facts:

(i) The container No.CLHU 8612196 was imported in the name of M/s.Pico Trading Company, proprietor where of is Mr.Sanjay Arora, it was placed for clearance vide Bill of Entry No.5028721 dated 27.10.2011. It was examined by Special Intelligence and Investigation Branch (SIIB) of Customs on 02/03.11.2011.

(ii) Undeclared goods that too of highest brands were found stuffed in the said container. Accordingly undeclared goods valuing Rs.3,24,93,750/- along with container were seized, were destuffed and the container was affixed with Customs seal No.5944385. The said container was handed over to the appellant/CONCOR for safe custody.

(iii) This seizure was disputed by the appellant on the ground that there are two panchnamas of 2.11.2011 and 3.11.2011 which is sufficient to doubt the examination, proceedings and factum of customs seal. Also none of the panchnamas bear signature of appellant nor its representative.

(iv) On 1.6.2012, when the container was found to be affixed with seal No.344378, Department alleged tampering of seal on the container lying in the customs area and also that it was found at different location.

(v) The appellant on 15.10.2012 requested for a joint survey of the said container which was conducted in the presence of the Insurance Surveyor of the Appellant.

(vi) In the joint survey the container was found to contain goods worth of only Rs.2,35,000/- as contrary to such number of variety of goods as were assessed at Rs.3,24,93,750/- on 2.11.2011.

(vii) The inspecting team thus formed an opinion that the remaining goods had been pilfered.

(viii) To safeguard itself the appellant lodged an FIR with Delhi Police on 17.10.2012, reporting loss/theft of goods which were found missing from container.

12. From the above admitted facts, it is apparent that the goods valued more than Rs.3.25 crores were imported in the name of M/s.Pico Trading Co. at behest of Mr.Sanjay Arora, who had misdeclared and undervalued the goods in the Bills of Entry dated 27.10.2011. Resultantly the said container was seized and was handed over to CONCOR, the appellant, custodian.

(viii) The CONCOR had admitted the custody of the goods.

Accordingly, section 45 of Customs Act, 1962 is relevant which reads as under:-

Section 45. Restrictions on custody and removal of imported goods.-

(1) Save as otherwise provided in any law for the time being in force, all imported goods, unloaded in a customs area shall remain in the custody of such person as may be approved by the Principal Commissioner of Customs or Commissioner of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.

(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force,—

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer.

(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilferred after unloading thereof in a customs area while in the custody of a person referred to in sub-section (1), that person shall be liable to pay duty on such goods at the rate prevailing on

the date of delivery of an import manifest or, as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried.

13. Regulation 6 of Handling of Cargo in Customs Area Regulations,2009 is also relevant. The relevant regulations thereof are 1(f), 1(i) and 1(q) which reads as under:-

"6. Responsibilities of Customs Cargo Service provider:

(1) The Customs Cargo Service provider shall -

(a) to (e) ----------

(f) not permit goods to be removed from the customs area, or otherwise dealt with, except under and in accordance with the permission in writing of the Superintendent of Customs or Appraiser.

(i) be responsible for the safety and security of imported and export goods under its custody.
(j) to (p) ----------

(q) abide by all the provisions of the Act and the rules, regulations, notifications and orders issued thereunder."

14. Meaning of both these provisions has been discussed by this Tribunal in the case of M/s.Continental Warehousing Corporation (Nhava Seva) Ltd. vs. Principal Commissioner of Customs, Chennai-2021 (12) TMI 745 as under:

"5.4 Section 45 of the Customs Act, 1962, dealing with clearances of imported goods, prescribes restrictions on custody and removal of imported goods. Further, Section 45(1) authorizes the granting of custody of imported goods with such approved person, until the same are cleared, as prescribed. Section 45 (2) prescribes the role of the person who is given the custody of the imported goods, and Section 45 (3) speaks of the consequences in case such imported goods are pilfered while in custody of the approved person, which makes such person liable to pay duty at the prevailing rate. This means that until 29.03.2018 (ie., the date of amendment), the custodian of the imported goods had no authority at all to release the imported goods from its custody. Further, the Regulations in question, i.e., HCCAR, 2009, casts certain responsibilities on the Customs Cargo Service provider (CFS) which is also based on the conditions to be fulfilled before issuing a Public Notice. Regulation 6 (1) interalia mandates that the customs cargo service provider shall not permit goods to be removed from the customs area, or otherwise dealt with, except under and in accordance with the permission in writing of the Superintendent of Customs or Appraiser. When there is a specific embargo prohibiting the custodian from moving the goods, without a specific order in writing is a clear violation of the Regulations."

15. As already observed above, the container was handed over to the custody of the appellant is an admitted fact. When the said admission is seen through the prism of above quoted interpreted provision, it cannot be denied that the said provisions have been violated and that there is lack of diligence towards responsibility of the custodian. However, the appellant though has pleaded its non involvement with panchas at the time of initial inspection when two contradicted panchnamas were prepared and that there was no information of Customs seal bearing No.594385 having been affixed at the time when the container was handed over to appellant, CONCOR and also that the responsibility of the custodian was otherwise given to CISF. But we observe that irrespective there were two panchnamas but both mentions to have been drawn on 2.11.2011, both bear signatures of two panchas, namely, Rajesh Kumar and Shri Anu Sharma and of independent witnesses Shri Kamlesh Kumar alongwith signatures of proprietor of importing company, namely Shri Sanjay Arora.

16. From the perusal of both panchnamas, we do not observe any cogent difference in the contents thereof except that the time of proceeding is slightly different. In panchnama signed on 2.11.2011, proceedings are mentioned to have started at 12.00 hours and to have ended at 23.00 hours. Whereas for panchnama dated 3.11.2011, the proceedings are mentioned to have started at 12.18 hours on 2.11.2011 and to have got concluded at 00.30 on 3.11.2011. Thus, there is not much difference

except 15 minutes/ while beginning one and half an hour time duration while ending the proceedings. Since examination ended post midnight, means date got changed by that time. To our opinion, this cannot be the reason to challenge or to doubt the veracity/correctness of the panchnama. We also observe that only one out of the two panchnamas bear signatures of Customs Inspector, namely, Rakesh Kumar. Hence this panchnama can be held as the one drawn at the relevant time. As already observed above that examination which started in afternoon of 2.11.2011 continued till its midnight i.e. early morning of 3.11.2011, the plea taken about date is not at all relevant to doubt the panchnama which bears signatures of all concerned. On perusal of panchnama, it is amply clear that after such inspection of container on 02/03/11.2011 the container was resealed with new Customs seal No.594385 and was handed over to the manager of CONCOR, the appellant for the safe custody. This fact is also coming out from the cross examination of Customs Inspector, Shri Rajesh Kumar. The letter dated 02.11.2011 also corroborates the handing over the container with said seal to CONCOR – appellant. The contention of appellant that it has no knowledge about seal nor any responsibility for the container lying in the customs area/shed is not sustainable.

17. Coming to the issue of objection about Customs seal, we observe that the appellant has not brought to our notice that it was mandatory for the Customs Inspector to cut seal only in the presence of custodian of CONCOR on 2.11.2011. Admittedly, it was case of mis-declaration and undervaluation and till the request of appellant of joint survey on 15.10.2012 no pilferage was at all noticed. It is clear that presence of CONCOR was mandatory neither on 02/03.11.2011 nor even on 15.10.2012. The examination on 15.10.2012 was though, conducted in presence of CONCOR. Hence, we do not find any reason to differ from the finding in the order under challenge that at the time drawing panchnama dated 2.11.2011, Customs seal No.594385 was affixed on the container and the said seal was handed over to the CONCOR. It is coming apparent from the statements of proprietor of company as well as shipping line who was also present at the time of said panchnama drawn and have signed panchnama wherein it is recorded that Customs seal was cut and the container was resealed and handed over to the CONCOR for safe custody. None of them was cross examined by the appellant. Resultantly, there is no evidence produced by the appellant to falsify the contents of panchanma.

18. With respect to the plea about transferring liability to CISF, we observe from above quoted specific section 45 of Customs Act, 1962, that custodian is a person who has been approved by the Commissioner of Customs. Admittedly such approval was given to the appellant/CONCOR. Admittedly, there is no such approval in favour of the CISF. All the allegations as fastened against the custodian are under Regulation 6 HCCAR,2009 and section 45 of Customs Act, 1962 i.e. against the approved by custodian, who is none but CONCOR, the appellant. As per section 45 (2) (b) of Customs Act, 1962, the custodian is duty bound to not to permit such goods to be removed from the customs area, except under and in accordance with written permission of proper officer or otherwise dealt with. Admittedly, there was no such permission with CONCOR for removal of the goods.

19. As already observed above, that there is no denial that the container had shifted from its location within the customs area. Also the seal of the container was found tampered and most of the goods were found pilfered from the said container. As per section 45, the custodian is burdened with the responsibility of safe custody of imported goods unless and until those goods cleared either for home consumption or for being warehoused. Admittedly, the goods got pilfered and container seal found tempered when the goods were not still cleared. Resultantly, we do not find any reason to absolve the appellant from the responsibility fastened upon him and violation confirmed.

20. In the light of entire above discussion, we do not find any reason to differ with findings in the order under challenge. Resultantly, the order is hereby upheld. Consequent thereto the appeal is hereby dismissed.

(Order pronounced in open court on 10.10.2023)

(DR.RACHNA GUPTA) MEMBER (JUDICI

(HEMAMBICA R PRIYA) MEMBER (TECHNIC

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Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

CUSTOMS APPEAL No. 50828 of 2021 [DB]

[Arising out of Order in Original No. KS/COMMR/ACE/03/2021 dated 09.04.2021 passed by Commissioner OF Customs, Air Cargo Complex, New Custom House, New Delhi]

M/s. Decor Rubber Industries **...Appellant**

A-114/1, Wazirpur Industrial Area,New Delhi-110052

Versus

Commissioner of Customs, ... Respondent

Air Cargo Complex (Export),

New Custom House, Near IGI Airport,New Delhi – 110037.

APPEARANCE:

Mr. Bipin Kumar Sinha, Consultant for the appellant

Mr. Rakesh Kumar, Authorized Representative for the Respondent

CORAM : HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)HON'BLE MR.P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: **13/07/2023Date of Decision:03/11/2023**

FINAL ORDER No. 51494/2023DR.RACHNA GUPTA

Present is an appeal assailing the Order in Original bearing

No. 03/2021[1] dated 9th April, 2021. The facts in brief relevant for the appeal are that M/s.Decor Rubber Industries, the appellant, has been importing goods namely unbranded "Reflective Sheets". Acting on an intelligence, the containers covered under bill ofentry No.874293 dated 09.02.2010filed by the appellant through its Customs Broker M/s. Sajeev Kumar were preliminarily examined on 17.02.2010. The imported goods were found to be supplied by M/s. Changzhou Hua R Sheng Reflective Materials Co. Ltd., China. The goods were finally examined on 23.02.2010 by the officers of the Special Intelligence and Investigation Branch (SIIB) of the Commissionerate in presence of two independent witnesses. The goods were found to be rolls of branded Reflective Sheets of brand name "Sablite". Two types of reflective sheets of series TM3200 AB and TM1800 of1219 and 5 rolls respectively were found. The value of these goods declared in the Bill of Entry was Rs.15,41,721.53 (USD 32758.58). The examining officer doubted these values as they were too low. The goods weredetained and a market survey was done on 18.02.2010 in which quotation from M/s. Surya Plastics, Paharganj, New Delhi was obtained which showed that the price of similar Reflective Sheets was Rs.8,000 per roll (Roll size is 1.2 Mtr x 45.7 Mtrs.) and other reflective sheets were priced Rs.36,000/- to Rs.39,000/- per roll. The value declared in the Bill of Entry was Rs.15,41,721.53 which works out toRs.1247/- per roll. Hence it was felt to be very low.

2. During investigation, it was also found that the appellanthad imported the same goods through fourteen other bills ofentries in the past declaring similar prices. It was felt that the goods imported under these past Bills of Entry were also undervalued and were, therefore, liable to confiscation. It was felt that the values declared in these fifteen Bills of Entry totaling

Rs.1,29,50,222/- was low and it should be Rs.5,44,86,414/-.

3. In order to investigate the matter further, enquiries were conducted overseas and it was found that there was a vast difference between the prices declared in the Bills of Entry before the Indian Customs by the appellant and the values declared by the exporter to the Chinese Customs authorities. With respect to four containers in Bills of Entry dated 22.04.2018, 30.06.2018, 01.08.2018 and 27.10.2018 tabulated below were compared with the values declared for those very consignments of goods before the Chinese Customs authorities and the values declared in the Trade Declarations before the Chinese Customs were four times the values declared before the Indian Customs. In view of this response department formed the opinion that the importer undervalued their goods at the time of import to evade paymentof customs duties.

Sr. No.	Container No.	Invoice No.		BOE No.	Before Indian Custom (inUSD)	Before Chinese Customs (in USD)
1	TTNU 1398469	HRS-DEC-0801		22.04.2018	12578.1	50528
2	FSCU 3101101	HRS-DEC-0802		30.06.2018	12578.1	50528
3	FSCU 3179141	HRS-DEC-0803		01.08.2018	16378	65274
4	TLXU 3005360	HRS-DEC-0805		27.10.2018	16378.3	74515

3. On a specific query from the bench as to how the two valueswere correlated as pertaining to the same consignments, learned authorized representative for the Revenue submitted that these can be correlated by the Bill of Lading number and date, the vessel number and date and the container numbers. He further clarified that the Bill of Lading is the document of title issued by the Master of the Vessel or his representative to the exporter indicating the receipt of the goods. This Bill of Lading is received by the importer through banks and is used to claim the goods. Thus, the Bill of Lading is found both in the Shipping Bill or any other export document presented to the Customs by the exporter and it is also found in the Bill of Entry or any other document presented by the Importer before the Customs in the port of import. Further, the Containers are uniquely numbered and notwo containers in the world have the same number. Matching the container numbers in the export and import documents also establishes that what is being referred to is the same container. Ifthe name of the vessel and the date of sailing are also matched with the container number, there can be no manner of doubt that the declarations before the Chinese Customs by the exporter and before the Indian Customs by the importer pertain to the same consignment imported in the same container in the same vesselon the same date.

4. Summons were issued to Shri Varinder Singh Choudhary, Proprietor of the appellant who in his statement dated 15.11.2011recorded under section 108 of the Customs Act, 1962, said thathe has been the Proprietor of M/s. Décor Rubber Industries since its inception in 1986 and the firm is engaged in the activity of import of Automobiles Accessories and Reflecting Sheets for trading thereof. He also admitted that five rolls of the sheetimported were not declared in the Bill of Entry dated 9.2.2010 which was filed. He admitted that all the impugned Bills of Entry were filed by his firm and he had signed on the copies of these Bills of Entry in token of having seen the same. The goods imported under the Bill of Entry dated 9.2.2010 were seized and later provisionally released.

5. Show Cause Notice bearing (SCN) No.29221 dated 30.08.2012 was served upon the appellant alongwith, inter alia, copies of the Trade Declarations filed by their supplier with the China Customs duly authenticated by the Indian Consulate alongwith their English translations. It was alleged that the importer-appellant had fraudulently suppressed the correct transaction value of the imported goods by fabricating import documents with intent to evade payment of appropriate duties of customs, while importing the same during the period 03.02.2008 to 09.02.2010. Hence the said SCN proposed to reject the declared value of Rs.1,44,91,944/- (Rs.15,41,722/- for Bill ofEntry dated 09.02.2010+ Rs.1,29,50,222/- of 15 Bills of Entry from 03.02.2008 to 09.02.2010) of „Reflective Sheets" imported by appellant during the said period and enhance it to Rs.6,09,72,523/- demand and recover the differential duty under the proviso to section 28(1) of the Act alongwith interest under Sections 28AA and 28AB. The goods imported under Bill of Entry No.87293 dated 09.02.2010 which were detained andprovisionally released were proposed to be confiscated under

section 111 (m) of the Customs Act, 1962.Goods imported under the other Bills of Entry were not available for seizure as they werealready cleared but it was still proposed to hold them liable for confiscation due to the observed mis-declaration of value. In addition, penalty was proposed to be imposed on them under section 112 (a), 112 (b), 114A and 114AA of the Act ibid.

5. The proposals in the SCN were confirmed by the impugned order. The operative part of which is as follows:

"(i) I order to reject the declared value of Rs. 15, 41,722/- in respect of Bill of Entry No. 874293 dt. 09.02.2010 under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and re-determine the same to Rs.64,86,108/-under Section 14 of the Act ibid read with rule 3 (4). Rule 4 and Rule 9 of the said rules and further order for confiscation under Section 111 (m) of the Customs Act 1962. However, I give an option to the Importer to redeem the imported goods on paymentof fine of Rs. 5,00,000/- (Rupees Five Lacs Only in terms of Section 125 of the Customs Act, 1962.

(ii) I reject the declared value of Rs.24,88,990/- of Reflective Sheets' pertaining to four Bills of Entry No. 687904 dated 22.04.2008, 706622 dated 30.06.2008, 716536 dated 01.08.2008 and 734013 dated 27.10.2008 imported by M/s. Decor Rubber Industries during the period from 03.02.2008 to 09.02.2010 under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and re- determine the same to Rs. 1,04.78,218/- under Section 14 of the Act ibid read with rule 3(4), Rule 4 and Rule 9 of the said rules.

(iii) I refrain from confiscation of the goods imported in past by M/s. Decor Rubber Industries vide Bills of Entry Nos. 765238 dated 03.02.2008, 687904 dated 22.04.2008, 706622 dated

30.06.2008,	*716536*	*dated*	*01.08.2008,*	*734013*	*date*
27.10.2008,	*775599*	*dated*	*19.03.2009,*	*783248*	*date*
17.04.2009,	*788781*	*dated*	*05.05.2009,*	*800863*	*date*
15.06.2009,	*815100*	*dated*	*30.07.2009,*	*828110*	*date*
09.09.2009,	*842429*	*dated*	*24.10.2009,*	*855194*	*date*

08.12.2009 and, 865928 dated 13.01.2010, for the reasons stated above, I, however, order confiscation of goods imported vide four Bills of Entry No. 765238 dated 03.02.2008, 687904 dated 22.04.2008, 706622 dated 30.06.2008, 716536 dated

01.08.2008, 734013 dated 27.10.2008 under Section 111 (m) of the Act.

(iv) I demand the differential Customs duty amounting to Rs.37,40,363/- under Section 28 from M/s. Decor Rubber Industries for the goods confiscated as discussed above alongwiththe interest liable thereon under Section 28AA and erstwhile 28ABof the Customs Act, 1962 as amended.

(v) I do not impose penalty under Section 112(a) and 112(b) of the Customs Act, 1962, on M/s. Decor Rubber Industries, A- 114/1, Wazirpur Industrial Area, New Delhi-110052, the Noticee No 1.

(vi) I impose a penalty of Rs.37,40,363/- (Rupees Thirty Seven Lakhs Forty Thousand Three Hundred Sixty Three only) under Section 114A of the Customs Act, 1962 on M/s. Decor Rubber Industries, A-114/1, Wazirpur Industrial Area, New Delhi-110052,the Noticee No 1.

(vii) I impose a penalty of Rs.10,00,000/- (Rupees Ten Lacs only)under Section 114AA of the Customs Act, 1962 on M/s. Decor Rubber Industries, A-114/1, Wazirpur Industrial Area, New Delhi- 110052, the Noticee No 1.

(viii) I do not impose any penalty on Sh. Varinder Singh Chaudhary Prop. M/s Decor Rubber Industries, A-114/1. WazirpurIndustrial Area, New Delhi-110052, the Noticee No 2 under Sections 112(a), 112(b), 114(A), 114AA and 117 of the Customs Act, 1962 for the reasons discussed

above."

Being aggrieved, the appellant is before this Tribunal.

6. We have heard Mr. Bipin Kumar Sinha, ld. Consultant forthe appellant and Mr. Rakesh Kumar, Authorized Representative for the Department.

7. Ld. Counsel for the appellant submitted that there were two sets of Bills of Entry as follows:

(i) One set of four Bills of entry for which some declarations made by Chinese Exporters have been received.

(ii) Another set of 11 Bills of Entry of which valuation in respect of 10 Bills of Entry had already been accepted except the which is the live Bill of Entry No.874293 dated 09.02.2010.

8. In all these Bills of Entry, the description of goods, overseas supplier and country of origin are identical. The rejection of the values declared in the Bills of Entry and the re-assessment was based on the market enquiry during which a single quotation was obtained from M/s. Surya Plastics and the declarations allegedly made before the Chinese authorities by the exporter.

9. Ld. Counsel submitted that declarations received from the Chinese authorities for the goods cannot be relied as none ofthese bear any signature or stamp. Rejection of transaction value on the basis of such inadmissible documents is liable to be set aside. Also there is no proper market enquiry. The value has been enhanced and re-assessed based on a single quotation whichmentions the retail price of the goods and not the import value. Hence, this report also cannot be the basis for rejecting the transaction value as mentioned in the impugned Bills of Entry. Ld. Counsel has relied upon following decisions to support the above submissions has prayed for setting aside the order under challenge and for the appeal to be allowed.

1. Commissioner of Customs, Calcutta vs. South India Television (P) Ltd. reported in 2007 (214) E.L.T. 3 (S.C.)

2. Eicher Tractors Ltd. vs. Commissioner of Customs,Mumbai reported in 2000 (122) ELT 321.

3. Golden Agro Corporation vs. Commissioner of Customs,Jaipur-I reported in 2017 (354) ELT 655 (Tri.-Del.)

10. Rebutting these submissions, Learned AuthorisedRepresentative for the Revenue submitted that the appellant declared the goods as "Reflective Sheets" without specifying any brand, but on examination, they were found to be of "Sablite" brand. The brand name was suppressed with the sole intention tolower the value of the imported goods. The original value declared before the Chinese Customs for the goods was different than the value in the invoices presented before the Indian Customs Authorities for the same goods in the same consignments. This change is sufficient to prove the forgery committed by the appellant to suppress the original value. Ld. Departmental Representative further submitted that the declarations received from China are authentic and they have been obtained through Consulate General of India alongwith English Translations. These documents sufficiently prove that the price declared before Chinese Customs was much higher than the price declared before the Indian Customs. Not only are these documents/declarations admissible but these are a sound basis for rejecting the transaction value under Rule 12 of the Custom Valuation Rules, 2007. Finally, submitting that the forgery nullifies everything, that the order under challenge is prayed to be upheld and appealis prayed to be dismissed.

11. Ld. Departmental Representative has relied upon the following case laws:-

1. Martwin Electronics vs. Commissioner of Central Exciseand Service Tax, Ahmedabad reported in 2016 (331)
E.L.T. 85 (Tri.- Ahmd.).

2. Chandra Impex Pvt. Ltd. vs. Commissioner of Customs,New Delhi reported in 2008 (224) E.L.T. 583 (Tri. – Del.)

3. Poonam Plastic Industries vs. Collector of Customs reported in 1989 (39) E.L.T. 634 (Trib.).

12. Having heard the rival contentions, the following three issues are framed:

(i) Whether the Export Declarations received from China are genuine documents to be read into evidence.

(ii) Whether appellant mis-declared the goods imported under the Bills of Entry

(iii) Whether in the Bills of Entry the goods were undervalued and if so, whether the re-determination of the value and demand of differential duty and the confiscation of the goods imported under the Bill of Entry dated 9.2.2010 and the redemptionfine and the penalties imposed can be sustained.

Issue No.1

13. It is observed that the export declarations received from China contain data including Exporter name, Consignee name, Departure date, Transport mode, Vessel/Aircraft name, Port of discharge, Airway Bill No., Destination country, Destination country code, Marks and Nos., Container No., Number and kind of packages, description of goods, Country of origin, Country code, Quantity, Unit of quantity, FOB Value, Declarations, Signatory"s name, Signature, designation, date, etc. All these details, excepta few particulars that too in few of these documents, tally with the invoices. Thus, *prima facie*, the documents appear to be genuine. The admissibility of documents is covered under Section
139 of Customs Act, 1962which is reproduced below for better appreciation, reads as follows:-

"Section 139. Presumption as to documents in certain cases. - *Where any document -*

(i) is produced by any person or has been seized from the custody or control of any person, in either case under this Actor under any other law, or

(ii) has been received from any place outside India in the course of investigation of any offense alleged to have been committed by any person under this Act, and such document istendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a documentexecuted or attested, that it was executed or attested by the person by whom it purports to have been so executed orattested;

(b) admit the document in evidence, notwithstanding thatit is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i) also presume, unless the contrary is proved, the truth of the contents of such document.

It is observed that the Export Declarations are obtained from the Customs and Excise Department, Hong Kong under the cover of their letter on letterhead and signature, through Commission for India (High Commission/Embassy) in HongKong. It is also stated by Hong Kong Customs that they have no objection for the said 25 Export declarations to be used as evidence in judicial proceedings in India. It is also seen that theExport Declarations are signed by Thomas Chan, Merchandiser and Fradu Wang, Accountant on behalf of the Batshita International Limited. It also contains a declaration that he is the exporter and the particulars given in the declaration are accurate and complete. In view the facts and circumstances of this particular case, we find that these Export Declarations are admissible as evidence, and we hold so."

14. In the present case the declarations obtained from China Customs are the documents in terms of Section 139(ii). The appellant objected to these declarations being used as evidence but it cannot be denied that supplier of the appellant would have filed export declarations before China Customs. The appellant has failed to produce those declarations to demonstrate that the declarations produced by the Department were false. It is the submission of the learned counsel for the appellant that these declarations do not contain and signature or stamp. We do not find any force in this argument. When processing of documents is computerized, the declarations are filed online and they do not contain any signatures and stamps. In fact, even the Bills of Entryfiled by the appellant are also filed online and approved online andthe officer does not sign and stamp the Bills of Entry. Likewise, most of the documents such as invoice, packing list, etc. submitted along with the Bills of Entry are also sent and received through electronic means and not under the signature and stamp. At any rate, the documents filed with the Chinese authorities are as per their procedures and practices and if the declarations are tobe filed online by the exporter with the Chinese authorities, they will be so filed and they cannot be separately stamped and signed and issued to satisfy the appellant.

15. If the appellant wanted to dispute the authenticity of the declarations, he could have procured and produced the correct declarations as the appellant was in a better position to procure those documents from his supplier/exporter. The appellant failed to produce any such declarations. On the other hand, in order to obtain the declarations made before the Chinese authorities, the investigating officer had requested the Consulate General of India through letter No.62/2010 dated 29.11.2010 and subsequent reminders dated 08.06.2010 and 02/02/2011 to get the possible documents for facilitating the overseas inquiry in the import of Reflective Sheets made by M/s. Décor Rubber Industries(appellant).

16. The Consulate General of India, vide their letter bearing No.02/2011 dated 15.09.2011 provided four trade declarations from China Customs in respect of the case being investigated by ICD, Tughlakabad clearly indicating massive undervaluation over 75% of the value by the appellant while importing the „Reflective Sheets" from China. The English translation has been marked on these Chinese Declarations. These, documents were received by DRI Headquarters on 15.09.2011 and by the ICD Tughlakabad on 12.10.2011, based on which acomparative chart was prepared by the department (RUD 5 of the SCN) as below:

COMPARATIVE CHART OF DECLARATIONS BEFORE INDIAN CUSTOMS VIZ-A-VIZ CHINA CUSTOMS IN THE IMPORTS OF REFLECTIVE SHEETSFROM SHANGHAI PORT OF P.R. CHINA

Sl. No.	1	2	3	4	5
1	Name of the importer	Décor Rubber Industries Delhi	Décor Rubber Industries Delhi	Décor Rubber Industries Delhi	Décor Rubber Industries Delhi
2	Name of the exporter	Changzhou Hua RSheng Reflective Material Co. Ltd., China	Changzhou Hua R Sheng Reflective Material Co. Ltd., China	Changzhou Hua R Sheng Reflective Material Co. Ltd., China	Changzhou Hua R Sheng Reflective Material Co. Ltd., China
3	Bill of lading No. &date	OOLU 2006064410 DT.30.03.2008	TALJSH0029 1655 Dt. 07.06.08	TALJSH0029 1976 Dt. 12.07.08	TALISH0029 2 921 dt. 07.09.08
4	Invoice No. & Date	HRS-DEC-0801	HRS-DEC-0802	HRS-DEC-0803	HRS-DEC-0805
5	Container No.	TINU1398469	FSCU310110 1	FSCU317914 1	TLXU300536 0

6.	Declaration before Indian Customs				
	Descri ption of th goods	Reflective Sheeting	Reflective Sheeting	Reflective Sheeting	Reflective Sheeting
	(ii) Q	470 rolls, 10528 kg.	470 rolls, 10528 kg.	612 rolls 13709 kgs.	612 rolls 13709 kgs.
	Value(USD)(CIF)	12578.10	12578.10	16378.00	16378.00
7.	Declaration before China Customs				
	Descri ption of th goods	Reflective Film	Reflective Film	Reflective Film	ReflectiveFil
	(ii) Q	470 rolls, 10528 kg.	470 rolls, 10528 kg.	612 rolls 13709 kgs.	612 rolls 13709 kgs.
	Value(USD)(CIF)	50528	50528	65274	74515
8.	Difference (USI	37949.90	37949.90	48896.00	58136.71
9	% of Under Valuation	75.10	75.10	74.90	78.02

17. This chart was provided to the appellant on 15.11.2011.

Copies of declarations received from Chinese Customs were senttothe appellant vide letter dated 23.11.2012. Nothing has been produced by appellant to Show that these documents were incorrect or that the declarations made before the Chinese Authorities were different.

18. The mode of procuring the documents during investigation and the absence of any other Export Declarations with the appellants is therefore sufficient for us to hold that the appellant has failed to rebut the presumption of correctness attached to these documents in terms of section 139 of the CustomsAct. Appellant has not produced any other cogent document to show that price as was declared to the Chinese Customs was different from the price which is mentioned in the export declaration obtained by the department from China through Consulate General of India The Export Declarations as received from China are, therefore, admissible in the evidence.

19. In view of above discussion, there appears no doubt about the authenticity of documents as these were obtained by DRI through the Government channel and were obtained from the concerned Department of the exporting country. We draw our support from the decision in the case of **Orson ElectronicsPrivate Ltd. vs. Collector of Customs, Bombay reported in 1996 (82) ELT 499 (Tri. Delhi).**

20. Resultantly the first question of adjudication framed above stands decided in favour of the Department.

Issue No.2

21. The appellant objected the quotation obtained by the Department to be called as the market inquiry report. However, perusal of said quotation reveals that it is about the same product as has been imported by the appellant. The only defense takenby the appellant is that the value quoted in the said quotation is the retail value. But no evidence is placed on record to support this submission. Otherwise also there cannot be a difference of more than 75% in wholesale value and the retail value. The undervaluation in the present case has been noticed to that extent based upon the documents which have already been held admissible in terms of Section 139 of the Customs Act. The quotation from M/s. Surya Plastics is obtained by the competent officers during the course of investigation. Nothing has been produced by the appellant to rebut the presumption of Section 139 of Customs Act even qua the said quotation/market inquiry. We hold that the presumption of

correctness was attached to this document, as well.

22. Although only one quotation was obtained during market inquiry, the value mentioned therein is actually in corroboration to the values mentioned in the Chinese Customs declaration. We observe that the adjudicating authority below in para 22.3 of the impugned order has meticulously compared the information of these documents and has cross checked it with the declarations made by the appellant in the five number of Bills of Entry including that of the live consignment which is one of the Bills of Entry among 11 others of past. Hence, we do not find any error when the adjudicating authority has concluded that the comparison makes it clear that for the same Bill of Lading and invoice, the importer declared very less value of transaction in the Bills of Entry as contrast to the value as declared by the exporter in his country for the same invoice. It implies that invoice hasbeen manipulated in between export and import ports and invoice depicting less value was presented to the Indian Customs in order to evade the legitimate duty of customs and the importer succeeded in his intention many times till the documents from overseas came to the notice of the Department. These overseas documents when compared with the details in the import documents it get clearly established that the importer has mis- declared the value of the goods at the time of import by forging the invoice.

23. We also observe that the appellant had admitted the presence of five different rolls of Reflecting Sheets of different series TM 18 100 to have been sent by the exporter as samples, but still had not shown the same in the Bills of entry. Thisadmission corroborates the Department‟s stand that the appellant despite having knowledge of the content of his consignment and the correct/export value of the goods in the said consignment, hasfailed to declare the same.

24. Hence we don‟t find any reason to differ from the findings in the order under challenge with respect to the said quotation. We hold that the quotation of M/s. Surya Plastics has rightly been relied upon for the purpose of market inquiry. The decisions referred by the appellant are therefore held not applicable to the facts of the present case.

25. We also note that vide letter dated 25.02.2010 the Chinese exporter has certified that appellant is their Customer for years for reflective sheets under “Sablite” brand. This document confirms the alleged mis-declaration as the said brand has not been declared in Bill ofEntry. Though the price in said certificate is mentioned to be @ USD
0.48 per Sq. Mtr. but simultaneously the exporter has rescued itself from any responsibility due to any problem with reference to the grade ordered.

26. The defence taken by appellant that Chinese declarations are merely the photocopies is also not acceptable. We rely on thedecision in the case of **Chandra Impex Pvt. Ltd. vs. CC, New Delhi reported in 2008 (224) ELT 583 (Tri.-Del.).**

27. Thus, we hold that appellant mis-declared the goods while importing them. This issue also stands decided in favour of the Revenue.

Issue No. 3:

28. To adjudicate this issue, we need to examine the legalprovisions relating to valuation in the Customs Act. Duties of customs are levied on goods imported into and exported from India at the rates specified in the Schedules to the Customs Tariff Act, 1975. On some goods, the levy is based on quantity (specific duty) and other goods, it is based on value (ad valorem). If the duty is to be levied based on value, valuation for the purpose has to be done as per Section 14 which reads as follows:

Section 14. Valuation of goods. -

(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, ***the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid orpayable for the goods when sold for***

export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of thegoods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf*:*

Provided *that such transaction value in the case of importedgoods shall* ***include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges*** *to the extent and in the manner specified in the rules made in this behalf:*

Provided *further that the* ***rules*** *made in this behalf* ***may provide for,-***

(i) the circumstances in which the ***buyer and the seller shall be deemed to be related****;*

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or ***price isnot the sole consideration for the sale or in any other case****;*

(iii) ***the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section****:*

Provided *also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill ofentry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.*

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may,by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

Explanation *. - For the purposes of this section -*

(a) rate of exchange" means the rate of exchange -

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreigncurrency into Indian currency;

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)

29. The non-obstante clause in sub-section 2 of section 14 givesthe Board the power to fix tariff values for any class of goods and if fixed, the tariff value will be the value to determine the duty. This sub-section is not relevant to this case. In all other cases, thevalue to be reckoned for calculating the Customs duty shall be thetransaction value subject to five conditions:

a) Buyer and seller are not related.

b) Price is for delivery at the time and place of importation, i.e., all costs up to the point of import are to be included.For instance, if the sale is on Free on Board basis, the costs of transportation to the place of import, transit insurance, etc. will have to be added.

c) Price is the sole consideration for sale.

d) Some amounts indicated in the first proviso to sub-section 1of section 14 must be included.

e) Valuation will be as per any other conditions as may be specified in the Rules.

30. The first proviso to sub-section 1 of section 14 provides for some additions to the transaction value which are not relevant for the present case. The second proviso to this sub-section provides for Rules to be made in this behalf to provide for:

a) the circumstances in which **the buyer and the seller shallbe deemed to be related**;
b) the manner of determination of value in respect of goods

when there is no sale,

c) the manner of determination of value in respect of goods if

the buyer and the seller are related,

d) the manner of determination of value in respect of goods where **price is not the sole consideration for the sale**;
e) the manner of determination of value in respect of goods in

any other case; and

f) the manner of **acceptance or rejection of value** declared by the importer or exporter, as the case may be, **where the proper officer has reason to doubt the truth or accuracy of such value**, and determination of value for the purposes of this section.

31. The **Customs Valuation (Determination of Value of imported goods) Rules, 2007**[2]were framed as per the second proviso to sub-section 1 of section 14. It has 13 Rules in all of which Rules 1 and 2 are Preliminary rules. Rule 3 states that subject to Rule 12, the value shall be the transaction value adjusted according to Rule 10. Rule 10 provides for certain coststo be included in the transaction value. Rule 12 provides for the proper officer to reject the transaction value if he has reason to doubt its truth and accuracy. **Thus, unless the proper officer rejects the transaction value under Rule 12, the valuation has to be based on transaction value as per Rule 3 with some additions, if necessary, as per Rule 10.**

32. If the transaction value is rejected under Rule 12, then **it must be determined sequentially under Rules 4 to 9**. **Rule 4**provides for the valuation to be done on the basis of **identical goods**. **Rule 5** provides for the valuation to be done on the basis of the value of **similar goods**. Rule 6 states if Rules 4 and 5 cannot determine the value then they must be done as per Rule 7 and thereafter Rule 8 but this sequence can be reversed at the option of the importer. In other words, if the importer so chooses,Rule 8 can be applied directly instead of Rule 7. **Rule 7** provides for a **deductive method of valuation** on the basis of prices of similar or identical goods sold in India and after making some deductions from such prices. **Rule 8 provides for a computed value,** i.e., based on the cost of raw material, cost of manufacture, reasonable profit, etc. In view of Rule 6, the importer may choose the computed value without examining the feasibility of determining value through deductive methods. **Rule9 is a residual method** which provides for determining the valuewhere it cannot be determined under Rules 3 to 8. Rule 10, as already discussed, provides for some costs to be added to the transaction value if the valuation is done as per Rule 3. Rule 11 requires the importer to make a declaration. Rule 12 lays downthe provision for rejection of transaction value. Rule 13 provides for interpretative notes for the Rules.

33. **To sum up, valuation has to be done sequentially** as follows:

a) If a **tariff value** is fixed by the Board, it is the value (sub- section 2 of Section 14);
b) If no tariff value is fixed by the Board, valuation is as per the **transaction value, if necessary, with some additions** (as per the first proviso to sub-section 1 ofsection 14 and as per Rule 10);
c) If the transaction value is rejected as per Rule 12 by the proper officer, valuation has to be done as per the **value of identical goods** (Rule 4);
d) If transaction value is rejected and there is no value of identical goods, then it must be as per the **value of similargoods** (Rule 5);

e) If transaction value is rejected and there is no value of identical goods or similar goods, value must be determined through **Deductive method** (Rule 7)

f) If transaction value is rejected and there is no value of identical goods or similar goods and it is not possible to determine value following deductive method, then valuemust be determined through **computation** (Rule 8)

g) If the importer so chooses, computational method may be adopted without examining the deductive method first (Rule 6).

h) If the transaction value is rejected and there is no value of identical goods or similar goods and if it is also not possible to determine the value through deductive method or computational method, then value may be determined through the **residual method** by the officer following the above principles (Rule 9).

34. The next question which arises is when can the properofficer reject the transaction value. Rule 12 reads as follows:

12. Rejection of declared value. -

(1) When the proper officer ***has reason to doubt the truth or accuracy of the value declared*** *in relation to any imported goods, he* ***may ask the importer of such goods to furnish further information including documents or other evidence*** *and if****, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt*** *about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions ofsub-rule (1) of rule 3.*

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation*.-(1) For the removal of doubts, it is hereby declaredthat:-*

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does notrepresent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

(ii) The declared value shall be accepted where the properofficer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include -

(a) the significantly higher value at which identical or similar goods imported at orabout the same time in comparable quantities in a comparable commercialtransaction were assessed;

(b) *the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;*

(c) *the sale involves special discounts limited to exclusive agents;*

(d) *the mis-declaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;*

(e) *the non declaration of parameters such as brand, grade, specifications that have relevance to value;*

(f) the fraudulent or manipulateddocuments.

35. Thus, if the officer has **reason to doubt** the truth and accuracy of the transaction value, he can call for information including documents and evidence. If the information and evidence is presented and after examining it or if no informationor evidence as called for is

presented, if the proper office has **reasonable belief** then it shall be deemed that the value cannot be determined as per Rule 3 (i.e., based on transaction value withadditions, if necessary). The grounds on which the proper officer may raise doubts about the truth and accuracy of the transaction value have been illustrated in explanation 1 (iii) to Rule 12. Thelist is inclusive and not exhaustive.

36. While examining the issue No.1 we have already held that the export declarations are admissible into evidence. Similarly, while examining issue No.2, we held that the quotation obtained during market enquiry is admissible as evidence. Of the fifteenBills of Entry, the Commissioner only re-determined the value of the goods in respect of five and did not re-determine the value in respect of the remaining ten Bills of Entry. These five Bills of Entryincluded the Bill of Entry dated 9.2.2010 and four past Bills of Entry in respect of which the transaction values could be obtained from the Chinese authorities through Consulate General of India from the declarations made by the exporter to Chinese Customs.

37. As far as the Bill of Entry dated 9.2.2010 is concerned, the Commissioner rejected the transaction value, firstly because, while the invoice and the Bill of Entry declared only 1219 rolls of TM 3200, on examination, it was found that there were fiveadditional rolls of TM 1800which were not at all declared in the invoice and in the Bill of Entry. Shri Virendar Singh, owner of the importer firm admitted to having imported but not declaring thesefive rolls in the bill of Entry.Market enquiry was conducted and it was found that the price of TM 3200 was Rs. 8,000/- per roll , the price of TM 1800 (which was not even declared) was Rs. 36,000/- per roll. Further, overseas enquiry into four past Bills of Entry by the appellant also showed that the actual values of identical goodsimported by the appellant declared by the exporter before the Chinese Customs was four times the values declared for the same consignment before the Indian Customs by the appellant. Shri Virendar Singh stated that the goods imported in the Bill of Entry dated 9.2.2010 were identical to the goods in the aforesaid four Bills of Entry in respect of which the declarations before theChinese Customs could be obtained.

38. For these reasons, she rejected the transaction value under Rule 12 of the Valuation Rules and re-determined it under Rule 4 in respect of the Bill of Entry dated 9.2.2010 taking the value of identical goods imported by the appellant in the past. Thus, as required, having rejected the transaction value under Rule 12, she determined the value on the basis of the contemporaneous imports of identical goods as per Rule 4.

38. As far as the four past Bills of Entry in respect of which the declarations made before the Chinese Customs were obtained are concerned, we find that the Bill of Lading numbers, names of the vessels, container numbers, etc. match which showed that the values declared in the four Bills of Entry were low and the actual values were declared by the exporter in the declarations beforethe Chinese authorities. Accordingly, the Commissioner has in the impugned order, rejected the declared transaction value in respect of these four Bills of Entry under Rule 12 and re-determined it based on the actual transaction value in respect of the four Bills of Entry. Consequently, she confirmed the demandof differential duty of customs under section 28. We are in full agreement with the decision of the Commissioner.

39. The Commissioner has dropped the demand in respect often other Bills of Entry proposed in the SCN in respect of which nodirect evidence in the form of declarations made before the Chinese authorities is available and therefore the issue has attained finality to this extent. Thus, the Commissioner‟s order was very fair and balanced.

40. In the impugned order, the Commissioner confiscated goodsimported under the Bill of Entry dated 9.2.2010 which were seizedand provisionally released on execution of a bond under section 111(m) but she refrained from confiscating the goods imported under the past Bills of Entry. Since the undisputed fact is that the goods imported in the Bill of Entry were not fully declared and fiveadditional rolls were imported but not declared and also since we found that the value declared in this Bill of Entry was correctly rejected under Rules 12 and re-determined under Rule 4, we find that there was mis-declaration of the goods both in terms of valueand quantity and the confiscation under section 111(m) must be upheld. The redemption fine of Rs. 5,00,000/- imposed under section 125 on the goods valued at Rs.64, 86,108/- is very fairand reasonable and calls for no interference.

41. In the impugned order, the Commissioner did not impose any penalty on the owner of the appellant. She also did not impose any penalty on the appellant under section 112 but imposed penalties under section 114 A and 114AA.

42. The penalty under section 114A is a mandatory penalty and is equal to the duty sought to be evaded. This section reads as follows:

Section 114A. Penalty for short-levy or non-levy of dutyin certain cases. –

Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppressionof facts, the person who is liable to pay the duty or interest,as the case may be, as determined under [sub-section (8)of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined:

43. Since we have upheld the confirmation of demand under section 28, we also uphold the consequential mandatory penalty under section 114A.

44. Penalty under Section 114AA can be imposed for use offalse and incorrect material. It reads as follows:

Section 114AA. Penalty for use of false and incorrect material.

If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

45. The appellant had, undisputedly, mis-declared the quantity of the goods imported in the Bill of Entry dated 9.2.2010. Shri Varinder Singh admitted in his statement that he had not declaredfive rolls of a different type which were also imported. Further, in respect of four of the past Bills of Entry, the values declared bythe exporter before the Chinese authorities was much higher than the values declared in the Bills of Entry by the appellant. We, therefore, find that the appellant was liable to penalty undersection 114AA and the penalty of Rs. 10,00,000/- was just and fair in the factual matrix of this case.

46. Resultantly, we are in full agreement with the findings of the adjudicating authority below. Order resultantly, is hereby upheld. Consequent thereto the appeal stands dismissed.

[Order pronounced in the open Court on 03/11/2023]

(DR.RACHNA GUPTA)MEMBER (JUDICIAL)

(P.V. SUBBA RAO) MEMBER (TECHNICAL)

Anita

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

CUSTOMS APPEAL No. 50871 OF 2019 [DB]

(Arising out of Order in Original No. 75/MK/Revocation/Policy/2018 dated 30/11/2018 passed by Commissioner of Customs (Airport & General), New Delhi)

M/s. SKH Freight Logistics Pvt. Ltd. **...Appellan**

E-29, Viswakarma Colony,

M.B. Road, New Delhi

Versus

Commissioner of Customs,(Airport & General) **....Responden**

New Custom HouseNear IGI Airport

New Delhi.

APPEARANCE:

Mr. Vedprakash Batra, Consultant for the appellant

Mr. Rakesh Kumar, Authorized Representative for the Respondent

Coram:

HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)

HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING : 11.08.2023DATE OF DECISION: 06.11.2023

FINAL ORDER NO.51504/2023

DR. RACHNA GUPTA

Facts in brief relevant for present adjudication are:-

Intelligence was received by DRI that a syndicate ofunscrupulous persons was engaged in exporting inferior quality of readymade garments by overpricing the same to earn undue amount of Drawback. It was found that M/s Linwood Sales Pvt. Ltd., (IEC No. 0216914418), 12, Sovaram Basak Street, 2nd floor, Kolkata-700007 filed six Shipping Bills for export of Women's Leggings of MMF to Dubai, UAE at a declared FOB value of Rs 5.22 crore under claim of Drawback amounting to Rs.51.19 lakh. The Shipping Bills were filedby Customs Broker, M/s. SKH Freight Logistics Pvt. Ltd. DRI intercepted the consignment of two containers bearing Nos.

TGHU 24041549 and FSCU 3539037. The declared FOB value of these two containers was Rs 5,22,33,258(Five crore twenty two lakh thirtythree thousand two hundred fifty eight) and total drawback claimed was Rs.51,18,864 (Fifty one lakh eighteen thousand eight hundred sixty four).

2. The goods under these containers were examined in the presence of Shri Souvik Guha Sarkar, representative of M/s Linwood Sales Pvt. Ltd., Shri Chandra Sekhar Hore, 'G' card license holder, M/sSKH Freight Logistics Pvt. Ltd., Customs Officers and two independentwitnesses. The FOB value of 1,14,480 pieces of 'Women's Leggings' attempted for exports under 6 Shipping Bills was reassessed and ascertained at Rs.81,60,134/- and Rs.7,99,693/- only.

3. DRI intercepted another three containers bearing Nos. EISU 3799380, EISU 3759475 and EMCU 3684964 which said to contain "Readymade Garments Babies Inner". Nine Shipping Bills were filedby M/S SKH Freight Logistics Pvt. Ltd. on behalf of the exporter M/s Linwood Sales Pvt. Ltd. against these three containers. The total declared FOB value was Rs.5,78,09,000/- (Five crore seventy eight lakh nine thousand). The total drawback claimed was Rs 54, 96, 615/- (Fifty four lakh ninety six thousand six hundred Fifteen). The goods were attempted to be exported through Kolkata Port. Thegoods were found to of inferior quality and were reassessed under Rule 6 of Customs Valuation Rules, 2007 at Rs 1,26,02,304/- (Rupees One crore twenty six lakh two thousand three hundred and four) and the admissible drawback amount was found to be Rs.12,35,206/-only.

4. Statements of all concerned including the G Card Holder of appellant, Shri Chandra Shekhar, the Representative of exporter,namely, M/s.Linwood Sales Pvt. Ltd., Director of the exporter, namelyShri Pradeep Singh alias Anil the supplier of garments namely Murari Ganpat were recorded. It was found that Guha Sarkar was also a Customs Broker whose license was already revoked but he was working as agent for importers/exporters through different customs brokers including the appellants One Mr. Sumit Aggarwal alias Ranjit Agarwal was found to be the master mind of the offence of availing undue drawback by means of fraudulent exports. Department formedthe opinion that M/s Linwood Sales Pvt. Ltd., (IEC No. 0216914418), 12, Sovaram Basak Street, 2nd floor, Kolkata - 700007 was involved in fraudulent export under drawback scheme to avail huge undue drawback amount. The Customs Broker who facilitated the fraudulent export is M/s. SKH Freight Logistics Pvt. Ltd. Show Cause Notice No. DRI/KZU/CFPENQ-01(INT-59)/2017 dated 08.07.2016 was issued by DRI after completion of inquiry into the matter. This SCN has been adjudicated by the Order- in-Original. KOL/ CUS/ COMMISSIONER/ PORT/ 29/ 2018 dated 22.03.2018. Treating the said order as offence report that the license of the appellant was suspended vide order dated 06.07.2018. It is thereafter that the impugned Show Cause Notice No.13/261/2013 dated 27.08.2018 was served upon the appellant proposing that:

a. CB should be held responsible for contravention of various provisions under the Regulations 1(4), 10(a), 10(b), 10(d), 10(k) 10(n) and 13(12) of Custom Broker Licensing Regulation, 2018 (hereinafter referred as CBLR, 2018)erstwhile Regulation 10, 11(a), 11(b), 11(d), 11(k), 11(n) and 17(9) of CBLR, 2013.

b. Their CB license should be revoked and part or whole of the security submitted at the time of issue of their license, should be forfeited from them in terms of Regulation 18 of CBLR, 2018.

c. The said proposal has been confirmed vide order in original No.75/2018 dated 30.11.2018.

d. We have heard Shri Vedprakash Batra, ld Consultant for the appellant and Shri Rakesh Kumar, Authorised Representative for the respondent – Revenue.

e. Ld. Consultant for the appellant has submitted that:

The Appellant was granted Custom Broker license by the Commissioner of Customs (General), New Custom House, New Delhi under regulation 7(1) of CBLR, 2013 on 06.09.2013 bearing No. R- 46-DEL/CUS/2013(PAN: AASCS5286K) which was valid upto 05.09.2023 to transact business at Delhi Customs. The Appellant was permitted to transact the business in Kolkata Customs also from27.10.2016. The DRI after receiving the impugned intelligence recorded the statement of Mr. Chander Sekhar Hore having „G" Card holder of the appellant. Based thereupon the action has been taken against the appellant. It is submitted that the said statement is neither made the RUD to SCN nor the copy of the same was ever supplied to the appellant. Furthermore it is not coming out from the text of the OIO that under which Act and Section it has been recorded.

f. It is further submitted that M/s. Guha Sarkar & Co. was not in operation and he was working as agent for importers/ exportersthrough different Customs broker including M/s.SKH Freight Logistics Pvt. Ltd. It is very much clear from the statement of Mr. Pradip Singh that the signature appearing on six invoices cum packing lists of M/s.Linwood Sales Pvt. Ltd., was not his signatures. He does not know about the alleged fraudulent export with reference to shipping bills Nos. 2800712 and 2088715 both dated 14.12.2016. Letter of Authorisation of M/s. Linwood Sales Pvt. Ltd. issue in favour of Shri Souvik Guha Sarkar was not signed by him."

g. Ld. Counsel further brought to notice that the Appellant closed the operations in Kolkata vide application dated 11.04.2017. TheOrder- in- Original No. KOL/ CUS/ COMMOSSIONER/ PORT/29/2018 dated 22.03.2018 passed by the Commissioner of Customs (Port), Custom House, Kolkata has been received in the office of the Commissioner of Customs (A&G), New Custom House, New Delhi on 22.03.2018. Copy of said order dated 22.03.2018 is not received by the appellant till date. However, copy got provided duringsubmissions.

h. It was also mentioned that Appellant appeared before the enquiry officer on 31.08.2018 for the personal hearing submitted the detailed reply on 31.08.2018 and requested to allow the cross examination of Sh. Chander Sekhar Hore (G-Card Holder), Sh. SouvikGuva Sarkar and all the exporters who were found engaged in the alleged fraudulent exports. The Deputy Commissioner of Customs i.e. the Inquiry Officer without proper appreciation of the reply of the appellants filed to the SCN and without any proper application of mindseconded the allegations made in the show cause notice.

i. Ld. Counsel finally submitted that there is no evidence against appellant having any role in customs clearance of subject goods or that he had any knowledge about the exporters or that the appellant was aware of impugned exports. Also there is no allegation that CB received any consideration in lieu of alleged overvaluation. With these submissions the order under challenge is prayed to be set asideand appeal is prayed to be allowed.

j. Ld. Authorised Representative while rebutting the above submissions has mentioned that present is a case of apparent fraud committed to fraudulently obtain the illeligible duty drawbacks. The duty of CHA while facilitating exports/imports is quite important. It acquires more relevance in case of such fraudulent transactions. It is impressed upon that the custom procedures are complicated and the CB/CHA occupies a very important position in the Custom House. Heis not only the agent of importer/exporter but also the agent of the Department. Hence, he is liable to safeguard the interest of both the importers as well as the customs department. The Department,therefore, poses a lot of trust in the CHA who in turn is responsible to ensure appropriate discharge of such trust.

k. It is impressed upon that in the present case of proven fraud the CHA has not even opted to come forward. Apparently he has allowed his license to be used by someone else at the behest of yet another person. Resultantly, there is no infirmity in the findings in the order under

challenge. Ld. Departmental Representative has relied upon the following case laws:-

(i) Decision of Hon‟ble Supreme Court in the case of**Commissioner of Customs vs. K.M. Ganatra & Compan**y**reported in 2016 (332) E.L.T. 15 (S.C.).**

(ii) Decision of this Tribunal in the case of **Evershine Customs C & F Private Ltd. vs. Commissioner of Customs reported in 2021 (TIOL) 482 – CESTAT, Delhi**.

(iii) The earlier decision of the Tribunal in the case of **Millennium Express Cargo Pvt. Ltd. vs. Commissioner of Customs, New Delhi reported as 2017 (346) E.L.T. 471 (Tri.-Del**).

With these submissions the order under challenge is prayed to beupheld and the appeal is prayed to be dismissed.

l. Having heard the rival contentions and perusing the entirerecord, we observe from the offence report dated 22.03.2018 and theShow Cause Notice issued by DRI dated 27.08.2018 that Shri Sumit Agarwal is held as the mastermind of the impugned offence of availing undue draw-back by means of fraudulent export who plotted the whole scheme with the help of other unscrupulous persons. He persuaded Shri Murari Sabu a supplier of readymade garments, on commission basis, for supply of cheap quality of garments which he attempted to export at highly inflated declared value to avail undue drawback. He only arranged for IEC in the name of a non-existent firm, namely, M/s.Linwood Sale Pvt. Ltd. and even changed the identity of its Director from Shri Anil Singh to Shri Pradeep Singh.Fake documents were used to avail the IEC in the name of said M/s. Linwood. It is apparent from the several statements of Souvik Guha Sarkar who himself was a partner of Customs Broker firm M/s. S. Guha Sarkar & Co. and whose license had already been revoked on earlier several occasions. He deposed that Sumit Agarwal managed to obtain IEC of M/s. Linwood Sales Pvt. Ltd. (the impugned exporter)on the basis of fake documents. The modus operandi has also been acknowledged by Director of the exporter Shri Pradeep Singh aliasAnil Singh in his statement dated 06.01.2017 that he conspired with Shri Sumit Aggarwal for some monitory consideration. Similar reason for conspiring into the fraudulent exports has been given by Murari Sabu. Not only this, the G Card holder of the present appellant Shri Chandra Shekhar Hore in his statement dated 02.01.2017 has acknowledged that the appellant CB was aware about Souvik Guha Sarkar to be a habitual offender who only used to process the transactions on behalf of the appellant. Mr. Hore despite being the G Card Holder of the appellant but has acknowledged to sign on the blank annexures of the shipping bills and to handover them to said **Shri Savik Guha Sarkar**.

m. With these apparent and corroboratively admitted facts alongwith the absence of the proprietor of the present appellant Shri Ram Pratap, we have no reason to differ from the said findings of the original adjudicating authority that the appellant has transferred his license to Shri Souvik Guha Sarkar to transact the business in appellant‟s name. The said act is highly impermissible in terms of Regulation 1(4) of CBLR, 2018. In the light of absence of appellant to bring evidence to falsify the evidence brought against him or to cross-examine the witnesses who had deposed about using his licenseand authority to facilitate a fraudulent export transaction, the findingsarrived at by the adjudicating authority cannot be faulted.

n. It is the appellant‟s own case, through Shri Chandra Shekhar Hore, that the exporter was not known to them. They had never met with him nor ever visited his premises. Apparently no authorization letter in favour of the appellant from M/s. Linwood Sales could be produced on record. Hence, we do not find any infirmity whenviolation of Regulation 10 (a) of CBLR has been confirmed against theappellant.

o. As already observed above, the business in customs station wastransacted though in the name of the appellant but apparently by Shri Souvik Guha Sarkar though the appellant has argued that they never authorised said Shri Sarkar but simultaneously it is an apparent fact that the impugned export transaction was not transacted in person bythe Custom Broker despite it was processed in its name. The G card holder of the custom broker has admitted that he was signing the blank papers required to transact the business in customhouse and was handing over the same to M/s. Guha Sarkar. These observations since have not been refuted by the appellant who rather opted to remain absent are sufficient for us to confirm the violation of Regulation 10 (b) of CBLR

of 2018 by the appellant.

p. Coming to the allegations confirmed under Regulation 10 (d) of CBLR of 2018, we observe that it is very much on record that one Mr. Sumit Aggarwal was the mastermind behind the fraudulent highly under-valued exports. The G Card Holder of the appellant was aware about Shri Guha Sarkar to transact the fraudulent exports. Since the custom broker is responsible for all acts and means of his employees during their employment as per Regulation 13 (12) of CBLR of 2018, it was mandatory for the appellant to advice the exporter to comply with the provisions of the Customs Act, else to have brought to the notice of the Dy. Commissioner Customs about the non-compliance. But neither the appellant nor his G card holder has ever brought the impugned fraud to the notice of the competent authorities. We have no reason to differ from the findings arrived at against the appellant.

q. With respect to the allegations of violating Regulation 10 (k) and 10 (n) of CBLR of 2018, apparently and admittedly no records have been produced. The onus was upon the appellant CB only to produce the same. He rather opted to remain absent. His agent/hisG Card holder has deposed about not maintaining any record with respect to **M/s.Linwood** Sales Pvt. Ltd. He also has acknowledged to not to ever verify the correctness of IEC and GSTIN of the exporter. It is otherwise on record that the impugned exporting firm were found to be non-existent. The address as was declared as the address of Directors of M/s. Linwood Sales pvt Ltd in the IEC details was found to be the residential address of Directors/Proprietors of other Companies/ Firms. Though it was noticed that an account was opened in the name of M/s. **Linwood** Sales Pvt. Ltd in February, 2015 but the Directors shown were Shri Krishan Chandra Dey andShri Dayal Singh. However, the later got substituted by Shri Pradeep Singh alias Anil Singh in August, 2017. The Articles of association of the said company were also found to be forged. No evidence could bebrought on record to falsify these findings. In the circumstances, we have no reason to differ from the findings that the appellant has failedto make the appropriate enquiries of their clients prior transacting thebusiness in customhouse station. Hence, the findings confirming the violation of Regulation 10 (k) and 10 (n) are held sustainable.

r. The appellant has challenged the order in question on theground of it being barred by time. But present is a case of proven fraud of availing false duty draw backs after exporting thecheap/scrap fabric at highly inflated price. Fraud vitiates everything as was observed in the case of **Evershine Customs C & F Private Ltd. (supra).** The time line otherwise is to avoid the serious repercussions of curtailing the right to carry on the trade or profession by a genuine and diligent custom broker. The object of theRegulations (CBLR) is that it contemplates a timely action but simultaneously contemplates an action against the erring brokers.

s. We draw our support from the decision of this Tribunal in the case of **M/s. Swastic Cargo Agency vs. Commissioner of Customs reported as 2023 (2) TMI 677** wherein the decision of Hon‟ble High Court of Madras in the case of **M/s. Kamakshi Agency vs. Commissioner of Customs, Madras reported in 2001 (129) ELT 29** (Mad.) has been relied upon. It was held by the Hon‟ble Madras High Court as follows:-

“…….the grant of licence to act as a Custom House Agent has gota definite purpose and intent. On a reading of the Regulationsrelating to the grant of licence to act as Custom House Agent, it is seen that while Custom House Agent should be in a position to act as agent for the transaction of any business relating to the entry or departure of conveyance or the import or export of goods at any customs station, he should also ensure that he does not act as an agent for carrying on certain illegal activities of any of the persons, who avail his services as Custom House Agent. In such circumstances, the person playing the role of Custom House Agent has got greater responsibility. The very prescription that one should be conversant with various procedures, including the offences under the Customs Act to act as a Custom House Agent would show that, while acting as Custom House Agent, he should not be a cause for violation of those provisions. A CHA cannot be permitted to misuse his position as a CHA by taking advantage of the access to the department. The grant of licence to a person to act as Custom *HouseAgent is to some extent to assist the department with the various procedures such as scrutinising the various documents to be presented in the course of transaction of business for entry and exit of conveyance or the*

import or export of the goods. In such circumstances, great confidence is reposed in a Custom House Agent. Any misuse of such position by the Custom House Agent will have far reaching consequences in the transaction of business by the Custom House officials."

t. The recent decision of this Tribunal in the case of M/s Falcon India (Customs Broker) Vs. Commissioner of Customs, (Airport and

General) New Delhi in Customs Appeal No. 50934 of 2021 dated21.03.2022, it has been observed:

"33. The above decisions lay down that the Customs Broker (or Custom House Agent) is a very important person in the transactions in the Custom House and it is appointed as an accredited broker as per the Regulations and is expected to discharge all its responsibilities under them. Violations even without intent are sufficient to take action against the appellant. While it is true, as hasbeen decided in a number of cases, that the Customs Broker is not expected to do the impossible and is not expected to physically verify the premises of the importer or doubt the documents issued by various Governmental authorities for KYC, it is equally true that the Customs Broker is expected to act with great sense of responsibility and take care of the interests of both the client and the Revenue. It is expected to advise the client to follow the laws and if the client is not complying, it is obligated under the Regulations to report to the Assistant Commissioner or Deputy Commissioner. Fulfilling such obligations is a necessary condition for the CB licence and it cannot be termed as „spying for the department" as argued by the appellant before us. It has also been argued that if it spies for the department, it will lose its business. It is evident from the facts of this case, that the appellant was not onlyaware of the benami Bills of Entry but has actually filed them with the full knowledge that they were benami and they were filed byAnil after a case of undervaluation has been booked by DRI against him. It is afraid of losing business because it has built its business model on violators who, it does not want to upset by reporting tothe department. Therefore, we find no reason to show any leniency towards the appellant. At any rate, once violation is noticed, it is notfor the Tribunal to interfere with the punishment meted out by the disciplinary authority, viz., the Commissioner unless it shocks our conscience. In this case, it does not."

u. Relying upon these decisions and the above findings, we have no reason to differ with the decision under challenge revoking the licence of the appellant which was otherwise valid up to 05.09.2023 alongwith forfeitures of the security deposit. Consequent thereto the appeal in hand is hereby **dismissed**.

[Pronounced in the open Court on **06.11.2023**]

(DR. RACHNA GUPTA)MEMBER (JUDICIAL)

Anita

(HEMAMBIKA R. PRIYA)MEMBER (TECHNICAL)

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 51791 of 2022 [DB]

[Arising out of Order-in-Original No. 43/ZR/Policy/2022 dated 07.07.2022 passedby the Commissioner of Customs (Airport & General), New Delhi]

M/s. Durga Link Logistics (Pvt.) Ltd. **…Appellant**
A-3, Saransh Appt. 34,

I.P. Extn., New Delhi - 110092

VERSUS

Commissioner of Customs
(Airport & General), New Delhi **…Respondent**

New Customs House,Near I.G.I. Airport, New Delhi - 110037

APPEARANCE:

Shri L.B. Yadav, Consultant for the Appellant

Shri Girijesh Kumar, Authorized Representative for the Respondent

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL) HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 12.07.2023 DATE OF DECISION: **07.11.2023**

FINAL ORDER No. 51507/2023DR. RACHNA GUPTA

The present appeal has been filed to assail the Order-in-

Original No. 43/2022 dated 07.07.2022 vide which the revocation ofappellant's customs broker license, forfeiture of security deposit and imposition of penalty of Rs.50,000/- has been ordered. The facts in brief are as follows:

Pursuant to acting on an intelligence, the goods covered by three shipping bills filed by M/s. Batra Enterprises were got examined by the officers of SIIB, ICD (Export), Tughlakabad, New Delhi on 29.01.2021 at ICD Tughlakabad Port. The aforesaid shipping bills were filed through M/s. Durga Link Logistics Pvt. Ltd. i.e. the appellant. When goods are exported, the exporter or its customs broker (the appellant in this case) files the shipping bill online on the Indian Customs EDI System (ICES). He also files the supporting documents such as invoice and packing list on the portal(e-sanchit) and files word copies of these documents which will be kept in a docket in the custom house. The scanned copies of the documents filed on e-sanchit help the officers to process the shipping bill quickly without having to refer to the physical copies inthe docket. In this case, the Customs Broker (the appellant)allowed the freight forwarder M/s. Toshnek International Freight Forwarder to use its credentials to file the documents instead of filing the documents by itself. The freight forwarder uploadeddocuments (invoice and packing list) sharing inflated quantities of pan masala when the actual documents filed in the docket shared lower quantities. This, according to the Revenue was done to claim excess IGST refund. Difference in the weight and the amount declared from the weight and amount in the packing list was observed. Following are the details:

Bill of Entry No anddate	8126680 dated 23.01.2021	8582895 dated 11.02.2021	8683596 dated 16.02.2021
FOB declaredvalue	Rs.53,00,575/-	Rs.54,44, 999/-	Rs.56,61,219/-
IGST refund claim	Rs.45,96,713/-	Rs.47,91,599/-	Rs.43,90,343/-
Declared weight ofPan Masala(in kg)	2726.4	2461.5	2796
Weight of Pan Masala found on examination	450	600	450
Declared rate of PanMasala	1110/-	907.5/-	1053.11-
Rate of Pan Masala foundon examination	Rs. 250/- & Rs. 300/-	Rs.250/- & Rs.300/-	Rs.300/-

2. Those investigations were received in the Office of Commissioner of Customs (Airport & General), New Delhi through Assistant Commissioner of Customs (SIIB), ICD-Tughlakabad (Exports) on 27.10.2021. Later a copy of Order-in-Original No. 59/2021 dated 26.10.2021 in the matter was also received on02.11.2021. Based upon the observations/findings therein and the statement of Director of appellant dated 02.07.2021 acknowledging them to be responsible for any mistake committed by Shri Pran Shanker Jha who had filed the impugned shipping bills that the Show Cause Notice No. 04/2022 dated 19.01.2022 was servedupon the appellant. It was alleged that the appellant by non-filing of shipping bills of the exporter, by not checking the correctness of

information i.e. the mis-declaration of weight of pan masala in all three of the shipping bills, being the custodian of file has neglected its duties by non-uploading the proper documents, has failed to discharge his duties as customs broker. He was alleged to have contravened Regulation 10(a), 10(b), 10(d), 10(e), 10(j), 10(k) and10(q) of Customs Brokers Licensing Regulations, 2018 (herein after referred as CBLR, 2018). Accordingly, the license of the appellant with the validity till 31.03.2031, was proposed to be revoked and the penalty was proposed to be imposed. The said proposal has been confirmed vide the order under challenge. Being aggrieved the appellant is before this Tribunal.

3. We have heard Shri L.B. Yadav, learned Consultant for the appellant and Shri Girijesh Kumar, learned Authorized Representative for the department.

4. Learned counsel for the appellant has mentioned that impugned order has been passed in sheer violation of principles of natural justice as the appellant was not given any opportunity to cross-examine Shri Pran Shanker Jha, also for the reason that no finding has been given with respect to the submissions made by theappellant. It is impressed upon that appellant had always transacted the customs clearance work in the customs station either personally or through his G-card holders (two in number). He out rightly denied transacting any business at customs station through Shri Pran Shanker Jha or anybody else who was not the authorized employee of the appellant. It is mentioned that Shri Pran Shanker Jha had not transacted any business from the customs station. Shri Pran Shanker Jha was filing check lists and shipping bills online from the office of the appellant, stationed at IP Extension, New Delhi, hence there can be no violation of Regulation10(b) of CBLR, 2018.

5. It is further submitted that the exporter had admitted that theclerical error had occurred in invoice cum packing list by the staff ofthe exporter namely, Ms. Aakansha Mishra, CHA cannot be held liable for the same. No question arises for violation of Regulation 10(d) of CBLR, 2018. Nothing has been concealed from the customs authority. The difference of weight in two separate packing lists was not to the notice of the appellant or his representatives. Hence violation of Regulation 10(j) of CBLR, 2018 has wrongly been confirmed. The appellant has duly maintained up to date customs related records and had duly cooperated with the customs authorities. The order confirming violation of Regulation 10(k) and 10(q) of CBLR, 2018 respectively is also alleged to be a wrong finding. With these submissions learned counsel has prayed for setting aside the order under challenge and for the appeal to be allowed.

6. While rebutting these submissions, learned DR has mentionedthat the license of the appellant has rightly been revoked. There is no infirmity while ordering forfeiture of the whole amount of security deposit nor in imposition of penalty of Rs. 50,000/- on the appellant. In view of apparent violation of Regulation 10(b), 10(d), 10(e), 10(j), 10(k) and 10(q) of CBLR, 2018. It is mentioned that there is a sufficient admission that on behalf of the appellant, Shri Pran Shanker Jha was filing the impugned shipping bills. Though hewas employee of the freight forwarder of the exporter but appellant himself had acknowledged his responsibility for any mistake by the said representative of the freight forwarder. The said admission is sufficient to prove that CB/appellant had failed to fulfill his obligation under Section 10(b) of CBLR, 2018.

6.1 It is further submitted that different set of packing list/invoicewas found, one in the docket file and another which was uploaded on e-sanchit to avail the undue export benefits. The appellant/CB was well aware of the same, still failed to bring it to the notice ofthe department. The violation of Regulation 10(d) and 10(e) of CBLR, 2018 has rightly been confirmed. Once there is no denial for the appellant to be the custodian of the docket file, the Regulation 10(j), 10(k) and 10(q) has been violated by the appellant. It is submitted that the appellant has failed to produce any evidence to counter the allegations against him. Though he prayed for cross-examination of Shri Pran Shanker Jha and the same was allowed also. However the cross-examination could not be conducted because Shri Pran Shanker Jha had resigned the office of freight forwarder and was no more available for the purpose. With these submissions, it is impressed upon that there is no infirmity in the order under challenge. Appeal is accordingly

prayed to be dismissed.

7. Having heard the rival contentions and perusing the entire records, we observe and hold as follows:

The present case is arising out of basic fact that the appellant, being the customs broker for exporter M/s. Batra Enterprise, had filed their three shipping bills dated 23.01.2021, 11.02.2021 and 16.02.2021 for export of consumer goods including pan masala. During examination it was found that weight of pan masala mentioned on invoice cum packing list was much higher than the actual weight thereof found during examination. Resultantly vide Order-in-Original No. 59/2021 dated 26.10.2021, itwas held that export of goods has been attempted to avail excess/undue export benefits such as IGST refund, than actually applicable, by way of deliberate misdeclaration/inflation of value of goods. Confirming the willful suppression and the said mis- declaration that the penalty was imposed. The impugned show cause notice dated 19.01.2022 has been issued pursuant to the aforesaid order alleging violation of several provisions of Regulation 10 of CBLR, 2018.

8. The sole adjudication in the present appeal is observed as to whether appellant has violated Regulations 10(a), 10(b), 10(d)10(e), 10(j), 10(k) and 10(q) of CBLR, 2018. For this purpose, we adjudicate regulation wise as follows:

8.1 Regulation 10(a) of CBLR, 2018. It reads as follows:

"(a) obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commissionerof Customs, as the case may be."

It is apparent from the statement of the appellant dated 02.07.2021 that there is an admission of the appellant about his knowledge for the impugned shipping bills to have been filed through the freight forwarder of the exporter. As apparent fromthe above provision, it was obligatory for the appellant to obtain an authorization even from the individuals by whom he is for the time being is employed as customs broker. Appellant has failed toproduce any such authorization from exporter M/s. Batra Enterprises mentioning Shri Pran Shanker Jha, an employee of their freight forwarder (M/s. Toshnek International) to be the authorized representative not only for the exporter but also for the customs house agent. Absence of such authorization is more than sufficient to prove the violation of 10(a) of CBLR, 2018.

8.2 Regulation 10(b) of CBLR, 2018. It reads as follows :

"(b) transact business in the Customs Station either personally or through an authorised employee duly approved by the DeputyCommissioner of Customs or Assistant Commissioner of Customs,as the case may be."

Though it is submitted on behalf of the appellant that no authorized person has ever appeared in customs station for the appellant and that there is no provision under CBLR, 2018 imposingrestrictions on filing on shipping bills from outside of customs station through an outsider. But simultaneously, it has been stated that Shri Pran Shanker Jha had filed the check list and shipping bill not from the customs station but from the office of the appellant stationed at IP Extension. No doubt Section 2(13) of Customs Act, 1962 defines customs station to mean any customs port, customs airport, international courier terminal, foreign post office or land customs station but the intent of Regulation 10(b) is that while transacting business in customs station, the customs broker has to transact either personally or through a authorized employee duly approved by the Deputy Commissioner of Customs or Assistant Commissioner of Customs as the case may be. To our opinion the transactions of business in relation to customs house is the idea behind Regulation 10(b). Transaction of business in customs station in case of exports is filing of shipping bills along with the invoice, packing list, checklist and all other requisite documents. In today's era of virtual transactions/online processings, physical presence in customs house for transacting the business is notrequired. However, the intent of the provision remains the same

that business has not to be transacted by an unauthorized person i.e. Shri Pran Shanker Jha that too to the notice and knowledge of the appellant. Apparently and admittedly the customs house related transaction of business has been done by an unauthorized person. The same is sufficient to confirm violation of 10(b) of CBLR, 2018.

8.3 Regulation 10(d) of CBLR, 2018. It reads as follows:

"(d) advise his client to comply with the provisions of the Act, otherallied Acts and the rules and regulations thereof, and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs,as the case may be."

In the present case, it is on record that the exporter vide his statement has acknowledged that the invoice cum packing listswere prepared by their staff Ms. Aakansha Mishra, Accountant. Dueto clerical mistake on her part, the exporter also signed the same due to oversight and the documents with the said ignored clerical mistake were forwarded to their CHA (the appellant) for filing the checklist. He also approved the same due to over sightedness. In view of the said statement, we hold that there is nothing on record which may prove that the appellant acquired any knowledge about any intentional change in the documents forwarded by the appellant. We also observe that the order dated 26.10.2021 which is the basis of impugned show cause notice was appealed by the exporter as well as the present appellant. The said appeal has beenallowed vide Order No.765/2022-23 dated 24.06.2022 wherein it has also been held "there is no evidence that the appellant were aware of mismatch between actual quantity of pan masala and still they declared the wrong quantity in shipping bills. The checklist/ based upon documents provided by the exporter, which were filed by the appellant, were also approved by the exporter. Thus, it cannot be held that appellant deliberately or intentionally made a wrong declaration."

As far as the mis-declaration of quantity allegation is concerned, we observe from the said Order-in-Appeal that thegoods were duly sealed by the exporter after obtaining self sealing permission for the department. Hence, the appellant/CB had no occasion to verify the quantity and weight of the goods sealed. Theappellant had no means to verify item wise quantity or weight of the goods and in fact as, customs broker, he is not required to do so. With these findings, the penalty as was imposed upon the appellant under Section 114 (iii) was also set aside. Once there was no knowledge with the appellant about the alleged mis- declaration, once it was a case of clerical mistake and over sightedness while preparing invoice/packing list no question arises for informing anything to the department. Violation of 10(d) therefore is not sustainable. We rely upon the decision in the case of **Perfect Cargo & Logistics Vs CC (A&G), New Delhi reported as 2021 (376) ELT 649 (Tri.-Del.)** wherein it is held that customs house agent merely processing agent of documents with respect of clearance of goods and not inspector to weigh genuineness of transaction and that if documents submitted to G- card holder, *prima facie* appear to be authentic, no reason for the card holder to verify contents of documents. **In the matter of Jeena and Company vs. Commissioner of Customs, Bangalorereported as 2021 (378) ELT 528 (Tri.-Bang.),** it has been held that "No evidence to show that Agent had knowledge of wrong doing of importer and colluded with importer to defraud Revenue- Not appropriate to punish CHA for filing document in good faith and on basis of documents supplied by importer."

8.4 Regulation 10(e) of CBLR, 2018. It reads as follows :

"(e) exercise due diligence to ascertain the correctness of anyinformation which he imparts to a client with reference to any work related to clearance of cargo or baggage".

We observe that violation of this regulation has been confirmed based on the fact that two set of invoices were found. One in the records with the appellant and another in the docket file with the customs house. But appellant did not make any effort to find out the reason for issuance of different set of invoices for the same shipment. We observe that the appellant has submitted that shipping bills were filed as per the invoice cum packing list providedby the exporter. The mistake has already been acknowledged by the exporter to be a clerical mistake at the end of his Accountant namely, Ms. Aakansha Mishra. The same cannot be attributed to the appellant. We hold that these submissions are insufficient to justify the two packing lists for the same

shipment. Irrespective the appellant had no *mens rea* to support the exporter for availing inadmissible export incentive but the fact remains is that once therecannot be two different documents as that of packing list with different description of the goods, it was the incumbent duty of the customs house agent to diligently check the veracity about the same. There is nothing on record about any such exercise of due diligence by the appellant. Hence, we do not find any infirmity withthe violation of 10(e) has been confirmed against the appellant.

8.5 Regulation 10(j), 10(k) and 10(q) of CBLR, 2018. It reads as follows:

"(j) not refuse access to, conceal, remove or destroy the whole or any part of any book, paper or other record, relating to his transactions as a Customs Broker which is sought or may be sought by the PrincipalCommissioner of Customs or Commissioner of Customs, as the case may be.

(k) maintain up to date records such as bill of entry, shipping bill,transhipment application, etc., all correspondence, other papers relatingto his business as Customs Broker and accounts including financial transactions in an orderly and itemized manner as may be specified bythe Principal Commissioner of Customs or Commissioner of Customs orthe Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be.

(q) co-operate with the Customs authorities and shall join investigations promptly in the event of an inquiry against them or their employees."

It has been observed that the correct invoice/packing list was not uploaded on e-sanchit by the CB but by the freight forwarder who the CB allowed to use his credentials. He could not satisfactorily answer about the change in the invoice, the violation has been confirmed. We observe that there is nothing on record to show that the appellant refused access to or concealed or removed or destroyed the whole or any part of the documents related to impugned shipping bills. There is sufficient evidence on record to show that G-Card holder of the appellant had deposited the docket file to the scanning department of the export shed who otherwise isthe custodian of the said docket file and not the customs broker as has wrongly been alleged. Neither the G-Card Holder nor the F- Card holder of appellant were aware about having different packing list in the file retained in the office of the appellant than the one as was sent to export shed as docket file. There is no allegation in theshow cause notice that up to date records were not being maintained by the appellant.

With respect to his cooperation with the customs authority, it is coming apparent that he only ensured the presence of ShriSaurabh Batra, the partner of the exporter, their employee including Ms. Aakansha Mishra and the freight forwarder i.e. Shri Pran Shanker Jha. He got his authorized representatives ShriPrasanta Kumar Samanta, the F-Card holder and Shri Om Prakash Kashyap, the G Card holder examined not once but on several occasions, Hence we find that violation of regulation 10(j), 10(k) and 10(q) has wrongly been confirmed.

9. In the light of the above discussion, we are not in conformity with the findings as far as Regulation 10(d), 10(j), 10(k) and 10(q) of CBLR, 2018 are concerned. The order under challenge is therefore set aside to this extent. However, the findings in the impugned order with respect to violation of Regulation 10(a), 10(b) and 10(e) are hereby confirmed. The order to this extent is upheld.

10. From the findings as arrived above, we are of the view that though the appellant is held guilty of the violations under Regulation 10(a), 10(b) and 10(e) but these are not so grave as to justify the revocation of the customs license. These violations are observed to be the consequence of negligence on part of the appellant custom broker. Depriving him of his livelihood is held to be disproportionate in the light of given findings. Hence, we are of the opinion that ends of justice would be met if the order offorfeiting security deposit and imposing penalty is upheld and as far as the order of revocation of license is concerned, the same be set aside. We draw our support from the decision of this Tribunal inthe case of **R.S.R. Forwarders Vs. Commissioner of Customs, New Delhi reported as 2018 (364) E.L.T. 541 (Tri.-Del.)** and also from the decision of **N.T. Rama Rao & Co. Vs. Commissioner of Customs, Chennai VIII reported as 2020 (371) ELT 789 (Tri.-Chennai).** In the light of the above discussion, the order under challenge

stands modified to the above discussed extent. The appeal resultantly stands partly allowed.

[Order pronounced in the open court on **07.11.2023**]

(DR. RACHNA GUPTA)MEMBER (JUDICIAL)

(P.V. SUBBA RAO)MEMBER (TECHNICAL)

HK

Back

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI
PRINCIPAL BENCH, COURT NO. 4

CUSTOMS APPEAL NO. 3 OF 2011

[Arising out of Order-in-Original No. 47/2010 dated 08.10.2010 passed by the Commissioner of Customs ICD, Tughlakabad, New Delhi]

M/S JAVERIA IMPEX INDIA PVT. LTD., **Appellant**
D-21, DDA Colony
West Gorakh Park Extn., New Zafarabad, Shahdara, Delhi

Vs.

COMMISSIONER OF CUSTOMS (ICD) NEW DELHI **Respondent**
Tughlakabad, New Delhi

AND

CUSTOMS APPEAL NO. 4 OF 2011

CUSTOMS MISCELLANEOUS APPLICATION NO. 50182 OF 2020

[Arising out of Order-in-Original No. 47/2010 dated 08.10.2010 passed by the Commissioner of Customs ICD, Tughlakabad, New Delhi]

MOHD. QASIM KHAN AUTHORIZED REPRESENTATIVE OF M/S JAVERIA IMPEX INDIA PVT LTD. **Appellant**
D-21, DDA Colony, West Gorakh Park Extn.,
New Zafarabad, Shahdara, Delhi

Vs.

COMMISSIONER OF CUSTOMS (ICD) NEW DELHI, TUGHLAKBAD, NEW DELHI **Respondent**

Appearance:

Present for the Appellant : Shri Vaibhav Singh, Advocate Present for the Respondent Shri Rakesh Kumar, Authorised Representative

CORAM:

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL) HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NOS. 51525-51526 /2023

Date of Hearing : 25/07/2023 Date of Decision : 08/11/2023

P V SUBBA RAO:

These two appeals were originally remanded by this Tribunal by Final Order dated 21.6.2017 along with twenty more appeals to the original authority for a fresh decision in view of the judgment of the Delhi High Court in **Mangli Impex Ltd. vs UOI**[1] setting aside the retrospective applicability of section 28(11) of the Customs Act, 1962[2] which judgment was stayed by the Supreme Court[3]. The original authority was directed by the Final Order of this Tribunal to maintain status quo until the final decision of the Supreme Court in the case of **Mangli Impex** and then decide**.**

2. On Revenue's appeal, Delhi High Court, by its Order dated 27.8.2019, set aside the Final Order of the Tribunal dated 21.6.2017, and remanded this appeal to this Tribunal with direction to decide the matter on merits uninfluenced by the judgment in **Mangli Impex.** The question before Hon'ble High Court in **Mangli Impex** was if, by virtue of Section 28(11), the officers of DRI and others were retrospectively empowered to issue notices for demand of duty under section 28. Subsequently, there was another judgment by the Supreme Court in **Canon India** deciding the question of competence of officers of DRI to issue an SCN under section 28 and the Review Petition filed by the Revenue against the judgment is pending before the Supreme Court. Further, in the Finance Act, 2022, some retrospective amendments were also made to empower officers of DRI and others to issue notices under section 28 of the Customs Act. The *vires* of these amendments are also said to be challenged before the Supreme Court.

3. However, in this case, both sides wanted to argue the matter only on merits and hence the question of jurisdiction of the officer two issued the Show Cause Notices[4] has not been argued nor are we examining it.

4. M/s. Javeria Impex India Pvt. Ltd.[5], the appellant in Customs appeal no. 3/2011, is aggrieved by the Order in Original[6] dated October 8, 2010 whereby differential duty was demanded on the goods imported by it under two Bills of Entry dated 09.02.2009 and 17.02.2009 (hereinafter called current Bills of Entry) and five past Bills of Entry; the goods imported under the current Bills of Entry were confiscated but were allowed to be redeemed on paying redemption fine; and penalties were imposed on it. Shri Mohd. Qasim Khan[7], authorised representative of the importer filed Customs Appeal No. 4/2011 assailing the personal penalty of Rs. 15,00,000/- imposed on him by the impugned order. The operative part of the impugned order is as follows:

"(a) The declared transaction value amount to Rs.62,64,795/- of imported goods covered under Bills of Entry Nos. 7668815 dated 17.02.09, 766759 dated 09.02.09, 760587 dated 14.01.09, 746857 dated 17.11.08, 725687 dated 30.08.08, 708103 dated 04.07.08 and 698659 dated 28.05.08 is rejected under Section 14 of Customs Act, 1962 read with Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and the same is re-determined at Rs.2,56,48,356/- (Two crore fifty six lacs forty eight thousand three hundred fifty six only) under Section 14 read with Rule 5 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

(b) The seized goods valued at Rs.48,36,860/- pertaining to Bill of Entry No.766759 dated 09.02.09 are confiscated under Section 111(m) of the Customs Act, 1962. Since the seized goods have already been provisionally released to the importer on furnishing of bond equal to the value of goods supported by 15% bank guarantee, I impose redemption fine of Rs. 10,00,000/- (Ten lacs only) in lieu of confiscation under Section 125 of Customs Act, 1962. The bank guarantee furnished by the importer stands appropriated towards payment of redemption fine.

(c) The seized goods valued at Rs.63,09,086/- pertaining to Bill of Entry No.768815 dated 17.02.09 are confiscated under Section 111(m) of the Customs Act, 1962. However, I give an

option to the importer to redeem the same on payment of redemption fine of Rs.12,50,000/- (Rs. Twelve lacs fifty thousand only).

(d) Since the goods covered under Bill of Entry No.766759 dated 09.02.09 have already been provisionally released to the importer on payment of duty of Rs.11,55,761/- (Rs. Eleven lacs fifty five thousand seven hundred sixty one only) on enhanced value, I appropriate the said amount towards payment of duty on the re-determined value.

(e) The goods valued at Rs.1,45,02,410/- (One crore forty five lacs two thousand four hundred ten only) covered under Bills of Entry Nos. 760587 dated 14.01.09, 746857 dated 17.11.08, 725687 dated 30.08.08, 708103 dated 04.07.08 and 698659 dated 28.05.08 are also liable for confiscation under Section 111(m) of Customs Act, 1962. However, as these are not available, I impose redemption fine of Rs.30,00,000/- (Rs. Thirty lacs only) in lieu of confiscation under Section 125 of Customs Act, 1962.

(f) The differential duty amounting to Rs.51,73,595/- pertaining to seven Bill of Entry 7668815 dated 17.02.09, 766759 dated 09.02.09, 760587 dated 14.01.09, 746857 dated 17.11.08, 725687 dated 30.08.08, 708103 dated 04.07.08 and 698659 dated 28.05.08, is hereby confirmed. The importer is directed to discharge duty liability alongwith statutory interest under Section 28AB of Customs Act, 1962.

(g) I impose a penalty of Rs.59,76,148/- (Rs.Fifty nine lacs seventy six thousand one hundred forty eight only) representing equal amount of duty plus interest on M/s.Javeria Impex India Pvt. Ltd., D-21, DDA Colony, West Gorakh Park Extn., New Zafrabad, Shahdara, Delhi under Section 114A of Customs Act, 1962. In case the importer avails the option of payment of duty alongwith interest and penalty as determined under sub-section (2) of section 28 of the Customs Act, 1962 within thirty days from the date of the communication of the order, the amount of penalty liable to be paid shall be twenty-five per cent of the duty or interest.

(h) I impose a penalty of Rs.15,00,000/- (Rs.Fifteen lacs only) on Sh. Mohd. Qasim Khan, authorized signatory of M/s.Javeria Impex India Pvt. Ltd under Section 112(a) of Customs Act, 1962."

5. The importer imported electric motors from China and filed two Bills of Entry dated February 9, 2009 and February 17, 2009 (current Bills of Entry). The Special Intelligence and Investigation[8] of the Custom House, lnland Container Depot, Tughlakabad received intelligence that the motors so imported were under-valued. Acting on this intelligence, they were examined in detail. As declared in the invoice and packing list, the 886 motors were found in the consignment of Bill of Entry dated 09.02.2009 and 408 motors were found in the consignment of Bill of Entry dated 17.02.2009 but their values appeared to be too low. The importer was asked for evidence to support their values but it could not produce anything other than the invoices.

6. The values of these goods were compared with the values of similar goods imported through several ports across the country as available in the National Import Database[9] and it was found that the declared values were quite low. Therefore, a Chartered Engineer Shri Pankaj Gupta was asked to inspect the goods and give his opinion on the value of the goods and he did so. The values determined by the Chartered Engineer were similar to the values found in the NIDB. Model wise details of the Unit value of the motors declared in the Bill of Entry, the value of similar goods available in the NIDB and the value determined by the Chartered Engineer were tabulated and were annexed as Annexure A1 and Annexure B1 to the SCN. For instance, in respect of motor Model Y2 802-4 (0.75KW), the unit value declared in the Bill of Entry dated 09.02.2009 was Rs. 590/- while the value of the similar goods as per NIDB was Rs. 2,470/- and the value determined by the Chartered Engineer is Rs. 2,225/-. Similarly, for Motor Model No. Y 2 225FS-4 (37KW) imported through Bill of Entry dated 17.02.2009 the declared value was Rs. 5,668/- while the value of similar goods in NIDB was Rs. 32,827/- and the value determined by the Chartered Engineer was Rs. 30,000/-. Similar large variations were found in the values of all the other motors.

7. Therefore, the goods imported under the two Bills of Entry were suspected to be undervalued and hence liable to confiscation under the Act and were seized under section 110 of the Act but they were later released provisionally on execution of bonds and bank guarantees.

8. The officers of SIIB also scrutinized five of the past Bills of Entry of similar goods imported by the appellant between 28.5.2008 and 14.1.2009 which had already been cleared and they came to the conclusion that they were also similarly undervalued and accordingly, the values of the goods imported under the five Bills of Entry and the corresponding values of similar goods under the NIDB database were tabulated as Annexures C, D, E,F and G to the SCN.

9. Statements of Shri Qasim were recorded under section 108 of the Act on 24.2.2009,25.2.2009 and 24.3.2209. In his statements with respect to the Bill of Entry dated 9.2.2009, he said that the declared value was Rs. 11,85,733/- compared to the value of Rs. 48,36,860/- of contemporaneous imports as per the NIDB data. He made a similar statement with respect to the Bill of Entry dated 17.2.2009. He said that these variations were due to the fact that the motors which it imported were of inferior quality and also because there was recession in the market. He requested that the value may be got assessed by some expert and that he was ready to pay the differential duty and that he wanted to avoid demurrages and did not want any SCN or personal hearing and the matter may be decided at the earliest.

10. Accordingly, the imported goods in the two Bills of Entry were evaluated by Shri Pankaj Gupta, Chartered Engineer. The NIDB data and the evaluation of the imported goods by the Chartered Engineer were explained to Shri Qasim and in his statements dated 25.2.2009 and 24.3.2009, he voluntarily agreed to pay the differential duty and also said that he did not want any SCN or personal hearing. Regarding the past clearances also, he said that he had imported five or six consignments in the past and was ready to pay the differential customs duty on them as well, if any.

11. As per Rule 5(3) of the Customs Valuation (Determination of Value of imported goods) Rules, 2007[10] of the values of the contemporaneous imports of similar goods available in the NIDB database, the lowest value for each good imported was considered and the differential duty worked out. Although the appellant waived the SCN and the personal hearing with respect to re-assessment of the imported goods, the SCN was issued proposing recovery of differential duty for the two current and five past Bills of Entry, confiscation of the seized goods of the two current Bills of Entry (which were provisionally released) and imposition of penalties.

12. After considering the replies to the SCN, holding personal hearings and allowing the Chartered Engineer to be cross- examined by the appellant, the impugned order was passed.

13. Aggrieved, the appellants filed these appeals. On behalf of the appellants, the following submissions were made:

13.1 The impugned order is illegal, void and not sustainable either on facts or in law.

13.2 After the SCN was issued, the appellant obtained, under the Right to Information Act[11], copies of some Bills of Entry dated 13.5.2009, 29.7.2009, 14.6.2010 and 30.8.2009 under
which the goods were cleared at by the department after loading 25% on the declared value. The values at which the goods were assessed by the department in these Bills of Entry were lower than what was proposed in the SCN in this case.

13.3 The Commissioner of Customs wrongly rejected the declared value under Rule 12 and no proof of contemporaneous import of similar goods at higher values was relied upon. The expert opinion is vague and is not based on any proof of similar import at higher values.

13.4 There was no admission of higher values by the appellant in the two statements made. No hawala payment or direct or indirect payment other than the declared value was noticed to substantiate the charge of mis-declaration of value by the department. Therefore, the allegation of

mis-declaration is arbitrary and whimsical.

13.5 The adjudicating authority did not produce any evidence showing the alleged relied upon NIDB data. The department did not produce catalogues of the goods imported in the contemporaneous imports whose values were relied upon for re- assessment so that the appellant could compare the specifications.

13.6 In the absence of detailed information such as Bills of Entry, invoices, examination reports, etc. of all the cases whose values were relied upon, re-assessment based on such values is not correct.

13.7 NIDB data is not fool proof evidence as held in

Commissioner of Customs, vs Modern Overseas[12]

13.8 The adjudicating authority did not give any finding on the decision of **Inquir Inc vs Commissioner of Customs, Chennai[13]** in which the Chartered Engineer's certificate was rejected as it was vague.

13.8 The Commissioner has wrongly confirmed the demand in respect of five past Bills of Entry based on NIDB data relying on the statement of the appellant dated 25.2.2009. In his statement, the appellant had not accepted any value in respect of the past Bills of Entry. He only stated that they had imported some goods in the past under five Bills of Entry but that he did not have the details at that time and that he was willing to pay duty liability, if any, for those goods. The department did not produce any evidence of mis-declaration/suppression of facts in respect of these past Bills of Entry. The SCN dated 21.8.2009 was therefore, wrongly issued invoking extended period of limitation in respect of these five past Bills of Entry. All these five Bills of Entry were assessed by the officers on the basis of declaration by the appellant in the Bills of Entry and the after examination of the goods. In one of the Bills of Entry numbered 760587 dated 14.1.2009, the goods were assessed by enhancing the value by 25%. It is evident that the department had all the NIDB data in its possession at that time. There is now, therefore, no basis to re-assess these Bills of Entry by loading 300% value at this time.

13.9 Since the value of the goods in the current imports should not have been rejected, there is also no case to confiscate them under section 111(m). Consequently, there is no case to impose penalty under sections 114A and 112(a).

13.10 The impugned order may be set aside and the appeal may be allowed with consequential relief to the appellant.

14. On behalf of the Revenue, the following submissions were made:

14.1 The issue pertains to undervaluation of the imported goods.

The values declared in the two current Bills of Entry were compared with the NIDB data and with the reports of an expert report and were found to be quite low. Investigation was initiated and statements of Shri Qasim were recorded on 24.2.2009, 25.2.209 and 24.3.2009 under section 108 of the Customs Act.

In these statements, which have not been retracted till date, the appellant accepted the re-determination of values.

14.2 The values of contemporaneous imports of goods were comparable to the values determined by the Chartered Engineer. The differential duty was calculated accordingly.

14.3 The values of the goods imported under the five past Bills of Entry were also determined accordingly.

14.4 Once the appellant accepted the enhanced value in writing, it was binding on both sides as per section 147. In fact, there was not even a need to issue any speaking order as per section 17(5) of the Act.

14.5 There was no forced acceptance of the valuation based on the NIDB data. If the appellant did not agree to the re- determination of value, it did not have to accept the proposed value or it could have paid duty under protest. If the appellant wanted to get the goods cleared while not accepting the values proposed by the department, it could have also got the goods provisionally assessed pending finalization of assessment. If it wanted to avoid demurrages, it could have got the goods shifted to a Customs bonded warehouse under section 49.

14.6 The appellant's contention that the rejection of the transaction value under Rule 12 was not correct holds no water. The values declared in the Bills of Entry were doubted because they were far lower than the values of the contemporaneous imports available in the NIDB. When these were shown, the appellant accepted valuation on the basis of the NIDB data. Therefore, rejection of the transaction value as per Rule 12 is absolutely correct.

14.7 The appellant's contention that valuation should have been done as per Rule 3 is not correct because, Rule 3 is subject to Rule 12 under which the transaction value can be rejected as has been done in this case.

14.8 As held by the Hon'ble Supreme Court in **Central Excise Madras vs Systems and Components Pvt. Ltd.[14],** once valuation has been accepted, it need not be proved.

14.9 The appellant cannot be allowed to play a cat & mouse game with the Revenue as held by the Tribunal in **Commissioner vs AR Fabrics[15].**

14.10. In **Commissioner of Customs vs Hanuman Prasad and sons[16],** it was held that once the values determined by the officers have been accepted, they cannot be questioned later.

14.11 In **Commissioner of Central Excise, Madras vs Systems & Components Pvt. Ltd.[17],** Hon'ble Supreme Court held that *It is a basic and settled law that what is admitted need not be proved.*

15. Learned departmental representative prayed that the appeals may, therefore, be dismissed.

16. We have considered the submissions on both sides and perused the records. The following issues need to be decided:

a) Is the rejection of the transaction value of the two current Bills of Entry under Rule 12 and its re-determination by the Commissioner and confirmation of the demand of differential duty sustainable?

b) Is the rejection of transaction value and its re-determination and confirmation of demand in respect of the five past Bills of Entry sustainable?

c) Is the confiscation of the goods imported in the two Bills of Entry and their release on payment of redemption fine, sustainable?

d) Is the order holding the goods imported under the five past Bills of Entry liable to confiscation and imposition of redemption fine since they were not available, sustainable?

e) Is the imposition of penalty on the importer under section 114A sustainable?

f) Is the imposition of penalty on Shri Qasim under section 112(a) sustainable?

Rejection of transaction value and re-determination of value in respect of the two current Bills of Entry

17. The case of the appellant is that the goods should be valued as per transaction value as per Rule 3 as there is no evidence of any payment through Hawala or any other direct or indirect payment by the importer to the overseas seller and no evidence to this effect was put forth by the Revenue. It is also its case that the appellant accepted the values proposed by the Revenue to avoid demurrages and ensure quick clearance. It is further its assertion that it has not been provided with copies of the Bills of Entry, invoices, catalogues, etc. whose values were used to reject its transaction value and therefore, there is no comparison of the value of the goods. It also asserts that the Chartered Engineer's certificate is vague and should have been rejected.

18. The case of the Revenue is that once the appellant accepted in writing the proposed transaction value based on the NIDB data, it cannot be permitted to play cat and mouse game and now (after goods have been cleared) dispute the very values which it had accepted in writing. It is also the case of the Revenue that what is accepted, need not be proved. In fact, as per Section 17(5), neither an SCN nor even a speaking order was required in this matter insofar as the re-assessment of the goods imported under the current Bills of Entry was concerned. The SCN and the impugned order was issued only because it was also proposed to re-assess the past Bills of Entry and recover differential duty under section 28 and also because goods confiscation of goods and imposition of penalties were considered.

19. We have considered these submissions. Before examining the facts of this case, we examine the relevant legal provisions, viz., Section 14 of the Act and the Rules. Duties of customs are levied on goods imported into and exported from India at the rates specified in the Schedules to the Customs Tariff Act, 1975. On some goods, the levy is based on quantity (specific duty) and other goods, it is based on value (ad valorem). If the duty is to be levied based on value, valuation for the purpose has to be done as per Section 14 which reads as follows:

Section 14. Valuation of goods. -

(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, **the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf**:

Provided that such transaction value in the case of imported goods shall **include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges** to the extent and in the manner specified in the rules made in this behalf:

Provided further that the **rules** made in this behalf **may provide for,-**

(i) the circumstances in which the **buyer and the seller shall be deemed to be related**;

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or **price is not the sole consideration for the sale or in any other case**;

(iii) **the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section**:

Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is

necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

Explanation . - For the purposes of this section -

(a) rate of exchange" means the rate of exchange -

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)

20. The non-obstante clause in sub-section 2 of section 14 gives the Board the power to fix tariff values for any class of goods and if fixed, the tariff value will be the value to determine the duty. This sub-section is not relevant to this case. In all other cases, the value to be reckoned for calculating the Customs duty shall be the transaction value subject to five conditions:

a) Buyer and seller are not related.

b) Price is for delivery at the time and place of importation, i.e., all costs up to the point of import are to be included. For instance, if the sale is on Free on Board basis, the costs of transportation to the place of import, transit insurance, etc. will have to be added.

c) Price is the sole consideration for sale.

d) Some amounts indicated in the first proviso to sub-section 1 of section 14 must be included.

e) Valuation will be as per any other conditions as may be specified in the Rules.

21. Thus, the default position is that the valuation has to be done on the basis of the transaction value and not based on any fixed value. The first proviso to sub-section 1 of section 14 provides for some additions to the transaction value which are not relevant for the present case. The second proviso to this sub- section provides for Rules to be made in this behalf to provide for:

a) the circumstances in which **the buyer and the seller shall be deemed to be related**; the manner of determination of value in respect of goods

when there is no sale,

b) the manner of determination of value in respect of goods if

the buyer and the seller are related,

c) the manner of determination of value in respect of goods where **price is not the sole consideration for the sale**;

d) the manner of determination of value in respect of goods in

any other case; and

e) the manner of **acceptance or rejection of value** declared by the importer or exporter, as the case may be, **where the proper officer has reason to doubt the truth or accuracy of such value**, and determination of value for the purposes of this section.

22. The Rules were framed as per the second proviso to sub- section 1 of section 14. These

are 13 Rules in all of which Rules 1 and 2 are Preliminary rules. Rule 3 states that subject to Rule 12, the value shall be the transaction value adjusted according to Rule 10. Rule 10 provides for certain costs to be included in the transaction value. Rule 12 provides for the proper officer to reject the transaction value if he has reason to doubt its truth and accuracy. **Thus, unless the proper officer rejects the transaction value under Rule 12, valuation has to be based on transaction value as per Rule 3 with some additions, if necessary, as per Rule 10.**

23. Rule 3 further provides that if the valuation cannot be done under that Rule, i.e., as per the transaction value with additions as per Rule 10, then **it must be done sequentially under Rules 4 to 9**. **Rule 4** provides for the valuation to be done on the basis of **identical goods**. **Rule 5** provides for the valuation to be done on the basis of the value of **similar goods**. Rule 6 states if Rules 4 and 5 cannot determine the value then they must be done as per Rule 7 and thereafter Rule 8 but this sequence can be reversed at the option of the importer. In other words, if the importer so chooses, Rule 8 can be applied directly instead of Rule 7. **Rule 7** provides for a **deductive method of valuation** on the basis of prices of similar or identical goods sold in India and after making some deductions from such prices. **Rule 8 provides for a computed value,** i.e., based on the cost of raw material, cost of manufacture, reasonable profit, etc. In view of Rule 6, the importer may choose the computed value without examining the feasibility of determining value through deductive methods. **Rule 9 is a residual method** which provides for determining the value where it cannot be determined under Rules 3 to 8. Rule 10, as already discussed, provides for some costs to be added to the transaction value if the valuation is done as per Rule 3. Rule 11 requires the importer to make a declaration. Rule 12 lays down the provision for rejection of transaction value. Rule 13 provides for interpretative notes for the Rules.

23. To sum up, valuation has to be done sequentially as follows:

a) If a **tariff value** is fixed by the Board, it is the value (sub- section 2 of Section 14);

b) If no tariff value is fixed by the Board, valuation is as per the **transaction value, if necessary, with some additions** (as per the first proviso to sub-section 1 of section 14 and as per Rule 10);

c) If the transaction value is rejected as per Rule 12 by the proper officer, valuation has to be done as per the **value of identical goods** (Rule 4);

d) If transaction value is rejected and there is no value of identical goods, then it must be as per the **value of similar goods** (Rule 5);

e) If transaction value is rejected and there is no value of identical goods or similar goods, value must be determined through **Deductive method** (Rule 7)

f) If transaction value is rejected and there is no value of identical goods or similar goods and it is not possible to determine value following deductive method, then value must be determined through **computation** (Rule 8)

g) If the importer so chooses, computational method may be adopted without examining the deductive method first (Rule 6).

h) If the transaction value is rejected and there is no value of identical goods or similar goods and if it is also not possible to determine the value through deductive method or computational method, then value may be determined through the **residual method** by the officer following the above principles (Rule 9).

24. The next question which arises is when can the proper officer reject the transaction value. Rule 12 reads as follows:

12. Rejection of declared value. -

(1) When the proper officer **has reason to doubt the truth or accuracy of the value declared** in relation to any imported goods, he **may ask the importer of such goods to furnish further information including documents or other evidence** and if**, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt** about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation.-(1) For the removal of doubts, it is hereby declared that:-

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) **The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include -**

(a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

(b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;

(c) the sale involves special discounts limited to exclusive agents;

(d) the mis-declaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) the non declaration of parameters such as brand, grade, specifications that have relevance to value;

(f) the fraudulent or manipulated documents.

25. Thus, if the officer has **reason to doubt** the truth and accuracy of the transaction value, he can call for information including documents and evidence. If the information and evidence is presented and after examining it or if no information or evidence as called for is presented, if the proper office has **reasonable belief** then it shall be deemed that the value cannot be determined as per Rule 3 (i.e., based on transaction value with additions, if necessary). While the officer can, **in the first place call** for information and evidence if he **has reason to doubt**, at the second stage, he should have not just some reason to doubt but a **reasonable doubt.** If he has such reasonable doubt, then the transaction value can be rejected. The grounds on which the proper officer may raise doubts about the truth and accuracy of the transaction value have been illustrated in explanation 1 (iii) to Rule 12. The list is inclusive and not exhaustive.

26. In this case, the officers received intelligence that the motors imported by the appellant were under-valued. Acting on this intelligence, the goods were examined in detail and they were found as declared in the two Bills of Entry but their values appeared to be too low. The importer was asked for evidence to support their values but it could not produce anything other than the invoices. The declared values were compared with the values of similar goods imported through several ports across the country as available in the NIDB and it was found that the declared values were, indeed, quite low. A Chartered Engineer Shri Pankaj Gupta was asked to inspect the goods and give his opinion on the value of the goods and he did so. The values determined by the Chartered Engineer were similar to the values found in the NIDB.

27. In this factual matrix when the officers had, in the first place, a reason to doubt the truth or accuracy of the transaction value. They called for further information from the importer but it could only supply the invoices to support its claim of the invoice value. Therefore, the officers had correctly crossed the first stage of ‘reason to doubt’ provided in Rule 12.

28. Statements of Shri Qasim were recorded under section 108 of the Act on 24.2.2009, 25.2.2009 and 24.3.2209. With respect to the Bill of Entry dated 9.2.2009, he said that the declared value was Rs. 11,85,733/- compared to the value of Rs. 48,36,860/- of contemporaneous imports as per the NIDB data. He made a similar statement with respect to the Bill of Entry dated 17.2.2009. He said that these variations were due to the fact that the motors which it imported are of inferior quality and that there was recession in the market. He requested that the value may be got assessed by some expert and that he was ready to pay the differential duty and that he wanted to avoid demurrages and did not want any SCN or personal hearing and the matter may be decided at the earliest. The goods were got assessed by the Chartered Engineer who also assessed the value of the goods similar to the values found in the NIDB. Therefore, the officers successfully crossed the second stage of 'reasonable doubt' under Rule 12 to reject the transaction value. We also find that in his statements, Shri Qasim specifically agreed to the valuation and agreed to pay the differential duty. In his statement dated 24.2.2009, he, interalia, stated:

… I further state that assessable value worked on the basis of the NIDB data may be correct and my declared prices are already on higher side and **in order to arrive at the fair reasonable assessable value I request you that the valuation of my imported goods may also be got done from some expert in this regard as there is a great difference in the prices declared by me and the value compiled on the basis of the NIDB data. I further state that I am ready to pay duty whatever fair assessable value is worked out.** I further submit that due to heavy demurrages and other charges my case may be decided at the earliest and a lenient view may be taken and I also submit that **I do not want any show cause notice or personal hearing in this matter**.

29. The appellant while agreeing to the valuation and waiving the SCN and personal hearing also sought that the goods may also be got examined by an expert. The goods had already been examined by a Chartered Engineer who submitted his report dated 23.2.2009. Another statement of Shri Qasim was recorded on 25.2.2009 in which he was shown the Chartered Engineer's certificate as well as the charts showing the values as per the NIDB data. In his statement, he, inter alia, stated as follows:

.. I have been shown the chart prepared by the Customs officials on the basis of the Chartered Engineer report according to which the value of the imported goods is Rs. 44,01,050 and the Customs duty on this value comes to Rs. 10,51,625/- I have seen the Chartered Engineer certificate Ref no. PG/CRT/424/IMP/2008-09 dated 23.02.2009 and I have signed the same in token of its correctness. **I have also been shown the chart prepared by the Customs officers on the basis of NIDB data as per the chart the assessable value of my imported goods i.e., 886 pieces of assorted electrical motors of different KVA vide Bill of Entry No 766759 dated 9.2.09 has been worked out to Rs. 48,36,860/- and the customs duty has been worked out to Rs. 11,56,761/-. I have also signed the statement in token of its correctness.**

I further state that the value as per the NIDB chart is correct and I am ready to pay Customs duty on this value as the margin of difference in the NIDB data and Chartered Engineer is very less and according to me the assesseable value of Rs. 48,36,860/- and the duty on this value Rs. 11, 56,761/- is fair assessable value and I will deposit the same within two-three days......

I further state that in the past I have imported the same goods by 2-3 Bills of Entry from China. At present I am not having the details, I am ready to pay Customs duty for the same if any.

30. Another statement was recorded on 24.3.2009 in which Shri Qasim, inter alia, stated as below:

…. I have been shown the chart prepared by the Customs officers accordin to the chart the assessable value has been worked out to Rs. 63,09,086/- on the basis of the NIDB data against my declared value of Rs. 15, 36,473/-. THE Customs officer explained me about the NIDB data according to which it is a data of prevalent prices of assessment of similar goods of similar country of origin of same period taken by the Customs at various ports of Customs in India. **Further, the**

method and basis of enchancement of declared value on the basis of the NIDB data has been explained to me and according to me it is a correct and fair method and I accept the enhanced declared value from Rs. 15,36,473/- to Rs 63,09,086/- for 408 pieces of electric motors of assorted KWs for the Bill of Entry dated 17.2.09, in token of my acceptance I have signed the chart prepared by the Customs officers today on 24.3.09 and I am ready to pay Customs duty. Further, I have been shown the certificate of Shri Pankaj Gupta, Chartered Engineer dated 21.3.09 and as per the valuation of the chartered engineer, the assessable value of the 408 pieces of electric motors works out toRs.61,21,950/- I have also signed the same in respect of B/E No. 768815 dated 17.02.09.

31. Having rejected the declared assessable value under Rule 12, the department sought to re-determine it under Rule 5 based on the contemporaneous value of similar goods imported into the country. It needs to be noted that since the imported goods were miscellaneous motors of various specifications there cannot be identical goods to determine duty as per Rule 4 and hence determining duty on the basis of values of similar goods under Rule 5 is fair and proper. To determine the value of the contemporaneous imports, the relevant data was extracted from the NIDB. The department also referred the matter to a Chartered Engineer to determine the value of the imported goods. In his first statement dated 24.2.2009, Shri Qasim was shown the NIDB data and he requested that the matter may also be referred to an expert to arrive at a fair value. On 25.2.2009, Shri Qasim was shown both the NIDB values and the report of the Chartered Engineer and he made a categorical statement accepting the chart prepared by the Customs officers based on the NIDB data with respect to the Bill of Entry dated 9.2.2009 that he accepts the value proposed by the Customs officers and that he was ready to pay the Customs duty accordingly. Further, he had also indicated that he did not want either an SCN or a personal hearing in the matter. He made a similar statement on 24.3.2009 with respect to the Bill of Entry dated 17.2.2009. None of the three statements have been retracted till date.

32. The appellant is now disputing the NIDB data on the ground that the Bills of Entry of the data and the brochures related to the goods imported under them were not provided to him. The appellant is also asserting that the Chartered Engineer's certificate is vague.

33. The appellant cannot be permitted to take this stand at this stage. It is a well-settled legal principle that what is admitted need not be proved. Every case, civil, criminal or otherwise, involves multitude of facts and evidence need not be produced by any side on all such facts. Only such facts which are asserted by one and disputed by the other need to be proved and the party asserting them has to produce evidence. For instance, if A says that he lent a sum of Rs. 1,000/- to B and that B did not returned it and B accepts that A had lent him the money but says that he returned it, the only fact which needs to be determined is if B returned the money or not. The fact that A had lent the money is not disputed and A need not prove it. Section 58 of the Indian Evidence Act,1872 clarifies this position. It reads as follows:

Indian Evidence Act

Section 58. Facts admitted need not be proved.

No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

34. In this case, since the fact that the goods were undervalued and the correct assessable value for the goods imported under the two Bills of Entry dated 9.2.2009 and 17.2.2009 are as per the charts prepared by the officers as per the NIDB data was not only not disputed but positively accepted, in writing, by the appellant, these facts were not in dispute and neither side needed to produce any evidence. Therefore, there is no force the submissions of the learned counsel for the appellants that the department failed to provide evidence in support. Revenue need

not produce any evidence. In fact, it did not have to even issue the SCN or hold a personal hearing insofar as the re-assessment of these two Bills of Entry is concerned because the appellant had waived them in writing.

35. The appellant's contention that it had accepted the value to avoid demurrages also does not hold any water. There is nothing on record to show that its acceptance was not voluntary. On the contrary all three statements explicitly state that the statements were voluntary and none of them have been retracted. If the appellant wanted to avoid demurrages and was not willing to accept the valuation, the appellant could have transferred the goods to a Customs bonded warehouse under section 49 and it would not have had to pay any demurrages but only the rent to the warehouse keeper. The appellant could have, as an alternative, disagreed with the re-assessment but paid duty under protest and asked for a speaking order. The appellant could also have sought provisional assessment. All these alternative methods are routinely used in the Custom houses by the importers.

36. Learned counsel also submitted that the NIDB data is not unquestionable and that the Chartered Engineer's certificate is vague and hence should be rejected. In this case, the NIDB data has not only NOT been questioned but has positively been accepted by the appellant. The Chartered Engineer's certificate was also provided to the appellant and he had not disputed it at all. After seeing both and the chart of valuation prepared by the Customs authorities, the appellant explicitly agreed to the valuation. What is accepted need not be proved. It has been held by the Supreme Court in **Systems & Components Pvt. Ltd.** as follows:

4. The Collector (Appeals) relied upon a Circular issued by the Board of Central Excise dated 25th September 1986 and held that Receivers, Surge Drums and Flash Vessels were classifiable under Tariff Item 73.11 and the Drain Pot under
73.10. It was held that the oil separator would be classifiable under 84.79 and Base Frame under 7308.90.

5. The Appeal filed by the Department has been disposed of by the Tribunal by holding that the Department has not proved that these parts were specifically designed for manufacture of water chilling plant in question. The Tribunal has noted the Technical details supplied by the Respondents and the letter by the Respondents dated 30th November 1993 giving details of how these parts are used in the Chilling Plant. **The Tribunal has still strangely held that this by itself is not sufficient to show that they are specifically designed for the purpose of assembling the Chilling Plant. We are unable to understand this reasoning. Once it is an admitted position by the party itself, that they have no independent use there is no need for the Department to prove. It is a basic and settled law that what is admitted need not be proved.**

37. The appellant also submitted that some Bills of Entry of other importers were obtained by it under the RTI Act from the Customs authorities which show that similar goods were cleared at lower values. We have examined this submission and find that the Bills of Entry which the appellant obtained were those which were filed after the disputed two Bills of Entry. It is a well settled legal principle that when goods are assessed based on values of contemporaneous imports, they refer to only imports which have already taken place, i.e., past Bills of Entry and not based on Bills of Entry which may be filed in future. The reason for this is that the assessment can be done based on what is available at the time of filing of the Bill of Entry and not anticipating what may happen in future. Therefore, there is no force in this argument either.

38. The correctness of the values determined by the determined and accepted by the appellant cannot, therefore, be questioned as they were undisputed. In a similar situation, where the importer accepted the re-assessment by the officers and after clearing the goods, filed an appeal questioning the same values which the appellant had accepted, this Tribunal had in **Hanuman Prasad & Sons** held as follows:

35. The following position emerges from the aforesaid decisions of the Tribunal:

(i) When an importer consents to the enhancement of value, it becomes unnecessary for the

revenue to establish the valueaion as the consented value, in effect, becomes the declared transaction value requiring no further investigation;

(ii) When an importer accepts the loaded value of the goods without any protest or objection, the importer cannot be permitted to deny its correctness;

(iii) The burden of the department to establish the declared value to be incorrect is discharged if the enhanced value is voluntarily accepted.

39. The decision in **Hanuman Prasad & Sons** was followed in several other decisions. We, therefore, answer question (a) framed by us in paragraph 16 in favour of the Revenue and against the appellants.

Re-determination of value and confirmation of demand in respect of the five past Bills of Entry

40. Insofar as the past five Bills of Entry are concerned, the case of the appellant is that the goods were cleared by the officers after examination and in respect of one of the Bills of Entry, the declared assessable value was also enhanced by 25% by the officer re-assessing the Bill of Entry. Therefore, there is no case to allege undervaluation much later and demanding duty under section 28 invoking extended period of limitation alleging suppression.

41. The case of the Revenue is that the appellant had agreed to pay the differential duty in respect of these five Bills of Entry in its statement and it cannot be allowed to renege at this stage. Just like the demand for the two current Bills of Entry, the demand of differential duty for these five Bills of Entry also needs to be upheld.

42. We find strong force in the submissions of the appellant.

Once the goods are cleared for home consumption after examination and assessment, unless there is an evidence to support, demand under section 28 invoking extended period of limitation cannot be raised unless there is evidence of collusion or willful mis-statement or suppression of facts are proven. There is no allegation or evidence in this case of collusion. The reason for invoking extended period of limitation given in the SCN is as follows:

" 12. Whereas, the importer had mis-declared the value of imported goods in the past consignments also and the value appeared to be grossly undervalued. Therefore, it appears that the declared invoice value is not free from doubts and same is not in conformity with section 14 of the Customs Act, 1962. Hence, it gave sufficient reasons to doubt the truth or accuracy of the invoice value declared in relation to the goods imported vide above said 7 Bills of Entry No. 768815 dated 17.02.09, 766759 dated 09.02.2009, 760587

dated 14.01.09, 746857 dated 17.11.08, 725687 dated

30.08.08, 708103 dated 04.0.08 and 698659 dated

28.05.08. No further information/ documents or any other evidence was provided by the importer to substantiate their declared invoice value."

43. Evidently, the SCN alleges mis-declaration and does not even allege that it was willful, let alone producing any evidence to the effect.

44. Learned authorised representative submitted that the appellant had agreed to pay the differential duty in respect of the past cases also. We have seen the Statement of the appellant given on 25.2.2009 and the relevant portion of it is as follows:

I further state that in the past I have imported the same goods by 2-3 Bills of Entry from China. At present I am not having the details, I am ready to pay Customs duty for the same if any.

45. A plain reading of the above shows that at the time of recording the statement, the appellant could not remember the exact number of Bills of Entry filed before and also did not have the details. All that is stated is that he is ready to pay Customs Duty for the same, if any. Neither were the details of the Bills of Entry nor the goods imported under them, their declared values, corresponding values of goods in the NIDB and why it became necessary to re-open the assessment which were already finalized shown to the appellant nor were they agreed to. This statement does not support the case of the Revenue in any sense.

46. We, therefore, answer the question (b) in paragraph 16 above in favour of the appellant and against the Revenue.

Confiscation of the goods imported in the two Bills of Entry and their release on payment of redemption fine

47. The goods imported under the two Bills of Entry valued at Rs. 48,36,860/- were seized and they were provisionally released on bond and bank guarantee. In the impugned order, they were confiscated under section 111(m) and released on payment of redemption fine of Rs. 10,00,000 under section 125 and the Bank Guarantee given by the appellant was appropriated towards it. Section 111(m) and section 125 read as follows:

111. Confiscation of improperly imported goods, etc.—The following goods brought from a place outside India shall be liable to confiscation:—

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54

125. Option to pay fine in lieu of confiscation.—(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply:

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

48. Section 111(m) provides for confiscation of imported goods which do not correspond in value or in any other particular to the entry made. The case of the appellant is that since the re-assessment itself is not sustainable, neither is the confiscation. The case of the Revenue is that the confiscation was done correctly. As we have already found that the goods were correctly re-assessed, section 111(m) squarely applies to the goods in question and therefore, their confiscation needs to be upheld.

49. Once the goods are confiscated, section 125 requires that, unless the goods are prohibited goods, the owner should be given an option to redeem the goods on payment of fine. If they are prohibited goods, the adjudicating authority has the discretion of allowing redemption or not. This section further restricts the quantum of penalty to the market value of the goods. It is not the case of either side that the motors imported by the appellant were prohibited goods. Therefore, they were released on redemption fine. The seized goods imported under Bill of Entry dated 9.2.2009 were valued at Rs. 48,36,860/- and the redemption fine imposed was Rs. 10,00,000/-. The seized

goods imported under Bill of Entry dated 17.2.2009 were valued at Rs. 63,09,086/- and the redemption fine imposed was Rs. 12,50,000/. In the factual matrix of this case, the fines imposed are, in our opinion, fair.

50. We, therefore, answer question (c) of paragraph 16 in favour of the Revenue.

Order holding the goods imported under the five past Bills of Entry liable to confiscation and imposition of redemption fine since they were not available.

51. The adjudicating authority also held that the goods imported under the past five Bills of Entry valued at Rs. 1,45,02,410/- were liable to confiscation under section 111(m) and imposed redemption fine of Rs. 30,00,000/-. As we have found that the demand under section 28 re-assessing the duty in respect of these five Bills of Entry is not sustainable, the confiscation of the goods imported under them as well as redemption fine also need to be set aside. Even otherwise, the goods which are not available cannot be either seized or confiscated. This is because, on confiscation, the property vests in the Government and if the importer opts to redeem them, he can pay the redemption fine and get the goods released. If the goods are not available neither can the government take over the goods nor can it return them to the owner or payment of fine. The case of the goods imported under the above two Bills of Entry was different as they were seized and were provisionally released on execution of a bond and bank guarantee. The bond and bank guarantee are meant to cover the redemption fine, if any, imposed if the goods are confiscated and released. We, therefore, answer question (d) of paragraph 16 in favour of the Appellant.

Penalty on the importer under section 114A

52. In the impugned order, penalty of Rs. 59,76,148/- being the importer being the amount equal to the differential duty demanded under section 28 (in respect of the five Bills of Entry) and interest thereon under section 114A of the Act. This section reads as follows:

114A. Penalty for short-levy or non-levy of duty in certain cases.—

Where the duty has not been been levied or has been short- levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall, also be liable to pay a penalty equal to the duty or interest so determined:

Provided that where such duty or interest, as the case may be, as determined under sub-section (8) of section 28, and the interest payable thereon under section 28AA, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the duty or interest, as the case may be, so determined: ******

53. As we have found that the demand of differential duty under section 28 in respect of the past Bills of Entry cannot be sustained, we set aside the penalty under section114A as well. As far as the duty on the two current Bills of Entry are concerned, they are a matter of re-assessment under section 17 and not a case of duty not levied or short levied under section 28. We, therefore, answer question (e) of paragraph 16 in favour of the appellant.

Penalty on Shri Qasim under section 112(a)

54. In the impugned order, penalty of Rs. 15,00,000/- was imposed on Shri Mohd. Qasim Khan under section 112(a) of the Act. This section reads as follows:

112. Penalty for improper importation of goods, etc.— Any person,—

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable,—

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty 5 [not exceeding the value of the goods or five thousand rupees], whichever is the greater

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher:

Provided that where such duty as determined under sub- section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater;

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;

(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest.

55. We have already found that the confiscation of the goods imported under the two current Bills of Entry and their release on payment of redemption fine need to be upheld and we have set aside the confiscation and imposition of redemption fine in respect of the five past Bills of Entry. We have also upheld the re-assessment of duty in the two current Bills of Entry and set aside the demand of duty under section 28 in respect of the five past Bills of Entry. Shri Qasim is the person most directly connected with the filing of the two Bills of Entry and the values of the goods in these did not match the imported goods which rendered the goods liable to confiscation under section 111(m). Therefore, Shri Qasim squarely falls under Section 112(a) and is liable to penalty under it.

56. However, in the impugned order, penalty under section 112(a) has been imposed considering the differential duty confirmed in respect of the two current and five past Bills of Entry. We have already found that the demand in respect of the five past Bills of Entry cannot be sustained. We, therefore, find it proper to reduce the penalty on Shri Qasim also from Rs. 15,00,000/- to Rs. 3,00,000/-

57. In view of the above:

a) **Customs Appeal No. 3/2011** filed by M/s. Jhaveria Impex is partly allowed by upholding the re-assessment of duty in the impugned order in respect of the two current Bills of Entry filed on 9.2.2009 and 17.2.2009 and confiscation of the goods imported under these two Bills of Entry and the redemption fines imposed. The demand of duty on the five past Bills of Entry, confiscation of the goods imported under them and imposition of redemption fine in lieu of the confiscation and the fine under section 114A are set aside. The appellant will be entitled to consequential relief, if any.

b) **Customs Appeal No. 4/2011** filed by Shri Mohd. Qasim Khan is partly allowed by reducing the penalty imposed on him under section 112(a) from Rs. 15,00,000/- to Rs. 3,00,000/-. The appellant will be entitled to consequential relief, if any.

[Order pronounced on **08/11/2023**]

(DR. RACHNA GUPTA) MEMBER (JUDICIAL)

(P V SUBBA RAO) MEMBER (TECHNICAL)

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Back

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI
PRINCIPAL BENCH, COURT NO. 4

CUSTOMS APPEAL NO. 3 OF 2011

[Arising out of Order-in-Original No. 47/2010 dated 08.10.2010 passed by the Commissioner of Customs ICD, Tughlakabad, New Delhi]

M/S JAVERIA IMPEX INDIA PVT. LTD., **Appellant**
D-21, DDA Colony
West Gorakh Park Extn., New Zafarabad, Shahdara, Delhi

Vs.

COMMISSIONER OF CUSTOMS (ICD) NEW DELHI **Respondent**
Tughlakabad, New Delhi

AND

CUSTOMS APPEAL NO. 4 OF 2011

CUSTOMS MISCELLANEOUS APPLICATION NO. 50182 OF 2020

[Arising out of Order-in-Original No. 47/2010 dated 08.10.2010 passed by the Commissioner of Customs ICD, Tughlakabad, New Delhi]

MOHD. QASIM KHAN AUTHORIZED REPRESENTATIVE OF M/S JAVERIA IMPEX INDIA PVT LTD. **Appellant**
D-21, DDA Colony, West Gorakh Park Extn.,
New Zafarabad, Shahdara, Delhi

Vs.

COMMISSIONER OF CUSTOMS (ICD) NEW DELHI, TUGHLAKBAD, NEW DELHI **Respondent**

Appearance:

Present for the Appellant : Shri Vaibhav Singh, Advocate Present for the Respondent Shri Rakesh Kumar, Authorised Representative

CORAM:

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL) HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NOS. 51525-51526 /2023

Date of Hearing : 25/07/2023 Date of Decision : 08/11/2023

P V SUBBA RAO:

These two appeals were originally remanded by this Tribunal by Final Order dated 21.6.2017 along with twenty more appeals to the original authority for a fresh decision in view of the judgment of the Delhi High Court in **Mangli Impex Ltd. vs UOI**[1] setting aside the retrospective applicability of section 28(11) of the Customs Act, 1962[2] which judgment was stayed by the Supreme Court[3]. The original authority was directed by the Final Order of this Tribunal to maintain status quo until the final decision of the Supreme Court in the case of **Mangli Impex** and then decide**.**

24. On Revenue's appeal, Delhi High Court, by its Order dated 27.8.2019, set aside the Final Order of the Tribunal dated 21.6.2017, and remanded this appeal to this Tribunal with direction to decide the matter on merits uninfluenced by the judgment in **Mangli Impex.** The question before Hon'ble High Court in **Mangli Impex** was if, by virtue of Section 28(11), the officers of DRI and others were retrospectively empowered to issue notices for demand of duty under section 28. Subsequently, there was another judgment by the Supreme Court in **Canon India** deciding the question of competence of officers of DRI to issue an SCN under section 28 and the Review Petition filed by the Revenue against the judgment is pending before the Supreme Court. Further, in the Finance Act, 2022, some retrospective amendments were also made to empower officers of DRI and others to issue notices under section 28 of the Customs Act. The *vires* of these amendments are also said to be challenged before the Supreme Court.

25. However, in this case, both sides wanted to argue the matter only on merits and hence the question of jurisdiction of the officer two issued the Show Cause Notices[4] has not been argued nor are we examining it.

26. M/s. Javeria Impex India Pvt. Ltd.[5], the appellant in Customs appeal no. 3/2011, is aggrieved by the Order in Original[6] dated October 8, 2010 whereby differential duty was demanded on the goods imported by it under two Bills of Entry dated 09.02.2009 and 17.02.2009 (hereinafter called current Bills of Entry) and five past Bills of Entry; the goods imported under the current Bills of Entry were confiscated but were allowed to be redeemed on paying redemption fine; and penalties were imposed on it. Shri Mohd. Qasim Khan[7], authorised representative of the importer filed Customs Appeal No. 4/2011 assailing the personal penalty of Rs. 15,00,000/- imposed on him by the impugned order. The operative part of the impugned order is as follows:

"(a) The declared transaction value amount to Rs.62,64,795/- of imported goods covered under Bills of Entry Nos. 7668815 dated 17.02.09, 766759 dated 09.02.09, 760587 dated 14.01.09, 746857 dated 17.11.08, 725687 dated 30.08.08, 708103 dated 04.07.08 and 698659 dated 28.05.08 is rejected under Section 14 of Customs Act, 1962 read with Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and the same is re-determined at Rs.2,56,48,356/- (Two crore fifty six lacs forty eight thousand three hundred fifty six only) under Section 14 read with Rule 5 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

(i) The seized goods valued at Rs.48,36,860/- pertaining to Bill of Entry No.766759 dated 09.02.09 are confiscated under Section 111(m) of the Customs Act, 1962. Since the seized goods have already been provisionally released to the importer on furnishing of bond equal to the value of goods supported by 15% bank guarantee, I impose redemption fine of Rs. 10,00,000/- (Ten lacs only) in lieu of confiscation under Section 125 of Customs Act, 1962. The bank guarantee furnished by the importer stands appropriated towards payment of redemption fine.

(j) The seized goods valued at Rs.63,09,086/- pertaining to Bill of Entry No.768815 dated 17.02.09 are confiscated under Section 111(m) of the Customs Act, 1962. However, I give an

option to the importer to redeem the same on payment of redemption fine of Rs.12,50,000/- (Rs. Twelve lacs fifty thousand only).

(k) Since the goods covered under Bill of Entry No.766759 dated 09.02.09 have already been provisionally released to the importer on payment of duty of Rs.11,55,761/- (Rs. Eleven lacs fifty five thousand seven hundred sixty one only) on enhanced value, I appropriate the said amount towards payment of duty on the re-determined value.

(l) The goods valued at Rs.1,45,02,410/- (One crore forty five lacs two thousand four hundred ten only) covered under Bills of Entry Nos. 760587 dated 14.01.09, 746857 dated 17.11.08, 725687 dated 30.08.08, 708103 dated 04.07.08 and 698659 dated 28.05.08 are also liable for confiscation under Section 111(m) of Customs Act, 1962. However, as these are not available, I impose redemption fine of Rs.30,00,000/- (Rs. Thirty lacs only) in lieu of confiscation under Section 125 of Customs Act, 1962.

(m) The differential duty amounting to Rs.51,73,595/- pertaining to seven Bill of Entry 7668815 dated 17.02.09, 766759 dated 09.02.09, 760587 dated 14.01.09, 746857 dated 17.11.08, 725687 dated 30.08.08, 708103 dated 04.07.08 and 698659 dated 28.05.08, is hereby confirmed. The importer is directed to discharge duty liability alongwith statutory interest under Section 28AB of Customs Act, 1962.

(n) I impose a penalty of Rs.59,76,148/- (Rs.Fifty nine lacs seventy six thousand one hundred forty eight only) representing equal amount of duty plus interest on M/s.Javeria Impex India Pvt. Ltd., D-21, DDA Colony, West Gorakh Park Extn., New Zafrabad, Shahdara, Delhi under Section 114A of Customs Act, 1962. In case the importer avails the option of payment of duty alongwith interest and penalty as determined under sub-section (2) of section 28 of the Customs Act, 1962 within thirty days from the date of the communication of the order, the amount of penalty liable to be paid shall be twenty-five per cent of the duty or interest.

(o) I impose a penalty of Rs.15,00,000/- (Rs.Fifteen lacs only) on Sh. Mohd. Qasim Khan, authorized signatory of M/s.Javeria Impex India Pvt. Ltd under Section 112(a) of Customs Act, 1962."

27. The importer imported electric motors from China and filed two Bills of Entry dated February 9, 2009 and February 17, 2009 (current Bills of Entry). The Special Intelligence and Investigation[8] of the Custom House, lnland Container Depot, Tughlakabad received intelligence that the motors so imported were under-valued. Acting on this intelligence, they were examined in detail. As declared in the invoice and packing list, the 886 motors were found in the consignment of Bill of Entry dated 09.02.2009 and 408 motors were found in the consignment of Bill of Entry dated 17.02.2009 but their values appeared to be too low. The importer was asked for evidence to support their values but it could not produce anything other than the invoices.

28. The values of these goods were compared with the values of similar goods imported through several ports across the country as available in the National Import Database[9] and it was found that the declared values were quite low. Therefore, a Chartered Engineer Shri Pankaj Gupta was asked to inspect the goods and give his opinion on the value of the goods and he did so. The values determined by the Chartered Engineer were similar to the values found in the NIDB. Model wise details of the Unit value of the motors declared in the Bill of Entry, the value of similar goods available in the NIDB and the value determined by the Chartered Engineer were tabulated and were annexed as Annexure A1 and Annexure B1 to the SCN. For instance, in respect of motor Model Y2 802-4 (0.75KW), the unit value declared in the Bill of Entry dated 09.02.2009 was Rs. 590/- while the value of the similar goods as per NIDB was Rs. 2,470/- and the value determined by the Chartered Engineer is Rs. 2,225/-. Similarly, for Motor Model No. Y 2 225FS-4 (37KW) imported through Bill of Entry dated 17.02.2009 the declared value was Rs. 5,668/- while the value of similar goods in NIDB was Rs. 32,827/- and the value determined by the Chartered Engineer was Rs. 30,000/-. Similar large variations were found in the values of all the other motors.

29. Therefore, the goods imported under the two Bills of Entry were suspected to be undervalued and hence liable to confiscation under the Act and were seized under section 110 of the Act but they were later released provisionally on execution of bonds and bank guarantees.

30. The officers of SIIB also scrutinized five of the past Bills of Entry of similar goods imported by the appellant between 28.5.2008 and 14.1.2009 which had already been cleared and they came to the conclusion that they were also similarly undervalued and accordingly, the values of the goods imported under the five Bills of Entry and the corresponding values of similar goods under the NIDB database were tabulated as Annexures C, D, E,F and G to the SCN.

31. Statements of Shri Qasim were recorded under section 108 of the Act on 24.2.2009,25.2.2009 and 24.3.2209. In his statements with respect to the Bill of Entry dated 9.2.2009, he said that the declared value was Rs. 11,85,733/- compared to the value of Rs. 48,36,860/- of contemporaneous imports as per the NIDB data. He made a similar statement with respect to the Bill of Entry dated 17.2.2009. He said that these variations were due to the fact that the motors which it imported were of inferior quality and also because there was recession in the market. He requested that the value may be got assessed by some expert and that he was ready to pay the differential duty and that he wanted to avoid demurrages and did not want any SCN or personal hearing and the matter may be decided at the earliest.

32. Accordingly, the imported goods in the two Bills of Entry were evaluated by Shri Pankaj Gupta, Chartered Engineer. The NIDB data and the evaluation of the imported goods by the Chartered Engineer were explained to Shri Qasim and in his statements dated 25.2.2009 and 24.3.2009, he voluntarily agreed to pay the differential duty and also said that he did not want any SCN or personal hearing. Regarding the past clearances also, he said that he had imported five or six consignments in the past and was ready to pay the differential customs duty on them as well, if any.

33. As per Rule 5(3) of the Customs Valuation (Determination of Value of imported goods) Rules, 2007[10] of the values of the contemporaneous imports of similar goods available in the NIDB database, the lowest value for each good imported was considered and the differential duty worked out. Although the appellant waived the SCN and the personal hearing with respect to re-assessment of the imported goods, the SCN was issued proposing recovery of differential duty for the two current and five past Bills of Entry, confiscation of the seized goods of the two current Bills of Entry (which were provisionally released) and imposition of penalties.

34. After considering the replies to the SCN, holding personal hearings and allowing the Chartered Engineer to be cross- examined by the appellant, the impugned order was passed.

35. Aggrieved, the appellants filed these appeals. On behalf of the appellants, the following submissions were made:

35.1 The impugned order is illegal, void and not sustainable either on facts or in law.

35.2 After the SCN was issued, the appellant obtained, under the Right to Information Act[11], copies of some Bills of Entry dated 13.5.2009, 29.7.2009, 14.6.2010 and 30.8.2009 under
which the goods were cleared at by the department after loading 25% on the declared value. The values at which the goods were assessed by the department in these Bills of Entry were lower than what was proposed in the SCN in this case.

35.3 The Commissioner of Customs wrongly rejected the declared value under Rule 12 and no proof of contemporaneous import of similar goods at higher values was relied upon. The expert opinion is vague and is not based on any proof of similar import at higher values.

35.4 There was no admission of higher values by the appellant in the two statements made. No hawala payment or direct or indirect payment other than the declared value was noticed to substantiate the charge of mis-declaration of value by the department. Therefore, the allegation of

mis-declaration is arbitrary and whimsical.

35.5 The adjudicating authority did not produce any evidence showing the alleged relied upon NIDB data. The department did not produce catalogues of the goods imported in the contemporaneous imports whose values were relied upon for re- assessment so that the appellant could compare the specifications.

35.6 In the absence of detailed information such as Bills of Entry, invoices, examination reports, etc. of all the cases whose values were relied upon, re-assessment based on such values is not correct.

35.7 NIDB data is not fool proof evidence as held in

Commissioner of Customs, vs Modern Overseas[12]

35.8 The adjudicating authority did not give any finding on the decision of **Inquir Inc vs Commissioner of Customs, Chennai[13]** in which the Chartered Engineer's certificate was rejected as it was vague.

13.11 The Commissioner has wrongly confirmed the demand in respect of five past Bills of Entry based on NIDB data relying on the statement of the appellant dated 25.2.2009. In his statement, the appellant had not accepted any value in respect of the past Bills of Entry. He only stated that they had imported some goods in the past under five Bills of Entry but that he did not have the details at that time and that he was willing to pay duty liability, if any, for those goods. The department did not produce any evidence of mis-declaration/suppression of facts in respect of these past Bills of Entry. The SCN dated 21.8.2009 was therefore, wrongly issued invoking extended period of limitation in respect of these five past Bills of Entry. All these five Bills of Entry were assessed by the officers on the basis of declaration by the appellant in the Bills of Entry and the after examination of the goods. In one of the Bills of Entry numbered 760587 dated 14.1.2009, the goods were assessed by enhancing the value by 25%. It is evident that the department had all the NIDB data in its possession at that time. There is now, therefore, no basis to re-assess these Bills of Entry by loading 300% value at this time.

13.12 Since the value of the goods in the current imports should not have been rejected, there is also no case to confiscate them under section 111(m). Consequently, there is no case to impose penalty under sections 114A and 112(a).

13.13 The impugned order may be set aside and the appeal may be allowed with consequential relief to the appellant.

36. On behalf of the Revenue, the following submissions were made:

36.1 The issue pertains to undervaluation of the imported goods.

The values declared in the two current Bills of Entry were compared with the NIDB data and with the reports of an expert report and were found to be quite low. Investigation was initiated and statements of Shri Qasim were recorded on 24.2.2009,
25.2.209 and 24.3.2009 under section 108 of the Customs Act.

In these statements, which have not been retracted till date, the appellant accepted the re-determination of values.

36.2 The values of contemporaneous imports of goods were comparable to the values determined by the Chartered Engineer. The differential duty was calculated accordingly.

36.3 The values of the goods imported under the five past Bills of Entry were also determined accordingly.

36.4 Once the appellant accepted the enhanced value in writing, it was binding on both sides as per section 147. In fact, there was not even a need to issue any speaking order as per section 17(5) of the Act.

36.5 There was no forced acceptance of the valuation based on the NIDB data. If the appellant did not agree to the re- determination of value, it did not have to accept the proposed value or it could have paid duty under protest. If the appellant wanted to get the goods cleared while not accepting the values proposed by the department, it could have also got the goods provisionally assessed pending finalization of assessment. If it wanted to avoid demurrages, it could have got the goods shifted to a Customs bonded warehouse under section 49.

36.6 The appellant's contention that the rejection of the transaction value under Rule 12 was not correct holds no water. The values declared in the Bills of Entry were doubted because they were far lower than the values of the contemporaneous imports available in the NIDB. When these were shown, the appellant accepted valuation on the basis of the NIDB data. Therefore, rejection of the transaction value as per Rule 12 is absolutely correct.

36.7 The appellant's contention that valuation should have been done as per Rule 3 is not correct because, Rule 3 is subject to Rule 12 under which the transaction value can be rejected as has been done in this case.

36.8 As held by the Hon'ble Supreme Court in **Central Excise Madras vs Systems and Components Pvt. Ltd.[14],** once valuation has been accepted, it need not be proved.

36.9 The appellant cannot be allowed to play a cat & mouse game with the Revenue as held by the Tribunal in **Commissioner vs AR Fabrics[15].**

14.10. In **Commissioner of Customs vs Hanuman Prasad and sons[16],** it was held that once the values determined by the officers have been accepted, they cannot be questioned later.

14.11 In **Commissioner of Central Excise, Madras vs Systems & Components Pvt. Ltd.[17],** Hon'ble Supreme Court held that *It is a basic and settled law that what is admitted need not be proved.*

37. Learned departmental representative prayed that the appeals may, therefore, be dismissed.

38. We have considered the submissions on both sides and perused the records. The following issues need to be decided:

g) Is the rejection of the transaction value of the two current Bills of Entry under Rule 12 and its re-determination by the Commissioner and confirmation of the demand of differential duty sustainable?

h) Is the rejection of transaction value and its re-determination and confirmation of demand in respect of the five past Bills of Entry sustainable?

i) Is the confiscation of the goods imported in the two Bills of Entry and their release on payment of redemption fine, sustainable?

j) Is the order holding the goods imported under the five past Bills of Entry liable to confiscation and imposition of redemption fine since they were not available, sustainable?

k) Is the imposition of penalty on the importer under section 114A sustainable?

l) Is the imposition of penalty on Shri Qasim under section 112(a) sustainable?

Rejection of transaction value and re-determination of value in respect of the two current Bills of Entry

39. The case of the appellant is that the goods should be valued as per transaction value as per Rule 3 as there is no evidence of any payment through Hawala or any other direct or indirect payment by the importer to the overseas seller and no evidence to this effect was put forth by the Revenue. It is

also its case that the appellant accepted the values proposed by the Revenue to avoid demurrages and ensure quick clearance. It is further its assertion that it has not been provided with copies of the Bills of Entry, invoices, catalogues, etc. whose values were used to reject its transaction value and therefore, there is no comparison of the value of the goods. It also asserts that the Chartered Engineer's certificate is vague and should have been rejected.

40. The case of the Revenue is that once the appellant accepted in writing the proposed transaction value based on the NIDB data, it cannot be permitted to play cat and mouse game and now (after goods have been cleared) dispute the very values which it had accepted in writing. It is also the case of the Revenue that what is accepted, need not be proved. In fact, as per Section 17(5), neither an SCN nor even a speaking order was required in this matter insofar as the re-assessment of the goods imported under the current Bills of Entry was concerned. The SCN and the impugned order was issued only because it was also proposed to re-assess the past Bills of Entry and recover differential duty under section 28 and also because goods confiscation of goods and imposition of penalties were considered.

41. We have considered these submissions. Before examining the facts of this case, we examine the relevant legal provisions, viz., Section 14 of the Act and the Rules. Duties of customs are levied on goods imported into and exported from India at the rates specified in the Schedules to the Customs Tariff Act, 1975. On some goods, the levy is based on quantity (specific duty) and other goods, it is based on value (ad valorem). If the duty is to be levied based on value, valuation for the purpose has to be done as per Section 14 which reads as follows:

Section 14. Valuation of goods. -

(3) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, **the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf**:

Provided that such transaction value in the case of imported goods shall **include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges** to the extent and in the manner specified in the rules made in this behalf:

Provided further that the **rules** made in this behalf **may provide for,-**

(i) the circumstances in which the **buyer and the seller shall be deemed to be related**;

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or **price is not the sole consideration for the sale or in any other case**;

(iii) **the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section**:

Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.

(4) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

Explanation . - For the purposes of this section -

(c) rate of exchange" means the rate of exchange -

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(d) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)

42. The non-obstante clause in sub-section 2 of section 14 gives the Board the power to fix tariff values for any class of goods and if fixed, the tariff value will be the value to determine the duty. This sub-section is not relevant to this case. In all other cases, the value to be reckoned for calculating the Customs duty shall be the transaction value subject to five conditions:

f) Buyer and seller are not related.

g) Price is for delivery at the time and place of importation, i.e., all costs up to the point of import are to be included. For instance, if the sale is on Free on Board basis, the costs of transportation to the place of import, transit insurance, etc. will have to be added.

h) Price is the sole consideration for sale.

i) Some amounts indicated in the first proviso to sub-section 1 of section 14 must be included.

j) Valuation will be as per any other conditions as may be specified in the Rules.

43. Thus, the default position is that the valuation has to be done on the basis of the transaction value and not based on any fixed value. The first proviso to sub-section 1 of section 14 provides for some additions to the transaction value which are not relevant for the present case. The second proviso to this sub- section provides for Rules to be made in this behalf to provide for:

f) the circumstances in which **the buyer and the seller shall be deemed to be related**; the manner of determination of value in respect of goods

when there is no sale,

g) the manner of determination of value in respect of goods if

the buyer and the seller are related,

h) the manner of determination of value in respect of goods where **price is not the sole consideration for the sale**;

i) the manner of determination of value in respect of goods in

any other case; and

j) the manner of **acceptance or rejection of value** declared by the importer or exporter, as the case may be, **where the proper officer has reason to doubt the truth or accuracy of such value**, and determination of value for the purposes of this section.

44. The Rules were framed as per the second proviso to sub- section 1 of section 14. These are 13 Rules in all of which Rules 1 and 2 are Preliminary rules. Rule 3 states that subject to Rule 12, the value shall be the transaction value adjusted according to Rule 10. Rule 10 provides for certain costs to be included in the transaction value. Rule 12 provides for the proper officer to reject the transaction value if he has reason to doubt its truth and accuracy. **Thus, unless the proper officer rejects the transaction value under Rule 12, valuation has to be based on transaction value as per Rule 3 with some additions, if necessary, as per Rule 10.**

45. Rule 3 further provides that if the valuation cannot be done under that Rule, i.e., as per the transaction value with additions as per Rule 10, then **it must be done sequentially under**

Rules 4 to 9. **Rule 4** provides for the valuation to be done on the basis of **identical goods**. **Rule 5** provides for the valuation to be done on the basis of the value of **similar goods**. Rule 6 states if Rules

4 and 5 cannot determine the value then they must be done as per Rule 7 and thereafter Rule 8 but this sequence can be reversed at the option of the importer. In other words, if the importer so chooses, Rule 8 can be applied directly instead of Rule 7. **Rule 7** provides for a **deductive method of valuation** on the basis of prices of similar or identical goods sold in India and after making some deductions from such prices. **Rule 8 provides for a computed value,** i.e., based on the cost of raw material, cost of manufacture, reasonable profit, etc. In view of Rule 6, the importer may choose the computed value without examining the feasibility of determining value through deductive methods. **Rule 9 is a residual method** which provides for determining the value where it cannot be determined under Rules 3 to 8. Rule 10, as already discussed, provides for some costs to be added to the transaction value if the valuation is done as per Rule 3. Rule 11 requires the importer to make a declaration. Rule 12 lays down the provision for rejection of transaction value. Rule 13 provides for interpretative notes for the Rules.

58. To sum up, valuation has to be done sequentially as follows:

a) If a **tariff value** is fixed by the Board, it is the value (sub- section 2 of Section 14);

b) If no tariff value is fixed by the Board, valuation is as per the **transaction value, if necessary, with some additions** (as per the first proviso to sub-section 1 of section 14 and as per Rule 10);

c) If the transaction value is rejected as per Rule 12 by the proper officer, valuation has to be done as per the **value of identical goods** (Rule 4);

d) If transaction value is rejected and there is no value of identical goods, then it must be as per the **value of similar goods** (Rule 5);

e) If transaction value is rejected and there is no value of identical goods or similar goods, value must be determined through **Deductive method** (Rule 7)

f) If transaction value is rejected and there is no value of identical goods or similar goods and it is not possible to determine value following deductive method, then value must be determined through **computation** (Rule 8)

g) If the importer so chooses, computational method may be adopted without examining the deductive method first (Rule 6).

h) If the transaction value is rejected and there is no value of identical goods or similar goods and if it is also not possible to determine the value through deductive method or computational method, then value may be determined through the **residual method** by the officer following the above principles (Rule 9).

59. The next question which arises is when can the proper officer reject the transaction value. Rule 12 reads as follows:

12. Rejection of declared value. -

(3) When the proper officer **has reason to doubt the truth or accuracy of the value declared** in relation to any imported goods, he **may ask the importer of such goods to furnish further information including documents or other evidence** and if**, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt** about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

(4) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation.-(1) For the removal of doubts, it is hereby declared that:-

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) **The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include -**

(a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

(b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;

(c) the sale involves special discounts limited to exclusive agents;

(d) the mis-declaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) the non declaration of parameters such as brand, grade, specifications that have relevance to value;

(f) the fraudulent or manipulated documents.

60. Thus, if the officer has **reason to doubt** the truth and accuracy of the transaction value, he can call for information including documents and evidence. If the information and evidence is presented and after examining it or if no information or evidence as called for is presented, if the proper office has **reasonable belief** then it shall be deemed that the value cannot be determined as per Rule 3 (i.e., based on transaction value with additions, if necessary). While the officer can, **in the first place call** for information and evidence if he **has reason to doubt**, at the second stage, he should have not just some reason to doubt but a **reasonable doubt.** If he has such reasonable doubt, then the transaction value can be rejected. The grounds on which the proper officer may raise doubts about the truth and accuracy of the transaction value have been illustrated in explanation 1 (iii) to Rule 12. The list is inclusive and not exhaustive.

61. In this case, the officers received intelligence that the motors imported by the appellant were under-valued. Acting on this intelligence, the goods were examined in detail and they were found as declared in the two Bills of Entry but their values appeared to be too low. The importer was asked for evidence to support their values but it could not produce anything other than the invoices. The declared values were compared with the values of similar goods imported through several ports across the country as available in the NIDB and it was found that the declared values were, indeed, quite low. A Chartered Engineer Shri Pankaj Gupta was asked to inspect the goods and give his opinion on the value of the goods and he did so. The values determined by the Chartered Engineer were similar to the values found in the NIDB.

62. In this factual matrix when the officers had, in the first place, a reason to doubt the truth or accuracy of the transaction value. They called for further information from the importer but it could only supply the invoices to support its claim of the invoice value. Therefore, the officers had correctly crossed the first stage of 'reason to doubt' provided in Rule 12.

63. Statements of Shri Qasim were recorded under section 108 of the Act on 24.2.2009, 25.2.2009 and 24.3.2209. With respect to the Bill of Entry dated 9.2.2009, he said that the declared value was Rs. 11,85,733/- compared to the value of Rs. 48,36,860/- of contemporaneous imports as per the NIDB data. He made a similar statement with respect to the Bill of Entry dated 17.2.2009. He said that these variations were due to the fact that the motors which it imported are of inferior quality and that there was recession in the market. He requested that the value may be got assessed by some expert and that he was ready to pay the differential duty and that he wanted to avoid demurrages and did not want any SCN or personal hearing and the matter may be decided at the earliest. The goods were got assessed by the Chartered Engineer who also assessed the value of the goods similar to the values found in the NIDB. Therefore, the officers successfully crossed the second stage of 'reasonable doubt' under Rule 12 to reject the transaction value. We also find that in his statements, Shri Qasim specifically agreed to the valuation and agreed to pay the differential duty. In his statement dated 24.2.2009, he, interalia, stated:

… I further state that assessable value worked on the basis of the NIDB data may be correct and my declared prices are already on higher side and **in order to arrive at the fair reasonable assessable value I request you that the valuation of my imported goods may also be got done from some**

expert in this regard as there is a great difference in the prices declared by me and the value compiled on the basis of the NIDB data. I further state that I am ready to pay duty whatever fair assessable value is worked out. I further submit that due to heavy demurrages and other charges my case may be decided at the earliest and a lenient view may be taken and I also submit that **I do not want any show cause notice or personal hearing in this matter**.

64. The appellant while agreeing to the valuation and waiving the SCN and personal hearing also sought that the goods may also be got examined by an expert. The goods had already been examined by a Chartered Engineer who submitted his report dated 23.2.2009. Another statement of Shri Qasim was recorded on 25.2.2009 in which he was shown the Chartered Engineer's certificate as well as the charts showing the values as per the NIDB data. In his statement, he, inter alia, stated as follows:

.. I have been shown the chart prepared by the Customs officials on the basis of the Chartered Engineer report according to which the value of the imported goods is Rs. 44,01,050 and the Customs duty on this value comes to Rs. 10,51,625/- I have seen the Chartered Engineer certificate Ref no. PG/CRT/424/IMP/2008-09 dated 23.02.2009 and I have signed the same in token of its correctness. **I have also been shown the chart prepared by the Customs officers on the basis of NIDB data as per the chart the assessable value of my imported goods i.e., 886 pieces of assorted electrical motors of different KVA vide Bill of Entry No 766759 dated 9.2.09 has been worked out to Rs. 48,36,860/- and the customs duty has been worked out to Rs. 11,56,761/-. I have also signed the statement in token of its correctness.**

I further state that the value as per the NIDB chart is correct and I am ready to pay Customs duty on this value as the margin of difference in the NIDB data and Chartered Engineer is very less and according to me the assesseable value of Rs. 48,36,860/- and the duty on this value Rs. 11, 56,761/- is fair assessable value and I will deposit the same within two-three days......

I further state that in the past I have imported the same goods by 2-3 Bills of Entry from China. At present I am not having the details, I am ready to pay Customs duty for the same if any.

65. Another statement was recorded on 24.3.2009 in which Shri Qasim, inter alia, stated as below:

…. I have been shown the chart prepared by the Customs officers accordin to the chart the assessable value has been worked out to Rs. 63,09,086/- on the basis of the NIDB data against my declared value of Rs. 15, 36,473/-. THE Customs officer explained me about the NIDB data according to which it is a data of prevalent prices of assessment of similar goods of similar country of origin of same period taken by the Customs at various ports of Customs in India. **Further, the method and basis of enchancement of declared value on the basis of the NIDB data has been explained to me and according to me it is a correct and fair method and I accept the enhanced declared value from Rs. 15,36,473/- to Rs 63,09,086/- for 408 pieces of electric motors of assorted KWs for the Bill of Entry dated 17.2.09, in token of my acceptance I have signed the chart prepared by the Customs officers today on 24.3.09 and I am ready to pay Customs duty. Further, I have been shown the certificate of Shri Pankaj Gupta, Chartered Engineer dated 21.3.09 and as per the valuation of the chartered engineer, the assessable value of the 408 pieces of electric motors works out toRs.61,21,950/- I have also signed the same in respect of B/E No. 768815 dated 17.02.09.**

66. Having rejected the declared assessable value under Rule 12, the department sought to re-determine it under Rule 5 based on the contemporaneous value of similar goods imported into the country. It needs to be noted that since the imported goods were miscellaneous motors of various specifications there cannot be identical goods to determine duty as per Rule 4 and hence determining duty on the basis of values of similar goods under Rule 5 is fair and proper. To determine the value of the contemporaneous imports, the relevant data was extracted from the NIDB. The department also referred the matter to a Chartered Engineer to determine the value of the imported goods. In his first statement dated 24.2.2009, Shri Qasim was shown the NIDB data and he requested that the matter may also be referred to an expert to arrive at a fair value. On 25.2.2009, Shri Qasim was shown both the NIDB values and the report of the Chartered Engineer and he made a categorical statement accepting

the chart prepared by the Customs officers based on the NIDB data with respect to the Bill of Entry dated 9.2.2009 that he accepts the value proposed by the Customs officers and that he was ready to pay the Customs duty accordingly. Further, he had also indicated that he did not want either an SCN or a personal hearing in the matter. He made a similar statement on 24.3.2009 with respect to the Bill of Entry dated 17.2.2009. None of the three statements have been retracted till date.

67. The appellant is now disputing the NIDB data on the ground that the Bills of Entry of the data and the brochures related to the goods imported under them were not provided to him. The appellant is also asserting that the Chartered Engineer's certificate is vague.

68. The appellant cannot be permitted to take this stand at this stage. It is a well-settled legal principle that what is admitted need not be proved. Every case, civil, criminal or otherwise, involves multitude of facts and evidence need not be produced by any side on all such facts. Only such facts which are asserted by one and disputed by the other need to be proved and the party asserting them has to produce evidence. For instance, if A says that he lent a sum of Rs. 1,000/- to B and that B did not returned it and B accepts that A had lent him the money but says that he returned it, the only fact which needs to be determined is if B returned the money or not. The fact that A had lent the money is not disputed and A need not prove it. Section 58 of the Indian Evidence Act,1872 clarifies this position. It reads as follows:

Indian Evidence Act

Section 58. Facts admitted need not be proved.

No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

69. In this case, since the fact that the goods were undervalued and the correct assessable value for the goods imported under the two Bills of Entry dated 9.2.2009 and 17.2.2009 are as per the charts prepared by the officers as per the NIDB data was not only not disputed but positively accepted, in writing, by the appellant, these facts were not in dispute and neither side needed to produce any evidence. Therefore, there is no force the submissions of the learned counsel for the appellants that the department failed to provide evidence in support. Revenue need not produce any evidence. In fact, it did not have to even issue the SCN or hold a personal hearing insofar as the re-assessment of these two Bills of Entry is concerned because the appellant had waived them in writing.

70. The appellant's contention that it had accepted the value to avoid demurrages also does not hold any water. There is nothing on record to show that its acceptance was not voluntary. On the contrary all three statements explicitly state that the statements were voluntary and none of them have been retracted. If the appellant wanted to avoid demurrages and was not willing to accept the valuation, the appellant could have transferred the goods to a Customs bonded warehouse under section 49 and it would not have had to pay any demurrages but only the rent to the warehouse keeper. The appellant could have, as an alternative, disagreed with the re-assessment but paid duty under protest and asked for a speaking order. The appellant could also have sought provisional assessment. All these alternative methods are routinely used in the Custom houses by the importers.

71. Learned counsel also submitted that the NIDB data is not unquestionable and that the Chartered Engineer's certificate is vague and hence should be rejected. In this case, the NIDB data has not only NOT been questioned but has positively been accepted by the appellant. The Chartered Engineer's certificate was also provided to the appellant and he had not disputed it at all. After seeing both and the chart of valuation prepared by the Customs authorities, the appellant explicitly agreed to the valuation. What is accepted need not be proved. It has been held by the Supreme Court in **Systems & Components Pvt. Ltd.** as follows:

6. The Collector (Appeals) relied upon a Circular issued by the Board of Central Excise dated 25th September 1986 and held that Receivers, Surge Drums and Flash Vessels were classifiable under Tariff

Item 73.11 and the Drain Pot under
73.10. It was held that the oil separator would be classifiable under 84.79 and Base Frame under 7308.90.

7. The Appeal filed by the Department has been disposed of by the Tribunal by holding that the Department has not proved that these parts were specifically designed for manufacture of water chilling plant in question. The Tribunal has noted the Technical details supplied by the Respondents and the letter by the Respondents dated 30th November 1993 giving details of how these parts are used in the Chilling Plant. **The Tribunal has still strangely held that this by itself is not sufficient to show that they are specifically designed for the purpose of assembling the Chilling Plant. We are unable to understand this reasoning. Once it is an admitted position by the party itself, that they have no independent use there is no need for the Department to prove. It is a basic and settled law that what is admitted need not be proved.**

72. The appellant also submitted that some Bills of Entry of other importers were obtained by it under the RTI Act from the Customs authorities which show that similar goods were cleared at lower values. We have examined this submission and find that the Bills of Entry which the appellant obtained were those which were filed after the disputed two Bills of Entry. It is a well settled legal principle that when goods are assessed based on values of contemporaneous imports, they refer to only imports which have already taken place, i.e., past Bills of Entry and not based on Bills of Entry which may be filed in future. The reason for this is that the assessment can be done based on what is available at the time of filing of the Bill of Entry and not anticipating what may happen in future. Therefore, there is no force in this argument either.

73. The correctness of the values determined by the determined and accepted by the appellant cannot, therefore, be questioned as they were undisputed. In a similar situation, where the importer accepted the re-assessment by the officers and after clearing the goods, filed an appeal questioning the same values which the appellant had accepted, this Tribunal had in **Hanuman Prasad & Sons** held as follows:

36. The following position emerges from the aforesaid decisions of the Tribunal:

(i) When an importer consents to the enhancement of value, it becomes unnecessary for the revenue to establish the valueaion as the consented value, in effect, becomes the declared transaction value requiring no further investigation;

(ii) When an importer accepts the loaded value of the goods without any protest or objection, the importer cannot be permitted to deny its correctness;

(iii) The burden of the department to establish the declared value to be incorrect is discharged if the enhanced value is voluntarily accepted.

74. The decision in **Hanuman Prasad & Sons** was followed in several other decisions. We, therefore, answer question (a) framed by us in paragraph 16 in favour of the Revenue and against the appellants.

Re-determination of value and confirmation of demand in respect of the five past Bills of Entry

75. Insofar as the past five Bills of Entry are concerned, the case of the appellant is that the goods were cleared by the officers after examination and in respect of one of the Bills of Entry, the declared assessable value was also enhanced by 25% by the officer re-assessing the Bill of Entry. Therefore, there is no case to allege undervaluation much later and demanding duty under section 28 invoking extended period of limitation alleging suppression.

76. The case of the Revenue is that the appellant had agreed to pay the differential duty in respect of these five Bills of Entry in its statement and it cannot be allowed to renege at this stage. Just like the demand for the two current Bills of Entry, the demand of differential duty for these five

Bills of Entry also needs to be upheld.

77. We find strong force in the submissions of the appellant.

Once the goods are cleared for home consumption after examination and assessment, unless there is an evidence to support, demand under section 28 invoking extended period of limitation cannot be raised unless there is evidence of collusion or willful mis-statement or suppression of facts are proven. There is no allegation or evidence in this case of collusion. The reason for invoking extended period of limitation given in the SCN is as follows:

" 12. Whereas, the importer had mis-declared the value of imported goods in the past consignments also and the value appeared to be grossly undervalued. Therefore, it appears that the declared invoice value is not free from doubts and same is not in conformity with section 14 of the Customs Act, 1962. Hence, it gave sufficient reasons to doubt the truth or accuracy of the invoice value declared in relation to the goods imported vide above said 7 Bills of Entry No. 768815 dated 17.02.09, 766759 dated 09.02.2009, 760587

dated 14.01.09, 746857 dated 17.11.08, 725687 dated

30.08.08, 708103 dated 04.0.08 and 698659 dated

28.05.08. No further information/ documents or any other evidence was provided by the importer to substantiate their declared invoice value."

78. Evidently, the SCN alleges mis-declaration and does not even allege that it was willful, let alone producing any evidence to the effect.

79. Learned authorised representative submitted that the appellant had agreed to pay the differential duty in respect of the past cases also. We have seen the Statement of the appellant given on 25.2.2009 and the relevant portion of it is as follows:

I further state that in the past I have imported the same goods by 2-3 Bills of Entry from China. At present I am not having the details, I am ready to pay Customs duty for the same if any.

80. A plain reading of the above shows that at the time of recording the statement, the appellant could not remember the exact number of Bills of Entry filed before and also did not have the details. All that is stated is that he is ready to pay Customs Duty for the same, if any. Neither were the details of the Bills of Entry nor the goods imported under them, their declared values, corresponding values of goods in the NIDB and why it became necessary to re-open the assessment which were already finalized shown to the appellant nor were they agreed to. This

statement does not support the case of the Revenue in any sense.

81. We, therefore, answer the question (b) in paragraph 16 above in favour of the appellant and against the Revenue.

Confiscation of the goods imported in the two Bills of Entry and their release on payment of redemption fine

82. The goods imported under the two Bills of Entry valued at Rs. 48,36,860/- were seized and they were provisionally released on bond and bank guarantee. In the impugned order, they were confiscated under section 111(m) and released on payment of redemption fine of Rs. 10,00,000 under section 125 and the Bank Guarantee given by the appellant was appropriated towards it. Section 111(m) and section 125 read as follows:

113. Confiscation of improperly imported goods, etc.—The following goods brought from a place outside India shall be liable to confiscation:—

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect

thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54

125. Option to pay fine in lieu of confiscation.—(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply:

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

83. Section 111(m) provides for confiscation of imported goods which do not correspond in value or in any other particular to the entry made. The case of the appellant is that since the re- assessment itself is not sustainable, neither is the confiscation. The case of the Revenue is that the confiscation was done correctly. As we have already found that the goods were correctly re-assessed, section 111(m) squarely applies to the goods in question and therefore, their confiscation needs to be upheld.

84. Once the goods are confiscated, section 125 requires that, unless the goods are prohibited goods, the owner should be given an option to redeem the goods on payment of fine. If they are prohibited goods, the adjudicating authority has the discretion of allowing redemption or not. This section further restricts the quantum of penalty to the market value of the goods. It is not the case of either side that the motors imported by the appellant were prohibited goods. Therefore, they were released on redemption fine. The seized goods imported under Bill of Entry dated 9.2.2009 were valued at Rs. 48,36,860/- and the redemption fine imposed was Rs. 10,00,000/-. The seized goods imported under Bill of Entry dated 17.2.2009 were valued at Rs. 63,09,086/- and the redemption fine imposed was Rs. 12,50,000/. In the factual matrix of this case, the fines imposed are, in our opinion, fair.

85. We, therefore, answer question (c) of paragraph 16 in favour of the Revenue.

Order holding the goods imported under the five past Bills of Entry liable to confiscation and imposition of redemption fine since they were not available.

86. The adjudicating authority also held that the goods imported under the past five Bills of Entry valued at Rs. 1,45,02,410/- were liable to confiscation under section 111(m) and imposed redemption fine of Rs. 30,00,000/-. As we have found that the demand under section 28 re-assessing the duty in respect of these five Bills of Entry is not sustainable, the confiscation of the goods imported under them as well as redemption fine also need to be set aside. Even otherwise, the goods which are not available cannot be either seized or confiscated. This is because, on confiscation, the property vests in the Government and if the importer opts to redeem them, he can pay the redemption fine and get the goods released. If the goods are not available neither can the government take over the goods nor can it return them to the owner or payment of fine. The case of the goods imported under the above two Bills of Entry was different as they were seized and were provisionally released on execution of a bond and bank guarantee. The bond and bank guarantee are meant to cover the redemption fine, if any, imposed if the goods are confiscated and released. We, therefore, answer question (d) of paragraph 16 in favour of the Appellant.

Penalty on the importer under section 114A

87. In the impugned order, penalty of Rs. 59,76,148/- being the importer being the amount equal to the differential duty demanded under section 28 (in respect of the five Bills of Entry) and interest thereon under section 114A of the Act. This section reads as follows:

114A. Penalty for short-levy or non-levy of duty in certain cases.—

Where the duty has not been been levied or has been short- levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall, also be liable to pay a penalty equal to the duty or interest so determined:

Provided that where such duty or interest, as the case may be, as determined under sub-section (8) of section 28, and the interest payable thereon under section 28AA, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the duty or interest, as the case may be, so determined: ******

88. As we have found that the demand of differential duty under section 28 in respect of the past Bills of Entry cannot be sustained, we set aside the penalty under section114A as well. As far as the duty on the two current Bills of Entry are concerned, they are a matter of re-assessment under section 17 and not a case of duty not levied or short levied under section
28. We, therefore, answer question (e) of paragraph 16 in favour of the appellant.

Penalty on Shri Qasim under section 112(a)

89. In the impugned order, penalty of Rs. 15,00,000/- was imposed on Shri Mohd. Qasim Khan under section 112(a) of the Act. This section reads as follows:

114. Penalty for improper importation of goods, etc.— Any person,—

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable,—

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty 5 [not exceeding the value of the goods or five thousand rupees], whichever is the greater

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher:

Provided that where such duty as determined under sub- section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater;

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;

(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest.

90. We have already found that the confiscation of the goods imported under the two current Bills of Entry and their release on payment of redemption fine need to be upheld and we have set aside the confiscation and imposition of redemption fine in respect of the five past Bills of Entry. We have also upheld the re-assessment of duty in the two current Bills of Entry and set aside the demand of duty under section 28 in respect of the five past Bills of Entry. Shri Qasim is the person most directly connected with the filing of the two Bills of Entry and the values of the goods in these did not match the imported goods which rendered the goods liable to confiscation under section 111(m). Therefore, Shri Qasim squarely falls under Section 112(a) and is liable to penalty under it.

91. However, in the impugned order, penalty under section 112(a) has been imposed considering the differential duty confirmed in respect of the two current and five past Bills of Entry. We have already found that the demand in respect of the five past Bills of Entry cannot be sustained. We, therefore, find it proper to reduce the penalty on Shri Qasim also from Rs. 15,00,000/- to Rs. 3,00,000/-

92. In view of the above:

a) **Customs Appeal No. 3/2011** filed by M/s. Jhaveria Impex is partly allowed by upholding the re-assessment of duty in the impugned order in respect of the two current Bills of Entry filed on 9.2.2009 and 17.2.2009 and confiscation of the goods imported under these two Bills of Entry and the redemption fines imposed. The demand of duty on the five past Bills of Entry, confiscation of the goods imported under them and imposition of redemption fine in lieu of the confiscation and the fine under section 114A are set aside. The appellant will be entitled to consequential relief, if any.

b) **Customs Appeal No. 4/2011** filed by Shri Mohd. Qasim Khan is partly allowed by reducing the penalty imposed on him under section 112(a) from Rs. 15,00,000/- to Rs. 3,00,000/-. The appellant will be entitled to consequential relief, if any.

[Order pronounced on **08/11/2023**]

(DR. RACHNA GUPTA) MEMBER (JUDICIAL)

(P V SUBBA RAO) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI. PRINCIPAL BENCH – COURT NO. III

Customs Appeal No.51098 of 2019 (DB)

(Arising out of Order-in-Appeal No.CC (A) CUS/D-1/ACC (IMP)/656/2018-19 dated 31.01.2019 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi).

M/s. Windlass Online Stores Pvt. Ltd. **Appellant**
Shri Rajiv Goil,

Director, Windlass Online Stores Pvt. Ltd., R/o Y-8A, Hauz Khas,

New Delhi-110 016.

Versus

Commissioner of Customs, **Respondent**
Air Cargo Complex (Import), IGI Airport, New Customs House,

New Delhi-110 037.

APPEARANCE:

Shri Anshuman Sahni, Advocate for the appellant.

Shri M. Shukla, Authorised Representative for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL) HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.51524/2023

DATE OF HEARING:27/07/2023
DATE OF DECISION:08/11/2023

BINU TAMTA:

The present appeal has been filed challenging the Order-in-Appeal No. CC(A)CUS/D-1/ACC(IMP)/656/2018-2019 dated 31.01.2019, whereby the appeal filed by the appellant was dismissed and the order-in-original was affirmed.

2. The facts of the present case are that the appellant filed Bill of Entry No.7205764 dated 24.10.2016 for clearance of goods imported from Overseas supplier – M/s. Denix S.A. C/Dels Bijuteers, Spain. The description, quantity and value of the goods declared by the importer in the said Bill of Entry as per Invoice cum Packing List, are detailed in Table-A below:-

Sl.No.	Description of Goods as declared in the B/E	Model No.(As per Invoice/packing list)	CTH	Qty.(in Pcs.)
1.	Cannon (Decoration and Gift Articles, Replica Weapons for display purpose)	407	8306 29 90	5
2		420		5
				5
3		421		5
4		422		
5	Panoplie (Decoration and Gift Articles, Replica Weapons for display purpose)	518		10
6		506		10
7		508	8306 29 90	10
8	Cartridge Belt(Decoration and Gift Articles, Replica Weapons for	703	4203 40 90	5
9		707		5
10	Display purpose)	704		5
11		708		5
12				
		701		5
13	Catapult (Decoration and Gift Articles.			
	Replica Weapons for display purpose)	426	8306 29 90	5
14	Sword belt (decoration and Gif Articles, Replica Weapons for display purpose)	713	4203 40 90	5
15	Paperweight (decoration and Gift Articles, Replica Weapons for display purpose)	737	8306 29 90	10

16	Paper weight (Decorative and Gif Articles, Replica Weapons for Display Purpose)	56	8306 29 90	200
17	Letter opener (Decoration and Gift	F-3033		25
18	Articles, Replica Weapons for display purpose	F-3027		25
19		F-3029		25
20		F-3030		25
21		F-3032		25
22		F-3048		25
23		F-3047	8214 10 10	25
24		F-3059		25
25		F-3045		25
26		F-3066		25
27		F-3080	8214 10 10	25
28	Flintlock pistol with antique finish	1026		5
29	(Decoration and Gift Articles Replica	1009/G		5
30	Weapons for display Purpose)	1129/G		5
31		1135/G		5
32		1135/L	8306 29 90	5
33	Antique Finish Pistol(Decorative and Gif Articles Replica Weapons for Display Purpose)	1231/L		5
34		1238		5
35		1061		5
36		1062	8306 29 90	10
37		1123		5
38		1227		5
39		M-1227		5
40		1227/NC		5
41		1254		
42		1254/NC		
43		1123/NC		

44		1235		
45	Antique Finish Rifle (Decorative and Gif Articles, Replica Weapons for Display purpose)	1086	8306 29 90	10
46		1093		5
47		1097		10
48		1124/C		5
49		1125	8306 29 90	5
50	Antique Finish Rifle (Decorative and Gif Articles, Replica Weapons for Display purpose)	113IC	8306 29 90	5
51	Antique Finish Rifle (Decorative and Gif Articles, Replica Weapons for Display purpose)	4139/L		5
52		4139/NQ	7323 99 90	5
53		4157/NQ		5
54		4157/N		5
55		4101/NQ		
56	Antique Finish Sword (Decorative and Gif Articles, Replica Weapons for Display purpose)	4123	7323 99 90	5
57		4125/L		5

3. The said Bill of Entry was facilitated with RMS and was, therefore, neither prescribed for assessment nor for examination. The matter was forwarded to Special Intelligence and Investigation Bureo (SIIB) for investigation as similar cases of imitation /replica of Fire Arms were being investigated by SIIB of Air Cargo Complex (Import). The consignment was subjected to 100% examination on 28.11.2016, whereby it was found that the goods were declared in the subject bill of entry as "Antique Finished Pistols", "Antique Finished Rifles" and "Antique Finished Carbind Guns". The details are at Sl.No.35-44, 45-49 and 50 respectively of the Table-A given above, though, prima facie, the goods appeared to be of articles of lethal weapons. Similarly, the swords detailed at Sl.Nos.51-55 and daggers detailed at Sl.No.56-57 of Table A were found to have blade size of more than 9". The samples were drawn for further investigation. The appellant had earlier imported similar consignment vide Bill of Entry No.79761580 dated 12.01.2015 and the same was stopped by ICE, Patparganj, which was challenged by the appellant in Writ Petition No.4906/2015, where the Hon'ble High Court of Delhi called for the Balestic report of examination of these articles by the Forensic Science Laboratory (FSL). The examination report dated 23.11.2015 was placed before the Hon'ble High Court and vide Order dated 26.11.2015, the High Court disposed of the petition observing that , "

"From the above report, it is evident that the exhibits 'F1' to 'F5' cannot discharge a projectile in their present condition and these are not firearms as defined in the Arms Act, 1959. Though, it

is submitted that after modification the same could be used as firearms, in the present state, they are not firearms as defined in the Arms Act, 1959. Mr. Kalra appearing for the Delhi Police (DCP Licensing) states that since these are not firearms no licensing is necessary.

In view of the foregoing, the Customs Department is directed to assess the Bill Entry No.7267159 dated 06.11.2014 in accordance with law and release the goods within two weeks to the petitioner.

The writ petition stands disposed of. Dasti."

Subsequently, vide order dated 11.12.2015, the High Court directed the Customs Department to re-assess the Bill of Entry No.7961580 dated 12.01.2015 in accordance with law and release the goods within two weeks.

4. In order to verify the actual nature of the goods in the present case, the catalogue found with the goods was examined, wherein a warning was mentioned as under:-

"Assembled/kit, non-firing DENIX Replica Models should be used only in the home as scale model displays or collector's item or for theatrical or training purpose. They should always be used under supervision of a responsible adult. They should ER be carried on the street, pointed at anyone, hidden on your person or left carelessly in your car. Do not leave them where they are accessible to unsupervised children or irresponsible adults. The carrying, handling or brandishing in public of any model that resembles a real weapon may be in violation of the law, may create undue apprehension on the part of law enforcement officers or other persons, and could result in INJURY to the person handling the model. Be sure to check your local laws for any restrictions regarding replica guns."

Information was also gathered from the website of the manufacturer www.denix.ex and it was found that they were involved in the manufacture of the following categories of goods:-

"i. Novelties

ii. Hangers

iii. Complements

iv. Cannons

v. Panoplies

vi. Axes & Halberds

vii. Leather articles\

viii. Firearms with mechanism

a. Arms S.XVII-XVIII-XIX
. Guns Museums
. Pirate Pistols
. Pocket Pistols
. Pistols S.XVII, XVIII
. Trabucos X.XVIII
. Rifles S.XVIII
b. Western
. Revolvers
. Guns
. Rifles
c. World War I & II
. Pistols and Revolvers
. SMGs and Rifles
d. Modern Weapons
. Guns
. Revolvers
. SMGs and Rifles

ix. Letter Openers

x. Swords and Daggers

. Dagers & Byonets

. Swords

. Sabres."

5. The subject consignment was placed under seizure on 19.12.2016 under Section 110 of the Customs Act, 1962. The appellant filed Writ Petition No. C/12051/2016 referring to the earlier writ petition and the orders passed therein and accordingly, prayed that the present Bill of Entry be assessed and the goods may be released. The Hon'ble High Court vide Order dated 22.12.2016 disposed of the writ petition, *inter alia,* observing that :-

"A reading of the previous order of the Court in the petitioner's case undoubtedly suggests that upon satisfaction, the Customs Authorities were directed to release the goods. At the same time, this Court notices that after the order, certain subsequent events occurred with the promulgation of the new rules with effect from 15.07.2016 and the introduction of Rule 89, which stipulates that import of replicas of contemporary or modern firearms would be subject to the submission of a certificate of innocuousness from the manufacturing company of the country of Export and an undertaking from the importer that the replicas of firearms imported are incapable, even after modification, of expelling or launching a bullet or short or projectile. Even with such certificate apparently, the permission of the Director General of Foreign Trade (DGFT) is essential for the import under the prevailing Exim Policy. Having regard to these circumstances, at this stage, the previous order would not *ipso factory* be the basis of disposing of the petition. Instead the petitioner should respond to the notice issued by the department and ensure participation, in the proceedings."

6. Considering the warning on the catalogue found along with the goods, FSL examination report dated 23.11.2015 from Balestic Division, FSL and also the information gathered from the manufacturers' website and the legal provisions, the Department issued show cause notice dated 15.06.2017 on the ground that the appellant made incorrect declaration of the description, value and classification of the imported goods in Bills of Entry No.7205764 dated 25.10.2016 and thereby, contravened the provisions of Section 46(4) of the Act read with Rule 11 of the Foreign Trade Regulation Rules, 1993 (as amended). The appellant imported "Replica Fire Arms" convertible into Fire Arms" classifiable under CTH 93040000, which was restricted as per ITC (HS) Import Policy, without any licence or authorization from the DGFT and also imported "daggers" and "swords" with blade size more than 9" without fulfillment of the requirements specified in the MHA Notification No.S.O.667(E) dated 12.09.1985 and Notification No.S.O.831 (E) dated 02.08.2002 and thereby contravened the provisions of para 2.08 of FTP 2015 -2020 read with Section 11 (1) of the Foreign Trade (Development) and (Regulation) Act, 1992 (as amended). The appellant thereby rendered themselves liable for penal action under Section 112(a) of the Act and under Section 114 (AA) for intentionally using false and incorrect documents. The above show cause notice was adjudicated and vide order-in-original dated 23.09.2018, the Adjudicating Authority passed the following order:-

"(i) I reject the classification of imported goods mentioned at Sl.No.35-50 and sl.No.51-57 of Table-A, which were classified under CTH 8306 29 90 & CTH 7323 99 90 respectively in the Bill of Entry No.7205764 dated 24.10.2016 and order for classification of these goods under CTH 9304 00 00 in respect of goods at Sl.No.35-50 and under CTH 9307 00 00 in respect of goods at Sl.No.51-57 of Table A.

(ii) I reject the declared assessable value of Rs.6,56,842.62/- for the imported goods covered under Bill of Entry No.7205764 dated 24.10.2016 in terms of Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962.

(ii) I reject the declared assessable value of Rs.6,56,842.62 for the imported goods covered under Bill of Entry No.7205764 dated 24.10.2016 in terms of Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962.

(iii) I re-determine the assessable value as Rs.31,80,469/- (Rupees Thirty One Lakh Eighty Thousand Four Hundred Sixty Nine only) for the imported goods covered under Bill of Entry No.7205764 dated 24.10.2016 under Rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962.

(iv) I order for absolute confiscation of the goods mentioned at Sl.No.35 to 57 of Table-A in para-1 above, i.e. Replica Firearms & Daggers/Swords valued at Rs.19,36,371/-, under Section 111(d) of the Customs Act, 1962.

(v) I order for confiscation of the imported goods mentioned at Sl.No.1 to 34 of Table-A in para-1 above, valued at Rs.12,44,097/-, covered under Bill of Entry No.7205764 dated 24.10.2016 under Section 111(m) of the Customs Act, 1962. However, I give an option to the importer to redeem the goods on payment of redemption fine of Rs.2,50,000/- (Rupees Two Lakh Fifty Thousand only) under Section 125(1) of the Customs Act, 1962.

(vi) I confirm the demand of Customs duty amounting to Rs.3,66,275/- (Rupees Three Lakh Sixty Six Thousand Two Hundred Seventy Five only), on the goods mentioned at Sl.No.1 to 34 of the Table A in para-1 above, out of which Rs.1,93,381/- has already been paid by the importer on account of self-assessed duty.

(vii) I order for appropriation of customs duty already paid amounting to Rs.1,93,381/- towards the demand of customs duty. I also order that, thus, importer is required to pay a differential duty amounting to Rs.1,72,894/-, under Section 28(1) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act, 1962.

(viii) I impose a penalty of Rs.50,000/- (Rupees Fifty Thousand only) on the importer i.e. M/s. Windlass Online Stores Pvt. Ltd. under Section 112 (a) of the Customs Act, 1962.

(ix) I impose a penalty of Rs.50,000/- (Rupees Fifty Thousand only) on the importer i.e. M/s. Windlass Online Stores Pvt. Ltd. under Section 114 AA of the Customs Act, 1962."

7. Being aggrieved, the appellant filed an appeal, which has been rejected by the Commissioner (Appeals) by the impugned order dated 31.01.2019. Hence, the present appeal has been filed before this Tribunal.

8. Having heard both the sides at length and also perused the records along with the written submissions and compilations filed, we may consider the contentions raised both by the appellant as well as by the Department.

9. Mr. Anshuman Sahni, learned Counsel for the appellant raised preliminary issue that the impugned order lacks application of mind and has been passed in violation of principles of natural justice. On merit, he referred to similar consignment vide Bills of Entry No.7961580 dated 12.01.2015 which was cleared by the Customs Authorities as ordered by the Delhi High Court vide Order dated 26.11.2015. It is also his contention that the earlier FSL report dated 23.11.2015 has been relied upon in a selective manner and thereby ignored the observations that, " no projectile can be fired in the present state" and the present FSL report dated 10.03.2017 has not given any view, whether the goods are capable of discharging any projectile or have all firing mechanism and, therefore, a mere composition of conversion in future cannot be a ground to retain the goods. The learned counsel also referred to the Certificate/declaration issued by the supplier/manufacturer of the imported goods stating that the goods imported are classifiable under CTH 83062900 and, therefore, there is no prohibition or restriction either under the Customs Act or under the Foreign Trade Policy to import the "Replica Fire Arms". The goods in question do not fall within the definition of " firearms" under Section 2(1) (e) of the Arms Act, 1959, according to which firearm means "arms of any description designed or adapted to discharge a projectile or projectiles of any kind by the action of any explosive or other forms of energy".

Further, referring to the Notification No.2461(E) dated 18.07.2016 issued by MHA, the learned Counsel submitted that the Replica Fire Arms are exempted from the operation of Arms Act and Rules. Learned Counsel also challenged the re-valuation of the goods on the ground that the Department has not compared the imported price to any identical or similar imports rather had simply relied on the suggested retail price on the internet by the manufacturer - supplier. Thus, purpose of contemporaneous exports having been ignored, the impugned order is bad and the goods in question could not have been confiscated by the department.

10. The learned Authorised Representative for the Revenue Ms. Jaya Kumari, vehemently opposed the appeal. Referring to HSN Explanatory Notes, she submitted that all type of arms, ammunitions and parts or accessories thereof including the replica arms are covered under chapter 93 whereunder even very pistol, revolver, gun and dummy/imitation/safety/warning pistols/revolvers /guns have been covered for classification. Therefore, irrespective of their state, (lethal or innocuous), category (prohibited, restricted, permissible standard or non- standard) all kinds of arms are classifiable under chapter 93. She also referred to the provisions of the Arms Act, 1959 to say that as per the definition of "arms" under section 2 (1)(c), it excludes only those weapons that are incapable of being converted into serviceable weapons. Referring to the definition of "arms" under Section 2(1)(c), the Apex Court in **Neel Vs. State of West Bengal - 1972 (2) SCC 668 para 6**; observed sword is "arms" within the meaning of Section 2 (1)(c) of the Act. Further, Schedule 1 of the Arms Rules, 2016 covers all kinds of arms, i.e., prohibited, restricted and permissible. Firearm replicas have been characterised under category III (g) of the Schedule and hence the same are classified under chapter 93. Similarly, category V of the Schedule covers arms, other than firearms whereunder swords and daggers with blades longer than 9" or wider than 2" have been covered and therefore the same are rightly classifiable under chapter 93. In support of her contentions, the learned AR has relied on the ruling of US No. HQH023504, where replica guns were held to be classified under subheading 9304.00.20., which provides for: "Other arms (for example, spring, air, or gas guns and pistols, truncheons), excluding those of heading 9307". The reasoning in the said decision was that replicas of real guns are classified on the basis of their similarity in appearance to the real gun of which they are on imitation. Referring to Para 2.03 of the Foreign Trade Policy she relied on the provisions of rule 89 of the Arms Rules, 2016 whereby import of replica firearms are subject to submission of certificate of innocuousness from the manufacturing company of the country of export and an undertaking from the importer that the replica firearms are incapable, even with modification, of expelling or launching a shot, bullet or projectile. In fact, in view of the said provisions, the High Court of Delhi in its order dated 22.12.2016 rejected the writ petition holding that the permission of DGFT is essential for the import under the prevailing Exim Policy and refused to grant any relief to the appellant on the basis of its earlier order. The reliance placed by the appellant on the MHA notification S.O.2461 (E) dated 18.07.2016 granting exemption to the replica firearms from the provisions of the Arms Act, 1959, she clarified that the exemption was in respect of all sections except Section 5, whereby a license is required to procure, sell, expose or offer for sale or transfer or have in his possession for sale of any firearms or any other firearms and the appellant has not produced any such license and hence the same is hit by the provisions thereof. On importability she referred to the conditions specified in the MHA Notification No. S.O.667 (E) dated 12.09.1985 and Notification No. S.O.83 (E) dated 02.08.2002 are fulfilled, i.e. obtaining the requisite license from the competent authority which the appellant failed to produce in respect of the goods in question, i.e., the swords or daggers for clearing them for home consumption. Lastly, she relied on the test report dated 10.03.2017, which was obtained subsequent to the directions of the order of the High Court of Delhi and which in categorical terms stated the possibility of converting the replica firearms into non-standard firearms by improvisation cannot be ruled out. The learned Authorised Representative also relied on the findings of the Adjudicating Authority as under:-

"28.7 ……. I also find that during the investigations, as mentioned in para-19 above, it came to light that in respect of the goods detailed at S.No.35-44, 45-50, the importer in his e-mail communications with the overseas supplier had referred same as "Modern Pistols & Revolvers" and "Assault Rifles" respectively of respective model numbers and not as "Antique Finish Pistol", "Antique Finish Rifle" and "Antique Finish Carbine Gun" as declared in the Bill of Entry by the importer. I further find that the investigating agency also found out that during communication of importer with supplier, no quotation for

prices was made. I find that neither the importer had quoted for supply of goods as "Antique Finish Pistols or Revolvers or Carbine Guns" nor the manufacture-cum-supplier's catalogue available on their website www.denix.es declared these goods as "Antique Finish". Instead the website of manufacturer-cum- supplier's website declared these goods as "Modern Weapons" & "World War I & II."

11. Considering the elaborate arguments made on behalf of the appellant as well as the revenue, we find that the appellate authority has not considered the same in proper perspective. Rather on perusal of the impugned order we find that the same is repetition of the order in original passed by the adjudicating authority. We agree with the learned counsel for the appellant that the impugned order lacks application of mind, in as much as it is verbatim the same as the order under challenge. Neither the applicability of the legal provisions particularly with reference to the Arms Act and the Rules and various notifications have been considered nor any reasoning has been given with reference thereto by the Commissioner (Appeals) though being the first appellate authority. The impugned order is therefore unsustainable and deserves to be set aside with a direction to the appellate authority to consider the appeal and decide the same giving proper and substantive reasoning in support thereof. Since the impugned order does not reflect any application of mind, we feel that it would be appropriate to remand the appeal to the Commissioner (Appeals) to discuss the issues on merit. In the circumstances, when we are remanding the matter, we are not stating anything on the merits of the matter.

12. The appeal is, accordingly allowed by way of remand.

[Order pronounced on 08/11/2023].

(Binu Tamta) Member (Judicial)

(P. V. Subba Rao) Member (Technical)

Ckp

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

CUSTOMS APPEAL NO.51513 OF 2018

[Arising out of Order-in-Original No. 05/2018/RNS/COMMR/IMP)/ICD/TKD dated 09/03/2018 passed by the Commissioner of Customs (Import), Tughlakabad, New Delhi].

M/s. Shree Shyam Enterprises **…Appellant**
Through its ProprietorB-4/21-2, Sector-11, Rohini, Delhi - 110085

VERSUS

Commissioner of Customs (Import) **…Respondent**
Island Container DepotTughlakabad

New Delhi

WITH

CUSTOMS APPEAL NO.51514 OF 2018

[Arising out of Order-in-Original No. 05/2018/RNS/COMMR/IMP)/ICD/TKD dated 09/03/2018 passed by the Commissioner of Customs (Import), Tughlakabad, New Delhi].

Shree Sanjeev Garg Authorised Signatory,
Shree Shyam Enterprises, **…Appellant**

D-3, 18/4, Phase-2,

Mayapuri,New Delhi

VERSUS

Commissioner of Customs (Import) **…Respondent**
Island Container DepotTughlakabad

New Delhi

APPEARANCE:

Mr. L.B. Yadav and Mr.Mayank Sharma, Advocates for the AppellantMr.Nagendra Yadav, Authorised Representative for the Respondent

Coram: HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL) HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 24.07.2023DATE OF DECISION: 14.11.2023

FINAL ORDER NO.51546-51547/2023

DR.RACHNA GUPTA

Brief facts of the present cases are as follows:

A specific intelligence was gathered by the officers of Customs (SIB) ICD (Import), Tughlakabad New Delhi that goods contained in container No BSIU2052206 covered under Bill of Entry No 4873621 dated 12.04.2016 (RUD-1) to be grossly undervalued Accordingly, an Alert No.04/2016-17 dated 12.04.2016 was issued against the Bill of Entry No 4873621 dated 12.04.2016 filed by CHA M/s. Abhinav CargoMovers on behalf of importer, M/s. Shree Shyam Enterprises, 18/4, Phase-2. Mayapuri New Delhi having IEC No. 0514046007. The importer had declared the assessable value as Rs.23,20,035/- and duty payable as Rs. 6,13,145/- for 9400 pieces of Diaphragm Boost Pump of „E-Chen‟ brand shifted in 940 Cartons.

2. The goods of the said Bill or Entry were examined 100% by SIIB officers and the entire proceedings were recorded under Panchnama dated 13.04 2016 (RUD-2) drawn on the spot in presenceof two independent witnesses, representative of importer and G-Card holder of CHA firm. There was no variation in quantity of goods vis-à-vis declared quantity. However, the goods were detained for further investigations on a reasonable belief that the subject goods were undervalued with an intent to evade payment of customs duty. Representative sample was drawn as per procedure. The container was again stuffed with the same goods and sealed with Custom Seal No. 324531. On completion of examination proceedings the F- Cardholder Sh. Tapasvi Singh, was advised to ask the importer to get the goods stored in the Customs Bonded Warehouse under Section 49of the Customs Act, 1952 to avoid incurring of demurrage and detention charges of the container.

3. On the basis of authorization dated 21.04.2016 (RUD-3) issued by Sh. Sumit Aggarwal proprietor of M/s Shree Shyam Enterprises,Sh. Sanjeev Garg, Authorised Representative, R/o. 214, Arunodya Apts. F-Block, Vikas Puri, New Delhi-110018 appeared on 22.04.2016 (RUD-4) and rendered his statement of Shri Sanjeev Garg, AuthorisedRepresentative of appellant was recorded under section 108 of Customs Act 1962 wherein, he, inter-alia, stated that Shri Sumit Agarwal, his cousin who had obtained an IEC in the name of importing firm has allowed him to import Diaphragm Boost Pump from Shunde Light Industrial Products Imp. & Exp. Company Ltd. of Guangdong, China in the month of January 16, that he had imported another consignment in the month of March 16. Earlier two consignments and present consignment were all of 9400 pcs each of Diaphragm Boost Pump E-Chen (EC-103-75), with capacity of 75 GDPfrom the same supplier at the same rate of 3.58 USD CIF per piece; that the description E- Chen (EC-103-75) pertained to Booster Pump with a capacity of 75 GPD (Gallons Per Day); that the Manufacturer Company of the item under import was Shenzen Ecowell Purification Company Limited but he had obtained his goods from a Trading firm; namely, M/s. Shunde Light Industrial Products Import & Export Company Ltd. of Guangdong, China. The investigating officer showedhim computer print outs of e-bay for the identical goods which showed selling price @Rs 1799/- per piece and at Alibaba, the retail sale website the price shown was @ 15-16 USD (FOB) for a quantityof 100 pcs.

4. The appellants endorsed no objection for ascertaining the value of the goods either on the basis of market enquiry or on the basis of value given in the computer print-outs shown to him. The assessable value got worked out on the basis of lowest rate available on the e-bay website and the differential duty payable on that basis and that the appellants accepted the re-determined value. The similarmodus operandi was acknowledged for past consignments also. Based on statements recorded during further investigation of Shri Sanjeev Garg and the others concerned, the Show Cause Notice No. 18842 dated 05/10/2016 was served upon the appellants proposing for rejecting:

(i) the total declared value of Rs. 1,59,92,820/-(Rs. OneCrore Fifty nine Lakhs ninety two thousand eight hundred and twenty only) for the goods covered under Bill of EntryNo. 48,73,621/- dated 12.04.2016(Live Consignment) and covered under past Bills of Entry No. 4728925 dated 29/03/2016, 4495811 dated 8/03/2016, 4233475 dated 12/02/2016 & 3872308 dated 11/01/2016 under Rule 12 of the Customs Valuation (Determination of value of the Import goods) Rules, 2007 read with Section 14 of the Customs Act, 1962 and to be re-determined as Rs.74,59,370/- in case of Bill of Entry No. 4873621 dated 12.04.2016 (live Bill of entry) and value of Rs.4,37,24,283/- in case of past imports in terms of Rule7 of the Customs Valuation Rules, 2007 read with Section 14 of the Customs Act. 1962

(ii) The differential Customs duty amounting to Rs13,59.354/- in case of live Bill of Entry and differential duty of Rs.79,52,547/- in case of past imports was proposed to be confirmed and recovered with interest with appropriation of differential customs duty of Rs. 13,59,354/- deposited vide TR-6 Challan no 36653 dated 13/05/2016 deposited towards. Goods were proposed to be confiscated. Penalties were also proposed under Section 114A of the Customs Act 1962 on M/s Shree Shyam Enterprises.

Discharge of duty liabilities under Bill of Entry No. 4873621 dated 12/04/2016 should not be appropriated against the said duty demand.

5. The said proposal is confirmed vide Order-in-Original No.05/2018 dated 09.03.2018.

6. Being aggrieved the appellants are before this Tribunal.

7. We have heard Mr. L.B. Yadav and Mr. Mayank Sharma, ld.

Counsels and Mr. Nagendra Yadav, Authorised Representative for the appellants.

8. Ld. Counsel for the appellants mentioned that on examination ofgoods quantity and description were found as per declaration. However, it appeared to department that goods were under-invoiced. Shri Sanjeev Garg was the authorized representative of Appellants, who stated that declared unit price @ 3.58 USD was correct, however, on being shown computer printouts of e-bay-website of the similar goods which showed selling price @ 1799/- per piece and of Alibaba website which showed price of 15-16 USD (FOB) for a quantity of 100 pcs, he under the pressure of increasing detentionand demurrage charges, stated that he had no objection if the assessable value was ascertained on the basis of lowest value and requested the department to release goods at an early date. In his further statement, Shri Sanjeev Garg, under the assurance of officers that their goods will be released in a day or two, accepted theinternet value @ 1799 per piece and paid the differential duty amountRs. 13,59,354/ on 13.05.2016. But goods were still not released despite deposit of differential duty that Appellants, vide letter dated 17.05.2016, requested for provisional release of goods and issuance of Show Cause Notice. Again, vide their letter dated 10.11.2016, Appellants requested for provisional release, which was ultimately accepted and goods were released under Bank Guarantee and Bond. The impugned Show Cause Notice therefore should not have been issued.

9. The Adjudicating Authority without proper appreciation of the facts and without discussing the case law relied upon, by the appellants has wrongly confirmed the value of the goods and wrongly imposed penalty. The order is challenged on the ground that provisional assessment is in itself is an evidence that Appellants had not voluntarily accepted the value @Rs 1799/- per piece.

10. The decision in the matter of **Ajex & Turner Wire Dies Co. - 2012 (279) ELT 394 (Tri. Del.**) is relied where, it was held that when importer has cleared goods at enhanced value to save demurrage charges or otherwise, it does not mean that he has consented for enhancement of value. Similar view has been taken by Hon'ble Tribunal in the matter of **Laxmi Colour Lab 1992**

(62) ELT 613 (Tri.) and Digitech Photocopier Vs. Commissioner of Customs. Mumbai - 2009 (233) ELT 425 (Tri. - Del.).

11. The ld. Counsel further mentioned that it is settled propositionof law that in absence of any contemporaneous import, mere internet price is not reliable evidence to discard the transaction value. Decision in the matter of Aggarwal Distributors (P) Ltd. Vs. Commr of Customs. New Delhi-2000 (117) ELT 49 Tribunal) [confirmed by Hon'ble Supreme Court-2000 (122) ELT A121 (SC)] is relied. It is also submitted that it is well settled that the onus of proof relating to undervaluation is on the Revenue which has not been discharged. Butno evidence of collusion, willful mis-statement or suppression of facts has been adduced by Department, levy of penalty under said section, can in no way be countenanced. No parallel invoice or other incriminating document was recovered.

12. Deductive Value of the goods as determined under Rule 7 of CVR, 2007 without following the provisions as laid therein has also been objected.

13. It is finally submitted that Shri Sanjeev Garg is only an Authorised Representative in the matter. He had rendered statementsas per authorization given by proprietor of Appellant. Importer Exporter Code (IEC) was obtained by the proprietor himself. He hadno role to play with foreign supplier in negotiation of the value of instant goods. There is no mention in the entire Notice or Order-in- Original that he had any prior knowledge or that he abetted in the alleged act of undervaluation. Order is accordingly prayed to be set aside.

14. To rebut these submissions ld. Departmental Representative has mentioned that Sanjeev Garg had admitted the re-determined value vide three separate statements dated 21.04.2016, 10.05.2016 & 13.05.2016. None of these statements is ever retracted. In view of said admission no further evidence was required to be produced bydepartment. The appellants vide letter dated 24.04.2017& 07.06.2017 have even requested for waiver of Show Cause Notice. They rather deposited the differential duty on 13.05.2018. Now the appellants cannot back out from the said admission. Ld. Departmental Representative has relied upon the following case laws:-

(i) Commissioner of C. Ex., Madras Versus Systems ComponentsPvt. Ltd. Reported As 2004 (165) ELT 136 (Sc).

(ii) Jai Shiv Trading Co. Versus Commissioner of Central Excise,New Delhi Reported As 2018 (359) ELT 208 (Tri. Del.)

(iii) Sodagar Knitwear V. Commissioner - Reported As 2018 12 (362)

E.L.T. A213 (S.C.)]

(iv) Commissioner Of Customs Delhi Versus M/S. Hanuman Prasad &Sons Reported as 2020 (12) TMI 1092 CESTAT New Delhi

(v) M/s. Sukhdev Exports Overseas Versus Commissioner Of Customs (Preventive), New Delhi Reported As 2023 (2) Tmi 1038 - CESTAT New Delhi

15. Having heard the parties at length and perusing the entirerecord, foremost we need to know as to what „value‟ and „transactionvalue‟ mean:-

Value is derived from the price. Value is the function of the price. Thisis the conceptual meaning of value. Under Section 2(41), “value” is defined in relation to any goods to mean value determined in accordance with Section 14(1) of the Act. Section 14 of the Customs Act, 1962 is the sole repository of law governing valuation of goods. The Customs Valuation Rules, 1988 have been framed in respect of imported goods.

16. Section 14(1) is a deeming provision as it talks of „deemed value" of such goods. Therefore, normally, the Assessing Officer is supposed to act on the basis of price which is actually paid and treat the same as assessable value/transaction value of the goods. This, ordinarily, is the course of action which needs to be followed by the Assessing Officer. This principle of arriving at transaction value to be the assessable value applies. That is also the effect of Rule 3(1) and Rule 4(1) of the Customs Valuation Rules. The authority is thus boundto accept price actually paid or payable for goods as the transaction value. Exceptions are, however, carved out and enumerated in Rule 4(2). As per that provision, the transaction value mentioned in the Bills of Entry can be discarded in case it is found that there are any imports of identical goods or similar goods at a higher price at or around the same time or if the buyers and sellers are related to each other. In order to invoke such a provision it is incumbent upon the Assessing Officer to give reasons as to why the transaction value declared in the Bills of Entry was being rejected; to establish that the price is not the sole consideration; and to give the reasons supported by material on the basis of which the Assessing Officer arrives at his own assessable value.

17. **In *South India Television (P) Ltd*.**, the Court explained as to how the value is derived from the price and under what circumstances the deemed value mentioned in Section 14(1) can be departed with. Discussion in the said judgment is quoted hereunder:

"Before rejecting the invoice price the Department has to givecogent reasons for such rejection. This is because the invoice price forms the basis of the transaction value. Therefore, before rejecting the transaction value as incorrect or unacceptable, the Department has to find out whether there are any imports of identical goods or similar goods at a higher price at around the same time. Unless the evidence is gathered in that regard, the question of importing Section 14(1A) does not arise. In the absence of such evidence, invoice price has to be accepted as the transaction value. Invoice is the evidence of value. Casting suspicion on invoice produced by the importer is not sufficient to reject it as evidence of value of importedgoods. Undervaluation has to be proved. If the charge of undervaluation cannot be supported either by evidence or information about comparable imports, the benefit of doubt must goto the importer. If the Department wants to allege undervaluation, itmust make detailed inquiries, collect material and also adequate evidence. When undervaluation is alleged, the Department has to prove it by evidence or information about comparable imports. For proving undervaluation, if the Department relies on declaration made in the exporting country, it has to show how such declaration was procured. We may clarify that strict rules of evidence do not apply to adjudication proceedings. They apply strictly to the Courts' proceedings. However, even in adjudication proceedings, the AO hasto examine the probative value of the documents on which relianceis placed by the Department in support of its allegation of undervaluation. Once the Department discharges the burden of proof to the above extent by producing evidence of contemporaneous imports at higher price, the onus shifts to the importer to establish that the invoice relied on by him is valid. Therefore, the charge of under-invoicing has to be supported by evidence of prices of contemporaneous imports of like goods."

18. To the same effect, are other judgments, reiterating the aforesaid principle, such as, ***Commissioner of Customs, Calcutta***
v. *South India Television (P) Ltd.*, (2007) 6 SCC 373 = 2007 (214) E.L.T. 3 (S.C.), *Chaudhary Ship Breakers* v. *Commissioner of Customs, Ahmedabad*, (2010) 10 SCC 576 = 2010 (259) E.L.T. 161 (S.C.) and *Commissioner of Customs, Vishakhapatnam* v. *Aggarwal Industries Ltd.*, (2012) 1 SCC 186 = 2011 (272) E.L.T. 641 (S.C.).

19. Revealing to the facts of present case, we observe that the appellants have imported 4 consignments of Diaphragm Boost Pumpin the past and one live consignment was detained by the Departmentfor investigation. It is a matter of record that the following facts have emerged in the course of investigation on the basis of which show cause notice was issued to the appellant importing firm:

(i) That the value of the identical goods for the contemporary importperiod on the e-bay and an Alibaba Web based trading firm isindicating the value of the imported goods @ U.S.

$ 17 to 18 per piece while the declared value of the live consignment as well as of the previously imported consignment was declared U.S. $ 3.58 CIF per piece;

(ii) During the investigations the representative of the importingfirm have also been confronted with the available price of the importconsignment goods at E- bay and Alibaba and Shri Sanjeev Garg, Authorized Representative has voluntarily agreed for value of Rs. 1,799/- per piece (Rs. 794/- per piece as the assessable value after making necessary deductions, accordingly the assessable value has been raised to Rs. 794/- per piece by the Department applying the provisions of Rule 7 of Customs Valuation Rules, 2007;

(iii) Differential amount of the duty amounting to Rs. 13,59,354/- was deposited by the appellant for their live consignment under TR- 6 challan No. 36653 dated 13 May, 2016;

(iv) The statements recorded under Section 108 of the Customs Act,1962 have never been retracted by the Proprietor and the Authorized Representative of the appellant firm.

20. From the above facts, we find that the Assessing Officer was having a valid and enough evidence for rejection of the transaction value as declared by the appellant in their bill of entry by resorting to Rule 3 (4) of the Customs Valuation Rules, 2007. Since the value of identical and similar goods at the contemporary import time was also could not be ascertained, we feel that the resorting the valuation under Rule 7 of the Customs Valuation Rules by the Department is legally sustainable in the facts and circumstances of this case as narrated above. While holding the above view, we take shelter of the decision of this Tribunal in the case of **Commissioner of Customs (Import), ICD, TKD, New Delhi versus Sodagar Knitwear reported in 2018 (362) E.L.T. 819 (Tri. Del.)** which hasalso been confirmed by Hon'ble Apex Court in its decision reported under **2018 (362) E.L.T. A213 (S.C.).** The relevant extract of the above decision is reproduced here below :-

"8. The second issue in the present appeal is regarding the value of the imported goods. The Customs Authorities redetermined the value of the imported goods in terms of Customs Valuation Rules, 2007. Since the importer had failed to advance any documents/invoice to substantiate the value of the goods, the transaction value stands rejected and the value of the goods have been redetermined as per Rule 7 of the Customs Valuation Rules, 2007. It is noteworthy that the representative of the importer has been specifically shown the basis for redetermination of the value and his statement recorded by the Customs Officers. It is on record that Sh. Eklovey Chug, Manager of the importer has specifically admitted in his statement dated 31-12-2016 that he agreed with themanner of calculating the assessable value and differential duty.

9. It is settled position of law that the facts which are admitted neednot be proved. In the case of ***CCE, Madras v. Systems & Components Pvt. Ltd. 2004 (165) E.LT. 136 (S.C.),*** *the Hon'ble Apex Court in para 5 of the order has observed as follows:*

".....Once it is an admitted position by the party itself, thatthese are parts of a Chilling Plant and the concerned party doesnot even dispute that they have no independent use, there is no need for the department to prove the same. It is a basic and settled law what is admitted need not be proved".

10. Further, this Tribunal in the case of ***Jai Shiv Trading Company vide F. O., dated 20-7-2017*** *has observed as follows:*

"The appellant has also challenged that valuation adopted by the customs authorities. From record, it is seen that such redetermination of value has been carried out in terms of Rule 7 of the

Customs Valuation Rules which provides for determination of value on the basis of the price of identical or similar imported goods in India. It is further seen from records, that the proprietor of the appellant, Sh. Jayshiv, was shown the market enquiry report at the time of recording his statement on 8-7-2008. Further, in the statement he has voluntarily accepted the increased valuation of the imported goods. It is settled position of law that once, the importer has admitted the redetermination of value on record and hasaccepted the method of such valuation, he cannot subsequently challenge the same on the same ground. Consequently, we uphold the redetermination of the value carried out by the customs authorities".

The ratio of the above judgment is squarely applicable to theinstant case".

21. We also observe that in the present case also there is sufficient admission of the authorized representative of the appellants for the value of contemporaneous import of similar goods shown by thedepartment. We observe that thrice the statements of said representative were recorded where he corroborated the admission and there is no retraction. Law is clear that admissions need no further proof (52 of Indian Evidence Act). The appellants /importer has also not appeared to depose contrary to the said admission. The onus of proof in the given circumstances was of the appellant which has not been discharged. The only plea that the admission was to avoid the demurrage charges is not acceptable for want of any evidence about the place of price negotiations by the importer. Above all, admittedly the importer has not purchased from the manufacturer the possibility of getting the goods from trader at lower prices doesn‟t arises.

22. In view of above discussion and the decision of this Tribunal, which has also been confirmed by Hon‟ble Apex Court, we hold that there is no infirmity in the order-in-original under challenge. We do not find any requirement of interfering with the findings in the order- in-original. Therefore, we uphold the same.

23. Accordingly, the appeals are **dismissed**.

[Pronounced in the open Court on 14.11.2023]

(DR. RACHNA GUPTA)MEMBER (JUDICIAL)

(P.V. SUBBA RAO) MEMBER (TECHNICAL)

Anita

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI.

PRINCIPAL BENCH, COURT NO. I

CUSTOMS APPEAL NO. 50271 OF 2021

[Arising out of the Order-in-Original No. 04-05/COMMR/CUS/IND/2019-20 dated 30/07/2019 passed by The Commissioner of Customs, Manik BaghPalace, Indore (M.P.).]

Shri Nitesh Shekatkar, Proprietor, **Appellant** **M/s Aashavi Enterprises,**
02, Sakshi Apartments,

Plot No. 1121, Scheme No. 14,Part – 1, A.B. Road,

Indore – 452 001.

VERSUS

Commissioner of Customs, **Respondent**
Manik Bagh Palace,Indore – 452 001.

APPEARANCE

None – for the appellant.

Shri Rajesh Singh, Authorized Representative (DR) – for the Department

CORAM : **HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT HON'BLE SHRI P.V. SUBBA RAO, MEMBER (TECHNICAL)**

FINAL ORDER NO. 51569/2023

DATE OF HEARING : 15.11.2023

JUSTICE DILIP GUPTA

The appeal was filed on 15.11.2019 and in the CA-3 form the appellant stated that 7.5% of the penalty amount of Rs. 25,00,000/- had been deposited, but neither the challan number nor the date was mentioned. A copy of the challan enclosed with the appeal also does not give the challan number or date or the bank name.

2. In this view of the matter, when the objection was raisedby the learned authorized representative appearing for the department, the bench on 03.10.2023 directed the appellant to file a legible copy of the document by which the pre-deposit has been made. The bench also made it clear this was last opportunity.

3. Today when the case has been called out, no one has appeared on behalf of the appellant.

4. Shri Rajesh Singh, learned authorized representativeappearing for the department has submitted that on verificationof the challan, the Additional Commissioner by the communication dated 03.08.2023 has informed that the document cannot be verified since neither the challan is

legible nor the bank name, challan number or date is legible.

5. In such circumstances, the appellant should have appearedto either submit the legible copy of the challan or seek time to make the pre-deposit.

6. When the statutory requirement of pre-deposit has notbeen made the appeal has to be dismissed and is dismissed.

(Dictated and pronounced in open court.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)MEMBER (TECHNICAL)

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CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNALPRINCIPAL BENCH, NEW DELHI

COURT No. IV
CUSTOMS EARLY HEARING APPLICATION NO.50800 OF 2022

IN

Customs Appeal No. 52946 of 2019

(Arising out of Order-in-Original No.92/MK/Policy/2019 passed by the Commissioner of Customs (Airport & General), New Customs House, Near IGI Airport, New Delhi-110037)

COMMISSIONER OF CUSTOMS, NEW DELHI
(AIRPORT AND GENERAL),
New Customs House, Near IGI Airport, New Delhi-110037 **Appellant**

Vs.

M/s. AIR LOGIX SOLUTIONS,
A-186,Mahipalpur-Extension, Telephone Exchange Lane,New Delhi-110037. **Respondent**

APPEARANCE:

Shri Rajesh Singh, Advocate for the Appellant

Shri R.P.Singh, Authorised Representative for the Respondent

CORAM:

HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL) HON'BLE MS. HEMAMBIKA R.PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 51591/2023

Date of Hearing: 31/08/2023Date of Decision: 29.11.2023

DR.RACHNA GUPTA:

Present appeal has been filed pursuant to review order No.14/2019 dated 27.11.2019 passed by the Commissioner of Customs (Airport & General),New Delhi.

2. The brief facts of the case are as follows:

3. That the respondent, M/s.Air Logix Solutions is the licensed courier vides registration No.DEL/POL/COUR/22/2005 issued by the Ministry of Finance dated 27.6.2008. The respondent was required to strictly adhere to the provisions laid in the Notification No.07/98-Customs (NT) dated 9.11.1998. On 23.04.2018, an information was received that the respondent was using one Aadhar No.233962343459 repeatedly with different Bills of Entry (BOE) for import of parcels through courier and it was found to have used 22433 times during the period from November 2017 to March 2018. Pursuant to said information, search was conducted at the premises of the respondent, no documents pertaining to KYCs (Know Your Customers) and POD (proof of delivery) were found. Proceedings were recorded under panchnama dated 23.4.2018. Statements of various concerned including G-Card Holder of the respondent, Shri Tikaram, of Shri Atish Mohanty, partner of respondent, of Shri A.Murugan, proprietor of Femtosoft

Technologies and of Project Manager of M/s.Wipro Ltd., Shri Vikash Kaushik were recorded. The respondent vide letter dated 11.6.2018 submitted some documentsincluding PODs alongwith Bills of Entry and KYC document of the consignees.It was found that aforementioned Aadhar number was used as KYC for several BOE's for different consignees. It was also found that GSTN No. given in BOEs i.e. Aadhar No.233962343459 did not match with the copy of KYC document attached with the respective BOE.

4. Verification of genuineness of POD was also conducted by the jurisdictional Commissinerate and the PODs were found forged. Most of the addresses were fictitious and the consignments were found bogus. Theverification report clearly revealed that authorized courier/ respondent has failed to exercise due diligence and to comply with the conditions of provisions of Regulation of Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 (hereinafter referred to as "CIER,2010"). Resultantly the show cause notice bearing No.04/MK/Policy/2019 dated 12.03.2019 was served upon the appellant proposing revocation of their courier registration for contravention of provisions of Regulation 12 (1) (iv), 12 (1) (v) and 12 (1) (x) of Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 (hereinafter referred to as "CIER,2010") for forfeiture of security deposit and imposition of penalty was also proposed. The said proposal was not accepted except that the penalty of Rs.50,000/- was imposed upon the respondent vide Order-in-Original No.92/MK/Policy/2019 dated 2.9.2019.The said order has been reviewed vide aforesaid order directing the appellant-department to file appeal before this Tribunal. Resultantly, the present appeal has been filed by the department.

5. Heard Shri Rajesh Singh, ld. Counsel for the respondent-assessee ad Shri Shri R.P.Singh, Authorised Representative for the Respondent.

6. It is submitted on behalf of learned DR that the documents recovered during investigation clearly revealed that the respondent-assessee had used one aadhar No.233962343459 repeatedly as many as 22433 times duringthe period from November 2017 to March 2018 for importing parcel through courier for different fictitious consignee's name and address. The same aadhar number was mentioned in all the bills of entry. That the KYC details filed in the Bills of entry were not same and were also found fake. Ld.DR mentioned that though respondent –assessee has taken defence that it was software mistake and it was absolutely unintentional but it is very much apparent on record that the respondent-assessee was well aware for using same aadhar number on all BOE's. The software developer has categorically stated they used fields GSTIN Type" and "GSTIN Number" as per instructionof the company. It is also apparent admission of the G-Card holder of the respondent that KYC's of the consignee were not properly maintained in the company office. It is also impressed upon that the original adjudicating authority has miserably failed to take into consideration clear admission and other cogent evidence on record which have sufficiently proved the alleged violation of provisions of CIER Regulations, 2010. The order under challengeis accordingly prayed to be set aside and appeal is prayed to be allowed in terms of observations made in the impugned review order.

7. While rebutting these submissions, ld.Counsel for the respondent- assessee has submitted that Rule 12 (iv) of Regulation of CIER, 2010 has notbeen violated by the respondent as there was sufficient verification done about antecedents and identity with respect to five consignments. The respondent has exercised due diligence to ascertain the correctness of information in regard to alleged five consignments. The respondent also submits that all subject consignments were non commercial in nature. These were basically gift items imported from middle-east meant for dependent members of family of the respective consignor. Therefore, question of any loss of customs duty, does not arise. The allegations that KYC did not tally with the names mentioned in the Bills of Entry are vehemently denied by the respondent submitting that KYC as were received from sender on email,were filed for clearance. The Aadhar card was also submitted from Govt. portal. The department also verified the Aadhar (KYC) but no objection was ever earlier raised. These facts are clear enough to show that the proper due diligence was done by the respondent and that there is no violation of any provisions of CIER Regulations, 2010.

8. Ld. Counsel has also relied upon the decision of the Tribunal in the case of **FLE Fast Line Express Pvt.Ltd. vs. CC-2021 (378) ELT 361 (Tri.-Del.)** to impress upon that when there is no evidence that courier was aware of real content of consignment, violation of Regulation of CIER, 2010 cannot be alleged against him. Otherwise also there is no provision under Regulation of CIER, 2010 requiring courier to physically verify the particulars. The decision in the case of **Him Logistics Pvt.Ltd.-2017 (348) ELT 625 (Del.)** is also relied upon.

9. With these submissions, ld. Counsel for the respondent has prayedfor appeal to be dismissed and Order-in-Original dated 2.9.2019 is prayed to be upheld.

10. Having heard rival contentions of both the parties and after perusing entire records of the impugned appeal, we observe and hold as follows:

11. There is no denial of the respondent to the fact that same GSTIN number/Aadhar No.233962343459 has repeatedly been used for several Bills of entry filed during the period of November, 2017 to March, 2018. There is also no denial to the fact that consignees were different for these Bills of Entry and even consignors were different. The said admission has also been observed by the original adjudicating authority however the authority has held it to just be lack of due diligence on the part of respondent towards observing obligations of authorized courier. The adjudicating authority did not revoke courier's registration nor forfeited the amount of security, except that the penalty of Rs.50,000/- has been imposed on the respondent. The department has filed impugned appeal being aggrieved of the fact that verification report of Cochin Commissionerate (Preventive) has clearly concluded that the addresses for five consignments were bogus/fictitious but the report has been ignored by the adjudicating authority. The report sufficiently reveals that the obligations under impugnedRegulation have been so violated by the respondent that it amounts to intentional misconduct. Imposition of penalty is therefore alleged to behighly disproportionate to the fraudulent act committed by the respondent.

12. From the admissions as observed above, in our opinion, it also becomes apparent fact that the respondent has failed to verify the correctness of IEC code and even identity of its clients. The respondent was aware of the use of same Aadhaar Number for all BOEs still the Authorized Courier nor to verify the said Aadhaar Number or did not verify the antecedent, correctness of Import Export Code (IEC) number, identity of its client. Further, the respondent during the time of uploading of the Bill of Entry failed to take note that the data entered was not correct. The respondent did not inform the Custom Department that KYC details filed in the Bill of Entry was not the same which was received via email in respect of any given import. G.card holder of respondent, Shri Tikaram has also admitted in his statement dated 23.04.2018 that KYCs of the consignee werenot properly maintained in the company office. Investigation also revealed that the GSTIN given in the BOEs i.e. the Aadhaar No.233962343459 did notmatch with the copy of the KYC document attached with the BOEs filed by the respondent. The respondent did not even bother to inform the said mistake to the Customs department, despite that KYC details filed by him in the Bills of Entry was not the same as was reflected in those Bills of Entry. Accordingly, we hold that respondent has contravened the provisions of Regulation 12(1) (v) of CIER.2010.

13. We also observe that to ascertain as to whether the imported goods indeed reached the declared importers, a verification of genuineness of the PODs (Proof of Deliveries), submitted by the authorized courier and KYC was carried out by the Commissioner of Customs, ACC (Export), New Delhi through the jurisdictional Commissionerate(s). The Joint Commissioner, Commissioner of Customs (Prev.), Cochin vide letter C.No.VIII/26/21/2018 CCP(Prev.)4807/18 report dated 28.11.2018 provided the verification report in respect of 19 addresses out of 24 addresses pertaining to M/s. Air Logix Solutions and other authorized courier companies. Failure of delivery of the consignment to the consignee or denial of receipt of the consignment by the consignee that the addresses were found bogus during verification of genuineness of the PODs, proves that the imported goods were never destined to the consignees named in the BOEs and have been intentionally diverted.

It is known to reasonable prudence that such diversion was not possible without indulgence of the authorized courier, the respondent. Thus, we hold that the respondent was knowingly involved in the diversion of imported goods and he intentionally and knowingly misused the ID's of consignees in whose name the goods were shown imported, consignees being the relatives of NRI consignees. The goods otherwise meant for some one else.

14. We further observe from the record that the respondent has taken pleathat the mistake of same Aadhaar No. to have been uploaded for several BOEs to be the consignee's software mistake. But is apparent from the statement of Shri A.Murugan, Proprietor of Femtosoft Technologies and Shri Vikas Kaushik, Project Manager of M/s.Wiprto Limited, who acknowledged developing a software for Courier Company (including the presentrespondent) to convert Excel input into XML file that can be used for bulk uploading of data to ECCS server for filing of Courier Bills of Entry. Further Mr.Murugan explained that if any courier company wanted to edit any information in XML File generated by the software, the right has been given to the courier company who before uploading the same to ECCS Server, company could check any data/information in XML File and if it is desired it can change the data or undo any error that may be detected. Shri A.Murugan categorical reported that the fields "GSTIN Type" GSTIN Number"were kept constant with values "Aadhar Number "233962343459" as per direction of the respondent. This particular deposition corroborated the indulgence of respondent in the alleged act. Also there is absence on the partof the respondent to bring to the notice of all concerned including competent authority about repeated use of one and same Aadhar number at different occasions for the different consignees. Respondent gave no information about the said mistake to the department nor ever took the plea that it was happening due to software error. From said statements above, it becomes clear that software was so designed under the instructions of respondent. GSTIN field showing Aadhaar number was directed by the respondent himself to be kept constant while software was developed. The edit option was with the respondent. He has failed to upload the correct edited information. Thus respondent cannot be allowed to take shelter of plea of "software error". Thus we hold that the alleged/impugned act was notmerely lack of due diligence but was intentional misconduct.

15. Respondent himself had provided proof of deliveries which got verifiedby the Cochin Commissionerate. The Verification report revealed as follows:

Name of the registered Courier	No.of addresses verified	Remarks
M/s.Air Logix Solutions	10	**06** consignments were reported ogus/fictitious; **02** consignments were reported genuine and; **KYC of 02** consignments could not be verified due to incomplete address.

16. The said report sufficiently established the fact that the respondent has imported consignments in the name of consignees who were not even aware of the fact that their identity has been misused by the respondent i.e. couriercompany for import purpose. The report is held cogent evidence to show that authorized courier has failed to verify the correctness of IEC code and even identity of its clients. As observed above, it was done intentionally by the respondent, hence is wrongly held to be the mere act of negligence.

17. Regulations 12(1) (iv) and 12 (x) of CIER,2010 are extracted below:-

"REGULATION 12. Obligations of Authorised Courier.

(1) An Authorised Courier shall -(i) to (iii) ----------

(iv) verify the antecedent, correctness of Importer Exporter Code (IEC) Number, identity of his client and the functioning of his client in the declared address by using reliable,

independent, authentic documents, data or information;

(v) exercise due diligence to ascertain the correctness and completeness of any information which he submits to the proper officer with reference to any work related to the clearance of imported goods or ofexport goods;

(vi) to (ix) - - -- -

(x) abide by all the provisions of the Act and the rules, regulations,notifications and orders issued thereunder."

18. Regulation 12(1)(iv) requires an authorised courier to verify the antecedents, correctness of IEC number, identity of his client and the functioning of his client in the declared address by using reliable, independent, authentic documents, date or information. In the normal course, this would be easy for any courier because it has to finally deliver the goods by itself at the declared address of theconsignee after clearance from the customs. In this case, instead, the appellant has facilitated imports and attempted to obtain clearance of the goods in the name of many consignees whose IEC did not match with the respective KYC. Thus, we hold that the appellant has violated Regulation 12(1)(iv) of CIER, 2010.

19. Regulation 12(1) (v) requires the couriers to exercise due diligence to ascertain the correctness and completeness of any information which he submits to the proper officer with reference to any work related to the clearance of imported goods or of export goods. In this case, the appellant has intentionally filed documents (BOEs) to clear the goods by mis-declaring the names of the consignees and consignors and by knowingly using same GSTIN for allBOEs meant for different consignees, without informing the same to the proper officer. Respondent has knowingly violated this Regulation as well.

20. Regulation 12(1)(x) requires authorised courier to abide byallthe provisions of the Act and the rules, regulations and notifications and orders issued thereunder. In this case the appellant has actively violated the provisions of the act and rules byknowingly filing the bills of entry in the name of wrong consignees by using wrong KYCs.

21. The Regulations also provide that the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may revoke the registration of an authorised courier and also pass an order for forfeiture of security on any of the following grounds:

(a) Failure of the authorised courier to comply with any of the conditions of the bond executed by him under Regulation 11;

(b) failure of the authorised courier to comply with any of the provisions of these Regulations;

(c) mis-conduct on the part of the authorise courier by within the jurisdiction of the Principal Commissioner which in the opinion of Principal Commissioner render it unfit the transit any business in the Customs Airport.

(d) Regulation 14 provides for imposition of a penalty which may extend to 50,000/- for contravention of any of the regulations or abatement such contravention or for failure to comply with any provisions of the regulation which it was his obligation to comply with.

22. In view of above discussions, we also find that there is sufficient evidence on record to hold that the above said Regulations have been violated by the respondent. The violation invite revocation of courier licence as per Regulation 11 discussed above. But the original adjudicating authority despite acknowledging the alleged violations has merely imposed penalty. Since the alleged act is proved to be intentionalact of the respondent, we hold that mere imposition of penalty ofRs.50,000/- (fifty thousand) is disproportionate punishment. Hence, weaccept the prayer made by the appellant-department for revocation of courier registration of the respondent for committing intentional fraud while importing several goods in the name of those being gifts from NonResident Indian (NRI) to their family member residing in India, which otherwise were not imported by them nor were meant for them.

23. As a result of entire above discussion, the findings under challenge are hereby set aside and the appeal of Department is hereby allowed. Consequently the courier licence of the respondent is hereby revoked. Early hearing application is also disposed of.

(Order pronounced in open court on 29.11.2023)

(DR.RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R PRIYA)
MEMBER (TECHNICAL)

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Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 50234 of 2021 [DB]

[Arising out of Order-in-Original No. 55/2020/UG/Principal Commissioner dated 07.10.2020 passed by the Principal Commissioner of Customs, Air Cargo Complex(Import), New Delhi]

M/s. L.G. Electronics India Private Limited **…Appellant**
Plot No. 4, Tech Zone-2, Greater Noida,Uttar Pradesh - 201305

VERSUS

Principal Commissioner of Customs,
New Delhi **…Respondent**

Air Cargo Complex (Import),

New Customs House, Near IGI Airport,New Delhi - 110037

APPEARANCE:

Ms. Jyoti Pal and Shri Amitabh Amrit, Advocates for the AppellantShri Rajesh Singh, Authorized Representative for the Respondent

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 31.07.2023 DATE OF DECISION: **30.11.2023**

FINAL ORDER No. 51585/2023

DR. RACHNA GUPTA

The appellant had imported 2000 units of "G Watch (Smart Watch)" from the Republic of Korea vide two Bills of Entry bearing No. 2370169 and 2375523 both dated 11.03.2019. They had classified the said goods under CTH 91021900 and have assessed the basic customs duty at the rate of 'NIL' BCD after claiming the benefit of entry serial no. 955 of Notification No. 152/2009-Cus., dated 31.12.2009. However, IGST at the rate of 18% was paid. Department observed that the imported goods, "G Watches" are capable of performing many functions other than those related to timekeeping and as such are the smart watches as different from those classifiable under CTH 91021900. Department formed an opinion that such kind of apparatus/device merits classificationunder CTH 85176290. Resultantly, the Show Cause Notice No. 01/2020 dated 13.01.2020 was served upon the appellantproposing rejection of classification claimed by the appellant i.e. under CTH 91021900. It is proposed that the imported goods be classified under 85176290 to which the duty exemption, as availed, is not applicable. Resultantly, short payment of customs dutyamounting to Rs.86,62,852/- with respect to the import of the impugned goods vide the aforementioned two Bills of Entry was proposed to be recovered along with the interest. The imported goods were proposed to be held liable to confiscation. In addition, the penalty was also proposed to be imposed upon the appellant. The said proposal has been confirmed vide the Order-in-Original bearing no. 55/2020 dated 07.10.2020. While ordering confiscation, option to impose redemption fine has not been given and penalty of Rs.8,00,000/-

has been imposed on the appellant under Section 112 (a) of the Customs Act, 1962. Being aggrieved the appellant is before this Tribunal.

2. We have heard Ms. Jyoti Pal and Shri Amitabh Amrit, learned Advocates for the appellant and Shri Rajesh Singh, learned Authorized Representative for the department.

3. Learned counsel for the appellant has mentioned that appellant is a private limited company engaged in import and saleof various electronic goods including LG Watch W7 (Hybrid Watch orimpugned goods). It is impressed upon that the impugned goods have two physical watch hands and a micro gearbox and it operate on quartz movements, designed by finest Swiss Watch Maker, SOPROD SA. It is also submitted that the impugned goods carry the look of traditional analog watch and works also like the said analog. Learned counsel acknowledged that though the imported goods perform the smart watch functions with the help of few electrical components (LCD, 4GB RAM, Bluetooth, Qualcomm Chipset etc.), however, still the users can wear the same on their wrist to watch time, to receive alarms etc., just like the traditional watch analog. Hence, the imported goods have rightly been classified by the appellant under CTH 91021900. Chapter 91 coversdifferent types of watches and their features. The impugned goods duly get covered under the criteria given therein. It is further submitted that under Chapter 85 CTH 8517, the goods covered are telephone sets and other apparatus for communication in a wired orwireless network. Whereas the goods covered under CTH 9102 are wrist watches, pocket watches etc., as the heading suggest and there is no denial that the imported goods are wrist watches for observing time. The brochure of their company describing the imported goods has also been elaborated. From no stretch of imagination they can be called as telephones sets/other apparatus, hence the correct classification is CTH 91021900. The findings under challenge are therefore liable to be set aside.

3.1 Learned counsel further mentioned that the tariff entries haveto be interpreted as per the relevant section and chapter notes.The decision in the case of **Saurashtra Chemical Porbandar Vs. Collector of Customs reported as 1986 (23) ELT 283 (Tri.-LB)**and **Mauri Yeast India Pvt. Ltd. Vs. State of U.P. reported as 2008 (225) ELT 321 (SC)** has been relied upon by the learned counsel. Learned counsel also submitted that the technological advancements have to be taken into consideration while determining the classification. Various other functions of the imported goods is nothing but technological advancement due to which wrist watch/clock cannot be made to fall under any othertariff entry. The decision in the case of **Collector of Customs & Central Excise Vs. Lekhraj Jessumal & Sons reported as 1996 (82) ELT 162 (SC)** has been relied upon. Learned counsel further submitted that while importing the goods the benefit of Notification No. 152/2009 has rightly been claimed as the country of origin certificate was duly submitted. All the requirements thereof have duly been satisfied. Above all, the benefit of notification can be claimed at any stage. Finally it is submitted that even if the classification of appellant is not accepted, the act of appellant is merely a claim for incorrect classification. It cannot be alleged as mis-declaration. Question of imposition of penalty upon the appellant does not at all arise. The decision in the case of **Northern Plastic Ltd. Vs. Collector of Customs and Central Excise reported as 1998 (101) ELT 549 (SC)** has been relied upon. With these submissions, learned counsel has prayed for the order under challenge to be set aside and appeal to be allowed.

4. Learned DR while rebutting these submissions has mentioned that the imported goods have the function of transmission and reception of data which allow the communication to the wired or wireless communication network. Hence, those have rightly been classified by the department under CTH 85176290. It is submitted that importer itself, while filing the Bills of Entry at the time of self- assessment, has declared the imported goods as "G Watch (Smart watch)". Admittedly the product performed many other functions than merely timekeeping. It is mentioned that even by following General Rules of Interpretation, the goods merits classification under 85176290.

4.1 Learned DR further impressed upon that the declared classification 91021900 covers electrical wrist watches working on the basis of quartz movement. But as per appellant's own

brochure/catalogue, the G watch except being a wearable wrist device and having two moving hands to show time, has the combined mechanical movements with digital functionalities including that of LCD display, touch sensitivity, microphone, Wifiand Bluetooth connectivity and that it needs an operating system asprovided by Google. Even the initial set up of time is done through syncing the impugned good with the user phone. On the contrary, the wrist watches/non-smart watch time pieces are set manually. Learned DR also impressed upon that according to World Customs Organization ruling (Harmonised System Committee 55th Session – March 2015), smart watches are technical equipment with display, processor, main memory etc. can fulfill several other functions suchas receiving, converting and sending or regenerating sounds, picture and other data. Thus by applying section note 3 to Section XVI, smart watches merits classification under CTH 85176290. Resultantly, the duty exemption under Notification No. 152/2009 is rightly been denied. Impressing upon no infirmity in the order under challenge, appeal is prayed to be dismissed.

5. Having heard the rival contentions of both the parties, perusing the entire records of the appeal memo including the catalogue of the appellant with respect to the impugned imported goods and the Bills of Entry in question, we observe that thefollowing are the issues to be adjudicated:

(i) Whether LG Watch W7 as imported by the appellant is classifiable under CTH 91021900 as claimed by the appellant or is classifiable under CTH 85176290 as confirmed vide the Order-in- Original.

(ii) Whether the appellant is eligible to claim concessional rate of basic customs duty under serial no. 955 of the Notification No. 152/2009 dated 31.12.2009

(iii) Whether the imported goods are liable for confiscation and the appellant is liable for being penalized.

6. First point of adjudication:

Both the parties have relied upon the General Rules of Interpretation (GRI) and have impressed upon that the chapter notes read with GRI decides the tariff entry for a particular goods. In view thereof, we foremost need to look into the tariff entries in question and then the General Rules of Interpretation. Chapterheading and chapter note for Chapter 85 are as follows:

Tariff Item	Description of goods	Unit	Rate of duty	
			Standard	Preferential Areas
(1)	(2)	(3)	(4)	(5)

8517 517 11	Telephone sets, including telephones for cellularnetworks or for other wireless networks; **other apparatus for the transmission orreception of voice, images or other data,including apparatus for communication in a wired or wireless network (such as a local or wide area network),other than transmissionor reception apparatusof heading 8443, 8525, 8527 or 8528** - Telephone sets, including telephones for cellularnetworks or for other wireless networks: -- Line telephone sets with	u	Free	
8517 11 10 8517 11 90 8517 12 8517 12 10 8517 12 90 8517 18 8517 18 10 8517 18 90	cordless handsets: --- Push button type --- Other -- Telephones for cellula networks or for other wireless networks: --- Push button type --- Other Other --- Push button type --- Other - Other apparatus fo	u uu uu	Free 20% 20% FreeFree	

	transmission or reception ofvoice images or other data, including apparatus for communication in a wiredor wireless network (suchas a local or wide area network): -- Base stations -- **Machines for the reception conversion and transmission or regeneration of voice, images or other data, including switching androuting apparatus:** --- PLCC equipment	u uu	[1][20%] FreeFree	
8517 61 00		u	Free	
8517 62	--- Voice frequency			
8517 62 10	telegraphy			
8517 62 20	--- Modems (modulators-demodulators)	u	Free	
8517 62 40	--- High bit rate digitalsubscriber line system(HDSL)	u	Free	
8517 62 50	--- Digital loop carrier system (DLC)	u	Free	
8517 62 60	--- Synchronous digital hierarchy system (SDH)	u	Free	
8517 62 70	--- Multiplexers, statistical multiplexers **--- Other** --- Other: --- ISDN System --- ISDN terminal adaptor	u	20%	
8517 62 90	--- Routers	**u**uuuu	**Free** Free Free Free	
8517 69	--- X 25 Pads	u	Free	
8517 69 10	--- Subscriber end equipment --- Set top boxes for		Free	

8517 69 20 8517 69 30 8517 69 40 8517 69 50 8517 69 60 8517 69 70 8517 69 90 8517 70 8517 70 10	gaining access to internet --- Attachments for telephones --- Other - Parts: -- Populated, loaded or stuffed printed circuit boards	u u [u] kg	Free [2][20%] [3][10%] 15%	
8517 70 90	-- Other			

Few of the relevant Chapter notes of chapter are as follows:

3. For the purposes of heading 8507, the expression "electric accumulators" includes those presented with ancillary componentswhich contribute to the accumulator's function of storing andsupplying energy or protect it from damage, such as electrical connectors, temperature control devices (for example, thermistors) and circuit protection devices. They may also include a portion of the protective housing of the goods in which they are to be used.

5. For the purposes of heading 8523:

(a) "Solid-state non-volatile storage devices" (for example, "flash memory cards" or "flash electronic storage cards") are storage devices with a connecting socket, comprising in the same housing one or more flash memories (for example, FLASH E^2PROM") in theform of integrated circuits mounted on a printed circuit board.They may include a controller in the form of an integrated circuit and discrete passive components, such as capacitors andresistors;

(b) The term "smart cards" means cards which have embedded in them one or more electronic integrated circuits (a microprocessor,random access memory (RAM) or read-only memory (ROM)) inthe form of chips. These cards may contain contacts, a magnetic stripe or an embedded antenna but do not contain any otheractive or passive circuit elements.

7. For the purpose of heading 8536, "connectors for optical fibres, optical fibre bundles or cables" means connectors thatsimply mechanically align optical fibres end to end in a digital line system. They perform no other function, such as the amplification,regeneration or modification of a signal.

- For the purposes of heading 8523, "Information Technology software" means any representation of instructions, data, soundor image, including source code and object code, recorded in a machine readable form, and capable of being manipulated orproviding interactivity to a user, by means of an automatic data processing machine.

Chapter heading and chapter notes for Chapter 91 are as follows:

Tariff Item	Description of goods	Unit	Rate of duty	
			Standard	Preferential Areas
9102	**Wrist-watches, pocket- watches and other watches, including stop watches, other than those of heading 9101**			
	-Wrist-watches, electrically operated, whether or not incorporating a stop-watchfacility:			
9102 11 00	-- With mechanical displayonly	u	20%	-
9102 12 00	-- With opto-electronic display only	u	20%	-
				-
9102 19 00	-- Other		20%	
	- Other wrist-watches, whether or not incorporating a stop-watch facility			
9102 21 00	-- With automatic winding	u	20%	-
9102 29 00	-- Other	u	20%	-
	- Other:			
9102 91	-- Electrically operated			
9102 91 10	--- Pocket watches	u	20%	-
9102 91 20	---Stop watches	u	20%	-
9102 91 90	--- Other	u	20%	-

9102 99	-- Other			
9102 99 10	--- Pocket watches	u	20%	-
9102 99 20	--- Stop watches	u	20%	-
9102 99 90	--- Other	u	20%	-

The Chapter note for Chapter 91 reads as "Clocks and watches and parts thereof". Few of the relevant notes are as follows:

2. Heading 9101 covers only watches with case wholly of precious metal orof metal clad with precious metal, or of the same materials combined withnatural or cultured pearls, or precious or semi-precious stones (natural, synthetic or reconstructed) of headings 7101 to 7104. Watches with case of base metal inlaid withprecious metal fall in heading 9102.

For the purposes of this Chapter, the expression ―watch movements‖ means devices regulated by a balance-wheel and hairspring, quartz crystalor any other system capable of determining intervals of time, with a display or a system to which a mechanical display can be incorporated. Such watch movements shall not exceed 12 mm in thickness and 50 mm in width, length or diameter.

1. Except as provided in Note 1, movements and other parts suitable for use both in clocks or watches and in other articles (for example, precision instruments) are to be classified in this Chapter.

A clock or watch is composed of two main parts: the movementand the container for the movement (case, cabinet, etc.)

6.1 To appreciate as to which of the above precisely apply upon "G-Watch (Smart Watch)", we need to look for General Rules of Interpretation also. Those read as follows:

Classification of goods in this Schedule shall be governed by thefollowing principles:

1. The titles of Sections, Chapters and Sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require,according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article.It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shallbe taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goodsconsisting of more than one material or substance shall be according to the principles of rule 3.

3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings,classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specificin relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofaras this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with theabove rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific articleor set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

(b) Subject to the provisions of (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision does not applywhen such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the sub- headings of a heading shall be determined according to the terms of those sub-headings and any related sub-heading Notesand, mutatis mutandis, to the above rules, on the understanding that only sub-headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

6.2 The impugned goods i.e. G-Watch, as discussed above, is imported as a 'smart watch' as is apparent from the Bills of Entryon record. Meaning of watch and smart watch also to be looked into. For the purpose we have taken aid from dictionaries and the technical information from internet. As per Cambridge dictionary,a smart watch is the watch that has many of the features ofa smart phone or a computer. As per Collins dictionary a smart watch is a wireless electronic device that can respond to spokencommands, for example by giving information or playing music.The smart watch is just one example of wearable tech. We judicially notice that a smart watch is a wearable computer in the form of a watch; modern Smart watches provide a local touch screen interface for daily use, while an associated smart phone app provides management and telemetry, such as long- term biomonitoring. While early models could perform basic tasks, such as calculations, digital time telling, translations, and game- playing. Smart watches released since 2015 have more general functionality closer to smart phones including mobile apps,a mobile operating system and WiFi/Bluetooth connectivity. Some smart watches function as portable media players with FM radio and playback of digital audio and video files via a Bluetooth headset. Some models, called watch phones (or phone watches), have mobile

cellular functionality such as making telephone calls. The main benefit of a smart watch is that it keeps you constantly updated without you having to whip out your smart phone. **A smart watch is a wearable computing device that closely resembles a wristwatch or other time-keeping device.** In addition to telling time, many smart watches are Bluetooth - capable. The gadget becomes a wireless Bluetooth adaptor capable of extending the capabilities of the wearer's smart phone to the watch. The wearer can use the watch's interface to initiate and answer phone calls from their mobile phone, read email and text messages, get weather reports, listen to music, dictate email and text messages, and ask a digital assistant a question. Smart watches offer many features. Among them are the following:

- health informatics, such as heart rate, blood oxygen level, blood pressure and temperature monitoring;
- contactless payment and digital wallet applications;
- messaging and calling features, similar to those on a smartphone;
- emergency calls for assistance if the watch detects the wearerhas fallen;
- social media and other notifications from synchronized smartphone applications;
- games, music, photos and other entertainment options;
- location features, such as maps, a compass and an altimeter;and
- GPS tracking

6.3 Smart watches typically integrate with a user's smart phone.

Many of the same features and applications available on the phone are available on the watch and can synchronize with it.

6.4 We also take judicial notice of the definition of watch/clock.

As per Collins dictionary, clock is a mechanical or electronic device, normally larger than a watch, which is meant for measuring and recording time, usually with two hands or changing or a digital display to indicate the hour and minute. Clock is otherwise originating from Latin word 'CLOCK' which means 'BELL'. It was an invention for period calculation. The clocks we see today areevolved versions of sundials, water clocks, mechanical water clocks and other time pieces. All these clocks have been used, since time immemorial, to calculate time periods that are shorter than the day,the lunar month and the year. Over the years various physical processes have been used to power the devices.

6.5 The Collins dictionary defines watch as a time piece different from clock that can be worn on the wrist /portable time piece with aband, carried in a pocket, or attached to a chain. The word is derived from old English word 'woecce' which meant 'watchman'. The term was coined by the sailors who timed the duration of their ship board watches. Over the years, there have been modifications to have different types of watches as that of waterproof watches, diving watches. Initially the watches were a mechanical device powered by winding a main spring and keeping time with an oscillating balance wheels. Later watches got powered by battery and kept the time with a vibrating quartz crystal. Various other extra features like moon face displays, timers, chronographs and alarm functions got incorporated in the watches. Howsoever, expansive collectable watches may be, valued more for their elaborate craftsmanship and glamorous design but the sole and simple object of watch/clock is time and day keeping. Thus anything to be called as watch/clock should has just two main components:

(i) Movement – it may be mechanical movement, utilizing gears andsprings to tell the time, the watch need to be manually winded. Movement can be automatic where the mechanical wrist watchutilizes physical movement from the user. Typically through a weighted rotor which winds the main spring automatically.Movement can also be the quartz movement i.e. a battery powered movement utilizing a vibrating quartz crystal and an electric circuit to tell the time very accurately.

(ii) The case of the watch which is the main body of the watch containing the movement inside and dial on the top. These conventionally were made of stainless steel with several advancements, various different quality of alloys, plastics, giving various other different types can be used for these cases. Clock/watch is so related to time keeping that they even are usedas verbs for time recording. For example, 'clock the raise' and timely vigilance example 'watch in watch out'.

6.6 From the above discussion about tariff entries, GRIs,definitions of smart watch and

watch/clock, we are of the opinion that the watches and clocks of Chapter 91 are designed mainly for time and date display though with some extra elements but nothingrelated to transmission of data in any form. Whereas the smart watch is actually a computer, an apparatus which is capable of transmitting and receiving data, irrespective it is a device wearable on wrist just like watch and is capable of time telling also.

6.7 Reverting to the product in question which is imported as 'G- Watch' and is being classified as watch under Chapter 91 by the importer but is alleged by the department to be a device which is capable of converting data and thus are alleged as classifiableunder Chapter 80 8517. We observe from the brochure/catalogue of the product on record that it is described as "LG Watch W7" smart watch with swiss effect, mechanical hands with precision movement with the following key specifications.

S.No.	Dimensions	44.5 x 45.4 x 12.9 mm
1	Weight	79.5g
2	Body Material	Stainless Steel; STS31 6L
3	Band	Quick-release 22 mm rubber
4	Display	1.2(3.048cm) LCD (360x360, 300ppi)
5	Movement	2 Hands (Hr. & Min.) + Micro Gearbox*
6	Chipset	Qualcomm APQ8009w
7	Operating System	Wear OS by Google
8	Memory	768MB/4GB eMMC**
9	Connectivity	Wifi, Bluetooth 4.2
10	Sensors	Accelerometer, Magnetic, Gyroscope & Barometer
11	Battery	240mAH Lithium Polymer
12	Water And Dust Resistance	IP68***
13	Smart Notifications	Messaging, Email, Calendar, App Alerts
14	In-box Accessories	USB-C Data cable, 5V TA, cradle Developed in partnership with Soprad SA, a Swiss Company

6.8 Thus it is apparent from the brochure that the impugned G- Watch is to be paired with the companion device which is running android and supports bluetooth and which wears the operatingsystem by Google. The companion device has to be connected to mobile data or a Wifi network. It is observed that to set up the impugned G-Watch for the first time, a data connection is mandatory. Thus in

addition to the looks of the impugned product which is almost similar to a watch/clock having two hands with quartz movement meant for telling time and even a chronograph, the impugned good can be used to do the following:

(i) can send and receive a text message,

(ii) user can make and receive telephonic calls of his mobile phone at this product,

(iii) can download and open any app (application) on the appscreen,

(iv) the home screen can be used as compass, stopwatch, timer, calibration, barometer and LT meter, the functions similar to that ofwatch,

(v) have Google fit app to view the workout reports,

(vi) it takes tasks using voice commands as it has a built in google assistance. However for the purpose, a data or wifi connection is required on the companion device and device must be in a Bluetooth range,

(vii) While using the Bluetooth the impugned G-Watch can beconnected to other mobile devices including the added wi-fi networks,

(viii) it provides upon source software information.

6.9 The specific features of the impugned imported product, as discussed above, make it clear that the main function of this device is not just time keeping or time watching but to work as a portable/wearable device as an organizer which is capable of transmitting or receiving data in the form of voice or images plus it is an apparatus for communication in a wired or wireless network. Chapter 91 talks about watches/clocks mechanically or electronically operated for respective display whether or not automatic and whether or not stop watch. Thus any gadget/apparatus or machine having any features in addition to above cannot be classified as watch/clock. Hence irrespective the product is wearable on wrist and that it has two metal hands with mechanical/quartz movement to show time, it cannot be called as clock and watches as are classifiable under Chapter 91. As discussed above, the products of Chapter 91 have a specific purpose of timekeeping / time telling with certain advance functionsbut related only to time. Nothing in Chapter 91, either Chapter headings or Tariff entry headings, suggests that a watch which is capable of transmitting data or which is working on operating system of Google or which has anything to do with wired or wirelessnetwork shall still fall under this Chapter 91.

On the contrary, Chapter 85 notes suggest that anythingwhich works on electronic integrated circuits, microprocessors, smart cards, Random Access Memories (Ram), digital system, signals, such apparatus are all covered under Chapter 85.

6.10 Tariff Entry No. 8517 though talks about telephone sets and the telephones for cellular networks but simultaneously it talksabout such apparatus which are capable of transmitting and receiving oral or visual data. The several entries under this headingshows that the apparatus other than telephones, if are capable of transmitting data, are included. The tariff entry 8517 6290 as proposed by the department to be the relevant entry for the impugned goods is sufficient for us to hold that all other apparatus which are capable of transmitting or receiving data other thantelephones and those specifically named under Tariff Entry 8517 arecovered under the said entry.

6.11 Learned counsel has relied upon the case of **SaurashtraChemicals (supra)** to impress upon that section notes and chapter are most relevant for the purposes of clarifying the scope ofany heading and for determining classification of the goods. However, the first Rule of GRI, as recorded above specifies that for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require in such manner that heading which provides most specific description shall be preferred to headings providing a more general description.The rules say that in any other case the goods shall be classified under the heading appropriate to the goods to which they are most akin. Essential character of the impugned good is to be a computeron wrist as different from being watch on wrist [GRI 2(a)]. A computer is an apparatus for transmission or receiving date though it is simultaneously telling time also but it is still different from specific description of watch/clock under chapter heading and notes of Chapter 85 [Rule 3 GRI].

6.12 In the light of above discussion it is held that once admittedly the impugned goods work on

internet, it is not acceptable that the essential character of the impugned goods remains that of time keeping only. Thus we hereby hold that section notes and chapter notes of Chapter 85 are most relevant for the purpose of classifyingimported G-Watch (Smart Watch), it being a device capable of transferring data and even making or receiving phone calls which have not been the intent of the section notes and chapter notes of Chapter 91. Hence, First point of adjudication stands decided in favour of Revenue holding the right classification for the impugned imported product is 8517 6290.

7. Second point of adjudication:

From the findings under first point of adjudication, it is clear that the appellant has wrongly classified the goods under 9102 1900. These are held classifiable under Tariff Entry 8517 6290. From the Notification No. 152/2009-Cus. dated 31.12.2009, weobserve that the entry at serial no. 955 thereof gives the benefit of exemption from customs duty to the goods falling under Tariff Entry9102 to 9103 only. As already held above the goods are classifiableunder 8157 6290, the benefit of the said notification shall not be available to the appellant. The certificate for origin is not sufficientto extend the benefit of nil rate of duty. As the origination from Korea is not the criteria of the Notification no. 152/2009-Cus. but such goods originating from Korea as are mentioned in the table under the said notification. Apparently and admittedly the goods classifiable under 8517 6290 are not mentioned in the said table. Hence, the benefit of nil rate of duty shall not be available to the appellant. Resultantly, the second point of adjudication is also decided against the appellant.

8. Third point of adjudication:

From the discussion on the above mentioned both the points of adjudication though it is clear that the goods have wrongly been classified by the appellant and the benefit of exemption of duty has also been wrongly claimed but we are aware that imposition of penalty is a penal consequence of some intentional *mala fide* act. The onus was of the department to prove that the wrong classification was an intentional act of the appellant to wrongly claim duty exemption. Mere mention of wrong tariff or claiming benefit of an ineligible exemption notification cannot form the basis for confiscation of goods as has been held by this Tribunal in the case of **Lewek Altain Shipping Pvt. Ltd. Vs. Commissioner of Cus., Vijayawada reported as 2019 (366) E.L.T. 318 (Tri.– Hyd.).** Hon'ble Supreme Court also in an appeal against the said decision has held that mentioning of wrong tariff item or claiming benefit of ineligible exemption notification did not amount to mis- description of goods neither did it amount to making faldr or incorrect statement. In the present case also, we observe that the appellant is convinced of the fact that the product imported has mechanical hands and quartz movements as identical to a wrist watch and that this apparatus is also wearable on wrist. It is a clear case of misunderstanding on part of the appellant. Question of invoking penal provisions does not at all arise in this circumstance. Resultantly, we decide the third point of adjudicationin favour of the appellant.

9. As an outcome of the entire above discussion on three of the points of adjudication, we hereby hold that the product imported is

a Smart Watch which is classifiable under 8517 6290. The appellant has wrongly classified it under 9102 1900. Thus the benefit under exemption Notification No. 152/2009-Cus. was not available to products of 8517 tariff entry hence it is held that same has wrongly been claimed. The order under challenge to the extentconfirming demand of customs duty is therefore hereby upheld. However, the order imposing penalty and confiscating the goods is hereby set aside in light of the findings under Point No. 3. Consequently, the appeal in hand is ordered to be partly allowed.

[Order pronounced in the open court on **30.11.2023**]

(DR. RACHNA GUPTA)MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)MEMBER (TECHNICAL)

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH COURT NO.IV

CUSTOMS APPEAL NO. 54708 OF 2023

[Arising out of Order-in-Original No. 34/2022/VSC/Commr/ICD-Import/TKD dated 05.12.2022 passed by the Commissioner of Customs (Import) ICD,Tughlakabad. New Delhi]

HOLYLAND MARKETING PVT LTD **Appellant**

Vs.

COMMISSIONER OF CUSTOMS (IMPORT)ICD, TUGHLAKABAD, NEW DELHI **Respondent**

Appearance:

Present for the Appellant : S/Shri Anup Kumar Srivastava & Utkarsh Srivastava,Advocate

Present for the Respondent : Shri Girijesh Kumar, Authorised Representatives

CORAM:

HON'BLE DR. RACHNA GUPTA, MEMBER(JUDICIAL) HON'BLE Ms.HEMAMBIKA R. PRIYA, MEMBER(TECHNICAL)

DATE OF HEARING : August 11, 2023DATE OF DECISION:November 30, 2023

FINAL ORDER No. 51574 /2023 PER HEMAMBIKA R PRIYA

The present appeal is filed to assail the impugned Order-in- Original No. 34/ 2022/ VSC/ Commr/ ICD-Import/ TKD dated 05.12.2022, passed by the Commissioner of Customs (Import), ICD, Tughlakabad, New Delhi by M/s Holyland Marketing Pvt. Ltd., Delhi (hereinafter referred to as the appellant) under Section 28(4)of the Customs Act, 1962. The Adjudication Authority, vide the aforesaid order dated 05.12.2022, held that Canned PineappleSlices are classifiable under Customs Tariff Heading No. 0804 3000 and confirmed a duty demand of Rs. 50,95,196/- against the five (05) Bills of Entry cleared from ICD Tughlakabad during the period of 2020-21 along with a differential Customs Duty amounting to Rs.33,46,770/- with applicable interest and penalty of Rs.33,46,770/- on the appellant under Section 114A of the Customs Act, 1962.

2. The brief facts are that an intelligence was received that the appellant was importing "Canned Pineapple Slices" from Philippines& Thailand and claiming exemption from Basic Customs Duty available to imports from ASEAN countries in terms of Customs Notification No. 46/2011-Cus dated 01.06.2011, as amended. However, it was alleged that the said 'Canned Pineapple Slices' are classifiable under Customs Tariff Heading No. 0804 3000 and consequently the benefits of Exemption Notification No. 46/2011- Cus dated 01.06.2011, as amended, are not available. Thereafter, the premises of the appellant was searched on 17.03.2021, in the presence of independent witnesses and Mr. Harith Budhraja, Director of the appellant. The proceedings conducted were recorded in a Panchnama dated 17.03.2021. Sh. Harith Budhraja's statement was recorded on 17.03.2021, wherein he inter-alia stated that they trade and manufacture processed fruits, vegetables and food additives etc. He stated that they had been importing pineapple for over 2 years and he also submitted the import data (i.e. Invoices, packing list, Bill of Entry) for last 02 years. He also explained the process of canning such sliced pineapples, and he named the ingredients of 'Canned Pineapple Slices', in descending (maximum to minimum) order as under: (a) Pineapple Slices (b) Water (c) Sugar and (d) Acidity Regulator (INS 330) (Citric acid). He also explained the manufacturing process of the 'Canned Pineapple Slices'. He submitted that the fresh fruits (Pineapple) are received, graded, washed, peeled, cut, core, sliced and then put in sterile cans (sterilized by passing under steam); boiling Hot Sugar syrup is added to balance the natural sugar content of the fruit and prevent it from draining out; sugar is added to maintain taste and palatability of the fruit and it is not a preservative; the Hot syrup (water+ sugar pre mixed) is heated tillboiling point to kill any ambient bacteria that may be present andto create vacuum in the cans thus completing the preservation process due to the isolation from atmospheric contact and vacuum.Thereafter, such cans are cooled and released to market. He also stated that there is no basic difference between fresh pineapple and canned pineapple slice is pineapple itself. He also stated that the recommended range of temperature for storage of the product is 10 Degrees Celsius to 40 Degrees Celsius at max, as long as the Hermetical seal is intact. However, as soon as the Can is opened, the shelf life of the product is only as good as of pineapple fruit andneeds to be refrigerated in glass or SS container and the same is recommended to be consumed within 24 to 48 hours after opening of can. He also added that the Canned Pineapple slices is not frozen product and does not require any freezing during storage based in the investigations the department issued a show cause notice and thereafter the impugned order was passed.

3. The learned Counsel submitted that the said adjudication proceedings are vitiated as the Show cause notice dated 15.03.2022 was issued by and made answerable to the Assistant Commissioner, Group-1, ICD. Thereafter, vide by Corrigendum dated 25.04.2022, the Assistant Commissioner made the Show cause notice answerable to the Principal Commissioner of Customs, ICD Tughlakabad rendering the notice bad in law as a junior officer had issued a Show cause notice which was made answerable to his senior officer. The learned Counsel further contended that the extended period of limitation had been wrongly invoked since it is settled law that claiming a particularclassification under a particular heading does not amount to mis- declaration. He relied on the Hon'ble Supreme Court judgement in **Northern Plastic Ltd. v. CCE 1998 (101) E.L.T. 549.**

4. The learned Counsel further submitted that it is settled law that extended period and penalty cannot be imposed when the Adjudicating Authority himself held in April, 2019 that the goods were liable to be classified under CTH 20082000, whereas in March, 2021 he held that the same goods were classifiable in CTH 08043000. He also submitted that the Assistant/Deputy Commissioner of Customs, Group 1, ICD Tughlakabad had opined that the goods were liable to be classified under CTH 08119010, but from March 2021, he decided that it should be in CTH 08043000. The learned counsel submitted that this is evident from the following course of events:-

i) The appellant filed B/E No 6030589 dated 18.04.2018 for cannedpineapple slices having CTH 20082000.

ii) However, after filing the B/E, appellant had the view that canned pineapple slices should have CTH 0811. Thus, the appellant requested the proper officer to reassess and reclassify the goods to CTH 08119010.

iii) By Assessment Order No 15/2019/AC/ICD/IMP/TKD dated 31.01.2019 passed by the Deputy

Commissioner of Customs, Group-I, ICD, he classified the goods as CTH 08119010.

iv) The Commissioner of Customs, ICD, Tughlakabad passed a Review Order vide C.No VIII/ICD/TKD/Rev/O10/670/2018 in April 2019, wherein he was of the opinion that it should be CTH 20082000 and not CTH 0811 and also directed the Department to file appeal before the Commissioner (Appeals) for classification to CTH 20082000. The grounds of appeal by the Department spoke purely of classification and had no whisper of non application of Section 17(5) Customs Act after out of charge. The Commissioner(Appeals) allowed the appeal of the Department by Order-in-Appeal No CC(A) CUS/D-II/ICD TKD/03/2020-21 dated 11.05.2020. The appellant appealed before the CESTAT, wherein by Final Order No 50094/2023 dated 31.01.2023, the appeal was rejected on the ground that Sec 17(5) Customs Act cannot be resorted after out of charge. However the question of classificationwas kept open.

5. The learned Counsel contended that the flow of events as indicated in the foregoing paragraph indicates that the Department were not sure of the classification of the product, hence invoking extended period of limitation and imposition of penalty on the appellant, is not correct. He relied on the following decisions in support of his contention:

i) **CESTAT Chennai in Commr of Service Tax Chennai vs Spectrasoft Technologies Ltd. [2019 (24) ELT 224].**
ii) **CESTAT Mumbai in Vardhamanan Fertilizers and Seeds Pvt Ltdvs Commissioner of Customs Pune [2017 (345) E.L.T. 560]**
iii) **Hon'ble Supreme Court in CCE Bangalore vs Karnataka AgroChemicals [2008 (227) E.L.T. 12]**

6. The learned Counsel further submitted that the appellanthas been regularly importing the said goods vide B/E No. 5259093 dated 17.02.2018 and B/E No 5259115 dated 17.02.2018, classifying them under CTH 08119010 in Nhava Sheva and the Department had not objected to the classification in that port. Similarly, the appellant had been exporting these goods regularly, classifying the same under CTH 08119010 viz S/B No 4797913 dated 23.09.2021 and S/B No 5052913 dated 04.10.2021. Allexport documents including Country of Origin Certificate indicate the CTH 08119010. He further submitted that it is settled law that assessments already made cannot be changed on the basis of change of mind of an authority based on different interpretation, when all the material facts were in the knowledge of the assessing officer/ proper officer. He relied on decision of CESTAT in **PSL Limited vs. Commissioner of Customs, [2015 (328) E.L.T. 177]** and affirmed by the Hon'ble Supreme Court in **Commissioner vs Man Industries India Ltd. [2016 (331) ELT A 90].** He contended that in PSL Limited decision, the Tribunal while considering the above cited judgment of the Hon'ble Supreme Court, had held that a declaration given with respect to classification of goods in the Bills of Entry cannot be considered as wilful mis-declaration/ suppression with intention to evade customsduty, in the absence of any other corroborative evidence. In the present case, there is no corroborative evidence brought on record by the department. Hence, the ratio of the above cited decision would apply squarely in the instant case. The learned Counsel also relied on the Tribunal's decision in **Asian Rubber Works vs. Commissioner of Customs, [1999 (109) E.L.T. 401]**, to support his contention. He further submitted that the Commissioner had erred in not appreciating that it is settled law that extended period of limitation cannot be invoked in matters of classification dispute, as held by CESTAT Hyderabad in **CCE Hyderabad vs Sandor Medicaids Pvt [2019 (367) ELT 486]** and affirmed by the Hon'ble Supreme Court in **[2019 (367)ELT A318].** The same was also held by CESTAT, Mumbai in **Advanced Spectra Tek P Ltd vs Commissioner of Customs (Air Cargo) Mumbai [2019 (369) E.L.T. 871]**. It is also settled law that penalty cannot be imposed, even if classification is decided against the appellant, as held by the CESTAT in **Vodafone Essar South Ltd. vs. Commissioner of Customs, [2009 (235) E.L.T. 466]**. He further contended that there was no estoppel for preventing theappellant to change his classification to CTH 08119010 and relied on the Tribunal's decision in **Commissioner of Customs (Prev.), Jamnagar vs. Nayara Energy Ltd., [2019 (370) E.L.T. 1201].** He also contended that the burden of proof was on the Department to prove the classification and it has failed to do so, and relied on the following

decisions:

1) Parle Agro Pvt Ltd vs Commr of CommercialTaxes Trivandrum [2017 (352)ELT 113]

2) Hindustan Ferodo Ltd vs CCE Bombay [1997 (89) ELT16]

3) Puma Ayurvedic Herbal P Ltd vs CC Nagpur[2006 (196) ELT 3]

7. The learned Authorised Representative contended that the impugned goods which are canned slices of pineapples, akin to fresh pineapples, in non-frozen state merit classification under CTH0804 3000 and not under chapter 20, which was relevant forpreparations of fruits or CTH 0811, which was relevant for frozen fruit. He went on to submit that as per the process explained by the Director in his statement, it is obvious that the canned pineapple slices is not a frozen product and does not require any freezing during storage. Therefore, he contended that the said goods are not liable to be classified under CTH 0811. The learned AR contended that the Supreme Court in the case of **DeputyCommissioner, Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs M/s Pio Food Packers [(1980(6) ELT 343(SC)]**wherein it was had held that the canned pineapple slices cannot betreated as different from pineapple. He further stated that section 17 of the Customs Act casts an obligation upon the appellant to self-assess the duty payable on the goods imported by correctly classifying the same. In the instant case, the appellant had wronglyclassified the goods under CTH 0811 by suppressing the fact that the goods were not frozen. This was duly admitted by the Director in his voluntary statement. Consequently, the impugned goodsmerit reclassification under CTH 08043000. He therefore submittedthat the adjudicating authority had correctly confirmed the duty demand against the five Bills of Entry cleared during the period 2020–21, and had imposed penalty equal to the differential customs duty under the Section 114A of the Customs Act, 1962.

8. We have heard the Learned Counsel for the appellant and the Learned Authorised Representative. The issue before us isclassification of canned pineapple slices.

9. We will first deal with the merits of the case, before we address other arguments of the learned counsel. Vide the show cause notice dated 15.3.22, the Department has sought to classify the Canned Pineapple Slices under Customs Tariff Heading 08043000, whereas the appellant has classified the same under CTH 08119010. To appreciate the arguments, it would be appropriate to reproduce the contested two Tariff headings:-

“0804 DATES, FIGS, PINEAPPLES, AVOCADOS, GUAVAS, MANGOES, AND MANGOSTEENS, FRESH OR DRIED

0804 10 - Dates :

0804 10 10 --- Fresh (excluding wet dates)

0804 10 20 --- Soft (khayzur or wet dates)

0804 10 30 --- Hard (chhohara or kharek)

0804 10 90 --- Other

0804 20 - Figs :

0804 20 10 --- Fresh

0804 20 90 --- Other

0804 30 00 Pineapples

-

0804 40 00 - Avocados

0804 50 - Guavas, mangoes and mangosteens:

0804 50 10 --- Guavas, fresh or dried

--- Mangoes, fresh: 0804 50 21 --- Alphonso (Hapus)

0804 50 22 ---------- Banganapalli

0804 50 23 ---------- Chausa

0804 50 24 ---------- Dasheri

0804 50 25 ---------- Langda

0804 50 26 ---------- Kesar

0804 50 27 ---------- Totapuri

0804 50 28 ---------- Mallika

0804 50 29 --------- Other

0804 50 30 --- Mangoes, sliced dried

0804 50 40 --- Mango pulp

0804 50 90 --- Other kg.

0811 FRUIT AND NUTS, UNCOOKED OR COOKED BY STEAMING OR BOILING IN WATER, FROZEN, WHETHER OR NOT CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER

0811 10 - Strawberries :

0811 10 10 ---------- Containing added sugar

0811 10 20 ---------- Not containing added sugar

0811 10 90 ---------- Other

0811 20 - Raspberries, blackberries, mulberries, loganberries, black, whiteor red currants and gooseberries :

0811 20 10 ---------- Containing added sugar

0811 20 20 ---------- Not containing added sugar

0811 20 90 ---------- Other kg.

0811 90 - Other :

0811 90 10 ---------- Containing added sugar

0811 90 90 ---------- Other ”

It is also appropriate to reproduce the extracts of the HSNExplanatory notes of these two headings.

“08.04 - Dates, figs, pineapples, avocados, guavas, mangoes and mangosteens, fresh or dried.

0804.10 - Dates

0804.20 - Figs

0804.30 - Pineapples

0804.40 - Avocados

0804.50 - Guavas, mangoes and mangosteens

For the purposes of this heading the term " figs " applies only to fruits of the species *Ficus carica,* whether or not to be used for distillation; the heading therefore does not cover cactus figs (prickly pears) which fall in heading 08.10.

08.11 - **Fruit and nuts, uncooked or cooked by steaming or boiling in water, frozen, whether or not containing added sugar or other sweetening matter.**

0811.10 - Strawberries

0811.20 - Raspberries, blackberries, mulberries, loganberries, black, whiteor red currants and gooseberries

0811.90 - Other

This heading applies to frozen fruit and nuts which, when fresh or chilled, are classified in the preceding headings of this Chapter. (As regards the meanings of the expressions " chilled " and frozen see the General Explanatory Note to this Chapter j

Fruit **and** nuts which have been cooked by steaming or boiling in **water** before freezing remain classified in this heading. Frozen fruit and nuts cooked by othermethods before freezing are **excluded (Chapter 20).**

Frozen fruit and nuts to which sugar or other sweetening matter has been added are also covered by this heading, the sugar having the effect of inhibiting oxidation and thus preventing the change of colour which would otherwise occur, generally on thawing out. The products of this heading may also contain added salt."

9.1 As per the explanatory notes, it is noted that for any product to be classified under CTH 0804, they have to be fresh or dried. Forfruits to be classified under CTH 0811, the said product has to be "Frozen", as elaborated above. In the instant case, the product being imported by the appellant is not frozen. This is amply clear from the statement of the Director of the appellant, wherein he submitted that the fresh fruits (Pineapple) are received, graded, washed, peeled, cut, core, sliced and then put in sterile cans(sterilized by passing under steam); boiling Hot Sugar syrup is added to balance the natural sugar content of the fruit and preventit from draining out; sugar is added to maintain taste and palatability of the fruit and it is not a preservative; the Hot syrup (water+ sugar pre mixed) is heated till boiling point to kill any ambient bacteria that may be present and to create vacuum in the cans thus completing the preservation process due to the isolation from atmospheric contact and vacuum. Thereafter, such cans are cooled and released to market. Nowhere is it stated that the fruits undergo any process of chilling or freezing. The general notes tothe HSN explanatory notes of this chapter define what refers to frozen. The same is reproduced for ease of reference;

"The term " chilled " means that the temperature of a product has been reduced, generally to around 0 °C, without the product being frozen. However, some products, such as melons andcertain citrus fruit, may be considered to be chilled when their temperature has been reduced to and maintained at + 10 °C. The expression " frozen " means that the product has been cooled to below the product's freezing point until it is frozen throughout."

9.2 In the instant case, the fresh pineapple slices are sterilizedby passing under steam which is followed by adding boiling Hot Sugar syrup to balance the natural sugar content of the fruit and prevent it from draining out. This Hot syrup (water+ sugar pre mixed) is heated till boiling point to kill any ambient bacteria andto create vacuum in the cans thus completing the preservation process. Thereafter, such cans are merely cooled, and not frozen toenable them to be released for sale. Thus, it is very clear from the facts of this case, the canned pineapple slices are akin to fresh pineapples and are liable to be classified under CTH 0804, and not under CTH 0811, as claimed by the appellant. This classification of canned pineapple slices in CTH 0804 is buttressed by the Supreme Court's judgment in the case of Deputy Commissioner of Sales Tax Vs Pio Food Products [1980 (6) ELT 343(SC)] wherein the Court held as follows:

"3. It appears that the pineapple purchased by the assessee is washed and then the inedible portion, the end crown, skin and inner core are removed, thereafter the fruit is sliced andthe slices are filled

in cans, sugar is added as a preservative,the cans are sealed under temperature and then put inboiling water for sterilisation. Is the pineapple fruit consumedin the manufacture of pineapple slices? xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

x

6. In the present case, there is no essential difference between pineapple fruit and the canned pineapple slices. The dealer and the consumer regard both as pineapple. The only difference is that the sliced pineapple is a presentation of fruit in a more convenient form and by reason of being canned it is capable of storage without spoiling. The additional sweetness in the canned pineapple arises from the sugar added as a preservative. On a total impression, itseems to us, the pineapple slices must be held to possess thesame identity as the original pineapple fruit."

9.3 It is important to note that the process of canning the slices as indicated above is the same as explained by the Director of the appellant. We further note that the Supreme Court in its judgment in the case of M/s Thermax Ltd Vs Commissioner of Central Excise, Pune 2022 (382) E.L.T. 442 (S.C.) has highlighted the persuasive value of the HSN and held as follows:-

"6. The definition of a product given in the HSN should be given due weightage in the classification of a product for the purpose of levying excise duty. This is because in the Statement of Objects and Reasons of the Bill leading to enactment of *Central Excise Tariff Act, 1985*, it was clearly stated that the pattern of tariff classification is broadly based on the system of classification derived from the *International Convention on the Harmonised Commodity Description and Coding System* (Harmonised System) with such contraction or modification thereto as are necessary,to fall within the scope of the levy of Central Excise duty. The tariff so suggested for the levy under the Indian Tariff Act is based on an internationally accepted nomenclature, in the formulation of which, all considerations, technical and legal, have been taken into account. This was done to reduce avoidable disputes on tariff classification. Besides,the tariff would be on the lines of the harmonized system. It was also borne in mind that the tariff on the lines of the harmonized system would bring about considerable alignment, between the Customs and Central Excise Tariffs, which in turn, would facilitate charging of additional customs duty on imports, equivalent of excise duty. It was therefore expressly stated in the Statement of Objects and Reasons that the Central Excise Tariff are based on the HSN and the internationally accepted nomenclature was as such taken into account, to reduce tariff classification disputes. **Thus, it was suggested that a safe guide for classification is the internationally accepted nomenclature emerging from the HSN and in case of doubt, the HSN should be chosen advisory for ascertaining the true meaning of any expression used in the Tariff Act.** In *Wood Craft* (supra), in the opinion written by Justice J.S. Verma, the following was pertinently opined in this context :

"12. … .. Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the HSN. This being the expressly acknowledged basis of the structure of Central Excise Tariff in the Act and the tariff classification made therein, in case of any doubt the HSN is a safe guide for ascertaining the true meaning of any expression used in the Act. The ISI Glossary of Terms has a different purpose and, therefore, the specific purpose of tariffclassification for which the internationally accepted nomenclaturein HSN has been adopted, for enacting the Central Excise TariffAct, 1985, must be preferred, in case of any difference between the meaning of the expression given in the HSN and the meaning of that term given in the Glossary of Terms of the ISI.

xx xx xx

18. We are of the view that the Tribunal as well as the High Court fell into the error of overlooking the fact that the structureof the Central Excise Tariff is based on the internationally accepted nomenclature found in the HSN and, therefore, any dispute relating to tariff classification must, as far as possible, be resolved with reference to the nomenclature indicated by the HSN unless there be an express different intention indicated by the Central Excise Tariff Act, 1985 itself. The definition of a term in the ISI Glossary, which has a different purpose, cannot, in case of a conflict, override the clear indication of the meaning of an identical expression in the same context in the HSN. In the HSN, block board is included within the meaning of the expression "similar laminated wood" in the same

context of classification of block board. Since the Central Excise Tariff Act, 1985 is enacted on the basis and pattern of the HSN, the same expression used in the Actmust, as far as practicable, be construed to have the meaning which is expressly given to it in the HSN when there is no indication in the Indian tariff of a different intention."

7. Commenting on the importance of taking guidance from HSN Classification and how a taxing statute should be construed in consonance with their commonly accepted meanings in the trade and popular sense, Justice Sanjiv Khanna in *D.L. Steels* (supra) also socorrectly observed as follows :-

"9. The Harmonised System of Nomenclature, developed by the World Customs Organisation, has been adopted in India by way of the Customs Tariff Act, 1975, though there are certain entries in the Schedules to this Act which have not been assigned HSN codes. The Harmonised System is governed by the *International Convention on Harmonised Commodity Description and Coding System*, which was adopted in 1983, and enforced in January, 1988. This multipurpose international product nomenclature harmonises description, classification, and coding of goods.While the primary objective of the HSN is to facilitate and aid trade, the Code is also extensively used by governments, international organisations, and the private sector for other diverse purposes likeinternal taxes, monitoring import tariffs, quota controls, rules of origin, transport statistics, freight tariffs, compilation of national accounts, and economic research and analysis. In the present times, given the widespread adoption of the Harmonised System by over 200 countries, it would be extremely difficult to deal with an international trade issue involving commodities, without adverting to the Harmonised System. TheCode is the bedrock of custom controls and procedures. The HSN consistsof over 5000 commodities groups, which are structured into 21 Sections and 97 Chapters, which are further divided into four and six digit sub- headings. Many custom administrations, like India, use an eight or more digit commodity coding system, with the first six digits being the HSN code.

10. Classification under the Harmonised System is done by placing the goods under the most apt and fitting sub-heading. This is done bychoosing the appropriate Chapter, Heading, and sub-heading respectively. To facilitate interpretation and classification, each of the 97 Chapters in the HSN contain corresponding Chapter Notes, General Notes, and Explanatory Notes applicable to the Headings and sub- headings within that Chapter. In addition, there are six General Rules of Interpretation applicable to the Harmonised System as a whole.

xx xx xx

12. We would, at this stage, take on record the well-settled principlethat words in a taxing statute must be construed in consonance with theircommonly accepted meaning in the trade and their popular meaning. When a word is not explicitly defined, or there is ambiguity as to its meaning, it must be interpreted for the purpose of classification in the popular sense, which is the sense attributed to it by those people who areconversant with the subject matter that the statute is dealing with. This principle should commend to the authorities as it is a good fiscal policynot to put people in doubt or quandary about their tax liability. The common parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law-maker. However, the above rule is subject to certain exceptions, for example, when there is an artificial definition or special meaning attached to the word in a statute, then the ordinary sense approach would not be applicable."

9.4 It is important to note here that in the aforesaid judgment, the Supreme Court has reiterated the view that the HSN code is '**the bedrock of custom controls and procedures'**. Therefore,in the instant case, the classification of the canned pineapple slices would have to be decided as per the HSN explanatory notes and would therefore be appropriately classifiable under CTH 0804 only. We also note that in the impugned order, it is recorded that the appellant had themselves quoted that it was their CHA who filed their Bills of Entry under the wrong CTH 20082000 without taking instructions from the regarding the correct classification, which would be CTH 08119010. As per the discussions above, we have already opined that the appropriate classification would have to be arrived at by going through the tariff headings, the chapter notes, the HSN explanatory notes therein. In view of the same, we hold that the most appropriate classification of canned pineapple slices would have to be CTH 0804 only.

10. We now address the other submissions made by the learned counsel for the appellant. It

has been contended before us that the proceedings under the show cause notice issued by the Asst Commissioner, Group-1, ICD initially made answerable to the Asst Commissioner stand vitiated as a corrigendum was issued makingit answerable to Principal Commissioner of Customs, ICD, Tughlakabad. We note that in a catena of decisions, this Tribunal has held that issuance of corrigendum where non-vocal of certain provisions of the law cannot be treated as a fatal defect. In the instant case, the said notice has only made the change in the authority who is to adjudicate the case. Therefore, we are unableto accept the learned counsel's submissions that this mere change vitiates the entire proceedings. We rely on the following decisionsto support our opinion:

i. Commissioner Of Customs, Hyderabad Vs Cheminor Drugs Ltd.[2003 (160) E.L.T. 649 (Tri. - Bang.)];

ii. Commissioner of C. Ex., Mumbai-v vs. P & P Containers Pvt.Ltd.[2001 (138) E.L.T. 600 (Tri. - Del.)];

iii. Aviation Star Express Vs Commissioner of Customs, Chennai[2015 (327) E.L.T. 422 (Tri. - Chennai)

11. The learned counsel has submitted that the Country of OriginCertificates issued by the Designated Committee of the Thailand Government have been questioned by the Revenue however there was no follow-up investigations carried out after the import, in order to deny the exemption benefit. Therefore, such unilateral rejection of the exemption benefits is not tenable. We are unable to accept the submission of the learned counsel. As noted supra, we find that the appellant in his statement has accepted that they have wrongly classified their product under CTH 0811 by suppressing the non-frozen character of the impugned goods, in order to avail the benefit of the Notification no 46/2011 – Cusdated 01.06.2011. We note that the Supreme Court in their decision in the case of Naresh J. Sukhawani v. Union of India, 1996
(83) E.L.T. 258 (S.C.) held that the statement made before the customs officials is not a statement recorded under Section 161 of the Cr.P.C. Therefore, such statement is a material piece of evidence collected by customs officers under Section 108 of the Customs Act. The material incriminates the petitioner in the contravention of the provisions of the Customs Act. Such material can certainly be used to connect the petitioner to the contravention. Therefore, we do not find any infirmity in the impugned order which has relied on the statement of the appellant.

12. We now address the submissions relating to limitation period.

It has been brought on record by the learned counsel for the appellant that there was confusion in the Department itself regarding the classification of canned sliced pineapples. It has beensubmitted that there is a ruling dated 17.09.2018 by the AAAR in their own group firm M/s Bharat Agro wherein it was held that canned pineapple slices are classifiable under CTH 0811. Thereafter, the Deputy Commissioner passed an order of reassessment on 31.01.2019 wherein the canned pineapple slices were reclassified from CTH 20082000 to CTH 0811. We find merit in the contention that the Department themselves have classified the said goods under different headings. In view of the prevailing circumstances as elaborated above, we hold that the extended period cannot be invoked in the instant case.

13. Accordingly, we hold that the classification of the canned pineapple slices would be CTH 0804. However, the demand for differential duty is limited to the normal period only. The interest would accordingly be reduced proportionately. The penalty under section 114A is set aside. The impugned order is modified to the extent indicated above and the appeal is partly allowed.

(Order pronounced in the open Court on 30-11-2023)

(DR. RACHNA GUPTA)MEMBER (JUDICIAL)

(HEMAMBIKA R PRIYA)

MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI. PRINCIPAL BENCH – COURT NO. III

Customs Appeal No.50823 of 2019(DB)

(Arising out of Order-in-Appeal No.CC(A)CUS/D-II/ICD-TKD/EXPORT/3730/2018-2019 dated 11.03.2019 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi).

M/s. C.L. International, **Appellant**

43/41, West Punjabi Bagh, New Delhi-110 026.

Versus

Commissioner of Customs (Import) **Respondent**

Inland Container Depot, Tughlakabad,

New Delhi-110 020.

APPEARANCE:

None for the appellant.

Shri Rakesh Kumar, Authorised Representative for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 51597/2023

DATE OF HEARING :18.08.2023 DATE OF DECISION:05.12.2023

BINU TAMTA:

The present appeal has been filed by the appellant challenging the Order-in-Appeal No.CC(A)CUS/D-II/ICD-TKD/EXPORT/3730/2018-19 dated 11.03.2019, whereby the Commissioner of Customs, upheld the quantum of bond and bank guarantee sought by the Department for provisional release of the impugned seized export goods as fair and reasonable.

2. Brief stated, the appellant filed 8 shipping bills bearing nos.8963637 dated 17.11.2018, 8963642 dated 17.11.2018, 8963639 dated 17.11.2018, 8986925 dated 19.11.2018, 8976509 dated 19.11.2018, 8976512 dated 19.11.2018, 9069487 dated 22.11.2018 and 9069488 dated 22.11.2018 with the ICD-Export, Tughlakabad, New Delhi for export of goods, namely "Whey Flour (Powder)", which were classified under CTH 04041020. These shipping bills were filed claiming benefit under Merchandise Export from India Scheme (MEIS). As per Public Notice No.23/2015-2020 dated 13.07.2018 issued by the Director General of Foreign Trade, Ministry of Commerce & Industry, Department of Commerce, Udyog Bhawan, New Delhi, the impugned goods i.e. "Whey Flour Powder (Customs Tariff Head- 04041020)" was added in the MEIS Appendix 3 B, Table 2 @ 10% of FOB value during 13.07.2018 to 12.01.2019. The declared FOB value of the impugned orders

was Rs.6,89,41,504/- wherein the MEIS benefit @ 10% of the FOB value that would be available to the appellant was Rs.68,94,150/-.

3. The consignments covered under these shipping bills were examined by the officers of Directorate of Revenue Intelligence ("DRI" in short) on 15.12.2018 and 17.12.2018 at Mundra Port. Samples of the consignments were sent for testing to Fair Quality Institute (Food Analysis & Industrial Research Quality Institute), New Delhi, which confirmed the impugned goods to be "Maida" (Wheat Flour), against which there was no Merchandise Export from India's Scheme benefit during the relevant period. As the goods were found to be mis-declared, they were seized vide seizure memo dated 19.01.2019. On the request made by the appellant, the competent authority provisionally released the impugned seized goods and communicated the same to the appellant vide letter dated 21.01.2019, subject to the fulfillment of the following conditions:-

"i. Submission of Seizure Bond of Rs.6,89,41,504/- i.e. equivalent to the declared FOB value of the seized goods'

ii. Furnishing of Bank Guarantee of Rs.70,00,000/- with auto-renewal clause; and

iii. Submission of an undertaking by the appellant that they will not dispute on quantity description and identity of the seized goods."

4. The said letter was challenged by the appellant in an appeal before the High Court of Delhi in WP (C) No.1274/2019 and vide order dated 6.2.2019, it was held, *inter alia*, that –

"2.4 It is open to the petitioner to approach the Commissioner with an appeal, within three days. The Commissioner shall decide the appeal at the earliest, preferably within two weeks form the date of receipt of the appeal in accordance with law."

5. The appellant, therefore, filed appeal before the Commissioner (Appeals), *inter alia*, submitting that 'Star Export House' are exempted from imposition of any bank guarantee for provisional release of export goods in terms of FTP 2014-2019 and also referred to the Circular No.17/2009-CUS dated 25.05.2009 issued by the Government of India, Ministry of Finance, whereby facility of 'nil' rate of bank guarantee was extended to Star Export House firms. Moreover, the demand of bank guarantee cannot be made as the appellant would be entitled to the benefit of MEIS only upon realization of the export proceedings and, therefore, mis-declaration, if any, is of no immediate benefit to the appellant. The Commissioner of Customs considered the report of Testing Agency and observed that the goods in question were mis-declared. Further, noticed that the Dy. Commissioner of Customs (SIIB-Export), ICD-TKD, New Delhi vide letter dated 28.02.2109 considered the CBEC Circular No.01/2011-CUS dated 4.1.2011 providing the guidelines for the provisional release of the seized export of goods pending adjudication under Section 110A of the Customs Act, 1962 and, therefore, observed that the quantum of bond to be executed for provisional release of the seized export goods equal to the declared FOB value of the export goods is justified. The power to fix the quantum of bank guarantee was entrusted to the Competent Authority, which as per the said Circular covered the probable redemption fine and penalties that may be imposed at the time of adjudication. As the Department had also alleged the charge of over- valuation of the goods so as to wrongly avail the MEIS benefit, it was observed that the export goods appeared to be liable for confiscation under the Customs Act, 1962 and accordingly, the redemption fine and penalties under Section 114 (iii) and Section 114 (AA) were liable to be imposed and in that view, the quantum of bank guarantee was held to be justified. Being aggrieved, the appellant has preferred the present appeal before this Tribunal.

6. The present appeal was filed on 22.04.2019 and we find from the Court proceedings that there is a chequered history of non-appearance of the appellant except on one or two occasions. The order passed by this Tribunal on 20.04.2023 is quoted below:-

" None is present for the appellant. Perusal of file shows that appellant has repeatedly been seeking the adjournments though on few of the occasions, the matter could not have been taken up during the court hours. In the interest of justice, the matter is adjourned for today for awaiting presence, however, with the warning that the next date shall be the last opportunity for the appellant to make submissions in the appeal. Matter now be listed for hearing on **01.06.2023.**"

7. On the next date of hearing on 1.6.2023, a request was made by the learned counsel for the appellant to list the same on August 18, 2023. On the next date (18.08.2023) also none appeared for the appellant and hence, in terms of the earlier order, as quoted above, we are constrained to hear the matter ex parte.

8. Having heard the Authorised Representative for the Revenue and also perusing the grounds of appeal taken by the appellant in the present appeal, we reserved the order on 18.08.2023, with liberty to file written submissions within two weeks, however the appellant has not submitted any written arguments despite long gap of time and hence we are passing the present order considering the grounds taken in the memorandum of appeal.

9. The appellant herein is aggrieved by the conditions imposed on the provisional release of the impugned seized goods, particularly, the quantum of bond and the bank guarantee.

10. The appellant in the grounds of appeal apart from reiterating the grounds taken in appeal before the Commissioner and referring to the decisions in the case of **Kuber Castings (P) Ltd. Vs. Union of India – 2013 (29) ELT 49 (P&H)** and also in the case of **Pallahan Industries Vs. Union of India -2015 (325) ELT 18 (P &H)** on the principle that the demand of bank guarantee is not only harsh but squeezes the petitioner's business and in case of dispute of valuation and classification, the condition of demand of guarantee is not justified. Also, the status of the party has to be taken into account and, therefore, the bank guarantee cannot be imposed mechanically. The appellant, claims himself to be a "Two Star Export House". We would like to quote some of the grounds taken in the appeal memorandum as under:-

"E. Because the conditions imposed in the Order of provisional release are harsh and have been passed in violation of the judicial principles. It is submitted that the appellant has been called upon to submit an undertaking that they will not dispute on quality, description and identity of the seized goods. It is pertinent to mention that the above mentioned conditions prejudices the case of the appellant as he is prejudiced from proceeding with his case in a rightful manner and amounts to foreclosing the defence pending investigation. It is pertinent to mention that the case is under investigation and allegation qua the appellant have not been finalized.

F. Because the appellant cannot be debarred from asserting its version as to the value and classification of the goods. It if the condition of furnishing undertaking is allowed to stand, the respondent can unilaterally allege any description and continue to keep the goods under detention unless the appellant agrees to withdraw the challenge to the valuation, description, etc. This would certainly amount to denial of justice."

11. The learned Authorised Representative for the Revenue has heavily relied on the CBEC Circular No.1/2011-CUS dated 04.01.2011. The title of the Circular reads as – "Provisional release of export – goods detained for investigation – Regarding". The relevant provisions of the said Circular is reproduced below:-

"4. Seizure should be resorted to only when the Customs officers have a reason to believe that the goods in question are liable to confiscation under the Customs Act, 1962 and thereafter the provisions of Section 110A of the Customs Act, 1962 would come into play. However, there may be situations when the goods are to be detained for purpose of tests etc. to confirm the declaration. In such cases the endeavour should be to quickly undertake the necessary action (test / enquiry etc.) and take appropriate legal action thereafter so that the period of detention is kept to the minimum. Thus, the following course of action is prescribed in respect of goods entered for exportation:

(a) In case the export goods are found to be mis- declared in terms of quantity, value and description and are seized for being liable to confiscation under the Customs Act, 1962, the same may be ordered to be released provisionally on execution of a Bond of an amount equivalent to the value of goods along with

furnishing an appropriate security in order to cover the redemption fine and penalty.

(b) In case the export goods are either suspected to be prohibited or found to be prohibited in terms of the Customs Act, 1962 or ITC (HS), the same should be seized and appropriate action for confiscation and penalty initiated.

(c) In case the export goods are suspected of mis- declaration or where declaration is to be confirmed and further enquiry / confirmatory test or expert opinion is required (as in case of chemicals or textiles materials), the goods should be allowed exportation provisionally. The exporters in these cases are required to execute a Bond of an amount equal to the value of goods and furnish appropriate security in order to cover the redemption fine and penalty in case goods are found to be liable to confiscation. In case exports are made under any Export Promotion / Reward Schemes, the finalization of export incentives should be done only after receipt of the test report / finalisation of enquiry and final decision in the matter. The Bond executed for provisional release shall contain a clause to this effect."

11.1 Learned Authorised Representative for the Revenue has relied on the decision of the Madras High Court in the case of **Malabar Diamond Gallery Pvt. Ltd. Vs. The Additional Director General, Directorate of Revenue Intelligence, The Commissioner of Customs (Import), The Commissioner of Customs (AIR) -2016 (8) TMI 530 (Madras)**, where the petitioner sought provisional release of gold jewellery, which was smuggled into India on suitable conditions and the Court observed as under:-

"54. If the contentions of the appellant have to be accepted, then all the goods seized and liable for confiscation have to be provisionally released, in terms of Section 110(1A) of the Customs Act, 1962, and in such circumstances, the very object of the Customs Act, 1962, would be defeated. Going through the notifications, we are of the view that the above said notifications do not confer any absolute right to the appellant, to seek for provisional release of gold, alleged to have been smuggled.

89. While considering a prayer for provisional release, pending adjudication, whether all the above can wholly be ignored by the authorities, enjoined with a duty, to enforce the statutory provisions, rules and notifications, in letter and spirit, in consonance with the objects and intention of the Legislature, imposing prohibitions/restrictions under the Customs Act, 1962 or under any other law, for the time being in force, we are of the view that all the authorities are bound to follow the same, wherever, prohibition or restriction is imposed, and when the word, restriction, also means prohibition, as held by the Hon'ble Apex Court in Om Prakash Bhatia's case (cited supra).

92. Objective satisfaction, at the stage of provisional release, casts a duty on the authority, to consider, as to whether, there are prohibitions/restrictions in Customs Act, 1962, or any other law for the time being in force and whether he is bound to exercise his discretion, satisfying principles of fairness, reasonableness and whether, it is in accordance with the objects sought to be achieved. At the time of provisional release, it is also to be seen as to whether subjective satisfaction is based on valid materials, and not on whims and fancies of the authority.

95. Under the Customs Act, 1962, the authorities are duty bound to pass orders for confiscation, impose penalty, initiate prosecution and pending conclusion of the adjudicating proceedings, may order provisional release. At the time, when discretion is exercised under Section 110A and if any challenge is made under Article 226 of the Constitution of India, the twin test, to be satisfied is "relevance and reason". Testing the discretion exercised by the authority, on both subjective and objective satisfaction, as to why, the goods seized, cannot be released, when smuggling is alleged and on the materials on record, we are of the view that the discretion exercised by the competent authority, to deny provisional release, is in accordance with law. When there is a prima case of smuggling, for which, action for confiscation is taken, such proceedings taken should be allowed, to reach its logical end, and not to the stiffed, by any provisional release."

12. The above decision was followed by the Gujarat High Court in **Bhargavraj Rameshkumar Mehta Vs. Union of India - 2018 (3) TMI 284 – Gujarat High Court.**

13. In this case the appellant is seeking provisional release of goods. As per the settled position

of law there is no absolute right to claim provisional release and the same is subject to conditions that may be imposed by the competent authority, though the conditions that may be imposed cannot be arbitrary and capricious. To safe guard the exercise of this power, the Board has issued the Circular, the provisions thereof we have quoted above. Perusal of the Circular, we find that in case export goods are found to be mis-declared in terms of quantity, value and description, the first and foremost condition for grant of provisional release is execution of a bond which has to be of an amount equivalent to the value of the goods and along with that is the requirement of furnishing appropriate security so as to cover the redemption fine and penalty. The contents of the circular are simple, clear and there is no ambiguity in the terms and conditions prescribed therein and hence the same has to be complied.

14. The authorities below has categorically recorded the findings on the basis of the test report that the description of the impugned goods to be exported have been mis-declared. The appellant has described the goods as 'Whey Flour Powder', however, they were found to be 'Maida'. By virtue of the said mis-declaration, the appellant attempted to achieve the benefit of 10% of the FOB value as whey flour powder was covered under the MEIS whereas Maida was not covered under the said Scheme and therefore the appellant would not have been entitle to the benefit of the Scheme. Similarly, even in respect of valuation, the appellant has over valued the goods.

15. In view of such mis-declaration the Circular is clearly applicable and hence the conditions imposed for provisional release are fully justified. The Commissioner by the impugned order has rightly arrived at the conclusion that the competent authority have judiciously exercised the discretion, inter- alia observing :

"5.4 From the above CBEC Circular, it is evident that quantum of the Bond to be executed for provisional release of the seized export goods should be equal to declared FOB value of the export goods. However, power to fix quantum of the bank guarantee has been entrusted to the competent authority, but as per the said Circular, the quantum of the bank guarantee should cover the probable redemption fine and penalties that may be imposed at the time of adjudication of the matter.

5.6. The Department also alleges the charge of overvaluation of the goods to wrongly avail MEIS benefit, which was not due in the first place. The export goods having been mis-declared and overvalued, appeared liable for confiscation under the Customs Act, 1962. Redemption fine is imposable under Section 125 ibid. Besides, penalties under Section 114 (iii) and Section 114 AA are also liable to be imposed for alleged fraud committed to unduly avail inadmissible/ineligible MEIS benefits. Penalties imposable are maximum upto five times the value of the export goods. Therefore, in my view, while deciding the quantum of Bank guarantee for allowing provisional release of the seized export goods to safe guard the probable redemption fine and penalty, the value of the goods and the quantum of the alleged undue benefit of MEIS have to be considered. The MEIS benefit that would have been available to the appellants has been calculated as Rs.68,94,150/- with export value as Rs.6,89,41,504/-. Therefore, quantum of the probable penalties under the applicable provisions of the Customs Act, 1962, if the investigation succeeds, are not only equal to or more than the alleged MEIS benefit, but upto five times the export value. Besides, quantum of redemption fine under Section 125 ibid is also leviable depending upon value of the seized export goods, which is declared as Rs.6,89,41,504/-. These aspects are to be borne in mind while adjudicating bank guarantee."

16. Reliance placed by the appellant on Circular No. 17/2009 dated 25.5.2009 is misconceived as it specifically refers to norms for execution of bank guarantee under specified export promotion schemes, i. e. Advance License and EPCG Schemes, whereas the Circular dated 4.1.2011 specifically provides for conditions while ordering provisional release of export goods where they have been mis-declared.

17. We therefore do not find any infirmity in the impugned order and the same deserves to be upheld.

18. Accordingly, the appeal stands dismissed. [Order pronounced on 05.12.2023]

(BINU TAMTA) MEMBER (JUDICIAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH, COURT NO. 4

CUSTOMS APPEAL NO. 51151 OF 2015

(Arising out of Order-in-Original No. No.04/KAM/COMMR/2015 dated 16.1.2015 passed by the Commissioner of Customs, New Custom House, New Delhi-110037)

VIJAY KUMAR SHARMA **Appellant**

Vs.

COMMISSIONER OF CUSTOMS (GENERAL)– NEW DELHI **Respondent**

Appearance:

Present for the Appellant : Shri L.B. Yadav & Ms. Gunjan Tawnar, Advocates

Present for the Respondent: Shri Manish Kumar Chawda, Authorized Representative

WITH

CUSTOMS APPEAL NO. 51152 OF 2015

(Arising out of Order-in-Original No. No.04/KAM/COMMR/2015 dated 16.1.2015 passed by the Commissioner of Customs, New Custom House, New Delhi-110037)

DILIP SINGH JAIN **Appellant**

Vs.

COMMISSIONER OF CUSTOMS (GENERAL)– NEW DELHI **Respondent**

Appearance:

Present for the Appellant : Shri L.B. Yadav & Ms. Gunjan Tawnar, Advocates

Present for the Respondent: Shri Manish Kumar Chawda, Authorized Representative

WITH

CUSTOMS APPEAL NO. 51153 OF 2015

(Arising out of Order-in-Original No. No.04/KAM/COMMR/2015 dated 16.1.2015 passed by the Commissioner of Customs, New Custom House, New Delhi-110037)

SATISH KUMAR CHADHA Appellant

Vs

COMMISSIONER OF CUSTOMS (GENERAL)– NEW DELHI **Respondent**

Appearance:

Present for the Appellant : Shri L.B. Yadav & Ms. Gunjan Tawnar, Advocates

Present for the Respondent: Shri Manish Kumar Chawda, Authorized Representative

WITH

CUSTOMS APPEAL NO. 51167 OF 2015

(Arising out of Order-in-Original No. No.04/KAM/COMMR/2015 dated 16.1.2015 passed by the Commissioner of Customs, New Custom House, New Delhi-110037)

AJAY KAUSHAL **Appellant**

Vs.

COMMISSIONER OF CUSTOMS (GENERAL)– NEW DELHI **Respondent**

Appearance:

Present for the Appellant : None

Present for the Respondent: Shri Manish Kumar Chawda, Authorized Representative

WITH

CUSTOMS APPEAL NO. 51942 OF 2015

(Arising out of Order-in-Original No. No.04/KAM/COMMR/2015 dated 16.1.2015 passed by the Commissioner of Customs, New Custom House, New Delhi-110037

SANDEEP KUMAR **Appellant**

Vs.

NEW DELHI (PREV.) **Respondent**

Appearance:

Present for the Appellant : Shri Sandeep (In person)

Present for the Respondent: Shri Rajesh Singh, Authorized Representative

WITH

CUSTOMS APPEAL NO. 51943 OF 2015

(Arising out of Order-in-Original No. No.04/KAM/COMMR/2015 dated 16.1.2015 passed by the Commissioner of Customs, New Custom House, New Delhi-110037)

PRADEEP KUMAR **Appellant**

Vs.

NEW DELHI (PREV.) **Respondent**

Appearance:

Present for the Appellant : Shri Sandeep (In person)

Present for the Respondent: Shri Rajesh Singh, Authorized Representative

WITH

CUSTOMS APPEAL NO. 51944 OF 2015

(Arising out of Order-in-Original No. No.04/KAM/COMMR/2015 dated 16.1.2015 passed by the Commissioner of Customs, New Custom House, New Delhi-110037)

BHARAT VIDHURI **Appellant**

Vs.

NEW DELHI (PREV.) **Respondent**

Appearance:

Present for the Appellant : Shri Sandeep (In person)

Present for the Respondent: Shri Rajesh Singh, Authorized Representative

WITH

CUSTOMS APPEAL NO. 52504 OF 2015

(Arising out of Order-in-Original No. No.04/KAM/COMMR/2015 dated 16.1.2015 passed by the Commissioner of Customs, New Custom House, New Delhi-110037)

ROHIT SAKHUJA **Appellant**

Vs.

NEW DELHI (PREV.) **Respondent**

Appearance:

Present for the Appellant : Shri Ashish Batra, Advocate

Present for the Respondent: Shri Girijesh Kumar, Authorized Representative

WITH

CUSTOMS APPEAL NO. 52514 OF 2015

(Arising out of Order-in-Original No. No.04/KAM/COMMR/2015 dated 16.1.2015 passed by the Commissioner of Customs, New Custom House, New Delhi-110037)

KAMAL VIRMANI **Appellant**

Vs.

NEW DELHI (PREV.) **Respondent**

Appearance:

Present for the Appellant : Shri Ashish Batra, Advocate

Present for the Respondent: Shri Munshi Ram Dhania, Authorized Representative

WITH

CUSTOMS APPEAL NO. 52515 OF 2015

(Arising out of Order-in-Original No. No.04/KAM/COMMR/2015 dated 16.1.2015 passed by the Commissioner of Customs, New Custom House, New Delhi-110037)

NARESH KUMAR **Appellant**

Vs.

NEW DELHI (PREV.) **Respondent**

Appearance:

Present for the Appellant : Shri Ashish Batra, Advocate

Present for the Respondent: Shri Munshi Ram Dhania, Authorized Representative

AND

CUSTOMS APPEAL NO. 53516 OF 2015

Arising out of Order-in-Original No. No.04/KAM/COMMR/2015 dated 16.1.2015 passed by the Commissioner of Customs, New Custom House, New Delhi-110037)

AJIT SINGH CHADHA **Appellant**

Vs.

NEW DELHI (PREV.) **Respondent**

Appearance:

Present for the Appellant : None

Present for the Respondent: Shri Munshi Ram Dhania, Authorized Representative

CORAM :

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL) HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING : 09/08/2023 DATE OF DECISION:06.12.2023

FINAL ORDER NO.51610-51620/2023

DR.RACHNA GUPTA

The present order disposes of eleven appeals arising out of the same show cause notice and the same Order-in-Original No.04/KAM/COMMR/2015 dated 16.1.2015.

2. The facts of the case as relevant for the impugned adjudication are as follows:

3. The department got specific intelligence about container no.KKFU7222266 to have contained misdeclared goods. Investigations were initiated by the officers of DRI. On 28.5.2012, it was found that the said container alongwith other containers had moved out from ICD, Tukhlakabad (hereinafter referred to as "TKD"). On verification, investigating team observed that the container was removed on 25.05.2012 without filing any Bill of Entry

but by using manual customs gate pass. On enquiry, it was found that the signatures and stamps on the customs gate pass were forged. The fact was got confirmed by Central Forensic Science Laboratory (CFSL), Chandigarh. All the officers whose names mentioned on the gate pass were examined. They also denied their signatures on the said gate pass and also denied any knowledge about preparation of those gate pass. Other details of customs gate pass i.e. with respect to bill of entry, duty amount, etc. were also found to be incorrect. The CONCOR gate passes were fraudulently obtained based on these forged customs manual gate passes. Statement of Shri R.K.Mahapatra, Junior Executive (Commercial Operations) CONCOR,ICD,TKD, New Delhi was recorded. However, he could not re-collect the names as were mentioned in the Bill of Entry which were shown by the CHA concerned. The statements of concerned transporter, shippinglines and other related persons were also recorded by DRI officers including the statement of the appellant herein, alongwith the statements of Shri Chhutan, driver of truck/trailer No.HR55A-9309 of M/s.Bharat Transport Co. and Shri Laxmi Das, driver of truck/trailer of truck No.HR38K-3455 of M/s.K.T. Transport Co., New Delhi. Pursuant to the said statements, the investigating team reached one godown bearing No.76,50 feet Road, Meera Enclave, Village Ranhola, P.O.Nangloi, New Delhi was found locked on 30.5.2012. Since, the godown was found locked, it was sealed under panchnama. Subsequently, the godown was searched under panchanam dated 31.5.2012 in the presence of panchas, Head Police Constable, PS Ranhola and drivers namely, Shri Laxmi Das, Shri Ghulam Mohiuddin and Shri Chhutan and following items were seized under the provisions of Customs Act, 1962:

Sl No	Item Description	Quantity
1	Sanyo Spilt Air Conditioner (Outer Unit) SAP-C 18 AM.1.5 TON	155
2	Sanyo Spilt Air Conditioner (Outer Unit) SAK-C 18 AM.1.5 TON	155
3	O General Spilt Type (outdoor Unit) AOGR-24-AETH	310
4	O General Spilt Type (Indoor Unit) ASGR-18-AETH	310
5	O General Spilt Type (outdoor Unit) AOGR-24-AETH	75
6	O General Spilt Type (Indoor Unit) ASGA-18-AETH	75

A broken bottle-seal and sticker was found affixed on the goods. The drivers in whose presence the godown was searched acknowledged that the goods were delivered by them from ICD, TKD. They only informed that in addition to the aforesaid air conditioners several gas cylinders were also brought to the said godown.

4. Two more godowns at (a) A-59, Adhyakpak Nagar, Najafgarh Road, Nangloi, Delhi-41 belonging to late Shri Satprakash r/o Trinagar, Delhi; and (b) J-118, Adhyakpak Nagar,P.O. Nangloi, New Delhi-41 belonging to Shri Satyanarayan Mittal were also searched on 31.5.2012 and were sealed under respective panchnama. On 31.05.2012 itself, the Commissioner of Customs, ICD,TKD informed DRI that one Shri Ajit Singh Chadha is the master mind in the import of goods which got cleared based on forged manual gate passes and that his statement has also been recorded. DRI also examined him on 31.5.2012, 01.06.2012 and on 25.07.2012. He admitted for importing air conditioners and LED TVs. Since 2006 in name of the firms which got opened in the name of his relative, (i.e. M/s. Star Aircon and M/s.M.C.Overseas). Mr. Manu, Mr. Naresh Kumar respectively with himself and Mr.Rohit Sakuja as partners. His premises also got searched. From the total searches conducted following goods categorized as below were found to be illegally imported.:

Category/type of goods	Description and other details of the goods in each category

A. Goods fraudulently removed from ICD, TKD in the aforesaid eight containers	1. 6382 pcs. of imported R-22 gas cylinders of 13.6 Kgs each (import „restricted" in the FTP), seized a gowdon in lane adjacent to Dr.Lakra"s clinic, Village Ranhola, Nangloi and later shifted to CWC godown Saibahad.
	2. 50 pcs of imported R-22 gas cylinders of 13.6 Kgs each, detained at godown premises of Shri Satish Kuma Chadha, Delhi under panchnama dt.12.06.2012. 3. 16 pcs of imported R-22 gas cylinders of 13.6 Kgs each, detained /seized at godown premises of Suman Enterprises, C-3/5 and 4/5, Ground Floor, Lal Quarters Krishna Nagar, Delhi-51 under panchnama dt.10.06.2012 4. 62,40,000 cigarettes of Indonesian origin (withou statutory health warning) detained/seized at godown A-29 Ground Floor, Krishan Vihar, Delhi-86. 5. 1055 units of air conditioners of different brands seized at 7, Meera Enclaive, Nangloi Godown.
B. Imported goods found to be without labeling requirements/MRP stickers. Apparently illegally imported/smuggled and apparently some of the fraudulently removed goods in the aforesaid eight containers	1. The following goods detained/seized at godown at A-59, Adhyapak Nagar, Nangloi: (a) 323 units of „O" General brand window air conditioners (b) 745 outdoor units of „O" general brand air conditioners of different models, (c) 718 indoor units of „O" general brand air conditioners of different models (d) 63 outdoor units of Sanyo brand air conditioners, and (e) 72 indoor units of Sanyo brand air conditioners 2. The following goods detained/seized at godown a 5575/75, Lower & Upper Ground, Reghar Pura, Karo Bagh, New Delhi: (a) 57 indoor/outdoor units of split air conditioners o different models of „O" general Brand (b) 16 indoor/outdoor units of split air conditioners o different models of Sanyo brand (c) 13 pcs of TVs of different models of Sony brand 2 pcs of TVs of Samsung brand 3. The following goods detained/seized at godown at WZ 33A, Village Dasghara, P.O. Pusa, New Delhi: 183 pcs of window air conditioners of „O" General Brand (b) 126 indoor/outdoor units of split air conditioners o different models of „O" general Brand 396 pcs of Oil Heaters 4. The following goods detained/seized at premises o Shri Ajay Kaushal, E-189, Shastri Nagar, New Delhi:

	8 pcs of window air conditioners of „O‟ General Brand 8 indoor/outdoor units of split air
	conditioners of different models of „O‟ General Brand. 5. 17 sets of (AOGR18AETH/ASGA18AET) of air conditioners detained/seized at the J-118, Adhyapak Nagar, Nanloi godown.

5. After further investigations about eight containers as got fraudulently removed without any bills of entry and the forensic investigation of three face book accounts of Mr. Rohit Sakuja, the Department formed opinion that Shri Ajit Singh Chadha and Shri Rohit Sakuja have hatched a conspiracy to remove eight containers clandestinely in a systematic pre-planned manner from ICD, TKD on the strength of forged Customs documents. In addition they also removed contraband goods, but also removed the goods the import of which is restricted under Foreign Trade Policy, in total disregard to national exchequer, national environment as well as the economy. Resultantly show cause notice dated 28.5.2013 was served upon the appellants alleging that the impugned imported goods as tabled above having collective assessable value of Rs.7,71,56,730 and air conditioners having collective assessable of value Rs.2,73,144/- inviting total duty amounting to Rs.2,25,36,349/- were illegally imported and fraudulently cleared by the appellants in eight containers. Hence they were proposed to be confiscated. The said amount of duty was proposed to be recovered:

Penal action in terms of sections 112, 114A and 114AA of Customs Act,1962 for master minding the entire operations of fraudulent removal of goods on the strength of forged documents, evasion of duty, illegal import of restricted goods without valid import licence ,

The total duty amounting to Rs.61,48,024/- alongwith interest, in respect of second category of goods in above table has also to be recovered.

The said proposals have been confirmed vide order under challenge. Aggrieved with the said order, the appellants are before this Tribunal.

6. We have heard Shri Shri L.B.Yadav & Ms.Gunjan Tanwar, Sh.Ashish Batra, Advocates on behalf of the the Appellants and Shri Manish Kumar Chawda, Sh.Rajesh Singh, Sh.Girijesh Kumar, Sh.Munshi Ram Dhania, Authorized Representatives for the Department.

7. Ld.Counsel for Bharat Vidhuri, appellant has mentioned that he is held liable for penalty under section 112 & 114AA of the Customs Act, 1962 merely on the basis of some un- corroborated statement made by one Shri Sushil Kumar, a daily wager who allegedly stated that he has handed over some gate pass book having no.0911-9050 to a person whose brother has asked Mr.Vidhuri to transport the goods for the importers. But the same is not justified, legal and fair especially when Sushil Kumar himself has retracted his statement and has become hostile.

8. Ld. Counsel has relied upon the decision of the Hon‟ble Supreme Court in the matter of **M/s.Akbar Badruddin Jiwani vs. Collector-1990 (47) ELT 161 (SC)** wherein the

Hon‟ble Apex Court has observed that "the discretion to impose penalty must be exercised judiciously. A penalty will ordinarily be imposed in case the party acts deliberately in defiance of law, or is guilty of contumacious or dishonest conduct or has acted in conscious disregard of its application but not in case where there is technical or venial breach of provision of Act or where the breach follows from a bonafide failure that the offender is not liable to act in prescribed by Statute.

9. The decision in the matter of **S.Anwanullah vs.Collector of Customs, Madras-1987 (27) ELT 734**, is also relied upon wherein it has been held that "suspicion however grave it might, cannot take place of proof" has been relied.

10. It is submitted on behalf of Shri Sandeep Kumar and Shri Pradeep Kumar that the whole allegations leveled upon the appellant for using the services of his brothers in facilitating the clearance of the goods by abetment in forgery of manual Custom Gate passes by being hand-in-glove with the main accused, Shri Rohit Sakhuja and Shri Ajit Singh Chadha by helping them with the illegal clearance of goods on forged documents, are wrong on face of it and are contrary to the facts and evidence placed on record. It is mentioned that the role of the Appellant admittedly starts when the importer has obtained the valid computerized gate pass from the CONCOR, and thereafter the Appellant has asked the Transporter Mr. Bharat Vidhuri to help the importer to get the imported goods transported to their warehouses as per their wishes. When the goods have been transported on the basis of the gate pass which appeared to have been issued by proper authority then no wrong can be attributed to the Appellant for illegally removing the goods of the importer in contravention to the laws laid down under Customs Act, 1962. Moreover, no one either being witness or being otherwise related in the present case had named the Appellant.

11. That the whole story of the respondent to connect the Appellant with the alleged clandestine removal of goods from ICD, TKD by procuring illegal and forged gate passé is based upon the Statement given by one daily wager, Sushil Kumar as was under Section 108 of the Customs Act, 1962. He on face of it appears to be a planted witness by DRI to make a wrong case against the Appellant.

12. None of the observations reflects that the answering appellants have committed forgery due to which the alleged consignment have been purportedly to be clandestinely and illegally removed from the jurisdiction of the ICD TKD resulting in revenue loss to the Department.

13. It is submitted on behalf of Shri Pradeep Kumar that the allegation leveled against the Appellant for helping his brother in clearance of the goods by abetment in forgery of manual Customs Gate passes and by being hand in glove with the main accused, Shri Rohit Sakhuja and Ajit Singh Chadha are absolutely wrong and contrary to the facts and evidence on record. Thus Pradeep Kumar is wrongly held liable for any penal action under section 112 and 114AA of the Customs Act, 1962.

14. It is mentioned on behalf of Shri Kamal Virmani that the investigation agency concluded that Rohit Sakhuja and Ajit Singh Chadha to be the masterminds and the defacto importers. That they with the aid of others acquired possession of eight containers which were allegedly cleared from the ICD port without filing Bill of Entry. Furthermore, other goods mentioned in Category-B which pre-dominantly contained air-conditioners were assumed to have been illegally imported in past also, in the same manner. In his statemen, though he has admitted the fact that he was involved in sale of air-conditioners procured from Rohit Sakhuja who was involved in import of air-conditioners through his various firms. Thus, sale of those air-conditioners by the Appellant is neither illegal nor in contravention with any of the provisions of the Customs Act. That it is well settled principle of law, that penalties for infraction of law cannot be imposed based upon assumptions and presumptions. In the instant case, the department has failed to bring on record any cogent evidence to suggest the appellant‟s involvement in the alleged act of smuggling.

15. While submitting on behalf of Satish Kumar Chadha, Dillip Singh and Vijay Kumar Sharma, it is mentioned that Mr.Satish Kumar Chadha and Mr. Dilip Singh Jain are small shop keepers of AC parts. Mr.Satish Kumar Chadha had purchased, kept and sold sold 40 cylinders of R-22 (Chlorodifluoromethane), and similarly Mr.Dilip Singh Jain had purchased, kept and sold 160 cylinders from Shri Vijay Kumar Sharma. Said Shri Vijay Kumar Sharma had purchased the said gas from Shri Rohit Sakhuja. Shri Vijay Kumar Sharma apart from purchasing, keeping and selling of R-22 gas was also engaged in keeping and dispatching the cigarettes through his godowns. He had purchased, kept and sold 600 cylinders of R-22 gas and kept and dispatched 1100 cartons of cigarettes so imported by Shri Rohit Sakhuja.

16. It is further mentioned that penalty under section 112 of the Act was leviable upon the appellants only when they had abetted or they had reason to believe that the goods were liable to confiscation under section 111. But these appellants had no knowledge at all about the smuggled nature of the goods. They had purchased the goods in good faith and in bonafide manner. Even Vijay Kumar Sharma who had sold the goods to Satish Kumar Chadha and Dillip Singh Jain had no knowledge about the instant act of alleged smuggling. In this connection, Shri Vijay Kumar Sharma in his statement dated 11.07.2012 has stated that he had purchased the goods from one Shri Rohit Sakhuja (a person who is main Noticee in the instant matter). Moreover a number of statements of number of persons were recorded but none of them has stated that these Appellants had any knowledge of the alleged illicit act or that they were complicit with that.

17. Ld. Counsels relied upon the decision in the matter of **Commissioner of Customs, Amritsar vs. Kamal Kapoor- 2007 (216) ELT 21 (P&H)**,where Hon‟ble High Court of Punjab and Haryana has held that penal action is not permissible under section 112 in absence of *mens rea*. Purchaser of imported goods, having no knowledge of any violation, could not be subjected to penalty.

18. With respect to penalty as has been imposed on these appellants under section 114AA of the Act, Ld. Counsel has relied upon 27th Committee on Finance (2005-06) a report of the standing committee which explains the purpose for which section 114AA has been inserted in the Customs Act. It is mentioned that the purpose is to punish only those people who avail export benefits without exporting anything. It is impressed upon that section 114AA has been introduced to counter serious frauds of export, not every kind of violations under Customs Act.

19. Decision of Tribunal in the matter of **Commissioner of Customs, Sea, Chennai-II vs. Sri Krishana Sounds and Lightings-2019 (370) ELT 594 (Tri.-Chennai)** is relied wherein, it is held that penalty under section 114AA ibid not imposable where goods were actually imported and it was not a case of mere paper transaction or fraudulent export. In present case also goods have actually been imported.

20. Finally, it is submitted that penalty is not leviable on the basis of mere suspicion. It is settled proposition of law that suspicion, however grave, cannot take place of an evidence. In the matter of **State of Rajasthan Vs. Basant Agrotech (I) Ltd.-2014 (302) ELT 3 (SC)** Hon‟ble Supreme Court has held that „equitable considerations, presumptions and assumptions have no role to play in fiscal statute. Court cannot apply anything which is expressed.‟ Also Hon‟ble Tribunal in the matter of **DP Industries vs. CCE-2007 (218) ELT 242 (Tri.-Del.)** has held that „suspicion, however, strong cannot take the place of evidence and clandestine clearance has to be established beyond reasonable doubt and not on the basis of preponderance of probability‟.

21. It is submitted on behalf of the appellants that the entire case has been made out solely on the basis of the statements as were recorded under section 108 of the Customs Act, 1962. It is mentioned on behalf of the appellants that they have found guilty and are being penalized

under the Customs Act merely on the basis of conjectures and surmises and that there is no material and cogent evidence. It is mentioned that the goods have been cleared on the basis of documents handed over by CHA of the importer entire case is concocted rather main link in the investigation is missing, the benefit of doubt must be given to the appellant. The order under challenge is liable to be set aside.

22. To rebut the above submissions, ld.DR has mentioned that the investigations in the present case revealed that Shri Ajit Singh Chadha and Shri Rohit Sakhuja had hatched a conspiracy to smuggle ACs, gas cylinders, cigarettes etc.with the help of Shri Pradeep Kumar, Shri Sandeep Kumar and Shri Raju Kumar. With the help, they procured gate passes from CONCOR and got the goods cleared. The goods were loaded on trucks of Bharat Transport owned by Shri Bharat Vidhuri. The same were offloaded at godown of Shri Ajit Singh Chadha in the presence of Shri Ajit Singh Chadha and Shri Sanjay Kumar. The goods were destuffed with the help of labour supplied by the labour contractor, Shri Vinod Kumar. Recovery of broken seals and sticker of one of the said eight containers also confirms the alleged act. The alleged acts have been admitted in corroboration to each other by different persons in their statements under section 108 of the Customs Act, 1962.

23. When the whole conspiracy was unearthed by the DRI, then Shri Ajit Singh Chadha and Shri Rohit Sakhuja tried to manipulate the witnesses. They made false statement under section 108 of the Customs Act, 1962. Their names figured out as the main persons from the entire sequence of events starting from the booking, purchase, import and clandestine removal of goods to the subsequent sale in India. These containers were initially imported in the name of the firms namely M/s. M.C. Overseas and M/s.Star Aircon. Shri Ajit Singh Chadha was identified by all the drivers and by Shri Sanjay Kumar as the person who was present at the time of destuffing of the containers. Both Ajit Singh Chadha and Rohit Sakhuja disappeared from Delhi as soon as the conspiracy was unearthed. Their whereabouts were also not known to their relatives. Thus their conduct is sufficient evidence proving their involvement in the case of alleged smuggling.

24. It is mentioned that there is sufficient evidence to show that Shri Bharat Vidhuri had provided transportation for the eight containers after receiving the gate passes from Sandeep Kumar. From the records of the case it is evident that he with the help of Shri Karandeep Rana, Mr.Bharat Vidhuri tried to mislead the investigation by stating that the gate passes were handed over to Karandeep by Shri Ravi a non-existing entity. Further, it was found that no records were maintained for the transportation of these containers. With respect to Sandeep Kumar it has come on record that he had given these gate passes to Shri Raju for loading the goods on the containers and get them released from the Customs. Both Shri Pradeep Kumar and Shri Raju who stated that it was Sandeep Kumar who advised them to destroy cell phone and disappear from Delhi for some days. He himself absconded to Surajkkund with Rohit Sakhuja. All these facts were admitted by them in their statements and the said statements were never retracted. Shri Sandeep Kumar actively associated in the clandestine removal of the eight containers from ICD,TKD. Both the brothers were working as CHAs for Shri Ajit Chadha‟s companies. M/s.M.C.Overseas and M/s. Star Aircon and were well versed with the process of clearance of goods from ICD, TKD and with the staff working there. Shri Pradeep Kumar and Shri Sandeep Kumar have not retracted their statements till date. Shri Kamal Virmani is mentioned to have admitted that he was dealing in the sale of imported ACs. He was aware of the fact that Shri Ajit Singh Chadha had imported restricted gases like R-22 several times. He confirmed that the said R-22 gas was sold through Shri Vijay Sharma. The fact of selling R-22 gas was admitted by Shri Vijay Sharma also.

25. Shri Naresh Kumar Sharma, had an active role in the transactions of cigarettes and it was established from the statement of Shri Umesh alias Renku in which he inter alia stated that he had delivered 120-122 cartons of cigarettes from B-1/36, Budh Vihar, Phase-I godown

to a transport company during 30.05.2012 to 01.06.2012. Shri Naresh Kumar was present at the said transport company and he himself got the biliti (bill) prepared for the same. DRI recovered 316 R-22 gas cylinders from the godown of Shri Dilip Singh Jain. As per version the same were purchased in cash from Shri Vijay Sharma without any legal document. He had bought 160 cylinders of R-22 gas from Vijay Sharma. Import of R-22 is restricted as the R-22 is also an Ozone depleting gas. Since license for the same is not available, it becomes abundantly clear that the said gas had been illegally imported.

26. The decision of Hon"ble Madras High Court in the matter of **M/s.ALM Enterprises vs. Commissioner of Customs (Imports)** is also relied upon, wherein it was held that

"39. In the instant case, it is recorded in para 49 of the Order in Original that all cosmetic products including air fresheners and other toiletries which are imported for sale in India need to be registered with the licensing authority as defined under Rule 21 of Drugs and Cosmetics Rules 1945. In the instant case, the goods are found imported without obtaining the registration certificate from the Central Drug Standard Control Organization and therefore, it is found that the importer did not possess necessary permission/registration certificate from the competent authority under the Drugs and Cosmetics Rules, 1945. In other words, goods which are liable to be imported subject to fulfillment of certain conditions, when so imported without fulfilling or satisfying such conditions amount to importing prohibited goods in terms of Section 11 read with Section 125 of the Act. Therefore, we find no merit in the contention canvassed that such of those clandestinely imported cosmetics and toiletries goods should also be permitted to be redeemed by the Commissioner of Customs and failure to do so vitiates the order is without any merit or substance. The Commissioner of Customs has no power to waive the conditions subject to which such cosmetic products can be imported as he is not the Competent Authority but someone else. Hence, the exercise of discretion has been properly carried out by the Commissioner of Customs."

27. Shri Dilip Jain who is dealing in ACs and parts thereof, is aware of the fact and therefore, did not insist for bills from Shri Vijay Kumar Sharma. Shri Satish Kumar Chadha who is dealing in ACs and parts thereof, was also aware of the fact and therefore, did not insist on bills from Shri Vijay Kumar Sharma. The statement of different persons including that of Satish Sharma has corroborated acknowledgement of fact that Satish Kumar was dealing with the sale of R-22 gas which was illegally imported by Shri Rohit Sakhuja. 600 pcs of R-22 gas were sent to him by Rohit Sakhuja from Nangloi godown to his Budh Vihar godown. He was the person who was dispatching and storing the cigarettes illegally imported by Shri Rohit Sakhua and Ajit Chadha.

28. Ld.DR has relied upon the decision of Hon"ble Supreme Court in the case of **Naresh J.Sukhawani vs. Union of India reported in 1996 (83) ELT 258 (SC)** wherein it was held that it must be remembered that the statement made before the Customs officials is not a statement recorded under section 161 of the Criminal Procedure Code, 1973. Therefore it is a material piece of evidence collected by Customs officials under section 108 of the Customs Act.

29. Finally, it is impressed upon that present is the case where fraud has been committed to smuggle restricted goods. Here the liability has rightly been confirmed and also there is no infirmity in imposition of penalty on all the appellants. The Apex Court"s decision in the matter of M/s.Munjal Showa Ltd. vs. Commissisoner-2022 (382) ELT 145 (SC) is relied upon wherein it was held that

"9. In that views of the matter and on the principle that fraud vitiates everything and such forged/fake DEPB licences/scrips are void ab initio, it cannot be said that the Department acted illegally in invoking the extended period of limitation. In the facts and circumstances, the Department was absolutely justified in invoking the extended period of limitation."

With these submissions, all the appeals prayed to be dismissed.

30. Having heard rival contentions of the appellants, and after perusing the entire record of the present and the connected appeals, we observe and hold as follows:-

31. That the present matter is the second round of litigation.

Common Order-in-Original No04/KAM/COMMR/2015 dated 16.1.2015 was also earlier adjudicated fide Final Order No.55617-56636 of 2017-CU (DB) dated 19.9.2017 However,
the said order has been set aside by Hon"ble Delhi High Court vide its order dated 23.07.2018 holding that

"There is no gainsaying that in an appeal the person aggrieved has right to address the facts in law. That CESTAT was presented with the arguments on merits undisputed given the tenor of its order, yet it is an unreasoned order as regards the conclusions and why it chose to dismiss the appeals. The impugned orders are accordingly set aside. The matter is remitted for fresh hearing and consideration by the CESTAT which shall address the arguments of all the appellants on their merits and pass a speaking and reasoned order dealing with all contentions."

32. Pursuant to the said remand order, sufficient opportunity of hearing was given to the appellants and the matter was heard regularly and continuously by the Tribunal on several dates. The allegation in the show cause notice has been confirmed by the Original adjudicating authority as follows:

(1) Shri Ajit Singh Chadha and Shri Rohit Sakhuja had conspired to remove eight containers clandestinely from the ICD, TKD by forging customs document i.e. Customs manual gate pass. The goods in the container included goods import whereof was restricted under Foreign Trade Policy.

(2) Seven of the eight containers were originally booked in the name of M/s.Star Aircon, in which both of them had substantial financial stake and were the de facto owners.

(3) All the drivers who transported the said eight containers were originally identified by Shri Ajit Singh Chadha who himself was present during the relevant time and on whose instructions/supervisions goods were being de-stuffed an stored/shifted.

(4) Shri Sanjay Kumar, employee of Shri Ajit Singh Chadha and Shri Rohit Sakhuja admitted that he was present at the Ranhola, Nangloi godown along with Shri Ajit Singh Chadha when goods from the said eight containers were being de-stuffed there. It is also on record that both them tried to avoid investigation they lied about their whereabouts even associates, employees and relatives feigned ignorance regarding whereabouts. They remained absconded for almost two months with an intention to avoid investigation. They also alleged that they obtained fake sim cards/mobile connection in the name of their employees (Shri Arun Lal and Suraj) and he also obtained Mobile connection on the basis of ID proof of (Pritam Singh). It has been found that forged/bogus photo identity card was submitted to the shipping line for obtaining the delivery orders and forged/bogus indemnity bonds were executed had been held forged and bogus.

(5) Penalties on all appellants, who had been held involved in the alleged clandestine removal of the goods from the Customs area on the basis of forged documents and forged illegal import of prohibited goods had been imported under sections 112 and 114AA of the Customs Act, 1962.

33. From the facts of the case, we observe that the department got initially a specific intelligence that container No.KKFU7222266 was contained mis-declared goods. The said container found to had been moved from ICD, TKD without any Bill of Entry by using Customs manual gate pass. While investigating about the said illegal removal of the said container from the Customs area, it was found that the seven other containers had also been

cleared in the same manner, however, in the name of different consignees by using the same modus operandi. The details are as follows:

Bill of Lading No. & Date	Container No.	Customs Manual Gate Pass No.& Date	Concor Gate Pass No. & Date
KKLUSIN100815 dt.06.05.12	KKFU7222266	9001/25.05.12	GPCC525739 Dt.25.05.12
KKLUSIN100369 dt.05.05.12	KKFU7095562	9002/25.05.12	GPCC525730 Dt.25.05.12
KKLUSIN100169 dt.05.05.12	KKFU7397095 KKFU7655332	9003/25.05.12	GPCC525735 and GPCC525736 both dt.25.05.12
KKLUSIN100136 dt.05.05.12	CAIU8452159 KKFU7692995	9010/25.05.12	GPCC525666 and GPCC525667 both dt.25.05.12
KKLUSIN100135 dt.05.05.12	KKFU7201113 KLFU1957220	9015/25.05.12	GPCC525668 and GPCC525669 both dt.25.05.12

Variation of these Bills of Entry revealed that they did not pertain to ICD, TKD but to ICD Patparganj and goods of BOE 6904765 dated 23..05.2012 pertained to Chennai port.

34. The officers whose names, signatures and stamp were found appended on the Customs manual gate pass denied their signatures and stamp affixed alleged to be fake. Deposition of the said officers got confirmed from the report of Forensic Science Laboratory, Chandigarh on forensic examination vide their reported dated 1.10.2012. Nothing has been produced on record by any of the appellant to falsify the said report. We hold that there is no illegality in the order under challenge when these Customs manual gate passes are held to be forged documents obtained upon bogus identity. However, CONCOR issued these gate passes seeing the signatures and stamps on manual customs gate passes out of charge basis.

35. For the allegations of smuggling of air conditioners R-22 gas cylinders which are restricted goods, gas being ozone depleting, cigarettes etc. We observe that several statements of concerned people have been recorded including Kranjeet, drivers, shippingline, traders, CHA and all concerned were proceeded by the DRI investigating team:

Shri Bharat Vidhuri, Proprietor of M/s.Bharat Transport admitted that he arranged transportation of eight containers out of ICD TKD on the instructions of his client Shri Sandeep Kumar and his company Supervisor Karandeep Singh and that all of them got destuffed at Nangloi. The information given to him by the respective drivers. Karandeep corroborated the said statement except about the name of the person who handed over the manual customs gate passes. As per Vidhuri, it was Ravi but as per Karandeep it was Raju. But corroboratively it is mentioned that the containers were taken out from ICD TKD on the basis of manual gate passes. As already observed that forensic examination of these manual gate passes has proved that those were bear forged and fake signatures and stamps. Drivers Chutan and Laxmi Das corroborated that containers got destuffed at godown in Nangloi. Based on these statements, godown at Nangloi got searched. Goods seized and godowns sealed vide respective panchnama dated 30.05.2012.

36. DRI further received the information from the office of Commissioner of Customs, ICD,TKD. Om 31.05.2012 that statement of one of the mastermind, Ajit Singh Chadha has been recorded. He admitted that he alongwith Mr.Rohit Sakhuja, both have trading business

in Karol Bagh, that they have been importing ACs. LCD etc. in the name of two companies namely M/s.M.C.Overseas and M/s. Star Aircon, both being jointly owned by said Ajit Singh Chadha and Rohit Sakhuja. Shri Sandeep Kumar S/o of Shri Rampal Singh acknowledged to be hand in glove with Shri Rohit Sakhuja in the fraudulent clearances. He admitted to have destroyed his SIM card and mobile thereby admitted to have destroyed crucial evidence. He admitted to be in regular touch with Shri Rohit Sakhuja prior to fraudulent clearance of the goods. We observe that Shri Sandeep Kumar remained absconded with Shri Rohit Sakhuja since detection of the case till his appearance before DRI officers on 03.06.2012. He also stated that his relatives Shri Pradeep Kumar and Shri Raju Kumar were deeply involved in the conspiracy and forging Customs gate passes leading to the fraudulent removal of goods.

37. From the statements of Shri Suraj Kumar and Anil Sakhuja were relatives of Ajit Singh Chadha and Rohit Sakhuja they were found helping Shri Ajit Singh Chadha in fraudulently obtaining SIM cards in the name of Shri Pritam Singh‟s using fake photographs and photo ID. The said SIM cards were used to facilitate and guide the entire operation of clandestine removal of the said eight containers.

38. Shri Sushil Sharma from the department acknowledged to have abetted and facilitated the fraud by providing the said gate pass booklet.

39. Shri Manu Chopra and Shri Naresh Kumar Sharma are found facilitating in the opening of front companies, in the name of M/s.M.C.Overseas and M/s. Star Aircon which were used by Rohit Sakhuja and Shri Ajit Singh Chadha. They were involved in misdeclaration and undervaluation.

40. Shri Jagjit Singh alias Bunty was actively involved in the sale of the air conditioners which were illegally imported was also proposed for penal action under section 112 112 of Customs Act, 1962.

41. Shri Arjun Lal and Sanjay Kumar admitted to help Shri Rohit Sakhuja and Shri Ajit Singh Chadha in the clearance and disposal of the fraudulently removed goods. Shri Arjun Lal admitted about procuring different mobile SIM cards in his own name and handing over to Bunty (Jagjit Singh) for taking direction about destuffing imported goods along with Sanjay Kumar in the godown.

42. Shri Kamal Virmani, Prorietor of M/s.Gaurav Enterprises and Vijay Kumar Sharma, Proprietor of M/s.Vijay Trading Co. admitted for facilitated in the storage, distribution and sale of illegally imported R-22 cylinders and air conditioners.

43. Shri S.K.Singh acknowledged about using mobile number was obtained fraudulently by Shri Ajit Singh Chadha in the name of Shri Pritam Singh to facilitate clandestine removal of the goods.

44. Shri R.K.Mahapatra, Junior Executive, CONCOR, ICD,TKD and Shri S.K.Dubey, Senior Executive (Commercial & Operation), CONCOR, ICD, TKD, New Delhi had issued the CONCOR „job orders‟ without verifying the particulars of the bills of entry, most importantly the port to which the bills of entry pertained to. Though he pleaded it to be bonafide mistake made on the basis of Customs gate passes shown

45. K Line Singapore Pte Ltd. is observed to have colluded with shipper and abetting the impugned import of goods.

46. Shri Vinod Kumar, Labour Contractor, admitted that he provided labourers for unloading of said eight containers at Nangloi at instance of Mr.Rohit Sakhuja as he was doing business of loadinig and unloading for him for last 10-12 years. From his statement, it is clear that he had knowledge that these containers had air conditioners and R-22 gas cylinders which were destuffed by his labour at Nangloi godowns. Rohit and Ajit had godown at Todapur, New Delhi also.

47. We also observe that several summons were issued to Shri Ajit Singh and Rohit Sakhuja but they did not appear in response to the same. On account of their non-compliance

of summons issued under section 108 of Customs Act, 1962, complaints for offences punishable under section 174 and 175 of Indian Penal Code were filed in the Court of ACMM, Patiala House, New Delhi on 17.07.12. Cognizance was taken in these cases and the Hon"ble Court issued notices to Shri Ajit Singh Chadha and Shri Rohit Sakhuja instructing them to appear before the Court on
04.08.12. In the mean time, the said two persons filed Writ Petitions (Cr.) No.94/2012 & 93/2012 in the Hon"ble Supreme Court of India inter alia seeking relief in the form of presence of their advocate at a visible distance during the recording of their statement before the DRI officer. The said Writ Petitions were allowed by the Hon"ble Supreme Court on 14.08.12. However, Shri Ajit Singh Chadha appeared before DRI officer on 25.07.2012 and his statement under section 108 of Customs Act, 1962 was recorded wherein he reiterated his statement dated 31.05.2012/01.06.2012 and inter-alia further stated that his father purchased a shop in Karol Bagh and asked to work there; that in this shop, he started trading of electronic goods like cameras, i-pods, speakers etc.; that during this period, he came in contact with Shri Rohit Sakhuja who offered to do import business which he and Shri Rohit Sakhuja started in 2007. Thus it is clear that both of them did not cooperate the investigating team.

48. It is also apparent on record that they generally appeared late/without their advocate and evaded replies to queries/gave contradictory and incorrect replies. When confronted with key evidence/questioned, the two aforesaid persons often took recourse to state that they were tried or not feeling well and would not be able to record their statements any further. They deliberately avoided appearing together before DRI officers in response to summons. Shri Rohit Sakhuja requested for release of air conditioners, LED, oil heaters, etc. detained/seized by DRI at their various godowns. Vide the said letter, Shri Rohit Sakhuja represented that Air Conditioners, LEDs and oil heaters were legally imported by him from time to time.

49. Vide the said letter, Shri Rohit Sakhuja also submitted that a chart purportedly showing correlation of detained/seized goods with bills of entry pertaining to M/s.Star Aircon and M/s.M.C.Overseas. Scrutiny of the said chart reveals that in most of the cases, the model nos.declared in the invoices and the corresponding bills of entry are incomplete and hence cannot be correlated with the goods detained/seized in the godowns. For example, in bill of entry no.6771348 dated 09.05.2012 and its invoice, the model no. of split O General air conditioner has been declared as "AOG18A". In the related packing list, the outdoor and indoor unit model nos. have been mentioned as "AOGR18AETH/ASGA18AET and AOGR18AAT/ASGA18ABCW detained/seized at the various godowns. Hence, it appears that in the bills of entry of M/s.M.C.Overseas and M/s.Star Aircon the complete model nos. of the air conditioners were not declared presumably to undervalue/misdeclare the goods. Hence, these cannot be correlated with the goods detained/seized at the various godowns wherein the complete model nos. have been found to be mentioned. Moreover, as already discussed above, in detail, majority of the detained/seized air conditioners were found without mandatory labeling requirements in respect of consignments imported through the legal Customs channels. Hence, such goods cannot be correlated with the bills of entry submitted by Shri Rohit Sakhuja and appear to have been removed in contravention of the legal provisions in this regard.

50. We do not find any evidence from both of them to falsify such deposition rather there is evidence on record that Ajit Singh Chadha had taken two godowns on rent from Shri Shamsher Singh though without any rent agreement since not only the goods but procured seal/sticker of the container, torn pieces of cardboard packing material also got recovered from the godown that there is no infirmity when allegation of clandestine removal of the container de-stuffing of goods in their godown have been confirmed.

51. We also observe that the original adjudicating authority in para 48 of the order under challenge has categorized the goods under two category has meticulously quantity as well as nature of the goods alongwith specific godown from where those goods were recovered. We do not find any evidence in the form of documents titled with either Shri Ajit Singh Chadha and Rohit Sakhuja with respect to the said goods. The goods included prohibited

goods i.e. R-22 cylinders which were concealed in the air conditioners and the goods were imported in the name of M/s. M.C.Overseas and Star Aircon. Proprietors thereof were Shri Manu and Naresh in their statement have denied any of their role in the impugned import and in subsequent clearance including alleged clandestine removal of goods of eight containers from ICD, TKD. They rather deposed that both firms were got opened by Shri Rohit Sakhuja for his own use. He was handed over all the affairs of the firms. Said Shri Rohit Sakhuja as well as Shri Ajit Singh Chadha in their statements, had admitted that they were active partner of the aforesaid two firms. They only used to manage aforesaid two firms. The admission has never been retracted by any of them. In view of section 50 of Indian Evidence Act, the admissions need not to be proved. Hence the said statements in the form of admission/confession in our opinion is more sufficient to hold that the findings arrive at against Rohit Sakuja and Ajit Chadha have no legality. Otherwise also as observed above, there is corroborative evidence on record to hold that the correctness of finding in the order under challenge.

52. We further observe there is no denial by the appellant to following facts also:

(1) Shri Rohit Sakhuja and Shri Ajit Chadha were engaged in the business of import and sale of air conditioners, LED and sale of refrigerators under the name and style of M/s.Saitel, Karol Bagh, New Delhi.

(2) In the above investigation, DRI recorded statement of 120 persons and collected voluminous documents.

(3) Five godowns got searched and examined by the DRI on 30.05.2012, 31.05.2012 and 7.6.2012. Searches lead to the recovery of such number of cylinders of R-22 gas, cigarettes and air-conditioners as has been tabled meticulously by the adjudicating authority below.

(4) Live consignment of Rohit Sakhuja as were examined by ICD, Bhalbhgarh and cleared on provisional basis were also found to havfe air conditioners and TVs imported in the name of M/s. M.C.Overseas and Star Aircon with Shri Manu Chopra as representative proprietor. As observed above, both of them (Rohit Sakuja and Ajit Chadha) acknowledged him to be dummy proprietor of the company opened by them for illegally importing and clandestinely removing the goods from Customs area on the basis of forged customs gate passes.

53. All the above observations about evidence collected these are sufficient to hold that there is meticulous investigation wherein voluminous documents obtained which corroborated testimony recorded during investigation proving the correctness of adjudication. Thus, we hold that we have no different opinion than the finding of original adjudicating authority while confirming allegation leveled against them and confirming proportionate liability.

54. Coming to the imposition of penalty, we observe that penalties have been imposed on the appellants under section 112, and 114AA of Customs Act, 1962:

Sl. No.	Appellant	Penalty Rs.
(a)	Shri Ajit Singh Chadha	40,00,000/- (Rupees forty lakhs only)
(b)	Shri Rohit Sakhuja	40,00,000/- (Rupees forty lakhs only
(c)	Shri Ajit Singh Chadha and Shri Rohit Sakhuja	2,86,84,373/- (Rupees two crores eighty six lakhs eighty four thousand three hundred seventy three only

(d)	Shri Vijay Kumar Sharma	30,00,000/- (Rupees thirty lakhs only
(e)	Shri Kamal Virmani	30,00,000/- (Rupees thirty lakhs only
(f)	Shri Diilip Singh Jain	30,00,000/- (Rupees thirty lakhs only
(g)	Shri Satish Kumar	30,00,000/- (Rupees thirty lakhs only
(h)	Shri Ajay Kaushal	30,00,000/- (Rupees thirty lakhs only
(i)	Shri Bharat Vidhuri	20,00,000/- (Rupees twenty lakhs only
(j)	Shri Sandeep Kumar	30,00,000/- (Rupees thirty lakhs only
(k)	Shri Pradeep Kumar	30,00,000/- (Rupees thirty lakhs only
(l)	Shri Naresh Kumar	30,00,000/- (Rupees thirty lakhs only

55. Penalties under section 112 is for commission or omission which may result in improper importation of goods and penalty under section 114AA is to penalize persons who knowingly and intentionally make or use or whatsoever means, any declaration, statement or documents which is false or incorrect any material.

56. From the entire evidence on record, it is clear that all the above names persons have acknowledged that they knew about Customs manual gate passes have been forged by Shri Rohit Sakhuja and Shri Ajit Singh Chadha for clandestine removal of containers from ICD,TKD. They knew that the goods are illegally imported by Shri Rohit Sakhuja and Shri Ajit Singh Chadha by adopting such *modus operandi* so as to defraud the competent authority.

57. All the concerned i.e. employees, transporters, the labourers/contractors, CHA the dummy proprietors of firms Shri Rohit Sakhuja and Shri Ajit Singh Chadha have acknowledged that they knowingly indulged in impugned fraudulent act of removing illegally imported goods from customs area. Their statements have already been appreciated above. We do not find anything which may falsify testimony of any of these witnesses. We do not find any infirmity in the findings where all these people are held responsible for abetting and facilitating impugned fraud committed for clandestine removal of the goods and improper importation of such goods also. Shri Kamal Virmani also has acknowledged about knowingly storing, distributing and selling illegally imported air conditioners and prohibited R-22 gas cylinders. Shri Satish Kumar also acknowledged about knowingly purchasing R-22 gas cylinders that those restricted goods have been illegally imported. Similarly Mr.Dilip Singh Jain and Vijay Kumar Sharma were found in possession of illegally imported goods with full knowledge in that respect.

58. Penalty upon Shri R.K.Mahapatra, Junior Executive (Commercial Operations) CONCOR,ICD,TKD, New Delhi and and Shri S.K.Dubey, Senior Executive (Commercial & Operation), CONCOR, ICD, TKD, New Delhi are also found rightly imposed for issuing the CONCOR „job orders" without verifying the particulars of the bills of entry.

59. We have no reason to differ from the finding of the adjudicating authority. There is sufficient evidence even against shipper, K Line Singapore Pvt. Ltd. for colluding and abetting the impugned illegal import of goods.

60. In the light of above entire discussion, we do not find any infirmity in the order demanding differential duty from Shri Rohit Sakhuja and Shri Ajit Singh Chadha nor with

the order penalizing all the other appellants for the reasons mentioned above. Hence the order under challenge is hereby upheld. Consequent thereto all the appeals as mentioned above are order to be dismissed. (Order pronounced in the open court on 06.12.2013)

(Dr. Rachna Gupta*)* Member (Judicial)

(Hemambika R. Priya) Member (Technical)

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CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL

NEW DELHI PRINCIPAL BENCH,COURT NO. 3

CUSTOMS APPEAL NO. 52359 OF 2019

[Arising out of Order-in-Original No. 03-2019-Pr.Commr.Exp-ICD-TKD dated 25.04.2019 passed by the Principal Commissioner of Customs, ICD (Export), Tughlakabad New Delhi]

ASFAQUE ABUBAKER NAVIWALA
A-903, AI Noor Residency, Near Meru Road, Rander Gorat Road, Surat, Gujarat 395005. **Appellant**

Vs.

COMMISSIONER OF CUSTOMS (Export) (ICD, TKD), NEW DELHI. **Respondent**

Appearance:
Sh. Somnath Shukla, Advocate for the appellant

Sh. Rakesh Kumar, Authorised Representative for the respondent

CORAM:
HON'BLE Ms. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE Ms. HEMAMBIKA R. PRIYA, MEMBER(TECHNICAL)

Date of Hearing : 14.09.2023Date of Decision :12/12/2023

FINAL ORDER No. 51635 /2023PER HEMAMBIKA R PRIYA

The present appeal is filed to assail the impugned Order-in- Original No. 03/2019- Pr. Commr. Exp-ICD-TKD dated 25.04.2019, passed by the Principal Commissioner of Customs (Export), ICD, Tughlakabad, New Delhi by Asfaque Abubaker Naviwala (hereinafter referred to as the appellant) to challenge the imposition of penalty of Rs.10,00,000/- (Rupees ten lakhonly) under section 114(iii) of the Customs Act, 1962 and of Rs.20,00,000/- (Rupees twenty lakhs only) under Section 114AA of the Customs Act, 1962.

2. The brief facts of the case are that an intelligence was received that some exporters based in Delhi were exporting carpets, garments, fabrics etc. to Jeddah, Malaysia, South Africa, Afghanistan and other countries at highly over invoiced values, thereby availing undue export incentives viz., Drawback, DEPB, Focus Product Scheme etc. Searches were conducted and subsequent investigations undertaken revealed that Shri Sajjan Kumar was involved in submitting forged invoices of overvalued goods for export by filing Shipping Bills and had claimed Duty Drawbacks along with several persons including the IEC holders. The appellant, a partner of the overseas buyer, was involved inthe abetment of the said forged exports. The said forgery was admitted by all the noticees in their statements recorded under Sec 108 of the Customs Act, 1962. A show cause notice dated 23.08.2012 was issued proposing for imposition of penalty on the appellant, and vide Order-in-Original dated 25.04.2019, penalties were imposed on various exporters including the appellant.

3. At the outset, the learned Counsel for the appellant submitted that Mr. Alip Kumar Das, a co-noticee in the subject show cause notice had approached the Tribunal by way of Customs Appeal No. 52100 of 2019 seeking deletion of penalty imposed upon him under Section 114(iii) and Section 114AA of the Customs Act, 1962. The Tribunal vide order dated 14.09.2020partly allowed the appeal filed by Mr. Alip Kumar Das and setaside the penalty imposed under Section 114(iii) of the Customs Act, 1962 and reduced the penalty from Rs. 10,00,000/- to Rs. 1,12,500/-. The learned Counsel submitted that Mr. Alip Kumar Das worked as an employee of Mr. Sajjan Kumar (co-noticee and the alleged mastermind) and looked after the work such as preparation of invoices, packing lists for the export and bank related work and other work as directed by Mr. Sajjan Kumar. TheTribunal, while allowing the appeal of Mr. Alip Kumar Das, hadheld that Mr. Alip Kumar Das as an employee, had carried out the instructions and directions of his employer Mr. Sajjan Kumar and therefore, the allegation of attempt to export goods improperly byShri Alip Kumar Das is not established. The Tribunal concluded that the allegation of aiding and abetting was not proved.

3.1 He further submitted that the case of the appellant stood at a better footing when compared to the case of Mr. Alip Kumar Das. The learned Counsel submitted that since the incorporation of M/s Aan Impex General Trading LLC, the entire management ofthe firm was being handled by Mr. Hussain who was based in Dubai and the role of the appellant was merely to introduce Mr. Hussain to the garment exporters based in Surat. He submitted that the appellant had 49% stake in M/s Aan Impex General Trading LLC, Dubai but the appellant was never in the know of the accounts maintained by the firm and the actual revenues generated by the firm through its operations. The Appellant had no role in and negotiations, documentation and payment etc. as all of the aforesaid processes were being taken care of by Mr. Hussain. He submitted that Mr. Hussain used to deal directly withthe exporters from India.

3.2 The Learned Counsel also submitted that the Department had failed to bring on record any incriminating material and failed to establish any alleged connivance between the appellant and thealleged kingpin Mr. Sajjan Kumar. In this context, he relied on thedecision of this Tribunal in the case of **Alip Kumar Das v. Commissioner of Customs,** Customs Appeal No. 52100 of 2019, CESTAT, Principal Bench, New Delhi. The learned Counsel submitted that the appellant was not aware of the practice of double invoicing by M/s. Aan Impex General Trading LLC to claim the export benefit from the Government. The learned Counsel submitted that the impugned order had been passed without examining the contentions/ submissions of the Appellantin the reply to the Show cause notice and consequently theimpugned order was not sustainable. In support of his contention,he relied on the following case Laws:

1. Kranti Associates Pvt. Ltd. and Others vs. Masood AhmedKhan and Others [(2011 (273) ELT 345 (SC)]

2. Jindal Stainless Limited v. Designated Authority Directorate, General of Anti-Dumping and Allied Duties [Anti-Dumping Appeal No. 50291 of 2018, CESTAT Principal Bench, New Delhi]

3. Deepak Nitrite Limited v. Designated Authority Directorate General of Anti-Dumping and Allied Duties [Anti-DumpingAppeal No. 50401 of 2018, CESTAT, Principal Bench, New Delhi]

3.3 The learned Counsel further submitted that though no time limit for adjudication of show cause notices had been prescribed, the adjudication should have been done within a reasonable period of time. It is a trite law that when no time limit isprescribed under the law, it has to be done within a reasonable period of time i.e. preferably within three years and not later thanfive years. However, there was a delay of more than 6 years in adjudication and hence the same is liable to be set aside.

4. Learned Authorised Representative submitted that the factual matrix of the case established the appellant as agent of the buyer in India involved in fraudulent exports and claim of unauthorized duty drawbacks on the exchequer. Infact all these owners/ directors of the overseas companies were Indian only andthe said companies were registered only for remittance purpose only. He contended that the appellant had knowledge of the fraudulent exports and he was facilitating the same for which he received 30% commission, apart from being 49% shareholder of the overseas companies. Statements of various Noticees proves beyond doubt that the documents were fabricated and the exporters, viz., Indus Chemitex and SRG had sublet their IEC to claim illegal drawback amount. The appellant's role was critical and the charges against the appellant for abetment of the said forgery stands proved.

5. The learned Authorised Representative submitted that the appellant had connived as he had prior knowledge of the fraud and inadmissible drawal of export incentives. The learned Authorized Representative further submitted that once the goods are liable for confiscation under Sec 113 of the Act, penalty under Section 114(iii) has to follow. The appellant was also involved in signing various documents. Being a partner of the company involved in such frauds, the appellant was liable for penalty under Sec 114AA of the Act also. Thus, the impugned order of the Commissioner is proper and the Appeal is liable to be dismissed.

6. We have heard the rival contentions and have perused the appeal records. It is important at this juncture to acknowledge that the Customs Act, 1962 is the primary law that controls the importation and exportation of products and arrival and departure of international passengers. Ensuring compliance of this law and other national and international laws is the responsibility of the Customs officers. All merchandise entering or leaving the country must do so through authorised entry/exit ports, report to Customs, and follow all applicable laws and regulations, including paying any customs that may be due. Infractions are also subject to civil and criminal fines, according to the Customs Act. Criminal liability can result in incarceration and financial penalties, while civil liability can result in monetary fines and the seizure of property. The nature of the punishment depends on the gravity of the offence, with penalties for improper import or export of goods outlined in Sections 112 and 114 of the Customs Act.

7. We now go on to deal with the first submission of the Ld Counsel that this Tribunal in the case of a co-noticee has reduced the penalty holding that Shri Alip Kumar Das was involved in keeping the accounts, doing bank work and preparing invoices, packing list as per the directions of the alleged mastermind Sh Sajjan Kumar. This Tribunal further held that the co-Noticee played no role in the purchase of goods and neither was involved in any negotiations with any of the parties in India or outside India. In the instant case, the appellant was a partner in the Dubai-based firm M/s. Aan Impex along with Mr Hussain Abdul Radha Mohammad Al Aswami. It is an admitted fact that the appellant used to visit Dubai every three months for business purposes and used to get commission in cash on the profitsearned. It is also admitted by the appellant that he was aware of the modus operandi adopted in the case where the exporters had shown highly inflated values in their invoices and the shippingbills were consigned to their firm in Dubai namely M/s Aan Impex.The Tribunal has categorically held that there is no evidence that the co-Noticee had been the beneficiary of any amount or part thereof, whereas in the instant case the appellant was receiving 30% of the profits. From the above, it is apparent that the role of the appellant as a partner in the firm is not on the same footing as that of the salaried employee. On this ground alone, we are not inclined to accept this submission.

8. Before we proceed to consider the other submissions itwould be appropriate to reproduce the relevant sections of the Customs Act, 1962 under which penalties have been imposed on the appellant.

"Section 114.- Penalty for attempt to export goods improperly, etc. -

Any person who, in relation to any goods, does or omits to doany act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding three times the value ofthe goods as declared by the exporter or the value as determined under this Act]], whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A to a penaltynot exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher:

***Provided** that where such duty as determined under sub- section (8) of section 28">section 28 and the interestpayable thereon under section 28AA">section 28AA is paidwithin thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person underthis section shall be twenty-five per cent of the penalty so determined;*

(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater."

Section 114AA. Penalty for use of false and incorrectmaterial. -

If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

8.1 A perusal of the provisions above makes it clear that any action by any person which renders imported or exported goodsto confiscation is liable for penal action under section 114 of the Customs Act. In addition, any person who has signed a false or incorrect document is liable for penalty under section 114AA of the Customs Act. The Customs Act deals with the "Confiscation of goods and conveyances, and imposition of penalties". It is further significant to note that the Legislature has simplicitor used the word "any person" to fasten the liability of a penalty. The Customs Act has not defined the word "person" and, therefore the definition and rules of interpretation contained inthe General Clauses Act, 1897, can be taken recourse to. Section 3(42) of the General Clauses Act defines "person" to mean "person shall include any company or association or body ofindividuals, whether incorporated or not". A partnership firm therefore falls within the definition of 'person' as defined in the General Clauses Act. It is on record that the appellant entered into a partnership with Shri Hussain, Dubai National and started a company in the name of Aan Impex Gen trading LLC, in November 2009 and his share in the partnership was 49%. He regularly visited Dubai and collected 25 to 30% of the profits of this company. He has also admitted that he has gotten his visa to visit Dubai on behalf of the company. It is seen that he has also admitted to have introduced the alleged mastermind Shri Sajjan Kumar to his partner Shri Hussain. He has agreed in his statement that export remittances were from other firms based inHong Kong, London, Sharjah instead of their Dubai-based firm. He has accepted that he was aware of this agreement between Sajjan Kumar and Hussain. Further in his statement dated 03.11.2011, the appellant has in response to questions No. 36has stated, which is reproduced verbatim hereinafter,acknowledging his knowledge of the overvaluation of export goods:

"Ans: I have put my dated signature on the above annexure and the three invoices shown to me and state that the above exporters have exported carpets by showing highly inflated values in their invoices and shipping bills while exporting from India whereas the invoices sent to our firm Aan Impex at Dubai as buyer, shows very less value i.e., correct value of

exported goods. The exports from India show very high inflated value of the export goods in their invoice claim the export benefit fromthe government. Accordingly, in this case also, exporters have shown highly inflated values in the invoices and shipping bills wherein our firm Aan Impex is the buyer. The above two types of it was showing different values for the same goods were pre-planned and as per understanding between Sajjan Kumar and partner of Aan Impex, Hussain Mohammed. Iknew about this; I have nothing more to say in this regard."

8.2 We also note that the appellant has admitted to signing on the blank papers containing the letterhead of the company, along with other papers required for opening a firm in Dubai. We note that the Supreme Court in the case of Shri Ram & Another v. State of Uttar Pradesh reported in 1975 (3) SCC 495 has specifically held that intentional aid and active complicity is the gist of the offence of the abetment. We note that both the Show Cause Notice as well as the order under challenge has clearly brought out the appellant's role in the fraudulent exports. Further,as regards the contention that the appellant was not aware of the wrong doings in the firm, we note that the Supreme Court judgment in Standard Chartered Bank [2006 (197) E.L.T. 18(S.C.)], has held that where contravention has been committed with consent of or connivance of or attributable to negligence of partner of partnership firm, such partner can also be proceeded against. Consequently, imposition of penalty on the appellant is correct, more so as the appellant has accepted in his statement that he was aware that the subject export goods were overvalued.

8.3 In the above context, we further note that the Hon'ble ApexCourt in the case of Om Prakash Bhatia v. CC, Delhi [2003(155)ELT 423(SC)] dealt with the over invoicing of export goods, and held that, when the importation or exportation, of the goods are subjected to certain prescribed conditions to be fulfilled either before or after clearance of the goods, and if those conditions are not fulfilled, the said goods would be considered as prohibited goods and Sections 2(23), 11 and 113(d) of the Customs Act, 1962 would come into play and the exporters would be liable for penalty. In the case of Abishek Export v. CC, Cochin, [2007 (208) ELT 155 (T-Bang.)] the Tribunal considered a case ofover valuation of export goods to get higher DEPB credit, and the confiscation of the impugned goods and penalty were upheldunder the relevant provisions of the Customs Act. The Supreme Court in the case of CCE v. Suresh Jhunjhunwala 2006 (203) ELT 353 (SC), dealt with a case of over-valuation of export goods for claiming higher DEPB, and it was held that the decision of the Supreme Court in the case of Om Prakash Bhatia (supra) squarelycovered the above case. In a catena of decisions of the Tribunal inrespect of cases of over valuation of export goods for benefit under export incentive schemes, the imposition of penalties under Section 114 of the Customs Act, 1962 has been upheld.

8.4 The Ld Counsel has submitted that the order is null and voidthere is no proposal for penalty in the show cause notice and there has been a delay in the adjudication of the case. As regards the first contention, it is a settled position of law that wrong mention or non-mention of a rule in the show cause notice does not vitiate the proceedings. The Supreme Court in the case Fortune Impex vs Commissioner [2004(167) ELT A 134(SC)] has held that non mentioning a particular section of Customs Act, 1962 would not vitiate the proceedings when the allegations and charges against all the appellants were mentioned in clear termsin the show cause notice. In the instant case, it is seen that the role of the appellant has been elaborated in para 23.5 of the notice. As regards the delay in adjudication, we note that there were several noticees in the show cause notice, which by itself would lend to the delay in adjudication. We are not inclined to accept this contention of the learned counsel.

9. In view of the above discussions, we uphold the impugned order and dismiss the appeal.

(pronounced in the court on 12/12/23)

(BINU TAMTA)MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)MEMBER(TECHNICAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI
PRINCIPAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 50642 OF 2019

[Arising out of Order-in-Original No. 36/COMMR/NOIDA-CUS/2018-19 dated 18.12.2018 passed by the Commissioner of Customs, Noida]

M/S GLOBAL DIAMOND PVT LTD. **Appellant**
Plot No. 16-18, Jewellery Complex, NSEZ, Noida-201305
Present Address: DGL-121, 1st Floor DLF The Galleria
Mayur Vihar, Phase-I,
Delhi-110091

Vs.

COMMISSIONER OF CUSTOMS NOIDA, COMMISSIONERATE, **Respondent**
Concor Complex, P O Container Depot, Greater Noida,
Distt. Gautam Budh Nagar (UP)
201311

And

CUSTOMS APPEAL NO. 50643 OF 2019

[Arising out of Order-in-Original No. 36/COMMR/NOIDA-CUS/2018-19 dated 18.12.2018 passed by the Commissioner of Customs, Noida]

ANAND SHRIVASTAV (PROMOTER) **Appellant**
Present Address: DGL-121, 1st Floor DLF The Galleria
Mayur Vihar, Phase-I,
Delhi-110091

Vs.

COMMISSIONER OF CUSTOMS NOIDA, COMMISSIONERATE, **Respondent**
Concor Complex, P O Container Depot, Greater Noida,
Distt. Gautam Budh Nagar (UP)
201311

Appearance:

Present for the Appellant : Shri J M Sharma, Consultant and Ms. Pooja Agarwal, Chartered Accountant

Present for the Respondent: Shri S K Rahman, Authorised Representative (Principal Commissioner) and Shri Rakesh Kumar, Authorised Representative

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NOS. 51652-51653 /2023

The Order in Original dated 8.12.2018[1] passed by the Principal Commissioner of Customs Noida in the remand proceedings is assailed in these two appeals. **Customs Appeal No. 50642 of 2019** is filed by **M/s. Global Diamonds[2]**, and **Customs Appeal no. 50643 of 2019** is filed by Shri Anand Srivastava assailing the personal penalty imposed on him.

The assessee is a manufacturing unit in the NOIDA export processing zone[3] which zone has subsequently been converted into NOIDA Special Economic Zone[4]. It imports gold duty free and manufactures and exports gold jewellery. Goods manufactured in the EPZ should only be exported. If they are removed and sold within India (known as Domestic Tariff Area[5]), Central Excise Duty equivalent to the Customs duties leviable on such goods if they are imported is leviable. This legal position is not in dispute.

2. The Central Excise officers caught some goods being clandestinely removed in a car from the assessee's factory and they seized them. In follow up investigations, the appellant's factory premises were searched and two notebooks and some private records were found which had entries of diamonds which it received from its sister unit M/s. Maharshi Ayurvedic Private Ltd.[6]. After completing the investigations, two Show Cause Notices[7] dated 03.4.2003 and 24.11.2004 were issued to the appellant and three others. The first SCN proposed confiscation of the goods which were seized and the car in which they were being carried. The second SCN proposed demand of duty on the goods allegedly manufactured and clandestinely cleared to DTA by the appellant without paying the excise duty. Both SCNs were decided by a common Order-in-Original dated 19.07.2006 passed by the Commissioner confiscating the goods, demanding duty and imposing penalties against the assessee, Shri Subhash Sharma, Shri G J Patel and Shri Anand Srivastava.

3. Assailing the order dated 19.7.2006, Excise Appeal Nos.

3454, 3620 and 3621 of 2006 were filed before this Tribunal by the assessee, Shri Anand Srivastava and Shri Subhash Sharma. Shri GJ Patel did not file any appeal. Learned counsel submits before us that in that round of litigation, they did not press the issue of confiscation of the goods and penalties as per the first

SCN and had only contested and pressed the confirmation of demand of duty and imposition of penalties as per the second SCN. Thus, the confiscation of goods and the case proposed in the first SCN have attained finality.

4. The three appeals were decided by this Tribunal's Final Order dated 18.12.2018 upholding the confirmation of demand of duty. However, the matter was remanded to the original authority for the limited purpose of examining the claim of the benefit of notifications for CVD and SAD and the entries found in the Work in progress register and computing the duty. There is no appeal by either side against the Tribunal's final order dated 18.12.2018 and therefore, the issues have attained finality except to the extent of the directions in the remand proceedings.

5. These two appeals assail the impugned order was passed by the Principal Commissioner in pursuance of this Tribunal's final order dated 18.12.2018.

6. We have heard Shri J M Sharma, learned consultant for the appellants and Shri S K Rahman, learned authorised representative for the Revenue and perused the records.

7. We now proceed to examine the submissions with respect to each of the three issues which were the subject matter of dispute in the *denovo* proceedings before the Principal Commissioner.

Exemption notifications applicable to CVD

8.

9. As discussed above, goods cleared from a unit in EPZ to DTA are chargeable to duty of excise equivalent to the duties of Customs leviable on such goods if imported into India. Goods imported into India are chargeable to basic customs duty, additional duty of customs (often loosely

referred to a countervailing duty or CVD), special additional duty of customs (SAD), etc. and hence the excise duty on goods removed from a unit in EPZ to DTA should be calculated accordingly. The basic customs duty is to be calculated as per the Customs Tariff read with any Customs exemption notifications. The Additional duty of Customs must be calculated on the value of the goods + basic Customs duty at the rates as per the Central Excise Tariff read with any Central Excise exemption notifications.

10. According to the appellants, the assessee was entitled to the benefit of exemption notification no. 6/2002-CE dated 1.3.2002 (S.No. 171) and it was wrongly denied to the appellant in the impugned order. The relevant portion of the impugned order is as follows:

"5.4. I would like to take up the first issue of CVD and SAD on the impugned goods i.e., studded diamond jewellery, cut &polished diamond and precious and semi-precious stone. In this context, the party argued that the CVD @ 16% cannot be demanded as the jewellery items were exempted unconditionally from payment of Central Excise Duty vide notification no. 6/2000 dated 1.3.2000, notification no. 3/2001 dated 1.3. 2001 and notification no. 6/2002 dated 1.3.2002……. In respect of notification no. 6/2002 dated 1. 3.2002, the same was amended vide notification no. 41/2002-CE dated 19.8.2002 which is reproduced below:

Notification no. 41/2002-Central Excise

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government….., hereby makes the following further amendments in the notification….. no. 6/2002-Central Excise dated 1st March 2002, namely:-

In the said notification, in the Table, after S. No. 44 and the entries relating thereto, the following S.No. and entries shall be inserted, namely:-

(1)	(2)	(3)	(4)	(5)	(6)
44A	28	All goods used within the factory of production for the manufacture of goods falling under Chapter 71			

5.5. From the above, it is clear…… The amended notification No. 41/2002-CE date d19.8.2002 clearly says that the exemption from duty was granted only to those goods which are sued within the factory of production for the manufacture of goods falling under Chapter 71"

11. Learned consultant for the appellant asserted that the assessee was entitled to the benefit of S.No. 171 of the notification. The Commissioner has erroneously considered entry no. 44A which it did not claim at all. It reads as follows:

(1)	(2)	(3)	(4)	(5)	(6)

71	71	Articles of- (a)Gold; (b) silver;(c) platinum; (d) Palladium; (e) rhodium; (f) iridium; (g) osmium; or (h) ruthenium; Ornaments and the like articles made of gold or silver or platinum or any one or more of them, whether or not set- With stones or gems (real or artificial), or with pearls (real, cultured or imitation); or With stones and pearls of the kind mentioned at (a) or any combination thereof; …… …. Explanation:- For the purposes of entries (I), (II) and (III), as the case may be,- (i) " ornament" means a thing, in any finished form, meant for personal adornments or for the adornment of any idol, deity or any other object of religious worship, made of, or	Nil		
		manufactured from, gold, or silver or platinum or any one or more of them, whether or not set with stones or gems (real or artificial) or with pearls (real, cultured or intimation), or with all or any of them an includes parts, pendants or broken pieces of ornaments; …. "articles" in relation to gold shall mean anything (other than ornaments), in a finished form, made or manufactured from or containing gold and includes any gold coin and broken pieces of an article of gold but does not include primary gold, that is, to say, gold in any unfinished or semi- finished form including ingots, bars, blocks, slabs, billets, shots, pellets, rods, sheets, foils and wires.			

12. Learned authorised representative for the Revenue submitted that the benefit of serial No. 171 of notification no. 6/2002-CE dated 1.3.2002 is available to goods which match the description against this entry "articles of gold/silver etc. or ornaments or strip wire of gold, etc." The definition of "ornament" and "article" are given in the notification. The impugned goods "studded jewellery, diamonds, semi-precious stones, etc." do not fall in the description of goods given in the Notification. Hence the benefit of this Notification for CVD cannot be extended to the appellant in respect of the goods clandestinely removed. He also submitted that any exemption notification must be interpreted strictly and any benefit of doubt should be given to the Revenue as held by the Supreme Court in

Commissioner of Customs (Import), Mumbai vs M/s Dilip Kumar & ors[8].

13. We have considered the submissions of both sides on this issue.

14. The Commissioner has, in the impugned order, denied the benefit of S.No. 44A of the notification which the appellant did not even claim. He did not examine S.No. 171 which the appellant had claimed. Both learned counsel and the learned authorised representative for the Revenue made submissions with respect to this S.No. of the exemption notification. We therefore, find it proper to decide the availability of the exemption under S.No. 171 instead of remanding the matter again to the Commissioner to examine this issue.

15. According to the learned counsel, the appellant is entitled to the benefit of this notification which is unconditional. According to the learned authorised representative for the Revenue, the appellant is not entitled to the benefit of this notification because it is available for ornaments as defined in the notification and **not to the diamond studded jewellery** which the appellant had manufactured and clandestinely removed. A perusal of the SCN dated 24.11.2004 shows that duty of Rs. 2,48,99,006/- was demanded on 'studded gold jewellery' as detailed in Annexure-D to the SCN. The meanings of 'jewellery' and 'ornaments' given in Oxford Advanced Learner's Dictionary
are as follows:

'Ornament' 1. An object that is used as decoration in a room garden/yard, etc. rather than for a particular purpose: a china
/glass ornament **2**. **An object that is worn as jewellery 3.** The use of objects, designs, etc. as decoration: The clock is simply for ornament; it does not work anymore. **4.** ..**to sth** a person or thing whose good qualities improve sth: The building is an ornament to the city.

'Jewellery" Objects such as rings and necklaces that people wear as decoration: silvery/gold jewellery

16. Thus, the term 'ornament' has a much wider connotation and includes such objects which are used for decoration of a garden, yard, etc. also in addition to the objects worn as jewellery. Jewellery, on the other hand, means only such objects for decoration as are worn by people. Thus, while all jewellery are ornaments, all ornaments are not jewellery. Ornaments for buildings or structures, for instance, cannot be called jewellery because although they are meant for decoration, they are not worn by people. Even plants which are used only for decoration and have no utility otherwise are referred to as 'ornamental plants'. Since the word 'ornament' has a very wide meaning, it has been specifically defined for the purpose of the notification to mean a thing, in any finished form, meant for personal adornments or for the adornment of any idol, deity or any other object of religious worship, made of, or manufactured from, gold, or silver or platinum or any one or more of them, whether or not set with stones or gems (real or artificial) or with pearls (real, cultured or intimation), or with all or any of them an includes parts, pendants or broken pieces of ornaments'. This definition includes anything in finished form meant for personal adornments which, in essence is jewellery. It also includes, in addition, other things such as those meant for adornment of idols, etc. Thus, the exemption clearly covers jewellery within its ambit. Further, the exemption under this notification at S.No. 171 includes 'Ornaments and the like articles' and thus, not only ornaments but also like articles are exempted. For these reasons, we find that jewellery is clearly exempted under S No. 171 of this notification.

17. The next question is if it covers 'diamond studded jewellery'. Entry at S.No. 171 exempts ornaments and like articles 'whether or not set with stones or gems or pearls' which leaves no manner of doubt that diamond studded jewellery was clearly exempted under the notification. For these reasons, we find that the appellant was entitled to the exemption from additional duty of Customs (CVD) under Notification no. 6/2002- CE (S.No. 171) which provides full and unconditional exemption. **We, therefore, find in favour of the appellant insofar as the exemption from CVD is concerned.**

Exemption notifications applicable to SAD

18. The appellant claimed the benefit of exemption notification No 6/2004-Cus dated 08.01.2004. Learned consultant for the appellant submits that duty was demanded based on the entries made in two notebooks found in the premises of the appellant with names Priya and Rishu and some other documents which showed that diamonds were received in the appellant's premises during the period 2000 to 2002. The case of the department is that the appellant had manufactured diamond studded jewellery using these diamonds and sold them. Neither these books

nor the documents indicate the dates on which the goods were removed from the appellant's premises. Since the duty was demanded under Section 11A of the Central Excise Act, 1944, the relevant date for calculating the rate of duty and exemption notification is the date of removal of the goods and since no date is available in this case, as per Rule 9A (5) of the Central Excise Rules, 1944, the date of the SCN is the relevant date which in the case is 24.11.2004 on which date notification no. 6/2004-Cus dated 8.1.2004 was available.

19. Learned authorised representative for the Revenue submitted that the SCN was issued on 24.11.2004 when the Central Excise Rules, 1944 were already superseded by Central Excise (no.2) Rules 2001 and further by Central Excise Rules, 2002. Neither of these two Rules provide for determining the duty applicable on the date of SCN but Rule 5 of both the 2001 Rules and 2002 Rules says that the rate of duty applicable is date of removal of goods. The period of removal is between 7.9.2000 and 4.10.2002. The exemption notification No. 6/2004-Cus dated 08.01.2004 claimed by the appellant was not even issued even on the last date of removal of goods, viz., 4.10.2002. Therefore, the benefit of this exemption notification was not available to the appellant.

20. We have considered the submissions by both sides on this issue.

21. We find that the appellant cannot claim the benefit of a notification applying Section 9A(5) of the Central Excise Rules, 1944 which was not even in existence at the time of the SCN and had already been superseded in 2001 and further in 2002. The appellant claimed that the date of removal was not known in the case and therefore, the benefit of the exemption notification available on the date of the SCN should be extended to it. While it is true that the exact date of removal of goods was not known, they are alleged to have been removed from 7.9.2000 and 4.10.2002. Undisputedly, the exemption notification no. 6/2004- Cus was not available during this entire period. Therefore, the appellant is not entitled to the benefit of the exemption notification not available during any of the dates of the clearance.

22. **We, therefore, find in favour of the Revenue and against the appellant and hold that the benefit of exemption notification no. 6/2004-Cus was not available to the appellant on the SAD to be paid.**

Entries in the work in progress (WIP) register

23. According to the learned consultant for the appellant, there were "contra entries" in the WIP register indicating that some of diamonds which were received were rejected and returned by the appellant to its sister concern. Therefore, the demand must be reduced for this reason. He further submits that the department has wrongly taken the diamonds received as 3080 carats when in fact, only 965.585 carats were recorded in the WIP register. Of these, 501.407 carats were covered by the contra entries in the register which must also be deducted while calculating the duty. According to him, the learned Commissioner has wrongly rejected these submissions.

24. Learned authorised representative for the Revenue submits that the demand of duty on 3080 carats of diamonds received by the appellant was not based only on the WIP register. In fact, the entries showing the receipt of these diamonds were in the two notebooks- Priya and Rishu and other documents. With respect to some of these, entries were also found in the WIP register which was the supporting evidence. There is no separate demand based on the entries in the WIP register. The details, according to him are as follows:

source	Period	Diamonds used in manufactur ing are studded jewellery in carats	Value of studded diamond jewellery I.e. after value addition. Rs Cr	Total Duty Rs Cr
Annex B to SCN Diamonds utilised for manufacture of studded core jewellery worked out on the basis of delivery challans of MAP diamond division Mumbai	08-05-2001 to 04-10-2002	1264.18	1.93	1.02

Annex C to SCN Diamonds utilised for manufacture of studded core jewellery worked out on the basis of Rishu exercise book and Priya Exercise Book recovered from Shri Subhash Sharma on 05-10 -2002.	07-09-2000 to 21-04-2002	1701.297	2.6	1.37
On the basis of loose paper file, which were also reclaimed from the factory without payment of duty i.e., 1.68+112.46		114.14	0.17	0.09
Total		3079.617		2.49

25. According to the learned authorised representative for the Revenue, of these, diamond of 965.585 carats were also mentioned in the WIP register. The appellant had claimed that there were contra entries to the extent of 501.407 carats and that they were returned by the appellant to the sender. It is only with respect to this claim that the matter was remanded by the CESTAT in the first round of litigation to the Commissioner and in the de-novo proceedings, he did not find in favour of the appellant with respect to this claim. Otherwise, the demand was already upheld by this Tribunal in the first round of litigation and there is no appeal against the Final Order in the first round of litigation.

26. We have considered the submissions on this aspect.

27. We do find that in the first round of litigation, this Tribunal remanded the matter for the limited purpose of deciding the claims with respect to CVD, SAD and the entries in the WIP register. We also find that it is true that the demand in this case was not based only on the WIP register but this register was used as supporting evidence only. The demand was based on the entries in the two notebooks Priya and Rishu and the some other entries and there was no separate demand on the basis of the WIP register. WIP register was only used as supporting evidence. The claim of the appellant with respect to some entries (known as contra entries by the appellant) were required to be examined by the Commissioner which he did in the impugned order. Paragraph 5.7 of the impugned order reads as follows:

"5.7 Now, I come to second issue wherein the noticee pleaded to consider data of Work in Process (WIP) register to quantify the quantity of studded diamond Jewellery, cut & polished diamond and precious and semi precious stone and duty element etc. In this context I have gone through the Work in Process (WIP) register, documents submitted by the party in their paper book - I and paper book III and written submissions dated 21.03.2018 and 11.10.2018. The party claimed in his written submission dated 11.10.2018 that "……..out of these 965.585 Carats,

501.407 carats (P-333 to 345 of PB) were returned since these diamonds were not fit for manufacture of jewellery. There are *contra entries* in WIP register in this regard." In this context, I have carefully gone through page 333 to 345 of paper book III and found that in Annexure B (page 333 to 341 of PB) there is only 6 entries under the column "Rejection" i. e. 23.9, 2.32, 4.69, 4.36 and 2.36; totaling to 37.63. Moreover, there is no column / entry for rejection of diamond shown in Annexure C (page No. 342 to 345). I also observed that there is no remark or indication in the (P

- 333 to 345 of PB) which shows that the rejected quantity (entry for only 37.63 carats was found out of

501.407 carats as claimed by the party in their written submission) returned by the party. In the light of facts narrated above, I observed that the claim of the party that 501.407 carats were returned by them since these diamonds were not fit for manufacture of jewellery, was not supported by any documentary evidence."

28. We find no reason to differ from view taken by the Commissioner as far as the entries are concerned because firstly, entries do not reflect that the total quantity of diamonds rejected was 501.407 carats and secondly, there is no indication that they have been returned to the sender. We,

therefore, do not find sufficient evidence for us to believe that these diamonds were returned by the appellant to the sender.

29. **Customs Appeal no. 50643 of 2019** is filed by Shri Anand Shrivastava assailing the personal penalty imposed on him under the impugned order. It has been submitted on his behalf that the submissions made before the adjudicating authority in the *de novo* proceedings were not considered and no finding has been given on them and therefore, there was violation of principles of natural justice and for this reason, the penalty imposed on him may be set aside.

" Regarding imposition of penalty on Shri Anand Shrivastava, it is submitted that Shri Anand Shrivastava (notice no. 2) is not involved in day to day activities as the work of import/export clearances was being looked after by professionally qualified persons. The ground on which penalty has been proposed in the SCN in para 30 (iii) is that Shri Anand Shrivastava, Director of the unit who was responsible for overall supervision and control of the unit and its activities failed to discharge its duties in terms of conditions of Notification applicable in the zone. Ther is no evidence whatsoever on record identifying the exact positive acts of omission and commission on the part of Noticee no. 2 listed in Rule 26 of the CER, 2002 which have rendered imported goods liable to confiscation u/s 111 of the Customs Act, 1962 warranting imposition of penalty u/s 112 of the Customs Act, 1962. Similarly, there is no evidence on record to suggest that Noticee no. 2 personally removed, transported, sold, purchased, etc. goods knowingly or having reason to believe that the goods are liable to confiscation under the Central Excise Acts and Rules, In any event, a proposal to impose combined penalty u/s 112 of the Customs Act, 1962 and u/r 26 of the CER, 2002 is not legally sustainable being independent legal provisions and hence the proposal to impose combined penalty on Noticee no. 1 &2 is not sustainable."

30. Learned authorised representative for the Representative for the Revenue submitted that the above ground was taken in the original proceedings as well and it was dealt with in the Order in Original dated 19-07-2006 passed by the Commissioner. The role of Sri Anand Shrivastava was explicitly covered and it was held that he was aware and, in fact, instrumental in unauthorized entry of diamonds in the unit on the strength of Challans of Maharshi Ayurvedic Products (MAP) Mumbai. As per the statements dated 18.08.2003 of Shri Yogesh Shah, Sri Anand Shrivastava requested him to sign on the delivery challans of diamonds as employee of MAP when, in reality, he was not an employee of MAP. As per statement dated 5.10.2002 of Sri GJ Patel, Shri Anand Shrivastava was overall in charge of the unit. Such being his position and responsibility, he must be always aware of the illegal, /unauthorised activities being carried out in the unit and, therefore, responsible for the violations of the prescribed rules and regulations in the unit . No new or additional ground was taken in the *de novo* proceedings and therefore, there was no need to deal with the grounds which were already dealt with in the first round of proceedings.

31. We have considered the submissions.

32. We find that the role of Shri Anand Shrivastava was dealt with the Order in Original dated 19.7.2006 passed by the Commissioner in the first round of litigation and a penalty of Rs. 25,00,000/- was imposed on him under Rule 26 of the Central Excise Rules, 2002. Although the proposal in the SCN was to impose penalties under section 112 of the Customs Act and Rule 26 of the Central Excise Rules, penalty was only imposed under Rule 26. We do not find that the SCN had a proposal to impose combined penalty under section 112 of the Customs Act, 1962 and under rule 26 of the CER, 2002 as contended by Shri Shrivastava. However, the penalty was only imposed under Rule 26 of the Central Excise Rules. Therefore, the contention of Shri Shrivastava that there was an untenable proposal for a combined penalty holds no water as it was neither the proposal in the SCN nor was any penalty imposed in that fashion. All the three appeals against the Order dated 19.7.2006 were decided by this Tribunal by Final Order dated 26.4.2017 by remanding the matter to the original authority for the limited purpose of deciding the three issues of eligibility of exemption to CVD and SAD and the effect of the entries in the WIP register. No other issue was remanded to the original authority in the appeal. The original authority was also directed to give adequate opportunity to present any additional documents. Having found against the assessee Diamond Jewellery on all three issues of exemptions from CVD and SAD and the entries in the WIP register, in the impugned order, the Commissioner reaffirmed the demands and penalties imposed in the original order.

33. Since there was no specific direction with respect to the penalty imposed on Shri Shrivastava by the Tribunal in the Final Order remanding the matter to the original authority, evidently, the only reason his appeal was also remanded was that the demand itself was being remanded. If the demand is dropped naturally the penalties would also need to be dropped. However, the appellants (including Shri Shrivastava) were also given the liberty to submit additional documents before the Commissioner in the *de novo* proceedings. The ground of appeal of Shri Shrivastava in this appeal is not new nor has it brought in any additional documents. This ground was taken in the original proceedings as well as in the *de novo* proceedings before the Commissioner. In the original proceedings, this plea was rejected by the original authority and such rejection was not interfered with in the Final Order of this Tribunal while remanding the matter.

34. Ideally, in the impugned order, the Commissioner should have recorded the pleading by Shri Shrivastava in the *de novo* proceedings but the Commissioner did not do so. In fact, the impugned order is not even addressed to Shri Shrivastava at all. However, in his appeal, Shri Shrivastava claimed to have received a copy of this order on 20.12.2018 and filed this appeal assailing it on 11.2.2019. It is thus evident that both sides understood this order to have been passed deciding the de novo proceedings in respect of Shri Shrivastava also and that the penalty against Shri Shrivastava imposed in the original order was affirmed in the impugned order.

35. The ground taken by Shri Shrivastava that, although he was the promoter of the Global Diamonds, he was not concerned with the day-to-day affairs during the relevant period was rejected by the original authority in the original proceedings and such rejection was not interfered with by this Tribunal while remanding the matter for the limited purposes indicated. There is nothing on record to show that the order of the Tribunal was either appealed against or any application for rectification seeking modification of the order was filed by either side.

Therefore, the order attained finality. However, the Tribunal remanded all three appeals before it including the one filed by Shri Shrivastava.

36. We have upheld the demand in the impugned order except giving the benefit of Notification No. 6/2002-CE dated 1.3.2002 (S.No. 171) for CVD. We find no reason to interfere with the penalty.

37. **Customs Appeal No. 50642 of 2019 filed by M/s Global Diamond Pvt Ltd.** is partly allowed and the impugned order is modified to the extent of giving the benefit of Notification No. 6/2022-CE dated 01.3.2022(S. No. 171) for the CVD. **Customs Appeal No. 50643 of 2019 filed by Anand Shrivastav (Promoter)** is dismissed.

[Order pronounced on **15.12.2023**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO) MEMBER
(TECHNICAL)

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Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH - COURT NO. 3

Customs Appeal No. 50961 of 2020

(Arising out of order-in-original No. 11/2020/MKS/Pr. Commr./ ICD-Import/ TKD dated 18/21.05.2020 passed by the Principal Commissioner of Customs (Import), ICD, Tughlakabad, New Delhi).

M/s Daxen Agritech India Pvt. Ltd., **Appellant**

120, DIC Industrial Area Baddi, Solan

Himachal Pradesh-173205.

VERSUS

Principal Commissioner of Customs **Respondent (Import)**

Inland Container Depot Tughlakabad, New Delhi.

APPEARANCE:

Shri T. Chakrapani, Consultant with Sh. Anil Kumar, Advocate for the appellant

Shri Rakesh Kumar, Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL) FINAL ORDER NO. 51678/2023

DATE OF HEARING: 14.09.2023 DATE OF DECISION: 20.12.2023

BINU TAMTA:

Challenge in the present appeal is to the order in original No. 11/2020/MKS/Pr. Commr./ ICD-Import/ TKD dated 18/21.5.2022 passed by the Principal Commissioner affirming the classification and confiscation of the goods and the consequent demand of differential duty, interest and penalty, as proposed in the show cause notice.

2. The facts of the case are that the appellant is engaged in cultivation, manufacturing and marketing of the health food supplements, especially Ganoderma business and is importing items in question, namely, "Bulk Reishi Gano Powder-100% Ganoderma and Bulk Ganocelium Powder 100% Gano Mycelium" from their related foreign supplier M/s DXN Industries, Malaysia.

3. On verification of the import data of M/s Daxen Agritech (India) Pvt. Ltd., it was noticed that the importer had imported the subject goods vide Bills of Entry as mentioned in Table-A.

BE No.	BE date	Item name	Ass. Value (INR)	Duty paid (INR)	Duty payable (INR)	Differential duty (INR)
2608299	03.07.2013	Bulk Reishi Gano Powder	8152639.2	726359	4308425.238	3582066.2
		Bulk Ganocelium Powder	7246790	645652	3829711.111	3184059.1

3421252	01.10.2013	Bulk Reishi Gano Powder	10738593	956755	5675024.243	4718269.2
		Bulk Ganocelium Powder	5206590	463881	2751526.617	2287645.6
3708747	04.11.2013	Bulk Reishi Gano Powder	7138150	441138	3772298.131	3331160.1
		Bulk Ganocelium Powder	11103788	686214	5868018.844	5181804.8
5210850	16.04.2014	Bulk Reishi Gano Powder	6937318	428726	3666164.443	3237438.4
		Bulk Ganocelium Powder	9249757	571635	4888219.082	4316584.1
6718801	10.09.2014	Bulk Reishi Gano Powder	7000436	432627	3699520.413	3266893.4
		Bulk Ganocelium Powder	9333915	576836	4932694.06	4355858.1
9286242	19.05.2015	Bulk Reishi Gano Powder	17060794	1054357	9134860.931	8080503.9
8183633	13.01.2017	Bulk Reishi Gano Powder	18240600	1127269	9766564.458	8639295.5
4305997	07.12.2017	Bulk Reishi Gano Powder	17377500	2085300	9894748.5	7809448.5
4346737	11.12.2017	Bulk Reishi Gano Powder	18344700	2201364	10445472.18	8244108.2
5700445	23.03.2018	Bulk Reishi Gano Powder	18456900	2214828	16223615.1	14008787
Total			171588470.2	14612941	98856863.35	84243922

The importer had filed these bills of entry under self- assessment scheme through their authorized representative, M/s Challenger Cargo and M/s SMS Clearing & forwarding Pvt. Ltd., Customs Broker. It appeared that they were mis-declaring these goods as Ayurvedic proprietary Medicine and consequently wrongly classifying the same under CTH 30039011 instead of correct CTH 21069099 of food supplements thereby evading payment of appropriate customs duty.

4. The issue of classification of subject goods viz. Bulk Reishi Gano Powder -100% Ganoderma and Bulk Ganocelium Powder-100% Gano Mycelium, had come up for consideration before the concerned appraising group earlier, and had been adjudicated by Assistant Commissioner (Group-I), ICD-TKD, Delhi vide Assessment Order No. 01/2012 dated 27.07.2012 whereby the goods had been held to be wrongly classified under CTH 30039011 by the importer.

5. On appeal by the appellant, the Commissioner (Appeals) vide order dated 26.08.2012 directed the assessing authority to pass a suitable order and accordingly remanded the matter back. The Assistant Commissioner passed a fresh order dated 24.05.2013, confirming the classification of the goods in question under CTH 2106 9099 as food supplements. The appellant once again challenged the said order before the Commissioner (Appeals) who was pleased to restore the classification of the products under CTH 30039011 as Ayurvedic Medicaments vide order dated 17.02.2024. Being aggrieved, the revenue filed an appeal before this Tribunal which was finally decided on 10.01.2018, upholding the classification as claimed by the revenue, reported in **2018 (362) ELT 713**, which is now the subject matter of challenge before the Supreme Court.

6. The Department then issued the show cause notice dated 02.07.2018 covering the bills of entry for the period from 30.07.2013 to 23.03.2018 to which the appellant filed its reply. Thereafter a supplementary, show cause notice was issued to the appellant which was also duly replied. On adjudication, the Principal Commissioner rejected the classification claimed by the appellant of the products as Ayurvedic medicaments under CTH 30039011 and affirmed the classification as proposed in the show cause notice, invoking the extended period of limitation and the consequential interest and penalty along with confiscation of goods under section 111(m) and (o) of the Customs Act, 1962 (hereinafter referred to as the Act).

7. We have heard the learned Counsel for the appellant and also the Authorised Representative for the revenue and have perused the records of the case.

8. The moot question in the present appeal is whether the product Reishi Gano and Ganocelium are classifiable as Ayurvedic medicaments under chapter 3003.9011 of the First Schedule to the Central Excise Tariff Act, 1985 (CETA) as contended by the appellant or as food supplements under CTH 2106999 of CETA. The relevant entries relied on by the appellant and the Department is as under:-

2106	Food preparations not elsewhere specified or included
2106 90 99	---- Other
3003	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not pout up in measured doses or in
3003 9011	---- Of Ayurvedic system

8.1 The said issue is no longer rest-integra and has been decided by the Chennai Bench in **DXN Manufacturing India Private Ltd. vs. Commissioner of Central Excise and Service Tax, Pondicherry - 2018 (11) GSTL 68**, where the Tribunal reconsidered the matter at length on being remanded by the Supreme Court - **2015 (325) ELT A41** and concluded that both the impugned goods fail both the twin test for being considered as Ayurvedic medicament and therefore the products in question are nothing but food supplements promoted mainly for general health or well-being and therefore merit classification under 2108 of the CETA and more specifically under 2108.99, as it stood at the relevant time and assessed accordingly under section 4A of the Act for discharge of duty liability. The issue of classification was thus decided in favour of the revenue and against the assessee. The said order was followed by the Principal Bench subsequently in an appeal filed by the revenue in respect of the present appellant relating to the earlier round of proceedings, reported in **2018 (362) ELT 713**, and finding no reason to differ from the ratio and findings arrived by the Chennai Bench of the Tribunal, the appeal was allowed holding that the products are classified as food supplement and not as Ayurvedic medicine. We have been told that appeal against both the orders of the Chennai Bench and the Principal Bench as referred above have been filed by the party before the Supreme Court and the same are pending consideration, however, there is no stay of the impugned orders. Therefore, the orders of the Chennai Bench and the Principal Bench of the Tribunal deciding the issue of classification in favour of the revenue are binding. Consequently, we have no hesitation in concluding the issue of classification of the products in question under CTH 21069099 as food preparation. We may also like to refer from the synopsis filed by the appellant, where it is stated :

"Since, the issue of classification, the dispute matter is in the Hon"ble Supreme Court, the appellant is not contesting the same before this

Hon"ble Tribunal, being sub-judice in nature."

Thus the issue of classification on merits stands affirmed in favour of the revenue and against the appellant.

9. The next question which arises in the present appeal is the invocation of the extended period of limitation under section 28(4) of the Act. The submission of the learned

Counsel is that the issue of classification of the products in question was within the knowledge of the department at the time of clearing of the subject goods at the relevant time of imports as the department itself had filed an appeal against the Order-in-Appeal dated 17.02.2014 before the Tribunal and therefore the allegations of suppression are not made out and so the extended period of limitation cannot be invoked. The learned Authorised Representative for the revenue have submitted that the period of limitation has been rightly invoked and cited several judgements in support thereof.

10. We find that show cause notice was issued on 2.7.2018 for the period 03.07.2013 to 03.03.2018, covering several bills of entries as given in Table-A above which is per Annexure-A to show cause notice. In the appeal filed against the first assessment order dated 27.07.2012, the Commissioner (Appeals) vide order dated 16.08.2012 remanded the matter to the adjudicating authority to pass suitable order. On remand, the Adjudicating Authority vide order dated 24.05.2013 once again confirmed the classification under CTH 21069099, however, the appellant challenged the said order and the Commissioner (Appeals) vide order dated 17.02.2014, set aside the Order-in-Original and classified the products under CTH 30039011 and thereafter till the final order dated 10.01.2018 was passed by the Tribunal that the product in question is to be classified as food supplements, the appellant was under a bonafide belief and filed the bills of entry, accordingly in terms of the order of the Commissioner (Appeals) dated 16.08.2012 and thereafter the order dated 17.02.2014. In view of the proceedings which was pending since 2012 and the department itself had preferred an appeal, it cannot be said that the department was not aware of the classification of the products as declared in the instant bills of entry by the appellant and therefore no fault can be found on the part of the appellant as 9 out of the 10 bills of entries were filed before the final order was passed by the Tribunal on 10.01.2018 and the Order-in-Appeal by the Commissioner (Appeals) was holding the field. In this regard we would like to refer to the observations made by this Tribunal in an appeal filed by the Customs Broker of the appellant against the present impugned order as under:

"11. In the order, the Principal Commissioner obfuscated the fact that the final order of this Tribunal was passed on an appeal by the revenue as the Commissioner (Appeals) had decided the classification in favour of the importer. Until the final order was passed by this Tribunal on 10.1.2018, the order of the Commissioner was binding on both sides. Of the bills of entry listed in the impugned order, all except one were filed before the final order was passed by this Tribunal. The last one was filed soon after the final order was passed. There is nothing on record to show that appellant was made aware of this order by the revenue and told to classify the goods accordingly. It is not unlikely that it took some time for the appellant to come to know about the final order. It may be pointed out that the SCN dated 02.07.2018 was issued in the present proceedings six months after the final order. Therefore, in respect of nine bills of entry, the importer and the appellant were correct in classifying the goods as per order of the Commissioner (Appeals) and the officers were correct in clearing the goods for home consumption accordingly. The Principal Commissioner is in error in holding in the impugned order that the importer and the appellant (in importer"s behalf) should have filed bills of entry contrary to the order of the Commissioner in good faith.

12. There is a well established practice in the department to deal with cases with the order which holds the field is against the revenue and an appeal is pending with the superior court or Tribunal. SCN are issued periodically to protect revenues interest and they are transferred to the call book which are then decided after the order of the superior Court or Tribunal is received. In these bills of entry also, after the order of the Commissioner (Appeals), SCNs could have been issued and transferred to Call Book and decided after this Tribunal passed the final order. However, until the final Order of this Tribunal was issued, the order of Commissioner (Appeals) was binding both on the importer and the officers."

11. The aforesaid observations of the Tribunal (against the present impugned order), holds the field that the appellant was justified in adopting the classification while filing the bills of entry.

This is sufficient to turn down the revenue‟s contention about the existence of wilful suppression of facts or deliberate mis-statement on behalf of the appellant. For these reasons, the revenue was not justified in invoking the extended period of limitation to fasten the liability on the appellant when the revenue is aware of the litigation with the appellant on the issue of classification of the very same products and taking steps to challenge the same before the higher forum. Thus it cannot be said that the appellant has in any manner, suppressed or mis-stated the facts wilfully to evade the payment of duty.

12. The law on invocation of extended period of limitation is well settled. Mere omission or merely classifying the goods/services under incorrect head does not amount to fraud or collusion or wilful statement or suppression of facts and therefore the extended period of limitation is not invocable. Reliance is placed on the decision of the Tribunal in **Incredible Unique Buildcon Private Ltd. 2022 (65) GSTL 377.**

"17. We are unable to find any proof of show cause notice or from the impugned order. intent to evade either from the Mere omission or merely classifying its services under an incorrect head does not amount to fraud or collusion or wilful misstatement or suppression of facts. The intention has to be proved to invoke extended period of limitation. Supreme Court has delivered the judgment in the case of *Larsen & Toubro* dated 20 August, 2015, prior to which there was no clear ruling that services which involved supply or deemed supply of goods could only be classified under WCS. The appellant had been classifying its services (which also involved supply/use of goods) under the CICS and Revenue never objected to it and, therefore, the appellant could have reasonably believed it to be the correct head and continued to file returns accordingly and paying duty. Once the returns are filed, if Revenue was of the opinion that the self-assessment of service tax and the classification was not correct, it could have scrutinized the returns and issued notices within time. The show cause notice was issued on 30 September, 2015 for the period covered October, 2010 to June, 2012, which is clearly beyond the normal period of limitation. Therefore, although Revenue is correct on merits, the demand is time barred and, therefore, cannot sustain. For the same reason, the penalties imposed upon the appellant under Sections 77 and 78 also cannot be upheld."

13. The Supreme Court in **Nizam Sugar Factory 1995 (78) ELT 401** has categorically laid down that where facts are known to both the parties, the omission by one to do what he might have done, and not that he must have done, does not render it suppression. Thus when all the facts are before the department as in the present case then there would be no wilful mis-declaration or wilful suppression of facts with a view to evade payment of duty. The relevant para from the judgement in **Nizam Sugar Factory** (supra) is quoted below:-

"4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

13.1 Without multiplying too many decisions on the principle justifying or rejecting the invocation of the extended period of limitation, we would just refer to the citations:

2004 (166) ELT 151 (SC) - Hyderabad Polymers (P) Ltd., vs. Commissioner of Central Excise, Hyderabad

2006 (197) ELT 465 (SC) – Nizam Sugar Factory vs. Collector of Central Excise, Andhra Pradesh

2004 (164) ELT 236 (SC) – ECE Industries Ltd., vs. Commissioner of Central Excise, New Delhi.

2003 (153) ELT 14 (SC) P&B Pharmaceuticals (P) Ltd., vs. Collector of Central Excise

2015 (324) ELT 8 (SC) – Caprihans India Ltd., vs. Commissioner of Central Excise, Surat

14. We have also considered the decisions cited by the learned Authorised Representative for the revenue on the issue of extended period of limitation, however, we feel that in the facts of the present case the same would not be applicable for the simple reason that the earlier proceeding on the subject matter (Order in Original dated 27.7.2012 annexed as „Annexure B" in the Appeal paper book) was decided without allegation of suppression and mis-statement of material facts, then in the subsequent show cause notice, it cannot be said that there was any suppression on the statement of facts by the appellant. We, therefore conclude that the revenue cannot invoke the extended period of limitation under section 28(4) of the Act, hence the show cause notice dated 2.07.2018 is barred by limitation for the period beyond the normal period.

15. We now come to the issue of imposing penalty under section 114A of the Customs Act on the appellant. As we have held that it is not a case of willful suppression, mis-statement or mis-declaration by the appellant, the ingredients required for invoking the penalty being the same, we hold that penal action under the provisions of section 114A as imposed by the impugned order is not justifiable and is hereby set aside. We are also supported by the decision of this Tribunal dated 1.12.2022 (arising out of the same impugned order) refuting the observations of the Principal Commissioner on self assessment by the appellant, inter-alia observing:

"14…….Self assessment is subject to any reassessment by the proper officer. Self assessment can also be appealed against to the Commissioner (Appeals). They can assess duty as per their understanding and the officers are free to reassess it as per section 17(4). Mis-classification or incorrect assessment of duty does not amount to mis-declaration in the bill of entry, nor does it attract any penalty.

15……..We understand that the bills of entry are cleared on the basis of self assessment, they are subjected to post clearance audit. If so, it gives sufficient time to the officers to find if any duty has escaped assessment and issue a demand under section 28. However, there can be no penalty for wrong self-assessment by the importer".

16. On similar grounds, we hold that the appellant cannot be held liable for penalty under section 114 AA of the Customs Act and the reasoning given by the Principal Commissioner that at the time of presenting the bill of entry, the importer made and subscribed to false declaration against the contents of bills of entry, in contravention to section 46(4) of the Act is unsustainable in view of the discussion above.

17. Lastly, we would consider the issue of confiscation of goods under section 111 (m) and (o) as ordered by the Principal Commissioner. The learned counsel for the appellant submitted that the invocation of section 111(m) of the Act is not proper, for the reason that the present dispute relates to classification of goods and does not involve any valuation issue. Similarly, the confiscation under the provisions of section 111(o) is also not sustainable as the benefit of the exemption notification has been availed in accordance with law.

18. Referring to the provisions of section 111 (m), the Tribunal analysed the same in the order dated 1.12.2022 (arising out of the same impugned order) observing as:

"20. Section 111(m) does not provide for confiscation of goods if the importer or on his behalf the Customs broker claims any wrong classification in the bill of entry. It only provides for confiscation if there is mis-declaration of goods. Even if the goods are mis-classified or duties, otherwise wrongly self-assessed by the importer, the goods do not become liable for confiscation. The remedy against wrong assessment is reassessment by the officer under section 17(4). The dispute between the revenue and the importer was with respect to the classification. At the time the bills of entry were filed, the Commissioner (Appeals) order held the field according to which the appellant filed the bills of entry. Therefore, the Principal Commissioner has erred in holding that the goods were liable for confiscation under section 111(m)".

19. In view of the aforesaid observations made, the findings in the impugned order that section 111(m) can be invoked for mis- declaration of any material particular, in respect of the goods and not necessarily only the value of the goods stands quashed and the issue stands decided in favour of the appellant that there cannot be any confiscation of goods under section 111(m) in the case of wrong classification.

19.1 Also, as noticed by us, it is a simple case of mis- classification/incorrect classification and not mis-declaration of goods on the part of the appellant, the logical inference would be that the appellant has not wrongly claimed the exemption benefit and therefore there can be no confiscation under Section 111(o) of the Act.

20. We therefore partly allow this appeal and modify the impugned order to the following effect:

a) The goods in question are re-classified as food preparations under CTH 2106 9099

b) The revenue cannot invoke the extended period of limitation and therefore the show cause notice is barred by limitation except to the extent of the normal period.

c) The demand of differential duty is limited to the normal period, i.e. 03.07.2013 to 19.05.2015 and the same may be computed accordingly.

d) The interest under the provisions of section 28AA of the Act is also to be charged and recovered from the appellant for not paying the due customs duties in respect of the normal period of demand.

e) There cannot be any order of confiscation under section 111(m) or 111(o) of the Act.

21. No penalty can be imposed on the appellant under the provisions of section 114A or under 114AA of the Customs Act, 1962. The impugned order is partly set aside as referred to above and the appeal is remanded to the Adjudicating Authority for the limited purpose of computing the differential duty to be demanded in respect of normal period only.

22. Accordingly, the appeal is partly allowed by way of remand.

(Pronounced on 20th Dec., 2023).

(Binu Tamta) Member (Judicial)

(Hemambika R. Priya) Member (Technical)

Pant

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI

PRINCIPAL BENCH – COURT NO.III

Customs Appeal No.50070 of 2020

[Arising out of Order-in-Appeal No.CC(A)Customs/DII/Prev./NCH/640/2019- 2020 dated passed by the Commissioner of Customs, New Customs House, New Delhi].

Shri Shankar Lal Goyal Prop. of M/s. Rahul Jewels,
R/O A-1507, Green Field Colony,
Faridabad, Village-Anangpur,
Faridabad. **Appellant**

Versus

Commissioner of Customs,New Customs House,
New Delhi. Respondent

APPEARANCE:

Shri Akshay Anand and Shri Tushar Anand, Advocates for the appellant.Shri Rakesh Kumar, Authorised Representative for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No.51685/2023

DATE OF HEARING:21.09.2023DATE OF DECISION:22.12.2023

BINU TAMTA:

1. The appellant has assailed the Order-in-Appeal No. CC(A)CUS/D-II/Prev./NCH/640/2019-20 dated 19.09.2019 passed by the Commissionerof Customs (Appeals) affirming absolute confiscation of the seized gold of foreign marking and penalty under Section 112(b) of the Customs Act, 1062(hereinafter referred to as the 'Ac').

2. That on the basis of intelligence, 8 cut pieces, 01 gold biscuit marked "AL Etihad, Dubai", 01 cut piece of gold marked "AL Etihad" and 01 melted gold piece of crude shape, total weighing 1199.550 gms which were being melted in a smelter, were recovered from the premises of Shri Amit Deshmukh. A certified jewellery appraiser tested the purity of recovered gold by Touch Stone Method and certified the recovered gold collectively weighing 1199.550 gms. Of foreign origin valued at Rs.30,90,109/-. Further,the said recovered 11 pieces of foreign origin gold were seized under Section110 of the Customs Act, 1962 in absence of any documents evidencing licit possession, on the reasonable belief that the same are liable for confiscation under the provision of Customs Act, 1962.

2.(i) Shri Amti Deshmukh, a Smelter, in his statement dated 29.01.2015 recorded under Section 108 of Customs Act, 1962, inter alia, stated that ShriRanjit Rawat, employee of shri Shankar Lal Goyal had come with 1 kg. bar bearing **foreign marking** along with one biscuit of 116.6 gms and 8 cut pieces and a half of 116.6 gm. Piece for melting.

2.(ii) Shri Ranjit Rawat, employee of Shri Shankar Lal Goyal, Prop. of M/s. Rahul Jewels, in his

statement dated 29.01.2015 recorded under Section108 of Customs Act, 1962, inter alia, stated that his job was to take 24 caratforeign marked gold biscuits for melting from Shri Shankar Lal and after getting the gold melted, get the melted gold back from the smelter; that he had been doing this job for around last 3-4 years. Further, he also admitted that on 29.01.2015, he had taken approx. 1200 gms. of foreign marked gold biscuits for melting to Shri Amit Deshmukh and from this gold when 1 kg. bar was being melted, Customs officer came and took this 1 kg. melted gold along with 200 gms. of foreign marked gold into their possession.

2.(iii) Shri Shankar Lal Goyal, Prop. of M/s. Raul Jewels, in his statement dated 29.01.2015 recorded under Section 108 of the Customs Act, 1962, inter alia, admitted that on 29.01.2015, he had purchased 1 kg. foreign marked gold bar from M/s. Sai Bullion (known as Teliwala in the market) andfrom this piece, he gave 48 gms. gold for making of jewellery to Shri Suresh Kumar and rest of 32 gms. in piece form along with one 116 gm. Biscuit, one 50 gm. Biscuit and one 920 gm. Biscuit was sent for melting to Shri Amit Deshmukh through his servant, Shri Ranjit Rawat. He also admitted that he did not have any document for legal possession of the above mentioned gold and purchased the same without any bill.

2.(iv) Shri Tarun Garg, son of the Prop. of M/s. Sai Bullion, in his statement dated 26.06.2015 and 13.07.2015 recorded under Section 108 of the Customs Act, 1962, inter alia, stated that they did not sell cut pieces; that he had not supplied any gold to M/s. Rahul Jewel after 08.12.2014 and further stated that on 29.01.2015, Shri Rahul, S/o Shri Shankar Lal Goyal, Prop. of M/s. Rahul Jewels approached his father for providing a bill for 1 kg. gold but they declined as they had not supplied any gold.

3. That on scrutiny of sales statement submitted by Shri Shankar Lal Goyal during investigation, they had sold 405.500 gms. of gold to M/s. Keshariya Gems Pvt. Ltd. vide Invoice No.6 dated 22.04.2014 and Invoice No.24 dated 11.08.2014. However, Shri Varun Jain, Director of M/s. Kesariya Gems Pvt. Ltd. in his statement dated 20.07.2015 recorded under Section 108 of the Customs Act, 1962, inter alia, confirmed that he had purchased primary gold (purity 0995) thrice from Sh. Shankar Lal Goyal, Prop. of M/s Rahul Jewels vide Bill Invoice No. 6 dated 22.04.2014, invoice No. 24 dated 11.08.2014 and Invoice No. 39 dated 03.01.2015, that he had paid for all the three transactions by cheque; that they had purchased 100 gm. Gold from M/s Rahul Jewels vide Invoice No. 39 dated 03.01.2015 and the same was not reflected by Sh. Shankar Lal Goyal in his sale statements.

4. After completing the investigation, show cause notice dated 27.07.2015 was issued as to why the gold recovered should not be confiscated under Section 111(d) read with Section 120 of the Customs Act, 1962 and appropriate customs duty on the seized gold should not be recovered under Section 125 of the Act and penalty should not be imposed under section 112 of the Act. The show cause notice was adjudicated bythe order-in-original dated 31.01.2017, whereby the adjudicating authority concluded that the appellant was knowingly involved in the handling of the smuggled gold of foreign origin, and was in conscious possession and he failed to discharge the onus on him that the seized gold was validly imported. The gold having been imported in contravention of the provisions of the notification no.12/2012 – Custom dated 17.03.2012, as amended, read with Section 11 of the Customs Act, and section 3 of the Foreign Trade (Development and Regulation) Act, 1992 was liable for confiscation under section 111 of the Customs Act and thereby liable to penal action under section 112(b) of the Act. The appeal filed by the appellant challenging the said order was dismissed by the impugned order and hence the present appeal has been filed before this Tribunal.

5. We have heard Shri Akshay Anand, the learned counsel for the appellant and also Shri Rakesh Kumar, the authorised representative for the Revenue and have perused the records of the case.

6. The main submissions of the learned counsel for the appellant is that the authorities below have erred in presuming that the seized gold was a prohibited item and was liable to be confiscated absolutely, though there was no such proposal in the show cause notice. Secondly, no effective opportunity was granted to present his case and no opportunity to cross examine the witnesses was given. Lastly, he submitted that the seized gold was not tested from the certified goldsmith through Melting Purity Method and the seized gold should have been released on payment of redemption fine to the appellant.

7. On the contrary, the learned authorised representative for the Revenue has relied

on the findings of the authorities below, holding that it is an admitted position that goods in question are gold items of foreign marking and the appellant has failed to discharge the onus by proving the source of the foreign marked gold bars by producing valid documents of import. He relied on several decisions, which we will discuss later, on the principle that gold may not be prohibited, but is a restricted item, and would therefore fall within the definition of 'prohibited goods' as per section 2(33)of the Act. The seized gold being of foreign origin are 'dutiable goods' and in the absence of any document showing the payment of customs duty, they are to be treated as 'smuggled goods' and therefore liable to confiscation under section 111 of the Act. The learned AR also referred to the conduct ofthe appellant in evading the investigation and also his statement recorded under section 108 of the Act.

8. The identity and the ownership of the goods is not disputed. The goods, i.e. 9 cut pieces, one biscuit marked with "AL Etihad, Dubai", one cut piece marked "AL Etihad, Dubai" and one melted gold piece of crude shape, total weighing, 1199.550 gms. were recovered when process of gold smelting was in process under Shri Amit Deshmukh and he in his statement dated 29.01.2015 admitted that Shri Ranjit Rawat, employee of the appellant had come with 1 kg. gold bar of foreign marking along with one biscuit of 116.6 gm. and 8 cut pieces which has also been admitted by Ranjit Rawat in his statement that he had taken 1200 gms gold biscuits (foreign marked) for melting to Shri Amit Deshmukh. The appellant Shri Shankar Lal Goyal in his statement dated 29.01.2015 under Section 108 of the Act admitted that he purchased one kg. of foreign marked gold bar without any bill. In the synopsis and submissions filed by the appellant, he has categorically stated in the opening paragraph that the present appeal relates to seizure of 11 cut pieces of gold weighing, 1199.550 gms. valuedat Rs.30,90,109 from a melter, Shri Anil Deshmukh belonging to the presentappellant. Thus appellant is the owner of the gold recovered which havebeen found to be of foreign origin without any bill or any supporting document.

9. The basic challenge by the appellant is that the gold is not a 'prohibited item' and is not liable to be confiscated absolutely, more so whenthere was no proposal in the show cause notice. We do not find any merit in the submissions made by the appellant and the law on the issue is well settled by several judgements of the superior courts. Before adverting to thedecisions, the statutory definition of 'prohibited goods', 'dutiable goods' and 'smuggling' as defined under Section 2(33), 2(14) and 2(39) of the Act, respectively is set out :

"**2(33)** prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with;

2(14) "dutiable goods" means any goods which are chargeable to duty and on which duty has not been paid;

2(39) "smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscationunder section 111 or section 113;

In this context, it would also be relevant to set out the provisions of section 111 (d) of the Act :
Section 111 (d) - any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contraryto any prohibition imposed by or under this Act or any other law for the time being in force;"

10. The definition of 'prohibited goods' have been the subject matterof interpretation in various decisions. In the case of **Sheikh Mohammed Omar Vs Collector of Customs, Calcutta & Ors. - 1970(2) SCC 728,** the contention raised by the appellant therein that the expression 'prohibition' used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import (Control) Order, 1955 was negatived bythe Supreme Court, holding that the word 'any prohibition' in section 111(d)of the Act meant complete as well as partial prohibition and merely because section 3 of the Imports and Exports (Control) Act, 1947, **used threedifferent expressions, "prohibiting", "restricting" or otherwise,"controlling" was not to cut down the amplitude of the word , "any prohibition" in Section 111(d) of the Act.**

11. Following the aforesaid decision in **Sheikh Mohammed Omar,** the Supreme Court in the case of **Om Prakash Bhatia Vs. Commissioner — 2003 (155) ELT 423 (SC)** enunciated the

meaning to the term 'prohibited goods' as defined by Section 2(33) and the authority of the Customs department to confiscate the goods, observing as:

"10. From the aforesaid definition, it can be stated that (a)if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can beissued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it mayamount to prohibited goods."

12. Similar issue was raised before the Madras High Court in the case of **Malabar Diamond Gallery P. Ltd Vs. Additional Director General, Directorate of Revenue Intelligence, Chennai - 2016 (341) ELT 65 (Mad.)** that gold jewellery was not an item whose import was prohibitedand therefore the goods were not liable to be confiscated, the Division Bench referring to the observations in **Sheikh Mohammed Omer** (Supra) and **OmPrakash Bhatia** (Supra) and other decisions, inter-alia observed:

"86. If there is a fraudulent evasion of the restrictions imposed, under the Customs Act, 1962 or any other law forthe time being in force, then import of gold, in contraventionof the above, is prohibited. For prohibitions and restrictions, Customs Act, 1962, provides for machinery, by means ofsearch, seizure, confiscation and penalties. Act also provides for detection, prevention and punishment for evasion of duty.

87. The expression, "subject to prohibition in the Act and any other law for the time being in force." in Section 2(33) of the Customs Act, has wide cannotation and meaning, and it shouldbe interpreted, in the context of the scheme of the Act, andnot to be confined to a narrow meaning that gold is not an enumerated prohibited goods to be imported into the country. If such narrow construction and meaning have to be given, then the object of the Customs Act, 1962, would be defeated."

13. We would now consider the latest decision by the jurisdictional High Court in the case of **Nidhi Kapoor - dated 21.08.2023** reported in **2023 (8) TMI 1008**, where both the learned Judges have passed separate detailed judgment considering the various notifications issued by the DGFT and also the Circulars issued by RBI, specifically considering the following issues:

"I. In respect of Scope of 'prohibited goods' under section2(33) of the Customs Act, 1962 ('Act')

i. Whether the definition of prohibited goods under theact includes goods which are subject to conditions?

ii. Which category of goods will be non-prohibited, butnonetheless liable to confiscation.

II. Whether gold is a prohibited item ?

III. What is the scope of redemption under section 125 of the Act?

In the main judgement, Justice Dharmesh Sharma categorically held that smuggling of gold is per se restricted by virtue of section 111 as also in terms of various notifications issued under the FTDR Act and under the RBI Act and therefore the importation of gold into India is highly regulated and bulk importation of gold item could only be affected by the nominated banks,

agencies or business houses in the manner laid down by various DGFT regulations as well as the RBI circular or by the eligible passengers in the manner provided by the relevant regulations as the main object of the Customs Act is to prohibit smuggling of goods and sternly deal with thesame as can be gathered on a conjoint reading of Section 2(25),11(2)(c), 111 and 112 of the Act. The concluding para reads as under:

"70. In the foregoing discussion, we answer the issues framed to the effect that Section 2(33) of the Act shall also include importation of such goods within the scope of "prohibited category" with regard to which the mandatory condition under the Act as also in other relevant notifications/circulars issued by the DGFT, the RBI or any other authority have not been complied with ,or in other words the restrictions imposed by the concerned authorities have not been adhered to. We further have no hesitation in holding that the importation of the gold is a prohibited item within the meaning of Section 2(33) of the Act; and that redemption in case of imposition of gold which is brought intoIndia illegally in the form of "smuggling" does not entitle the owner or importer for automatic release/redemption of such item, and therefore, as a necessary corollary a decision to allow release/redemption of the goods confiscated with or without imposition of fine in addition to payment of requisite duty is vested in the discretion of the Adjudicating Officer, who needless to state is duty bound to exercise his discretionary powers not only after considering the facts and circumstances of each case before it, but also in a transparent, fair and judicious manner under Section 125 of the Act."

In his separate judgement concurring with the aforesaid view, Justice Yashwant Varma observed as under:-

"**145.** In summation, we note that Section 2(33) of the Act while defining prohibited goods firstly brings within its dragnet all goods in respect of which a prohibitory notificationor order may have been Signature Not Verified Digitally Signed By:NEHA Signing Date:21.08.2023 17:00:50 issued. That order could be one promulgated either under Section11 of the Act, Section 3(2) of the FTDR or any other law for the time being in force. However, a reading of the latter part of Section 2(33) clearly leads us to conclude that goods which have been imported in violation of a condition forimport would also fall within its ambit. If Section 2(33) were envisaged to extend only to goods the import of which were explicitly proscribed alone, there would have been no occasion for the authors of the statute to have spoken of goods imported in compliance with import conditions falling outside the scope of ―prohibited goods‖.

146. Our conclusion is further fortified when we move onto Section 11 and which while principally dealing with the power to prohibit again speaks of an absolute prohibition or import being subject to conditions that may be prescribed. It is thus manifest that a prohibition could be either in absolutist terms or subject to a regime of restriction or regulation. It is this theme which stands reiterated in Section 3(2) of the FTDR which again speaks of a power to prohibit, restrict or regulate. It becomes pertinent to bear in mind that in terms of the said provision, all orders whether prohibiting, restricting or regulating are deemed, by way of a legal fiction,to fall within the ambit of Section 11 of the Act. This in fact reaffirms our conclusion that Section 2(33) would not only cover situations where an import may be prohibited but also those where the import of goods is either restricted or regulated. A fortiori and in terms of the plain language and intent of Signature Not Verified Digitally Signed By:NEHA Signing Date:21.08.2023 17:00:50 Section 2(33), an import which is effected in violation of a restrictive or regulatory condition would also fall within the net of ―prohibited goods.

147. We are further of the considered opinion that the absence of a notification issued under Section 11 of the Actor Section 3(2) of the FTDR would have no material bearing since a restriction on import of gold stands constructed in terms of the FTP and the specific prescriptions forming part ofthe ITC (HS). Those restrictions which are clearly referable toSection 5 of the FTDR and the relevant provisions of that enactment would clearly be a restriction imposed under a lawfor the time being in force. Once the concept of prohibited goods is understood to extend to a restrictive or regulatory measure of control, there would exist no justification to discern or discover an embargo erected either in terms of Section 11 of the Act or Section 3(2) of the FTDR. This more so since, for reasons aforenoted, we have already foundthat the power to prohibit as embodied in those two provisions itself envisages a notification or order which may stop short

of a complete proscription and merely introduce a restriction or condition for import."

14. From the analysis of the statutory provisions, one thing is clear that the Act does not define the expression 'restricted goods', but the decisions referred to above, have interpreted the expression 'prohibited goods' under Section 2(33) so as to include restricted goods. In terms of the definition of 'prohibited goods' in Section 2(33) even prohibited goods could be imported or exported, subject to compliance with the terms and conditions as prescribed but if import is not done lawfully as per the procedure prescribed under the Customs Act or any other law for the time being in force, in that event the said goods would fall under the definition of 'prohibited goods'.The necessary corollary is that goods being imported if not subjected to check up at the customs on their arrival and are cleared without payment of customs duty are treated as 'smuggled goods'. As observed by the Madras High Court in **Malabar Diamond Gallery P Ltd.** (supra) " The expression, subject to the prohibition under the Customs Act, 1962, or any other law for the time being in force, in Section 2(33) of the Customs Act, has to be read and understood, in the light of what is stated in the entirety of the Act and other laws. Production of legal and valid documents for import along with payment of duty, determined on the goods imported, are certainly conditionsto be satisfied by an importer. If the conditions for import are not complied with, then such goods , cannot be permitted to be imported and thus, to be treated as prohibited from being imported."

The observations of the High Court of Gujarat in **Bhargavraj Rameshkumar Mehta Vs UOI - 2018 (361) ELT 260** has also enunciated the principle that, "condition of declaration of dutiable goods, their assessment and payment of customs duties and other charges is a fundamental and essential condition for import of dutiable goods within the country. Attempt to smuggle the goods would breach all these conditions."

15. We may now examine whether the gold in question was legally imported by the appellant and whether it has to be treated as 'prohibited goods' on conjoint reading of Section 2(33) defining prohibited goods and Section 11 of the Act prohibiting importation and exportation of goods. The appellant in the present case has not been able to produce any documentsto show that the gold in question (foreign origin) recovered was validly imported by paying requisite customs duty as gold falls in the categoryof 'dutiable goods', that is goods chargeable to duty and on which duty has been paid. Infact in his statement recorded under Section 108 of the Act,the appellant admitted that he did not have any legal document to prove the possession of the gold of foreign origin. Though the appellant stated thathe purchased 1 Kg. gold of foreign origin from M/s Sai Buillion out of which he sent around 920 gms plus 116 gms. and 50gms of Biscuits to Shri Amit Deshmukh through his employee Shri Ranjit Rawat but on the contrary, M/s Sai Bullion not only denied having sold any gold bar to the appellant but also stated that the son of the appellant, namely Shri Rahul on 29.01.2015 had approached M/s Sai Buillion to provide them for a bill of 1 Kg. gold which they declined to do so as they had not sold any such gold to the appellant. The chain of events clearly establish that the appellant had illegally procured the gold of foreign origin, which therefore falls in the category of 'prohibited goods' and amounts to 'smuggling'. As noted by the Delhi High Court in Nidhi Kapoor (supra) the notification issued by DGFT has put gold under restricted category and the RBI Circular has allowed only the nominated agencies and banks to import the foreign marked gold bars, in that view the burden to prove that the gold recovered was not smuggled butwas validly procured was on the appellant as per the statutory provisions of Section 123 of the Act, which he failed to rebut by any substantive evidence/documents.

Since the conditions for import of gold as per the notification issued by DGFTand the restrictions imposed by RBI have been violated, the gold in question has to be treated as 'prohibited goods' under Section 2(33). Consequently, itwould fall within the definition of 'smuggling ' under Section 2(39) which will render such goods liable to confiscation under Section 111 or Section 113 of the Act.

16. We would now deal with the contention raised by the appellant that there can be no absolute confiscation in the present case and therefore the gold seized should be released provisionally. In support, he has relied on the decision of this Tribunal in Final Order No.51470/2019 dated 13.11.2019 where seized gold was provisionally released which has been affirmed by the High Court in CUSAA No.229/2019 vide order dated 01.06.2020 and alsoby the

Supreme Court in SLP (C) No.10472/202 vide order dated 01.10.2020 except that the amount of bank guarantee was enhanced by both the Courts. The said case is clearly distinguishable as the importer hadproduced all the requisite documents i.e., shipping bills and invoices, permission for export of the gold jewellery for exhibition, the export declaration forms filed at the time of export of the goods from Dubai, Customs endorsed coloured photographs of the jewellery, bills of entry for the imported jewellery and packing list covering the imported jewellery showing that the jewellery imported was the same, which had earlier been exported for the purpose of exhibition in terms of the notifications. Further,in respect of the gold seized at the workshop, it was noticed that the respondent was working in bonded premises and was in possession of documents evidencing licit acquisition of primary gold bars and gold jewellery and therefore could not have been regarded as prohibited. Considering this, the provisional clearance of the gold, gold jewellery, and silver was allowed. Thus the said case is not applicable to the facts of the present case and the appellant is not entitle to claim any parity on that basisas he has miserably failed to show the procurement and the possession of the gold by way of any legal document and hence we are of the view that noreliance can be placed on the said orders.

17. Having come to the conclusion that the gold seized of which theappellant claimed to be the owner without any valid documents of purchase, has to be treated as 'prohibited goods' and gold falls under the category of 'dutiable goods' but the appellant failed to prove that the liability to pay the customs duty was discharged and by necessary implication the seized gold are 'smuggled goods', we further hold that the seized goods are liable for confiscation under Section 111(d) whereby goods which are imported or attempted to be imported contrary to any prohibition imposed by or under the Act or any other law for the time being in force, would be liable for confiscation. Also absolute confiscation is justified in the facts of the present case where the trail of events show that the appellant is engaged in procuring gold of foreign origin in illegal manner and the multiple stands taken by him on the face of it were false as the alleged supplier M/s. Sai Buillion had denied having supplied any gold to the appellant after 08.12.2014 and also stated that on 29.01.2015, Shri Rahul son of the appellant approached his father for providing a bill for one Kg. gold, but they declined as they had not supplied any gold. We also find that in this case as per the statement of Shri Varun Jain of M/s. Kesariya Gems Pvt. Ltd. that they had purchased primary gold from M/s. Rahul Jewel vide invoice no.6 dated 22.04.2014, invoice no.24 dated 11.08.2024 and invoice no.39 dated 30.01.2015 which were paid by cheques, however the sales register did not show these transactions which also reflected that the statement submitted by the appellant was fabricated so as to justify the stock of gold. Moreover, the conduct of non-cooperation of the appellant in theinvestigation proceedings also cannot be ignored, which is a valid ground for not permitting provisional release of gold. We are supported by the following case laws on the issue of confiscation under section 110A and whether it has to be absolute or can be released provisionally subject tosuch terms and conditions as may be imposed by the adjudicating officer.

17.(i) In **Abdul Razak Vs. UOI - 2012 (275) ELT 300 (Ker.),** the Kerala High Court while holding that though gold is not a prohibited item andcan be imported but such import is subject to lot of restrictions, includingthe necessity to declare the goods on arrival at the customs station and make payment of duty at the rate prescribed, however, held that appellant cannot claim provisional release of goods on payment of redemption fine andduty, as a matter of right.

17.(ii) In the case of **Malabar Diamonds Gallery P. Ltd.** (supra), the Madras High Court while interpreting the provisions of section 110A of the Act, especially the word "may" and having regard to the prohibition/restrictions in the Act and the conditions to be complied with, provisional release of the goods liable for confiscation, is not automatic. As prohibition/ restriction is inbuilt in the Customs Act the Court rejected the prayer for provisional release of the goods, observing as under:

"93. Keeping in mind, the objects and purpose for which, Customs Act, 1962, is enacted, dealing with prohibition/restriction, this Court is of the considered view that the competent authority, has to arrive at a satisfaction, as to whether, goods seized and liable for confiscation, canbe released provisionally, pending adjudication, and in that context, the role of the Courts, in exercise of the powers, under Article 226 of the Constitution of India, should beconfined only to test such

satisfaction, arrived at, by the competent authority, with regard to the objects of the Customs Act, 1962 and any other law for the time being in force. When the competent authority, under the Customs Act,1962, makes a plea that there is a *prima facie* case ofsmuggling and that the appellant has failed to discharge the burden, in terms of Section 123 of the Customs Act and whenthe adjudication proceedings are pending, we are of theconsidered view that it would be appropriate to direct provisional release?

95. Under the Customs Act, 1962, the authorities are duty bound to pass orders for confiscation, impose penalty, initiateprosecution and pending conclusion of the adjudicating proceedings, may order provisional release. At the time, when discretion is exercised under Section 110A and if any challenge is made under Article 226 of the Constitution of India, the twin test, to be satisfied is "relevance and reason". Testing the discretion exercised by the authority, on both subjective and objective satisfaction, as to why, the goods seized, cannot be released, when smuggling is alleged and onthe materials on record, we are of the view that the discretion exercised by the competent authority, to denyprovisional release, is in accordance with law. When there is a *prima facie* case of smuggling, for which, action for confiscation is taken, such proceedings taken should be allowed, to reach its logical end, and not to the stiffed, byany provisional release."

17.(iii) The issue whether the goods are liable to absolute confiscation hasbeen dealt by the Supreme Court in **Union of India Vs. Raj Grow Impex LLP – 2021 (377) ELT 145 (SC)** and referring to the provisions of section 125 of the Act, it was observed:

"**69.1** " A bare reading of the provision aforesaid makes it evident that a clear distinction is made between 'prohibitedgoods ' and 'other goods'. As has rightly been pointed out, the latter part of section 125 obligates the release of confiscated goods (i.e., other than prohibited goods) against redemption fine but, the earlier part of the provision makes no such compulsion as regards the prohibited goods; and it is left to the discretion of the Adjudicating Authority that it may give an option for payment of fine in lieu of confiscation. It is innate in this provision that if the Adjudicating Authority does not chooseto give such an option, the result would be of absolute confiscation."

Further, on the exercise of this power by the adjudicating authority whichhas to be exercised judiciously and for which all the relevant facts and factors and the implication of discretion has to be weighed to arrive at a balanced decision, the Supreme Court in the case of **Union of India Vs. RajGrow Impex LLP (supra)** made observations to the following effect :

"79. As noticed, the exercise of discretion is a critical and solemn exercise, to be undertaken rationally and cautiously and has to be guided by law; has to be accordingto the rules of reason and justice; and has to be based on relevant considerations. The quest has to be to find what is proper. Moreover, an authority acting under the Customs Act,when exercising discretion conferred by Section 125 thereof, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The purpose behind leaving such discretion with the Adjudicating Authority in relation to prohibited goods is, obviously, to ensure that all the pros and cons shall beweighed before taking a final decision for release or absolute confiscation of goods."

17.(iv) In **Nidhi Kapoor** (supra), the Delhi High Court while holding that an infraction of a condition for import of goods would also fall within theambit of section 2(33) of the Act, and thus their redemption and release would become subject to the discretionary power of the Adjudging Officer, also observed :

"**136**. We also take note of the significance of Section 111 ofthe Act which deals with the confiscation of improperly imported goods. While dealing with the circumstances in which the imported goods may become liable for confiscation,the provision firstly speaks of dutiable or prohibited goods. Section 111, apart from speaking of dutiable or prohibited goods also brings within its net goods which have come to be imported either in violation of conditions prescribed or goods which have been concealed as well as imported articles which may have otherwise not compliedwith the conditions prescribed under the Act.

137. What thus clearly appears to flow from Section 111 is ofthe power of confiscation being extendable not just in thecase of dutiable or prohibited goods but also to goods whose import may have been effected in violation of the conditions prescribed by the Act. This is clearly evident from a readingof Clauses (e), (f), (g), (h), (i), (j), (m),(n), (o) and (p) of Section 111."

18. The submission of the learned counsel that there was no proposal for absolute confiscation in the show cause notice stands nullified in view of the decisions referred above, laying down that it is the discretion of the adjudicating authority to decide with reference to the facts and circumstances and based on relevant considerations. For the reasons given above, we are of the opinion that the authorities below have rightly exercised the discretion in not granting provisional release of the seized goods in terms of Section 110 A read with Section 125 of the Act.

19. In the grounds of appeal, the learned Counsel for the appellant has contended that he has been denied proper opportunity to present his case and no opportunity was granted to cross examine the witnesses. Consideringthe facts of the present case we do not find any substance in the argument so raised. Firstly, despite repeated summons the appellant did not appear before the Investigating Agency and merely sent a letter admitting hisstatement recorded under section 108, which during his life time (as he expired on 18.08.2018 during the pendency of the appeal) he never retracted the said statement. As per the settled law, the said statement is admissible in evidence and is binding on the appellant. The appellant during his life time had never asked for cross examination and hence no such plea can be raised at this stage. Moreover, in the event of his own admission no further corroboration is required, reliance is placed on the decision of the Supreme Court in **Commissioner of C. Ex., Madras Vs. M/s Systems & Components Pvt. Ltd. - 2004 (165) ELT 136,** where it has been held that it is a basic and settled law that what has been admitted need not beproved. We therefore reject the contention as raised on behalf of the appellant as frivolous and baseless.

20. Lastly, the learned Counsel for the appellant submitted that request was made for retesting of the seized gold by melting purity because the contents of the Panchnama was not recorded correctly and the purity certificate was also issued without any basis but the same was not allowed. We find from the records that on 29.01.2015, on the date of search itself, a Certified Jewellery Appraiser was called on spot who tested the recovered gold by touchstone method in the presence of two independent witnessesand certified the recovered gold. In order to deal with this contention, we would also rely on the decision of the High Court of Kerala in the case of **Mammu and another Vs. Assistant Collector of Central Excise - 1984 (171) ELT 54,** where it has been held that, since no definite tests have been prescribed under law, whether an article is gold of particular qualityand purity, it has to be borne in mind that the opinion of an expert on this point is relevant under Section 45 of the Evidence Act. The plea is of no significance but an attempt and tactics to delay the adjudicationproceedings, particularly in view of the marking on the gold biscuits "AL Etihad, Dubai) and the statements recorded under Section 108 of the Act.

21. Since on merits we have upheld the issue of confiscation of seized goldunder Section 11 and have also discussed the role and conduct of the appellant, we hold that the appellant for his acts of omission and commission have rendered himself liable to penal action under Section 112(b) of the Act.

22. To sum up, we hold --

(a) gold seized (foreign origin) would fall under the definition of 'Prohibited goods' as per Section 2(33) of the act.

(b) gold being dutiable goods can only be imported on payment of customs duty under the Act.

(c) as per the admission of the appellant himself, the transaction in the present case has to be treated as smuggling as defined in Section 2(39) of the Act.

(d) the gold seized is liable for confiscation under Section 111(d) of the Act.

(e) the adjudicating authority rightly did not invoke Section 110 A read with Section 125 of the Act and ordered for absolute confiscation.

(f) the appellant is liable to penalty under Section 112(b) of the Act.

23. We, therefore, affirm the findings of the authorities below and dismissthe present appeal.

24. Accordingly, the appeal stands dismissed.[Order pronounced on 22nd Dec., 2023]

(Binu Tamta)Member (Judicial)

Ckp.

(HEMAMBIKA R. PRIYA)

Member (Technical)

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI. PRINCIPAL BENCH – COURT NO.III

Customs Appeal No.50934 of 2018 (DB)

(Arising out of Order-in-Original No. DLI/CUSTOM/PRE/OPD/PR.COMMR/21/2017 dated 05.01.2018 passed by the Principal Commissioner of Customs, New Customs House, New Delhi)

Commissioner of Customs (Preventive) House, **AppellantNew Customs**

Near IGI Airport, New Delhi-110 037.

Versus

Suresh Bhonsle **Respondent**

S/o Jaysingh Bhonsle, R/o 86/87, S.S. Market,Silliguri,

West Bengal-734 001.

With

Customs Appeal No.51257 of 2018 (DB)

(Arising out of Order-in-Original No. DLI/CUSTOM/PRE/OPD/PR.COMMR/21/2017 dated 05.01.2018 passed by the Principal Commissioner of Customs, New Customs House, New Delhi)

Suresh Bhonsle **Appellant**

S/o Jaysingh Bhonsle, R/o 86/87, S.S. Market,Silliguri,

West Bengal-734 001.

Versus

Commissioner of Customs (Preventive) House, **RespondentNew Customs**

Near IGI Airport, New Delhi-110 037.

And

Customs Appeal No.51737 of 2018 (DB)

(Arising out of Order-in-Original No. DLI/CUSTOM/PRE/OPD/PR.COMMR/21/2017 dated 05.01.2018 passed by the Principal Commissioner of Customs, New Customs House, New Delhi)

Shri Mohd. Wajid @Bunty, **Appellant**

S/o Shri Saddik Ahmad,

R/o 2B-350, Awas Vikas Colony,

J.P. Nagar,

Amroha, Uttar Pradesh.

Versus

Commissioner of Customs (Preventive) House, **Respondent**

New Customs

Near IGI Airport, New Delhi-110 037.

APPEARANCE:

Shri Rakesh Kumar, Authorised Representative for the Revenue.

Shri Navneed Panwar, Advocate (Customs Appeal No.50934 and 51257/2018) and

R.K. Rawal, Consultant (Customs Appeal No.51737/2018) for the assessee.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)FINAL ORDER NOS.50015-50017/2024

DATE OF HEARING:03.10.2023DATE OF DECISION:04.01.2024

BINU TAMTA:

1. Separate appeals have been filed by the two appellants, namely Suresh Bhonsle and Mohammed Wajid against the order-in-original no.DLI/CUSTOM/PRE/OPD/PR.COMMR/21/2017 dated 05.01.2018 orderingconfiscation under Section 111(b) and Section 111(d) of the Customs Act, 1962, (hereinafter referred to as the Act) and have also challenged the penalty imposed under Section 112 (b)(i) and Section 112(b) of the Act. TheRevenue also filed separate appeal challenging non-imposition of penalty under Section 114AA of the Act against the appellant, Suresh Bhonsle.

2. The facts of the case are that acting on a specific information thatthree persons would engage themselves in handing and taking over smuggled gold in Delhi, the officers of Directorate of Revenue Intelligence, (DRI), apprehended three persons, namely, Shri Amzad Khan, Shri Imran Mullick and Mohammed Wajid in presence of independent witnesses on 14.05.2016 at around, 09:40 hours. Pursuant to notice under Section 102 of the Customs Act, they were apprised of the right to be searched either in thepresence of a Magistrate or a Gazetted Officer, they were searched as per their reply given in writing in the presence of a gazetted officer at the DRI office. On the personal search of Shri Amzad Khan and Imran Mullick apart from other things, three pieces of heavy yellow colour metal bars wrapped incarbon paper and Newspaper and fastened on their waist under the shirt were recovered. The recovered yellow colour metal bars were got examined and valued from Shri Vikram Bhasin, Jewellery Appraiser, Customs, (IGIA) inpresence of independent witnesses and as per his report, all the six yellow bars were gold bars of purity 999 collectively weighing, 10,000 gms. having market value of Rs3,05,00,000/-. None of the persons could produce any documents to show the legal possession of the gold bars recovered from them.

3. The voluntary statement of all the three persons, Amzad Khan, Imran Mullick and Mohammed Wajid were recorded under Section 108 of the Act on14.05.2016 and thereafter on 16.09.2016. Both Amzad Khan and Imran Mullick revealed about the past transactions in the month of December 2015, February 2016 and April 2016 when they had indulged in delivering gold illegally to Mohd. Wajid in Delhi at the behest of Sh. Suresh Bhonsle. Amjad Khan also referred to certain instances where he alone delivered gold to Mohd. Wajid in Delhi. In respect of the present consignment, both ofthem stated that on 12.05.2016, Sh. Suresh Bhonsle gave him

three packetscontaining five kgs. of gold to him as well as three packets containing 5 kgs. of gold to Shri Imran Mullick, with two delivery challans of M/s. Buillion Traders, Siliguri for delivery to Mohd. Wajid at Delhi and for this they boarded Brahmaputra mail on 12.05.2016 and reached Old Delhi Railway Station at around 6.3 0 a.m. on 14.05.2016, when they met Mohd. Wajid at 9.40 am. and as soon he handed over a bag, the DRI officers intercepted.

4. Shri Mohd. Wajid in his voluntary statement recorded under Section

108 of the Act on 14.05.2016, stated how he met Shri Suresh Bhonsle in December 2015, at a function in Kathmandu, Nepal, and thereafter Shri Bhonsle called him up to sell 3/4 kgs. of gold through him. He then contacted Mohammed Abid who agreed to sell the gold at Delhi. In his statement, he specifically stated that Sh.Bhonsle had told him that the gold was from outside India. Mohammed Abid in his voluntary statement dated 30.05.2016, agreed that he was disposing of the smuggled gold, handedover to him by Mohammed Wajid in the market, for which he was getting commission of Rs.50 per lakh of the sale proceeds. He also admitted that Mohd. Wajid had told him that the said gold was being received fromNepal.

5. In further follow-up action, search was conducted at M/s. BullionTraders, Siliguri where statement of Smt. Shalan Bhonsale, partner of M/s Bullion Traders (mother of Suresh Bhonsle) was recorded under Section 108 of the Act on 14.05.2016, however, she denied having signed any Challans (copies of challans recovered from Amjad Khan and Imran Mullick) as shedid not look after the business at all. As per the statement of Shri Shyamal Roy, Accountant of M/s. Bullion Traders, there was no transaction afterMarch 2016 and there was no stock apart from what was shown in the stock register.

6. Shri Suresh Bhonsle in his statement recorded under Section 108 ofthe Act on 17.05.2016 stated that they were in the business of trading of gold and silver, and he was a partner along with his brother and mother in the firm M/s.Bullion Traders. He denied that he knows Shri Amzad Khan and Shri Imran Mullick. On 15.07.2016 when the statement of Shri SureshBhosale was recorded he admitted that he used to receive gold from oneShri Mohan of Kathmandu, Nepal through one Shri Ramesh in melted condition to suppress the foreign originality. He also admitted thetransaction of gold being delivered by Shri Amzad Khan and Shri Imran Malikat Delhi and also that he took signatures of his mother on blank pages of Challan book to use the same to cover the transportation of smuggled goods. He categorically admitted that he did not make any entry in the stockregister in respect of the 10 Kg. gold as these were smuggled gold bars fromNepal.

7. Investigation of the mobile numbers held by these persons revealed that Shri Suresh Bhonsle was in constant touch with all of them and also in Nepal. From verification of the stock register of M/s. Buillion Traders,it was found that there was no sale and purchase of any kind of gold from 1.04.2016 to 14.05.2016, due to All India strike of Gold Jewellers Association.

8. Accordingly, show cause notice dated 7.11.2016 was issued proposing confiscation of the seized gold under Section 111(b) and Section 111(d) of the Act and imposition of penalty under Section 112(b)(i) and Section112(b) and also under Section 114AA of the Act. On adjudication, theproposal in the show cause notice was affirmed ordering absolute confiscation of the seized gold and penalty was imposed as under:-

"(iii) I impose under Section 112 (b)(i) of the Customs Act, 1962, a penalty of Rs.75,00,000/- (Rupees SeventyFive Lakh Only) on Shri Suresh Bhonsle S/o Late Jaysingh Bhonsle, partner of Bullion Traders and resident of 86/87,
S.S. Market Siliguri (W.B.) which should be recovered from him forthwith.

(iv) I impose under Section 112(b) of the Customs Act, 1962, a penalty of Rs.20,00,000/- (Rupees Twenty Lakh only) on Shri Imran Mullick S/o late Shoib Mullick, which should be recovered from him forthwith.

(v) I impose under Section 112(b) of the Customs Act, 1962, a penalty of Rs.20,00,000/- (Rupees Twenty Lakh only) on Shri Amjad Khan, S/o late Mohd. Khan, whichshould be recovered from him forthwith.

(vi) I impose under Section 112(b) of the Customs Act, 1962, a penalty of Rs.5,00,000/- (Rupees Five Lakh only) onMohd. Wajid @ Bunty, S/o Shri Saddik Ahmad, which shouldbe recovered from him forthwith.

(vii) I impose under Section 112(b) of the Customs Act, 1962, a penalty of Rs.2,00,000/- (Rupees Two Lakh only)on Mohd. Abid, S/o Mohd. Allaudidin, which should be recovered from him forthwith."

9. The appellant, Shri Suresh Bhonsle has challenged the confiscation and the penalty imposed by the impugned order before this Tribunal in the present appeal and the appellant, Mohd Wajid has challenged the penalty imposed on him. Whereas the Revenue has challenged that despite there being a proposal in the show cause notice for imposing penalty underSection 114AA, no penalty has been imposed by the Adjudicating Authority on Shri Suresh Bhonsle.

10. We have heard the Shri R. K. Rawal, Consultant for the appellant and also Shri Rakesh Kumar, Authorised Representative for the Revenue and perused the records of the case.

11. The first submission on behalf of the appellant is that the gold seized isnot of foreign origin. He has seriously challenged the report of the jewellery appraiser and sought for retesting of the gold to ascertain the purity, but thesame has not been allowed. He also submitted that gold was entrusted to Shri Amzad Khan and Imran Mullick for delivery to Delhi under proper challan, therefore, the burden of proof shifts on to the department and reliedon the decision in **Ashok Kumar Aggarwal – 2016 (342) ELT 232 (Cal.)**.Further, there is no evidence of the smuggled nature of the gold. Forimposing penalty under Section 112(b) of the Act, the department was required to produce cogent evidence. No CDR has been furnished to show any conversation with Shri Mohan of Nepal. Referring to the decision of the Apex Court in **Mohtesham Mohd. Ismal vs Special Director Enforcement, Directorate, 2007(220) ELT 2,** he submitted that confession of co-accused cannot be treated as substantive evidence.

12. Shri Rakesh Kumar has opposed the appeals filed by Amjad Khan and Imran Mullick on the principle that import of gold is prohibited under Foreign Trade (Development and Regulation) Act, 1992 except by authorisedbanks and nationalised agencies and the appellant has not been permitted toimport gold by the DGFT. Therefore, the gold seized is prohibited and the burden of proof that it is not smuggled gold lies on the appellant under Section 123 of the Act which he failed to discharge and the goods are therefore liable for confiscation under the Act. He relied on various judgments which have settled the law on the issue of import of gold. On the issue of penalty under Section 112(b), he submitted that the gold was seizedof which the appellant was the owner but he could not produce any evidentiary document showing that the gold was acquired legally. Referring to the provisions of Section 114 AA of the Act, Shri Rakesh Kumar submittedthat the present case was of creating false/fake documents to mask the smuggled gold which was transported to Delhi.

13. Over the period, the law on the subject relating to import of gold iswell settled by catena of decisions interpreting the statutory provisions, particularly the definition of 'prohibited goods' under Section 2(33), 'dutiablegoods' under Section 2(14) and 'smuggling' as defined under Section 2(39) of the Act read with Section 111 providing for various circumstances under which confiscation can be made, Section 110A and read with Section 125 forprovisional release on payment of redemption fine and Section 123 requiring the burden of proof to be discharged by the person in possession or owner ofthe seized goods that they are not smuggled goods.

14. On examining the facts of the present case, we find that there is no dispute that huge quantity of gold in question had been recovered which was concealed on the body of Amzad Khan and Imran Mullick to be handed over to Mohd. Wajid on the instructions of Suresh Bhonsle. From the statements recorded under section 108 of the Act, not only the instant chain of events is clearly established but even the past involvement shows that theappellants are habitual offenders. The connivance of all the persons involved stands proved by the detailed call records of different mobile numbers of Suresh Bhonsle to Mohd. Wajid, Imran Mullick, Amjad Khan and Mohd.Abid showing regular incoming and outgoing calls to each other during the relevant period as noted extensively in the impugned order. The frequent phone calls between all of them clearly establish their connivance in dealing with the sale purchase of gold procured in an illegal manner which amounts to smuggling. No document has been produced to show legal procurement ofgold. These facts are sufficient to draw the conclusion that all these persons are involved in illicit trade of gold on regular basis.

15. The contention of the appellant that gold is not of foreign origin is not sustainable in view

of his own statement dated 15.07.2016 where he specifically admitted that he used to get gold from one Mohan of Kathmandu, Nepal through one Rajesh. Gold of foreign origin was received in melted form to hide its identity and suppress that it is of foreign origin. It is a settled principle of law that the statement recorded under section 108 ofthe Act is binding on the appellant **(Romesh Chandra Mehta vs. State of West Bengal, 1969 (2) SCR 461, Percy Rustam Ji Basta vs. State of Maharashtra, 1971 (1) SCC 847, Assistant Collector Central Excise, Rajamundry vs. Duncan Agro Industries Ltd & Ors. 2000(7) SCC 53** and **Gulam Hussain Shaikh Chougule vs. Reynolds Supdt. of Customs Marmgoa 2001 (134) ELT 3(SC)** and the said statement of the appellant is further corroborated by the statement of the co-noticees that they were aware that the gold in question was of foreign origin. Once there is an admission by the appellant himself nothing further is required to be proved to the contrary. The Apex Court in **Surjeet Singh Chabbra vs. Union of India 1997 (89) ELT 646** held that confession made by the appellant binds him. Reliance is placed on **Commissioner of C. EX, Madras vs. M/s Systems and Components Pvt. Ltd 2004 (165) ELT 136, (SC)** where ithas been held that it is a basic and settled law that what has been admitted need not be proved.

16. On the issue of burden of proof, the submission that gold was entrusted to Amzad Khan and Imran Mullick for delivery to Delhi under proper voucher would shift the burden on the department to prove that itwas smuggled gold, we are of the view that the challan issued by the appellant had no sanctity as he could not show the source of procuring the gold. The appellant has not been able to discharge the burden that he has purchased the gold as per the specified sources by the RBI. There was no record or entry in their stock register of the gold covered by the challans issued. Moreover, the statement of Shri Shyamal Roy, the accountant of M/sBuillion Traders that there had been no transactions of sale-purchase of golddue to strike also corroborates that the delivery of gold under the challans was fraudulent and illegal. In the circumstances, as per Section 123 of the Act the department was under reasonable belief that it was smuggled gold and therefore the burden was on the appellant being the owner of it to prove that the gold seized was not smuggled gold, which remained undischargedat his end. The reliance placed by the appellant on the decision in **Ashok Aggarwal (supra)** is clearly distinguishable as the gold in that case was imported by MMTC Ltd and the respondent had produced the purchase bill and seller had confirmed the sale of such gold to him and in that event itwas observed that the onus shifted to the department. We are of theopinion that as the appellant failed to prove that the gold seized was validly procured in compliance of the statutory provisions whereby gold has beenput in restricted category by DGFT and in terms of the RBI Circular only nominated agencies and banks are entitled to import the foreign marked gold bars.

17. Having arrived at the finding that the gold seized was smuggled gold,it would fall under the category of 'prohibited goods' as defined in Section 2(33) of the Act and therefore liable for confiscation under the provisions of section 111 of the Act. We have recently observed in the case of **Shankar Lal Goyal vs. Commissioner of Customs Final Order No.51685/2023 dated 22.12.2023** relating to seizure of gold :

"**10.** The definition of 'prohibited goods' have been the subject matter of interpretation in various decisions. In the case of **Sheikh Mohammed Omar Vs Collector of Customs, Calcutta & Ors. - 1970(2) SCC 728,** the contention raised by the appellant therein that the expression 'prohibition' used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import (Control) Order, 1955 was negatived by the Supreme Court, holding that the word 'any prohibition' in section 111(d) of the Act meant complete as well as partial prohibition and merely because section 3 of the Imports and Exports (Control) Act, 1947, **used three different expressions, "prohibiting", "restricting" or otherwise, "controlling" was not to cut down the amplitude of the word , "any prohibition" in Section 111(d) of the Act.**

11. Following the aforesaid decision in **Sheikh Mohammed Omar,** the Supreme Court in the case of **Om Prakash Bhatia Vs. Commissioner — 2003 (155) ELT 423 (SC)** enunciated the meaning to the term 'prohibited goods' as defined by Section 2(33) and the authority of the Customs department to confiscate thegoods, observing as:

"10. From the aforesaid definition, it can be stated that

(a) if there is any prohibition of import or export of goods under the Act or any

other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for importor export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance ofgoods. If conditions are not fulfilled, it may amount to prohibited goods."

12. Similar issue was raised before the Madras High Court in the case of **Malabar Diamond Gallery P. Ltd Vs. Additional Director General, Directorate of Revenue Intelligence, Chennai - 2016 (341) ELT 65 (Mad.)** that gold jewellery was not an item whose import was prohibited and therefore the goods were not liable to be confiscated, the Division Bench referring to the observations in**Sheikh Mohammed Omer** (Supra) and **Om Prakash Bhatia** (Supra) and other decisions, inter-alia observed:

"86. If there is a fraudulent evasion of the restrictions imposed, under the Customs Act, 1962 or any other law for the time being in force, then import of gold, incontravention of the above, is prohibited. For prohibitions and restrictions, Customs Act, 1962, provides for machinery, by means of search, seizure, confiscation and penalties. Act also provides for detection, prevention and punishment for evasion of duty.

87. The expression, "subject to prohibition in the Act and any other law for the time being in force." in Section2(33) of the Customs Act, has wide cannotation and meaning, and it should be interpreted, in the context of the scheme of the Act, and not to be confined to anarrow meaning that gold is not an enumerated prohibited goods to be imported into the country. If such narrow construction and meaning have to be given, thenthe object of the Customs Act, 1962, would be defeated."

13. We would now consider the latest decision by the jurisdictional High Court in the case of **Nidhi Kapoor - dated21.08.2023** reported in **2023 (8) TMI 1008**, where both the learned Judges have passed separate detailed judgment considering the various notifications issued by the DGFT and also the Circulars issued by RBI, specifically considering the following issues:

"I. In respect of Scope of 'prohibited goods' under section 2(33) of the Customs Act, 1962 ('Act')

i. whether the definition of prohibited goods under the act includes goods which are subject to conditions?

ii. Which category of goods will be non- prohibited, but nonetheless liable to confiscation.

II. Whether gold is a prohibited item ?

III. What is the scope of redemption under section125 of the Act?

In the main judgement, **Justice Dharmesh Sharma** categorically held that smuggling of gold is per se restricted by virtue of section 111 as also in terms of various notifications issued under the FTDR Act and under the RBI Act and therefore the importation of gold into India is highly regulated and bulk importation of gold item could only be affected by the nominated banks, agencies or business houses in the manner laid down by various DGFT regulations as well as the RBI circular or by the eligible passengers in the manner provided by the relevant regulations as the main object of the Customs Act is to prohibit smuggling of goods and sternly deal with the same as can be gathered on a conjointreading of Section 2(25),11(2)(c), 111 and 112 of the Act. The concluding para reads as under:

"70. In the foregoing discussion, we answer the issues framed to the effect that Section 2(33)

of the Actshall also include importation of such goods within the scope of "prohibited category" with regard to which the mandatory condition under the Act as also in other relevant notifications/circulars issued by the DGFT, the RBI or any other authority have not been complied with, or in other words the restrictions imposed by the concerned authorities have not been adhered to. We further have no hesitation in holding that the importation of the gold is a prohibited item within the meaning of Section 2(33) of the Act; and that redemption in case of imposition of gold which is brought into India illegally in the form of "smuggling" does not entitle the owner or importer for automatic release/redemption of such item, and therefore, as a necessary corollary a decision to allowrelease/redemption of the goods confiscated with orwithout imposition of fine in addition to payment of requisite duty is vested in the discretion of the Adjudicating Officer, who needless to state is duty bound to exercise his discretionary powers not only after considering the facts and circumstances of each case before it, but also in a transparent, fair and judicious manner under Section 125 of the Act."

In his separate judgement concurring with the aforesaid view,

Justice Yashwant Varma observed as under:-

"**145.** In summation, we note that Section 2(33) of the Act while defining prohibited goods firstly brings within its dragnet all goods in respect of which a prohibitory notification or order may have been Signature Not Verified Digitally Signed By:NEHA SigningDate:21.08.2023 17:00:50 issued. That order could be one promulgated either under Section 11 of the Act, Section 3(2) of the FTDR or any other law for the time being in force. However, a reading of the latter partof Section 2(33) clearly leads us to conclude that goodswhich have been imported in violation of a condition forimport would also fall within its ambit. If Section 2(33) were envisaged to extend only to goods the import of which were explicitly proscribed alone, there would have been no occasion for the authors of the statute to have spoken of goods imported in compliance with import conditions falling outside the scope of ― prohibited goods‖.

146. Our conclusion is further fortified when we move on to Section 11 and which while principally dealingwith the power to prohibit again speaks of an absolute prohibition or import being subject to conditions that may be prescribed. It is thus manifest that a prohibition could be either in absolutist terms or subject to aregime of restriction or regulation. It is this themewhich stands reiterated in Section 3(2) of the FTDR which again speaks of a power to prohibit, restrict or regulate. It becomes pertinent to bear in mind that in terms of the said provision, all orders whetherprohibiting, restricting or regulating are deemed, byway of a legal fiction, to fall within the ambit of Section 11 of the Act. This in fact reaffirms our conclusion that Section 2(33) would not only cover situations where an import may be prohibited but also thosewhere the import of goods is either restricted or regulated. A fortiori and in terms of the plain language and intent of Signature Not Verified Digitally Signed By:NEHA Signing Date:21.08.2023 17:00:50 Section 2(33), an import which is effected in violation of arestrictive or regulatory condition would also fall within the net of ―prohibited goods.

147. We are further of the considered opinion that theabsence of a notification issued under Section 11 ofthe Act or Section 3(2) of the FTDR would have no material bearing since a restriction on import of gold stands constructed in terms of the FTP and the specific prescriptions forming part of the ITC (HS). Those restrictions which are clearly referable to Section 5 of the FTDR and the relevant provisions of that enactment would clearly be a restriction imposed under a law for the time being in force. Once the concept of prohibited goods is understood to extend toa restrictive or regulatory measure of control, there would exist no justification to discern or discover an embargo erected either in terms of Section 11 of the Act or Section 3(2) of the FTDR. This more so since, for reasons aforenoted, we have already found thatthe power to prohibit as embodied in those two provisions itself envisages a notification or order whichmay stop short of a complete proscription and merely introduce a restriction or condition for import.

14. From the analysis of the statutory provisions, one thing is clear that the Act does not define the expression 'restricted goods', but the decisions referred to above, have interpreted theexpression 'prohibited goods' under Section 2(33) so as to include restricted goods. In terms of

the definition of 'prohibited goods' in Section 2(33) even prohibited goods could be imported or exported, subject to compliance with the terms and conditions as prescribed but if import is not done lawfully as per the procedure prescribed under the Customs Act or any other law for the time being in force, in that event the said goods would fall under the definition of 'prohibited goods'. The necessary corollary is thatgoods being imported if not subjected to check up at the customs on their arrival and are cleared without payment of customs duty are treated as 'smuggled goods'. As observed by the Madras High Court in **Malabar Diamond Gallery P Ltd.** (supra) " The expression, subject to the prohibition under the Customs Act, 1962, or any other law for the time being in force, in Section 2(33) of the Customs Act, has to be read and understood, in the light of what is stated in the entirety of the Act and other laws. Production of legal and valid documents for import along with payment of duty, determined on the goods imported, are certainly conditions tobe satisfied by an importer. If the conditions for import are not complied with, then such goods , cannot be permitted to be imported and thus, to be treated as prohibited from being imported."

The observations of the High Court of Gujarat in **Bhargavraj Rameshkumar Mehta Vs UOI - 2018 (361) ELT 260** has also enunciated the principle that, "condition of declaration of dutiable goods, their assessment and payment of customs duties and other charges is a fundamental and essential condition for import of dutiable goods within the country. Attempt to smuggle the goods would breach all these conditions."

18. The provisions of Section 111 specify several eventualities where goods shall be liable to confiscation. The Adjudicating Authority has confirmed the confiscation under Section 111(b) and 111(d)of the Act, whichreads as :

"**111.** Confiscation of improperly imported goods, etc.

The following goods brought from a place outside India shall be liable to confiscation:

(b)any goods imported by land or inland water through any route other than a route specified ina notification issued under clause

(c) ……..

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of beingimported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

The factum of recovery of such large quantity of 10 kgs. of gold concealed under the shirt speaks for itself and the appellant being the owner thereof was unable to provide any licit document of procuring the gold, justifies the confiscation under Section 111(b) and 111(d). Taking note of the fact that the appellant had indulged in such illegal gold transactions in the past, the absolute confiscation needs to be affirmed and therefore the gold seized cannot be provisionally released in terms of section 110A read with Section
125 of the Act. The decision in **Abdul Razak vs. Union of India, 2012**

(275) ELT 300 (Ker.) and in the case of **Malabar Diamonds Gallery**

P. Ltd Addl. Director General, DRI, Chennai 2016 (341) ELT65(Mad.) has held that provisional release of goods on payment of redemption fine and duty is not as a matter of right and cannot be claimed automatically. We would also like to refer the decision of this Tribunal in **Deepak Handa vs. Principal Commissioner of Customs (Preventive) Customs Appeal No. 52922/2019 vide Final Order No. 51520- 51521/2021 dated 25.05.2021** where gold bars of foreign origin recovered without any licit documents were held liable for absolute confiscation with penalty. The relevant para reads as under :

"**29.** Under Section 111(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contraryto any prohibition imposed by or under this Act or any other law for the time being in force can be confiscated. Gold is a prohibited good inasmuch as its import was permitted during the relevant period only by designated agencies under the Foreign Trade (Development & Regulation) Act, 1992. Thereis no evidence on record whatsoever to show that the seized gold was imported by

one of the approved agencies. Thus,the gold is liable for confiscation under Section 111(d). Thereafter if the designated authority, in turn, sold the gold to anyone and such person carried them, concealed in a secret jacket or false bottom of a suitcase or shoes, Section 111(i) would not apply. However, in this case, there is no evidence that the goods in question were imported by the designated organizations who alone could have imported the gold. Therefore, the confiscated gold is prohibited good and since it has been found concealed in the shoes of Deepak andin the secret pockets of his back pack, Section 111(i) applies.

37. These coins were seized in the follow up action inJammu at the above business premises. Gold is coveredunder Section 123 and if it is seized on a reasonable belief that it is smuggled, the burden of proof shifts to the personfrom whom it is seized to the person who claims to be ownerof the gold. In this case, the gold coins had foreign markings.Import of gold was permitted during the relevant period onlyby authorized agencies and the appellants were not soauthorized. If they had purchased the gold from someauthorized agency, they would have the documents to establish this fact. From the records of the case, it is evidentthat the appellants could not produce any such documents toshow that these were not smuggled. Therefore, thepresumption is that these are smuggled gold. As discussedabove, these coins are liable for confiscation under Section111(d) of the Customs Act."

In **Shankar Lal Goyal's case** with reference to absolute confiscation, we have observed as :

"17.(iii) The issue whether the goods are liable to absolute confiscation has been dealt by the Supreme Court in **Union ofIndia Vs. Raj Grow Impex LLP – 2021 (377) ELT 145 (SC)** and referring to the provisions of section 125 of the Act, it wasobserved:

"**69.1** " A bare reading of the provision aforesaid makes it evident that a clear distinction is made between 'prohibited goods and 'other goods'. As has rightly been pointed out,the latter part of section 125 obligates the release of confiscated goods (i.e., other than prohibited goods) against redemption fine but, the earlier part of the provision makes no such compulsion as regards the prohibited goods; and it is left to the discretion of the Adjudicating Authority that it may give an option for payment of fine in lieu of confiscation. It is innate in this provision that if the Adjudicating Authority does not choose to give such anoption, the result would be of absolute confiscation."

Further, on the exercise of this power by the adjudicating authority which has to be exercised judiciously and for which all the relevant facts and factors and the implication of discretion has to be weighed to arrive at a balanced decision, the Supreme Court in the case of **Union of India Vs. Raj Grow Impex LLP (supra)** made observations to the following effect :

"79. As noticed, the exercise of discretion is a critical and solemn exercise, to be undertaken rationally andcautiously and has to be guided by law; has to be according tothe rules of reason and justice; and has to be based onrelevant considerations. The quest has to be to find what is proper. Moreover, an authority acting under the Customs Act, when exercising discretion conferred by Section 125 thereof, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The purpose behind leaving such discretion with the Adjudicating Authority in relation to prohibited goods is, obviously, to ensure that all the pros and cons shall be weighed before taking a final decision for release or absolute confiscation of goods."

19. We find that the Allahabad High Court in **Jalil Ahmad vs. State vide order dated 22.12.1978 – 1979 Cri.L.J.514** rightly concluded that goods were smuggled goods as neither the appellant adduced evidence that they paid the customs duty nor that they had brought these goods from Indian manufacturers. Similarly, in the present case the appellant neither adduced any evidence to show that he had legally procured the gold by following requisite conditions of payment of customs duty and other charges nor didhe produce any documents for having purchased the said gold within India and therefore the gold recovered were in violation of the prohibition imposedby DGFT and RBI apart from the provisions of the Customs Act hence was

liable for confiscation under section 111 of the Act.

20. The submission on behalf of the appellant that statement of co- noticees, Imran Mullick, Amjad Khan and Mohd. Wajid cannot be taken into account to fasten guilt on the appellant and in support he relied on the decision of the Apex Court in **Mohtesham Mohd. Ismal vs. Spl. Director, Enforcement Directorate 2007(220) ELT 2 (SC)** cannot be doubted, however in the facts of the present case the statement of the appellant recorded under section 108 is on record and the same is admissible in evidence as per the settled law. Infact the appellant has tried to get out of his confessional statement recorded on 15.07.2016 by submitting a letter through his advocate dated 16.11.2017 to say that he was forced and threatened to give his statement. The retraction sought to be made afterone year and five months does not inspire any confidence as it is anafterthought based on legal advice by his counsel and hence needs to be rejected. Reliance is placed on **Surjeet singh Chhabra** (supra) that confession, though retracted, is an admission and binds the petitioner.

21. Much emphasis has been laid by the appellant on the veracity of the test report by the jewellery appraiser and the request for re-testing. In this regard we find that the appellant had approached the Delhi High Court for re-testing in Writing Petition No. 9174/2017 which was disposed of vide order dated 17.10.2017, granting liberty to the appellant to agitate the issuebefore the adjudicating authority. As per the common practice, jewellery appraiser is called immediately at the spot and he on the basis of touchstonetest ascertain as to whether the metal bar seized is gold and also to large extent its quality/ purity. The same practice was followed here at the time of seizure. We also find that on the request made by the appellant, theJewellery Appraiser, Shri Vikram Bhasin was called and cross examined by Sh. Deepak Choudhry, Advocate for the appellants. We find that on being asked about the margin of accuracy of purity, which could be drawn by usingthe touchstone method, Shri Bhasin replied that in that particular case, the margin of accuracy was almost 100% as they were gold bars cut pieces. He further added that consistency level will remain almost the same as gravityof the gold bar remains the same. It is also pertinent to note that on being asked as to whether the method of analysis adopted by him is capable of ascertaining whether the gold bar is made up from melting jewellery or it isa virgin bar, Shri Bhasin replied in affirmative. All this would reveal that fair opportunity has been granted to the appellants and the plea of re-testingwas nothing but delaying tactics as it would not really make any difference ifthe gold recovered was less pure. Purity of the gold, in the instant case is not really relevant in view of the peculiar circumstances, i.e., the voluntary statements of all the persons recorded under section 108 of the Act which reveals the conspiracy in executing the smuggling of gold, the manner of concealment of gold in such large quantity when recovered, its transportation and the use of fake challans along with the phone call details clearly establish the role and involvement of all the persons involved . The appellant by taking such plea is indeed trying to mislead but the fact is that the goods smuggled, even if they change their form by melting, they still remain smuggled goods which are liable to confiscation under the Act. Reliance is also placed on the decision of the Kerala High Court in **Mammu & Anr. Vs Asst Collector of Central excise 1984 (171) ELT 54**where it has been held that since no definite tests have been prescribed under law, whether an article is gold of particular quality and purity, it has to be borne in mind that the opinion of an expert on this point is relevant undersection 45 of the Evidence Act.

22. We may now consider the penalty imposed on both the appellants, namely Suresh Bhonsle and Mohd. Wajid (along with others) under Section 112(b)(i) and 112(b)of the Act, respectively, the provisions thereof arequoted below :

“112. Penalty for improper importation of goods, etc. — Any person,—

(a) who, in relation to any goods, does or omits to do anyact which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shallbe liable,—

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the timebeing in force, to a penalty [216] [not exceeding the value of the goods or five thousand rupees], whichever is the greater;

As gold is a restricted item, the same has been treated as ‘prohibited goods’ in view of the

interpretation placed by various decisions on the definition of 'prohibited goods' as defined in Section 2(33) and hence the same have been held to be liable for confiscation. Once it is found that the gold recovered was not under valid documents, the same would be treatedas prohibited goods liable to confiscation and consequently, penalty is inbuilt and is leviable under Section 112 of the Act. Both the appellants as discussed above were consciously and intentionally dealing with illegal activity of sale purchase of gold and therefore the penalty imposed by the adjudicating authority is justified and needs no interference.

23. We accordingly, dismiss the appeals filed by the two appellants, Appeal No. C/51257/2018 and Appeal No. C/51737/2018.

Appeal No. C/50934/2018

24. The above appeal is filed by the Revenue assailing the order-in-original, whereby the Adjudicating Authority has failed to Impose penalty under Section 114AA of the Act. We find that in the show cause notice there is a specific proposal for imposing penalty under section 114AA on the appellant, Shri Suresh Bhonsle, the said clause reads as :

"(V) penalty should not be imposed upon him undersection 114AA of the Customs Act, 1962, for his act of omission and commission as brought out here in above. "

25. From the perusal of the impugned order, we find there is no discussionby the Adjudicating Authority on the proposal of imposing the penalty underSection 114AA. Without stating anything on this issue on merit, we consider it appropriate to remand the matter to the adjudicating authority for limited purpose to consider the said proposal in the light of the facts and circumstances and the legal provisions. We accordingly, allow the appeal filed by the Revenue by way of remand.

[Order pronounced on 04.01.2024]

(BINU TAMTA)
Member (Judicial)

Ckp.

(HEMAMBIKA R. PRIYA)
Member (Technical)

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI

PRINCIPAL BENCH - COURT NO. IV

Customs Appeal No. 50650 of 2020

(Arising out of Order-in-Original No. 25/Adj/2020 dated 26.02.2020 passed by the Commissioner of Customs (Airport & General), New Delhi)

Shri Rakesh Luthra, S/O Krishan Lal **Appellant**
R/O 347/12/3, New Kartar Nagar Salem Tabri, Ludhiana, Punjab-141008.

VERSUS

Commissioner of Customs Respondent (Airport & General)
T-3, IGI Airport, New Customs House, New Delhi-110037.

With

Customs Appeal No. 50651 of 2020

(Arising out of Order-in-Original No. 25/Adj/2020 dated 26.02.2020 passed by the Commissioner of Customs (Airport & General), New Delhi)

Ms. Sunita Luthra, D/O Mr. Mangat Rai **Appellant**
R/O 347/12/3, New Kartar Nagar Salem Tabri, Ludhiana, Punjab-141008.

VERSUS

Commissioner of Customs **Respondent (Airport & General)**
T-3, IGI Airport, New Customs House, New Delhi-110037.

With

Customs Appeal No. 50686 of 2020

(Arising out of Order-in-Original No. 25/Adj/2020 dated 26.02.2020 passed by the Commissioner of Customs (Airport & General), New Delhi)

Ms. Sonia Luthra, D/O Mr. Puran Parkash **Appellant Nischal**
R/O 6, Mathew Harrison Street, Brampton on Canada

VERSUS

Commissioner of Customs **Respondent (Airport & General)**
T-3, IGI Airport, New Customs House, New Delhi-110037.

APPEARANCE:

Shri A.S. Hasija, Consultant for the Appellant

Shri M.K. Shukla, Authorized Representative for the Respondent

And
Customs Appeal No. 50156 of 2021

(Arising out of Order-in-Original No. 25/Adj/2020 dated 26.02.2020 passed by the Commissioner of Customs (Airport & General), New Delhi)

Commissioner of Customs General), New Delhi **Appellant (Airport &**

VERSUS

Mr. Rakesh Luthra, Ms. Sonia Luthra, Mamik Luthra and Ms. Sunita Luthra **Respondent Mr.**

APPEARANCE:

Shri Girijesh Kumar, Authorized Representative for the Appellant Shri A.S. Hasija, Consultant for the Respondent

CORAM :

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 04.10.2023 Date of Decision : 08.01.2024

FINAL ORDER NOs. 50019-50022/2024

HEMAMBIKA R. PRIYA

Shri Rakesh Luthra, Ms. Sunita Luthra, and Ms. Sonia Luthra (hereinafter referred to as the appellants) have filed the captioned appeals against the common Order-in-Original No. 25-ADJ-2020 dated 16.02.2020 passed by the Commissioner of Customs (Import & General), New Delhi wherein the gold recovered from them was allowed to be redeemed on payment of redemption fine or permitted for re-export and penalties were imposed on the three of the appellants. The Department has also filed appeals against the decision of the adjudicating authority to permit Rakesh Luthra to redeem the gold, and the permission to re-export gold given to Sonia and Mamik Luthra.

2. The brief facts of the case are that Shri Rakesh Luthra along with Ms. Sonia Luthra, Shri Mamik Luthra and Ms. Sunita Luthra (hereinafter referred collectively as „appellants") arrived on 08.06.2019 at T-3 IGI Airport, New Delhi by Air India Flight No. AI 335 from Bangkok and walked through Green Channel and they all were intercepted near the exit gate of Customs Arrival Hall. Shri Rakesh Luthra and Shri Mamik Luthra were carrying one hand bag only while Ms. Sonia Luthra and Ms. Sunita Luthra were carrying two hand bags each. All the said four persons were asked whether they were carrying any dutiable goods or gold to which they replied in the negative. They were diverted for scanning of their baggage through the X-Ray machine and nothing objectionable was noticed in their baggage. All the said four persons were made to pass through Door Frame Metal Detector installed in the arrival hall, wherein strong and long sound was heard when Shri Rakesh Luthra, Ms. Sonia Luthra and Shri Mamik Luthra walked through the metal detector. No sound was heard when Ms. Sunita Luthra passed through. Thereafter, personal search of Shri Rakesh Luthra and others was conducted in the Customs Preventive Room in the presence of two witnesses. The searches resulted in the recovery of the items from the appellants as indicated hereinafter.

2.1 Personal search of Shri Rakesh Luthra resulted in:

(1) 03 (three) pieces of yellow metal bars weighing 1000 gms each and one piece of Yellow metal weighing 225 gms appearing to be gold, total weighing 3225 gms.

(2) Boarding pass of Air India Flight No. AI 335 dated 07.06.2019.

(3) One used I phone XS phone having Vodafone SIM No. 9814465658.

(4) Indian Passport No. SO377792 issued on 07.03.2018 at Chandigarh.

(5) Indian currency Rs. 12,500/- and Thai Bhatt 1120, USD 1000.

2.2 Personal search of Ms. Sonia Luthra resulted in:

(1) 01 (one) cut piece of Yellow metal bar appearing to be gold total weighing 900 gms.

(2) Boarding Pass of Air India Flight No. AI 335 dated 08.06.2019.

(3) One used iPhone 6 phone having Airtel SIM No. 9876121757.

(4) Indian Passport No. L237766 issued on 30.09.2015 at Toronto.

(5) Indian currency Rs. 9,100/- and Thai Bhatt 190, USD 700, CAD 225, UAE DIRHAM 1020.

2.3 Personal search of Shri Mamik Luthra revealed:

(1) 01 (one) cut piece of yellow metal bar appearing to be gold total weighing 1000 gms.

(2) Boarding Pass of Air India Flight No. AI 335 dated 08.06.2019.

(3) One used iPhone 8 phone having traveller SIM (as informed by Noticee-3).

(4) Canada Passport No. AA223049 issued on 06.06.2017 at Canada.

2.4 Personal search of Ms. Sunita Luthra resulted in:

(1) Boarding Pass of Air India Flight No. AI 335 dated 08.06.2019.

(2) One used Samsung phone having JIO SIM No. 7087493675.

(3) Indian Passport No. SO385480 issued on 07.03.2018 at Chandigarh.

3. Consequent to the personal search, the weight, value and purity of the recovered five pieces of yellow bars was appraised, and the jewellery appraiser submitted his report dated 08.06.2019 as reproduced in the table below:

S.No.	**Description of gold**	**Purity**	**Weight (in gms)**	**Value appraised IND**

Noticee -1 Shri Rakesh Luthra

1.	03 (three) pieces of gold bars	999	3000	87,24,011/-
2.	01 (one) cut piece of gold bar	995	225	6,51,681/-
Sub-Total			**3225**	**93,75,692/-**

Noticee-2 Ms. Sonia Luthra

1.	01 (one) cut piece of gold bar	995	993	28,76,086/-
Sub-Total			**993**	**28,76,086/-**

Noticee-3 Mamik Luthra

1.	01 (one cut piece of gold bar	999	1000	29,08,004/-
Sub-Total			**1000**	**29,08,004/-**
Grand Total			**5218**	**1,5159,782/-**

4. One bill for 1225.4 gms of gold in the name of Ms. Sunita Luthra was produced by Shri Rakesh Luthra (one of the appellants). The recovered gold was seized under different seizure memos under Section 110 of the Customs Act, 1962 on the reasonable belief that the same were liable to be confiscated under Section 111 of the Customs Act, 1962. The original adjudicating authority passed the impugned Order-in- Original No. 25-ADJ-2020 dated 16.02.2020 holding that Rakesh Luthra, Sunita Luthra, Sonia Luthra and Mamik Luthra were not eligible passengers to import gold. Hence the imported gold was confiscated but allowed redemption of the same on payment of fine, penalty and duty at baggage rate. The adjudicating authority also permitted re-export of gold in respect of two appellants, viz., Sonia Luthra and Mamik Luthra. The duty on gold said to be brought by them on their past visits was also confirmed.

5. The learned counsel for the appellant submitted that the said demand of customs duty under Section 28 of Customs Act, 1962 is based on the extracted statement of the appellant. It is settled law that unless the statement is corroborated by any other evidence, the same cannot be admitted as evidence. He contended that there is nothing in the impugned order or the show cause notice dated 19/20.11.2019 to show that the appellant Sunita Luthra had herself brought 2000 gms. of gold apart from 1965.4 gms. allegedly brought by her husband Rakesh Luthra. The statement has been mis-interpreted by the Commissioner to hold the appellant had herself brought gold in the past.

6. The learned counsel further contended that there is nothing in the impugned order or the show cause notice dated 19/20.11.2019 to show that any investigations to corroborate the veracity of the statements of the appellants with regard to the allegation of past clearances of gold without payment of duty was done by the Department. Consequently, the admission of past clearances of gold without payment of customs duty is not sustainable under the law. The learned counsel placed reliance on the following case laws:-

(i) In the case of **Centurian Laboratories Vs. Commissioner of Central Excise, Vadodara – 2013 (293) 689 (Tri.-Ahmed.),** it was held "Mere confessional statement not enough to conclude assessee engaged in clandestine removal as held in the case of **Tejal Dyestuff Industries – 2009**
(234) ELT 242 (Guj.) – Clandestine removal of goods not proved in absence of corroborative evidence – impugned order set aside – Section 11A and 11AC of Central Excise Act, 1944".

(ii) In the case of **Debu Saha Vs. Collector of Customs (Preventive) – 1992 (59) ELT 442 (Tribunal)** it was held "evidence – confession of one co-accused not to be corroborated by another co-accused – corroboration to come from independent source.

7. The learned Authorised Representative submitted that the claim of the appellants is without any merit. As per Baggage Rules, 2016, on arrival at an international airport in India, passengers should proceed to Red channel and make a declaration to the customs officers in case they carry any prohibited/controlled items or any dutiable commodities. Passengers with bonafide baggage, as permissible under Baggage Rules, 2016, can opt for exit through the Green Channel.Passengers walking through the Green Channel with dutiable/prohibited goods when apprehended are liable to prosecution/penalty and confiscation of goods.The learned Authorised Representative further stated that import of „Gold" is permissible for the „eligible" passenger subject to fulfilment of condition 41 of Notification No. 50/2017-Cus dated 30.06.2017, as amended vide Notification No. 25/2019-Cus dated 06.07.2019, that includes the conditionality of stay abroad (with permissible short visits). However, in the instant case, the appellants were frequent fliers and had visited India almost every month. Consequently, they did not satisfy the condition of being an „eligible passenger". As per the explanation to Notification No. 50/2017-Cus dated 30.06.2017:

"Eligible passenger" means a passenger of Indian origin or a passenger holding a valid passport, issued under the Passports Act, 1967, 915 of 1967),who is coming to India after a period of not less than six months of stay abroad."

7.1 In the instant case, the customs officers intercepted the appellants while crossing the Green Channel and approaching towards the exit gate of arrival hall. The appellants did not report at the

Red Channel for declaration for dutiable/prohibited goods which were in the possession of the appellants. Had the appellants not been intercepted near the exit gate by the customs officers, the appellants would have exited from Customs Area, i.e. from arrival hall without making any declaration oral or otherwise. Therefore, appellant‟s submission holds no merit.

7.2. As regards the appellant‟s contention that they were not evading customs duty, the learned Authorised Representative contended that on the basis of suspicion, the appellants‟ bags were scanned. Thereafter, the appellants were subjected to personal search which is a normal procedure adopted by customs officers in all such cases. He submitted that it is a matter on record that the seized gold was recovered from the appellant‟s pocket after they passed through the metal detector door frame. Had they not been diverted for personal search, they would have exited the customs area without payment of duty and successfully smuggled the gold.

7.3. The learned Authorised Representative also submitted that based on the statements, summons dated 22.06.2019 were issued to the alleged buyers Mr. Sonu (M/s M.K. Jewellers) and Mr. Surinder (M/s S.S. Jewellers) but same were not received back by customs authorities. Thus, it appears that the same had been delivered to the concerned persons. Thereafter, summons dated 8.7.2014 were issued again to Mr. Sonu (M/s M.K. Jewellers) and Mr. Surinder (M/s S.S. Jewellers). However, this summons remained undelivered, as per the remarks dated 12.7.2019 of the Postal Authorities reason for non-delivery was mentioned as „incomplete address‟ for Mr. Sonu and „no such person on address‟ in case of Mr. Surinder. The learned Authorised Representative contended that the names and addresses of the alleged buyers were provided by the appellants and summons were sent accordingly at the addresses as disclosed by the appellants in their statements. In view of the above, the learned Authorised Representative prayed for dismissing the appeals.

7.4 As regards the Departmental appeals, the learned Authorised Representative submitted that as the passengers do not satisfy the condition No. 41 of Notification No. 50/2017 dated 30.06.2017, which requires that a declaration be made by such eligible passenger. In the instant case, the appellants had denied carrying gold in person and the same was discovered only when they were made to pass through the metal detector. Consequently, the court seized from the appellant does not qualify as bonafide baggage. The learned Authorised Representative relied of the Madras High Court judgement in the case of **Commissioner of Customs (AIR) Vs. Abdul Azeez [2020 (371) ELT 224 (Mad)]** which held that there is no option or distraction with the Commissioner for redemption of gold.

8. We have heard the rival contentions and perused the appeal records. In order to appreciate the arguments, it is important to recount the facts of the case. The appellants, viz., Rakesh Luthra, Sonia Luthra, Sunita Luthra and Mamik Luthra arrived in India from Thailand. They were intercepted near the exit gate of the customs baggage hall, having chosen to walk through the green channel. Personal search of these passengers resulted in recovery of 5218 gms of cut gold pieces valued at Rs. 1,5159,782/-. It is pertinent to note here that the allegations are that appellants did not opt for red channel todeclare the gold nor did they file any declaration as required under the Notification. In order to appreciate the arguments of the learned counsel, and the learned Authorised Representative, it is pertinent to reproduce the condition no 41 of the aforesaid notification, which reads as under;

“41. If,-

1.(a) the duty is paid in convertible foreign currency;

(b) the quantity of import does not exceed one kilograms of gold and ten kilograms of silver per eligible passenger; and

2. the gold or silver is,-

(a) carried by the eligible passenger at the time of his arrival in India, or

(b) the total quantity of gold under items (i) and (ii) of Sr. No. 356 does not exceed one kilogram and the quantity of silver under Sr. No. 357 does not exceed ten kilograms per eligible passenger; and

(c) is taken delivery of from a customs bonded warehouse of the State Bank of India or the Minerals and Metals Trading Corporation Ltd., subject to the conditions 1 ;

Provided that such eligible passenger files a declaration in the prescribed form before the proper officer of customs at the time of his arrival in India declaring his intention to take delivery of the

gold or silver from such a customs bonded warehouse and pays the duty leviable thereon before his clearance from customs.

Explanation.- For the purposes of this notification, "eligible passenger" means a passenger of Indian origin or a passenger holding a valid passport, issued under the Passports Act, 1967 (15 of 1967), who is coming to India after a period of not less than six months of stay abroad; and short visits, if any, made by the eligible passenger during the aforesaid period of six months shall be ignored if the total duration of stay on such visits does not exceed thirty days and such passenger has not availed of the exemption under this notification or under the notification being superseded at any time of such short visits."

8.1 In the instant case, it is on record that the four passengers had gone to Bangkok on 05.06.2019 and had returned on 08.06.2019. Therefore, the appellants did not satisfy the requirements of the aforesaid notification in order to be eligible to import the gold legally. It is also on record that the appellants were intercepted near the exit gate. The argument that they were prevented from making the declaration is clearly an afterthought. The gold was recovered from their person. It is also noted that the appellants, in their respective statements have accepted that there were aware of the Customs procedures for passenger clearance, and that Gold was dutiable. Consequently, the argument that there is no of concealment or attempt to smuggle cannot be accepted. As regards the argument of the appellants that Gold is not a prohibited item, we note that the High Court of Gujarat in the case **Bhargavraj Rameshkumar Mehta Vs. Union of India [2018 (361) E.L.T. 260 (Guj.)]** held that attempt to smuggle by concealing the same, and breaching the condition for the import of such goods would make them „prohibited goods" in terms of Section 2(33) of the Customs Act, 1962. The relevant paras of the aforesaid decision is reproduced hereinbelow:

"15. We may recall, the contention of the Counsel for the petitioner in this respect was that the gold at the relevant time was freely importable. Import of gold was not prohibited. Case of the petitioner would therefore, fall under clause (ii) of Section

112 and penalty not exceeding 10% of the duty sought to be evaded would be the maximum penalty imposable. Such contention shall have to be examined in the light of the statutory provisions noted above. As noted, Section 111 of the Act provides for various eventualities in which the goods brought from a place outside India would be liable for confiscation. As per clause (d) ofSection 111, goods which are imported or attempted to be imported or are brought within the Customs quarters for import contrary to any prohibition imposed by or under the Act or any other law for the time being in force, would be liable for confiscation. Similarly, for dutiable or prohibited goods found concealed in any manner in any conveyance would also be liable to confiscation. As per Section 2(39) the term „smuggling" would mean in relation to any goods, any act or omission which will render such goods liable to confiscation under Section 111 or Section 113. Thus, clearly Section 111 of the Customs Act prohibits any attempt at concealment of goods and bringing the same within the territory of India without declaration and payment of prescribed duty. Term „prohibited goods" as defined under Section 2(33) means any goods, the import or export of which is subject to any prohibition under the Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with. This definition therefore, comes in two parts. The first part of the definition explains the term „prohibited goods" as to meanthose goods, import or export of which is subject to any prohibition under the law. The second part is exclusionary in nature and excludes from the term „prohibited goods", in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with. From the definition of term „prohibited goods", in case of goods, import of which is permitted would be excluded subject to satisfaction of the condition that conditions for export have been complied with. Bynecessary implication therefore in case of goods, import of which is conditional, would fall within the definition of prohibited goods if such conditions are not complied with.

16. Further clarity in this respect would be available when one refers to the term „dutiable goods" as to mean any goods which are chargeable to duty and on which duty has not been paid. We refer to this definition since Section 112 makes the distinction in respect of goods in respect of which

any prohibition is imposed and dutiable goods other than prohibited goods. When clause (ii) of Section 112 therefore, refers to dutiable goods other than prohibited goods, it shall necessarily have the reference to the goods, import of which is not prohibited or of which import is permissible subject to fulfilment of conditions and such conditions have been complied with. Condition of declaration of dutiable goods, their assessment and payment of customs duties and other charges is a fundamental and essential condition for import of dutiable goods within the country. Attempt to smuggle the goods would breach all these conditions. When clearly the goods are sought to be brought within the territory of India concealed in some other goods which may be carrying no duty or lesser duty, there is clear breach of conditions of import of goods though *per se* import of goods may not be prohibited."

8.2 Further, in the case at hand, the facts are the appellants were carrying gold in their person and were intercepted near the exit gate of the Customs Baggage Hall, which clearly establishes their intention to smuggle the Gold. In this regard, we note that the Supreme Court in the case of **Om Prakash Bhatia Vs. Commissioner of Customs, Delhi reported in [2003 (155) E.L.T. 423 (S.C.)]** and in case of **Sheikh Mohd. Omer Vs. Collector of Customs, Calcutta and others reported in [1983 (13) E.L.T. 1439 (S.C.)]** held that smuggling in relation to any goods is forbidden and totally prohibited. Failure to check the goods on the arrival at the customs station and payment of duty at the rate prescribed, would fall under the second limb of Section 112(a) of the Act, which states omission to do any act, which act or omission, would render such goods liable forconfiscation under Section 111 of the Act, and clause (b) to Section 111 of the Act covers the persons involved.

9. We now address the issue of the duty demanded on past such smuggling of gold by the appellants, which is based on the statement of one of the appellants, Ms Sunita Luthra. It is noted that Ms Sunita Luthra in her statement dated 08.06 2019 stated that she along with Sonia Luthra, Mamik Luthra and her husband Rakesh Luthra collectively brought 5218 gms of gold from Bangkok to Delhi via flight AI335. She also confessed that she had previously also visited Dubai with husband on 15.3.19, 03.04.19, and 01.05.19 and had brought gold totally about 2000 gms. Similar statement was made by Rakesh Luthra in his statement admitting of having brought gold on three occasions from Dubai, collectively weighing 1965.4 gms. The relevant extract of the statements are reproduced hereinafter:

Statement dated 08.06.2019 of Ms Sunita Luthra under Section 108 of the Customs Act, 1962

Q.No. 11. What was your purpose of visit to Dubai on 15.03.2019, 03.04.2019 and 01.05.2019. Have you brought gold in India earlier also?

Ans. I visited Dubai with my husband on 15.03.2019, 03.04.2019 and 01.05.2019 to bring gold.

Q.No. 12. How much gold you your husband bring in your past visit?

Ans. Around 2000 gms. I don‟t remember the exact quantity.

Statement dated 08.06.2019 of Sh Rakesh Luthra under Section 108 of the Customs Act, 1962

Q. No. 6: What is the purpose to visit Dubai on three occasions and did you bring gold in India and how much? Ans: I went to Dubai to bring Gold and I want to state that I had brought gold weighing 465.4 grams(04 bars of each 10 tola) on returning from Dubai on 16.03.2019 on first visit: gold weighing 500 gms on returning from Dubai on 04.04.2019 on second visit and gold weighing 1000 gms on returning from Dubai on 02.05. 2019 on third visit. On being asked I state that I had brought gold collectively weighing 1965.4 gms in the past.

The learned counsel has argued that the Department has not led any corroborative evidence and the demand is based merely on the statement of Ms Sunita Luthra. We are unable to accept this contention. A perusal of the statements of the appellants including the extracted portions above clearly establishes a modus operandi adopted by the appellants for smuggling gold. This is further corroborated in the statement dated 08.06.2019 of Ms Sonia Luthra. In addition, the appellant Mamik Luthra has also admitted in response to question no. 6 that he had been to Dubai along with his mother but he did not bring back gold. However, his mother had brought gold weighing 500 gms. We note that each of the appellant in their individual statements recorded under section 108 of the Customs Act, 1962 have admitted to smuggling of gold during their earlier visit to Dubai.

We take recourse to the observation of the Supreme Court in **Naresh J. Shukawani Vs. Union of India [1996 (83) ELT 258 (SC)]** that the statement made before Customs officials is not a statement recorded under section 161 one of the Criminal Procedure Code, 1973 and therefore, it is a period piece of evidence collected by Customs officials under Section 108 of the Customs Act. It was further stated by the court that if such a statement increased incriminates the accused, inculpating him the contravention of the provisions of the Customs Act, it can be considered as substantive evidence to connect the accused with the contravention of the provisions of this Act. Para 4 of the said judgement is reproduced:

"4. It must be remembered that the statement made before Customs officials is not a statement recorded under section 161 of the criminal procedure code, 1973. Therefore it is a material piece of evidence collected by the Customs officials under section 108 of the Customs Act. That material incriminates the petitioner inculpating him in the contravention of provisions of the Customs Act. Material can certainly be used to connect the petitioner the contravention inasmuch as Mr Dudani"s statement clearly inculpates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India… ....."

It is also seen that once there is an admission by the appellant himself, nothing further is required to be proved to the contrary. The Supreme Court in **Surjeet Singh Chabbra Vs. Union of India [1997 (89) ELT 646]** held that confession made by the appellant binds him. We also place reliance on another decision in **Commissioner of C. Ex. Vs. M/s Systems and Components Pvt. Ltd. [2004 (165) ELT 136 (SC)]** where it has been held that it is a basic and settled law that what has been admitted need not be proved. In view of the above, we are convinced that there is sufficient corroborative evidence to demand the duty on gold said to have been brought by the appellants during the previous visits. Consequently, the demand is confirmed for the extended period.

10. We now take up the appeal filed by the Department wherein the adjudicating authority had in the impugned order had permitted redemption of gold on payment of fine to appellant Rakesh Luthra, and permission to re-export the gold to 2 other appellants Sonia and Mamik Luthra, and have prayed for absolute confiscation of the gold. We note that all the four appellants collectively brought 5218 gram of gold (in the form of bars, not in the form of ornaments) from Bangkok. It is also established that all the appellants attempted to smuggle the gold with an intention to evade Customs Duty by not declaring the non-bonafide baggage which was commercial in nature. It is also established that the appellantswere „ineligible passengers" to import gold in terms of Notification No. 50/2017- Cus dated 30.06.2017 and also provisions of Foreign Trade (Development and Regulation) Act 1992, Foreign Trade (exemption from application of rules in certain cases) Rules, 1993 and Foreign Trade Policy 2015-

20. We also note that Section 80 of Customs Act, 1962 provides for „**temporary detention of baggage',** which is applicable in respect of only those goods for which a true declaration has been made under Section 77. Under Section 80, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India. In the instant case, though the appellants had not declared the gold and the fact remains that the passengers were intercepted by the officers of customs at the exit gate. This clearly establishes the intent was to walk away with the gold without payment of duty that was lawfully due to the Government. This is also corroborated by their statements that similar modus operandi was adopted when they had returned from Dubai. In this regard, the decision of the High Court of Gujarat in the case **Bhargavraj Rameshkumar Mehta Vs. Union of India** (supra) held that attempt to smuggle by concealing the same, and breaching the condition for the import of such goods would make them „prohibited goods" in terms of Section 2(33) of the Customs Act, 1962. Once it is established that the goods are prohibited, then there cannot be an option for either redemption or re-export, and such goods are liable for absolute confiscation. In this context, we note that the Tribunal in the case of **Sunny Kakkar Vs. Principal Commissioner of Customs (Preventive), New Delhi [2023 (385) E.L.T. 258 (Tri.-Del)]** upheld the absolute confiscation of Gold. The relevant paras of this decision is reproduced hereinafter:

"32. As per Section 2(39) "smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113. Therefore, if the gold bars in dispute are held liable forconfiscation under section

111 they will fall under the category of smuggled gold as per Section 2(39). Anotherimportant section in this regard is Section 123 which reads as follows:

SECTION 123 - Burden of proof in certain cases. – (1) Where any goods to which this section applies are seized

under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are notsmuggled goods shall be -

(a) in a case where such seizure is made from the possession of any person, -

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold, and manufactures thereof, watches, and any other class of goods which theCentral Government may by notification in the Official Gazette specify.

33. Section 123 shifts the burden of proof from the Department to the person from whom the goods have been seized in respect to gold and certain other goods which are notified. Undisputedly, the bars in question were of goldand they had foreign markings and were packed in a bag with the address of the jeweller in Dubai. The bars wereexamined by an expert and were held to be foreign origin gold of 995 purity. All these gave the officers reasonablebelief that the gold bars were of foreign origin. Since import of gold is restricted, if foreign origin gold bars were legallyimported it was incumbent upon the importer and any other person to whom they may have been sold to showdocuments that the gold was legally imported. This responsibility is cast upon the appellant as per Section 123. The gold was seized and after its assessment, statements of the appellant were recorded in which he explained that heprocured the gold from one Shri Harish of Dubai who told him that Shri Ahadees would contact him and give him thegold bars and accordingly, he was waiting at Rajeev Chowk Metro Station whether transaction took place. He had, atno point of time, produced any document to show that the gold was legally imported. According to his statement, thearrangement which he had with Shri Harish was that he would send gold through one of his persons (Shri Ahadees in this case) and after selling the gold he would pay Shri Harish. At the time of receiving the gold he would pay only someamount to the person handing over the gold. In this case, the amount which he paid in a pink polythene bag was Rs.5,45,000/- to Shri Ahadees. These statements were corroborated by the statement of Shri Ahadees. Neither Shri Ahadees nor the appellant have at any point of time produced any document to show that the gold was legally imported by them or that it was purchased by them from somebody who had legally imported it.

34. Learned counsel for the appellant submitted that on 8- 12-2015 the appellant had retracted his statement and, therefore, it cannot be relied upon. We have gone through the statements made before the learned CMM by theappellant in his application for bail which is at page 109 to 112 of the appeal book. The application only states that the statement was not made by the appellant. However, there is nothing in the statement made before the learned CMM explaining the nature of the gold seized from the appellant. In the absence of any other explanation, the statementsmade by the appellant and Shri Ahadees before the officer must be accepted as correct. These statementscorroborate each other and with the panchnama. The cross-examination of Shri Ahadees by the learned counsel forthe appellant also confirm the facts pertaining to this seizure and also that on previous two occasions smuggled goldwas transacted between the appellant and Shri Ahadees. The mobile phone recovered from the appellant and whichwas used to communicate with Shri Ahadees was also obtained in the name of Shri Kaskyrbayev a Kazakhi national who was not even in India at the time the SIM card was issued which corroborates the clandestine nature of the transaction in the confiscated gold."

10.1 As per the facts of the case, the seizure of gold from the appellants, as recorded in the panchnama and admitted in their respective statements is undisputed. It is also established that the gold was of foreign origin. It is also established that the appellants were attempting to

smuggle the gold without payment of duty. We also note that legal import of gold is governed by certain conditions which the appellant do not fulfil. Therefore, we are of the considered opinion that the gold recovered from the appellants is liable for absolute confiscation.

11. In view of the above discussions, we modify the impugned order to the above extent and reject the appeals filed by the appellants (Customs Appeal Nos. 50650 of 2020, 50651 of 2020 and 50686 of 2020) and allow the Appeal No. 50156 of 2021 filed by the department.

(Pronounced in the court on 08.01.2024)

(DR. RACHNA GUPTA) MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA) MEMBER (TECHNICAL)

RM

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI.

PRINCIPAL BENCH - COURT NO. 3

Customs Appeal No. 52249 of 2019

(Arising out of Order-in-Original No.63/MK/Policy/2019 dated 10.05.2019 passed bythe Commissioner of Customs (Import & General), New Custom House, New Delhi).

M/s HBS Logistics **Appellant**
Killa No. 19/4/2 & 19/5 Village Garh ShahjahanpuraSonepat, Haryana-131001.

VERSUS

Commissioner of Customs **Respondent**
(Airport & General)

New Custom House, Near IGI AirportNew Delhi-110037.

APPEARANCE:

Ms. Priyanka Goel, Advocate for the appellant

Shri M.K. Shukla and Shri M.R. Dhania, Authorised Representatives for therespondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL) HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.50030/2024

DATE OF HEARING: 17.10.2023DATE OF DECISION: 09.01.2024

BINU TAMTA:

1. Challenge in the present appeal is to the order-in-original no.63/MK/Policy/2019 dated 10.05.2019 whereby the Commissioner Customs revoked, the Customs Brokers License, forfeited the securityamount of Rs.5 lakh and imposed penalty of Rs.50,000/-.

2. The appellant is a firm of Customs Broker (CB) of which Shri Aman Jain and Smt. Seema Singh are partners. The work of import clearances were conducted by Shri Prashant Jain, H-Card Holder. The present case relates to submission of forged/fabricated documents by the CB before the customs officer to avoid assessment of imported goods, namely iron nuts and iron bolts vide bill of entry no. 7447412 dated 31.07.2018, on behalf of the importer, M/s Supreme Enterprises.

3. The bill of entry was facilitated under RMS and the examination order was generated which reads as, "Assessment and Examination has not been prescribed for this B/E "which meant that the said B/E was marked for RMS facilitation for which assessmentand examination was not to be conducted and the out of charge hasto be given by the in-charge shed appraiser. The container wascleared on 13.08.2018.

4. While reviewing the clearance of the goods under RMS, it came to the notice of the department that, the system entry showed as, "Assessment and Examination has not been

prescribed for this B/E" whereas it appeared that the CB produced the B/E for clearance at import shed with another examination instruction through forged entries where the first print page of the docket read as, "Examination has not been prescribed for this B/E" and he also added the name of two officers from appraising Group-4, which gave the impression thatthe B/E has been assessed by the group and no further examination is required.

5. The statement of Shri Prashant Jain was recorded on20.08.2018, under section 108 of the Customs Act, 1962, where he categorically stated that he submitted the forged documents to the customs authorities at the instance of Shri Aman Jain, partner in the CB firm for faster clearance of the goods at the declared value, andfor which he was offered monetary consideration.

6. On the basis of the letter dated 23.08.2018, received from the Additional Commissioner of Customs, ICD, PPG Inquiry for violation under the provisions of Customs Broker Licensing Regulations, 2018, (CBLR 2018) was initiated against the appellant for producing forged/fabricated documents to customs authority for clearance of goods. The Customs Broker license was suspended on 28.08.2018 and the same was confirmed on 18.09.2018. Thereafter show cause notice dated 20.11.2018 was issued for contravention of the provisions of Regulation 10(j) and 13(12) of the CBLR, 2018. Under Regulation 17(1), Enquiry Officer was appointed on12.12.2018, who submitted his report on 14.02.2019 to which the appellant submitted his representation on 14.3.2019. The show cause notice was adjudicated after granting personal hearing to the appellant and also issued notice to Shri Prashant Jain on the request made by the appellant for cross examination, however, despite reminders, Prashant Jain did not appear. The Adjudicating Authority after considering the Inquiry Report, perusing the statements recorded under Section 108 of the Customs Act, 1962 and the submissions made by the appellant held that the charges under Regulation 10(j) and 13(12) stands proved and accordingly imposed the punishment by revoking the customs broker license, ordered for forfeiture of the amount of security deposit and imposed penalty of Rs.50,000/-. Against this said order, the custom broker is in appealbefore this Tribunal.

7. Having heard the learned counsel for the appellant and also the Authorised Representative for the revenue, we need to consider whether the charges under the regulations are maintainable and the punishment imposed on the Customs Broker is justified.

8. The submissions of the appellant are to the effect that theact of fabrication of documents was done by Shri Prashant Jain and there was no instruction from the CB firm to manipulate the documents and they had no intimation of it. No monetaryconsideration was given to Shri Prashant Jain for speedy clearance of the goods. That as soon as the forgery was brought to the notice of the CB, he immediately coordinated with the department as well as the importer who paid the differential duty along with interest and penalty vide challan dated 23.08.2018. He denied that there hasbeen any casual approach in supervising the employees and hence there is no violation of Regulation 13(12).

9. The learned Authorised Representative reiterated the findings of the Commissioner of Customs in the impugned order and clarified the implications of the fabrication of the document in the present case. He relied on the statement of Shri Prashant Jain where he accepted having forged the document for monetary consideration offered by Shri Aman Jain for faster clearance of the goods which is further corroborated by the statement of Shri Aman Jain. According to him, it is a clear case where the CB had submitted forged/fabricated document before customs authority to avoid assessment of the imported goods vide subject bill of entry with intent to evade customs duty and therefore violated the provisions under Regulation 10(j) of CBLR 2018. In so far as compliance of Regulation 13(12) he submitted that the CB has not only failed to supervise his employee rather he actively connived in the forging of the documents.

10. We may first deal with the contravention of the provisionsof Regulation 10(j) by the appellant, which provides:

"**10.** Obligations of Customs BrokerA Customs Broker shall -

(j) not refuse, access to, conceal, remove, or destroy the whole, or any part of any book, paper, or other record, relating to his transactions as a Customs broker, which is sorted, or maybe sort by the principal, commissioner of customs, or commissioner of customs, as the case may be;"

There is no dispute that there is forging and fabrication of thedocument before the customs authorities. As per the statement of Prashant Jain, he indulged in this fabrication at the instance of Shri Aman Jain, partner of the appellant firm for which he has been paid monetary consideration and the reason stated by him was that Shri Aman Jain had insisted on fast clearance of the goods in question. Wefind from the statement of Shri Aman Jain recorded under Section 108 of the Act where he also admitted to the fact that he asked Prashant Jain for faster clearance of the goods. The requirement of faster clearance of the goods is further substantiated from the statement of Siri Rajneesh Kumar, the authorised signatory of the importer firm, M/s Supreme Enterprises. The relevant question put to him and his answer thereto is given below :

"Q.3 Have you pressurise CHA for fast clearance of this BOE?

Ans. Because this container took 45 days approximately transportation from Mundra to Patparganj and there were shortage of goods in our factory, therefore we asked the CHA for faster clearance."

Thus the reason for fabrication has been admitted by all three in their statements under section 108 of the Act and the same are admissible in evidence as per the settled law and needs nocitation in this regard. The fact that Shri Aman Jain and Shri RajneeshKumar have accepted that there was a need for fast clearance of the goods, shows that Prashant Jain had acted as per the instructions of the appellant. The admission by the appellant thus connects him tothe act of his employee and hence he is responsible for the contravention of the Regulations.

11. Having discussed that the actual fabrication was done by the CB representative to avoid the shed appraiser who keeps vigil over undervaluation cases in RMS and the fact that the goods in the bill of entry in question were found to be under-valued and in that view the importer had paid the differential duty with interest and penalty *suo-moto*, we are of the view, that the entire modus-operandiof fabricating and forging the document was at the behest of the Customs broker which was implemented by Prashant Jain being the H-Card Holder of the CB. Needless to say Shri Aman Jain is holding 90% share in the firm and therefore he is very much interested and affected by the efficient performance of the firm. The submission of the learned Counsel that there was no monetary gain or benefit tohim by such act, we feel that the same analogy would apply to Prashant Jain also. Therefore, irrespective of whether any benefit had accrued to the appellant or not, he is guilty for such forgery/fabrication of the document thereby violating Regulation 10(j).

12. Regulation 13(12) of CBLR 2018 (erstwhile 17(9) of CBLR2013) provides:

"Customs Broker shall exercise such supervision as may be necessary to ensure proper conduct of his employees in the transaction of business and he shall be responsible for all acts or omissions of his employees."

It is an admitted position that the entire work of handlingthe import clearances was done by Shri Prashant Jain, the G-Card Holder of the appellant. The appellant cannot escape the liability by putting the entire burden on his employee and say that nothing was in his knowledge. Consequently, we hold that the appellant is vicariously liable and responsible for the conduct of Prashant Jain being his employee in fabricating the document. The provisions of theregulations cast special obligations on the Customs broker to ensure proper conduct of his employees. The appellant has miserably failedto supervise the working and the conduct of his employee in terms of Regulation 13(12) and is, therefore, liable for all the acts and omissions of his employee.

13. We may refer to the decision in **Bhaskar Logistic Services Pvt. Ltd. vs. Union of India - 2016 (340) ELT 17,** wherethe Patna High Court observed that clause 9 of Regulation 17 ofCBLR. 2013, cast obligation on the Customs broker to exercise such supervision as may be necessary to ensure proper conduct of his employees in the transaction of business and he shall be held responsible for all acts or omissions of employees during their employment. Similarly, the Bombay High Court in the case of **CC (General) vs. Worldwide Cargo Movers - 2010 (253) ELT 190** while upholding the principle of liability of the CHA for the act of its employees observed as under:

"**27.** Prior to passing of the order, dated 30.09.2015, the Commissioner of Customs (), Patna, vide impugned order dated 4.9.2015, had already held that the CHA had failed to supervise his employee, Executive Director, Sheikh Khursheed, and did notexercise due diligence to ascertain the correctness of the actual importer, and did not observe due diligence for proper classification and valuation of the imported goods."

14. The Revenue has relied on the decision of this Tribunal in **Skytrain Services Vs Commissioner of Customs, (Airport & General), New Delhi - 2019 (369) ELT 1739**, holding that the appellant is bound by the act of G-Card Holder even otherwise,without the knowledge of the Customs broker, the goods could not have been diverted and he is equally bound by the act of his authorised representative or agent.

15. The appellant has relied on several decisions, which are as under:-

(i) ZulashClearing & Shipping Agency Vs.Commissioner of Customs (General), Mumbai – 2018 (9) TMI 766 –CESTAT-Mumbai

(ii) M/s. A.B. Agencies Vs. Customs, Excise & Service Tax Appellate Tribunal and Commissioner ofCustoms – 2015 (8) TMI 143 – Kerala High Court.

(iii) M/s. Ashiana Cargo Services Vs. Commissioner of Customs (I&G) - 2014 (3) TMI 562 – Delhi High Court.

(iv) Transfreight Merine Services Private Limited Vs. Commissioner of Customs (Seaport-Import),Chennai – 2016 (2) TMI 438 – CESTAT Chennai.

(v) Shri Ganesh Shipping Agency Vs. Commissionerof Customs, Bangalore – 2011 (4) TMI 1172 – CESTAT, Bangalore.

(vi) Ark Logistics (P) Ltd. Vs. Commissioner of CentralExcise, Hyderabad – 2009 (9) TMI 842 – CESTAT Bangalore.

(vii) Falcon Air Cargo & Travel (P) Ltd. Vs.Commissioner of Customs, New Delhi – 2001 (11)TMI 137 – CEGAT, New Delhi.

15(i). In **Zulash Clearing** (supra), the distinguishing feature was that in proceeding to hold the Customs broker responsible for any acts of commission or omission of employees, the licensingauthority did acknowledge that the Broker firm did not have knowledge of the forgery and also that due to lack of any finding in the order that the Customs Broker was aware, let alone, of conniving in the forgery , the revocation of the customs broker license as wellas the forfeiture of the security deposit was set aside.

15(ii). Reliance on **M/s A.B. Agencies** (supra), is also of no helpto the appellant, for the reasons observed by the Kerala High Court, asunder:

"**11.** In sofar as this case is concerned, admittedly, Shri Vipin Kumar was an employee of the appellant and he was also issued 'G' card, enabling him to transact the business of the appellant as a Customs House Agent. It was while working in that capacity that he was forged the signature of the proprietor ofthe appellant on the Bill of Entry, in the applications for issue of 'H' Cad and 'G' card and various other documents submitted to the Customs Department. He was enabled to do all the forgeries and derive the benefit thereof only because of his employment under the appellant and obviously on account of the failure of the appellant in effectively supervising the activities of his employees to ensure that they conduct themselves properly in the transaction of his business as a Customs House Agent. Therefore, the appellant cannot be absolved of his lapse of supervision attracting Clause 19 of the Regulations warranting action against him under Regulation 20."

(Emphasis laid)

On the issue of imposing the penalty, it was noted that the appellant therein did not have any role in what was done by Shri Vipin Kumar and his team and that the lapse found is supervisory lapse assumes importance and that is how the punishment of revocation of license was set aside and the forfeiture of security deposit was only confirmed. The present case is entirely different as discussed above.

15(iii). In **M/s Ashiana Cargo Services** (supra), the Delhi High Court observed that only proved infraction on record is of the issuance of G cards to non-employees as opposed to the active facilitation of any infraction or any other violation of the CHA Regulations and therefore the revocation of the license was set aside being dis-proportionate to the violation.

15(iv). The Chennai Bench in **Trans Freight Marine Services Private Ltd.** (supra), noted that the Adjudicating Authority had expressed that there is no involvement of the management/appellant in the act committed by the employee and in that view the revocationof license was held to be unsustainable.

15(v). Similarly, in **Sri Ganesh Shipping Agency** (supra), the Bangalore Bench following the decision in the case of **Ark Logistics**

(P) Ltd. held that CHA could not be penalised invoking Regulation 19(8) of CHA Licensing Regulations, 2004 in the absence of any finding that the CHA had knowledge of the acts of commissions and ommissions on the part of its employee and hence the same has to be distinguished from the facts of the present case.

15(vi). In **Falcon Air Cargo and Travel (P) Ltd.** (supra), the first enquiry officer exonerated the appellant and the second enquiry officer observed that it cannot be said with certainty that they connived with them to append false declaration as alleged and therefore applying the principle of proportionality, it was observed that it is not a fit case for revoking the license as the charges are not so grave.

16. One aspect which requires to be considered is that ShriAman Jain had asked for cross examination of Shri Prashant Jain but despite notice by the Commissioner Customs, he did not appear. Hence it is not a case of rejection of the request to cross-examine andtherefore no fault can be found with the impugned order on that ground.

17. On the issue of imposing punishment under the Regulations we are of the opinion that such action of forging and fabricating publicdocument has to be seriously viewed and does not warrant any kind of leniency. The appellant being well educated (M.Tech) cannot plead ignorance as to what his employee was doing, more so when the said employee is not an old reliable employee but one who had joined the appellant firm only in November 2017. We are also guided by the decision of the Bombay High Court in Worldwide Cargo Movers (supra), where it has been held as :

"**28……** Similarly, when one comes to the disciplinary measures, one must not lose sight of the fact that the appellant-Commissioner of Customs is responsible for happenings in the Customs area, and for the disciplineto be maintained over there. If it takes a decision necessary for that purpose, the Tribunal is not expected to interfere on the basis of its own notions ofthe difficulties likely to be faced by the CHA or his employees. The decision is best to be left to the disciplinary authority save in exceptional cases whereit is shockingly disproportionate or mala fide. This is not the case here"

18. The learned counsel for the appellant has referred to a recent decision of the Tribunal in **M/s Sameer Logistics Private Ltd., vs. Commissioner of Customs - Final Order No.40646/2023 dated 03.08.2023**, where the Tribunal set aside the punishment of revocation of Customs Broker License as too harsh a punishment as he was out of business for more than 6½ years. From the facts of the case, we find that the same is distinguishable as contravention related to Regulations 11(a), 11(b), 11(n), 11(e) of CBLR, 2013whereas in the present case regulation 10(j) of CBLR, 2018 has been invoked for forging/ fabricating the document whereby the first print page of the docket showed, "Examination has not been prescribed for this B/E" and also added the name of two officers from appraising Group-4 which gives an impression that the B/E has already been assessed by the group and examination is not required. This was just

to avoid the shed appraiser who keeps vigil over undervaluation casesin RMS and the present B/E was found to be undervalued. On the contrary the system entry showed,"Assessment and Examination has not been prescribed for this B/E." In other words it amounts to fraud and the principle is that fraud vitiates all actions. In the circumstances no indulgence is required to set aside the order of revocation of Customs Broker License.

19. We would like to refer to the statement of Smt. SeemaSingh, the other partner of the CB firm which was recorded on15.09.2018 where she stated that she did not know Sh. Prashant Jain. Later Smt. Seema Singh retracted her statement to the effect that the said statement was made in the heat of time and under mental pressure and clarified that she knows him as employee. The belated retraction by her has no substance and as held by the Apex Court in **Surjeet Singh Chhabra vs Union of India 1997 (89) ELT646**, the confession, though retracted is an admission and binds the petitioner. This conduct of Smt. Seema Singh raises doubt on her credibility and reflects that on being caught she also tried to escape from the responsibility.

20. The submission of the appellant that there is no mens-reaand hence the impugned order imposing the punishment for revocation of the license, forfeiture of security deposit and imposition of penalty needs to be set aside. We are of the view that in compliance of the obligations enunciated in the Regulations *mens-rea* is not a relevant criteria and the said principle has been approved by the Apex Court in **Commissioner of Customs vs K. M. Ganatra & Company – 2016 (332) ELT 15 (SC)** which was observed by the Tribunal in **Noble Agency vs Commissioner of Customs, Mumbai-2002 (142) ELT 84** in the following words :

"Any contravention of such obligations, even without intent would be sufficient to invite upon the CHA the punishment listed in the Regulations."

21. We are, therefore, of the considered view that the punishment imposed in the present case by the impugned order does not call for any interference and is hereby upheld. The appeal, is accordingly dismissed.
(Pronounced on 9th Jan., 2024).

(Binu Tamta)Member (Judicial)

(P. V. Subba Rao)Member (Technical)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI. PRINCIPAL BENCH – COURT NO.III

Customs Appeal No.50938 of 2020 (DB)

(Arising out of Order-in-Appeal No.CC(A)/CUS/D-II/ICD/TKD/Exp/70/2020-21 dated 21.05.2020 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi.)

M/s. Surendra Electricals **Appellant**
2028, Katra Lachi Singh, Bhagirath Palace, Chandni Chowk,Delhi-110 006.

Versus

Commissioner of Customs **Respondent(Export),**
Inland Container Depot,Export, Tughlakabad, New Delhi-110 020.

APPEARANCE:

Shri Vaibhav Singh, Advocate for the appellant.
Shri Nagendra Yadav, Authorised Representative for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL) HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.50033/2024

DATE OF HEARING:28.11.2023 DATE OF DECISION:10.01.2024

BINU TAMTA:

1. Challenge in the present appeal is to the Order-in-Appeal no. CC(A)/CUS/D-II/ICD/TKD/Exp/70/2020-21 dated 21.05.2020, whereby the Commissioner (Appeals) dismissed the appeal and confirmed the order in original.

2. Briefly stated, the appellant filed two Bills of Entry no. 3048586 dated 31.08.2017 and 306747 dated 1.09.2017 under self assessment scheme for goods declared as Christmas Lights Bulb, LED and Chain Lights etc. On the basis of information that the importer is indulging in evading customs dutyby mis-declaration of goods, investigation was initiated and on 100% examination of the goods, it was found that there was misdeclaration in respect of number of cartons/number of pieces/number of bulbs in light chain and as against the declared gross weight of 29847 kgs, the actual weight of both the containers was found to be 42170 Kgs. The goods were accordingly seized in terms of seizure memo dated 8.09.2017, under Section110 of the Customs Act, 1962.

3. The importer vide letter dated 20.09.2017 submitted that they neither want any personal hearing nor any show cause notice in the matter rather Shri Ojas Bansal S/o Sh Surendra Kr. Bansal, Proprietor of M/s Surendra Electricals in his statement recorded under Section 108 of the Act dated 14.09.2017 admitted about the mis-declaration of the goods and submitted that this happened due to mistake of his supplier and therefore undertook topay the differential customs duty on the goods found in excess.

4. The Adjudicating Authority by Order-in-Original dated 6.10.2017, on the principle that the admitted facts need not be further proved or established again, held that the importer had deliberately mis-declared the goods in respect of value as well as quantity with intent to evade payment ofcustoms duty. Accordingly, the order was passed rejecting the transaction value of Rs.31,17,778/- and

Rs.29,37,287/- under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 read withSection 14 of the Act as declared by the importer and determined the same as Rs.50,27,992/- and Rs.41,12,991/- for both the bill of entries under Rule 5 of the Rules. Also ordered for confiscation of the impugned goods, givingan option to redeem the same on payment of redemption fine of Rs10 lakhs under Section 125(1) of the Act and also to pay the differential amount of duty of Rs.7,49,680/- and Rs.5,19,877/- in respect of both the bill of entries.Penalty of Rs.1,20,000/- was imposed under Section 112(a)(ii) and penalty of Rs.12 lakhs under Section 114 AA of the Act. Said order was challenged by the appellant, however, the Commissioner (Appeals) dismissed the appeal and confirmed the order under challenge. Being aggrieved, the appellant has filed the present appeal before this Tribunal.

5. Having heard both the sides and perused the records, we find that the present case is squarely covered by the decision of this Tribunal in the case of the appellant himself in the order reported in **2023 (7) TMI 967– CESTAT, New Delhi**. The facts of the case are absolutely identical where onthe basis of an intelligence the goods were examined and were found to be 42% more than what was declared in the bill of entry. The plea taken by the appellant there was also same that due to mistake the supplier sent more goods. The Tribunal observing that the goods were found to be in excess of what was stated in the bill of entry and therefore liable to confiscation under Section 111(l) and (m) and also when excess quantity of goods is established, it was logical for the officer assessing the bill of entry to reject the transaction value because the transaction value reflected in the invoices and other documents was for declared quantity and not for the quantity actually imported. In the factual matrix of the case, the Tribunal found the redemption fine imposed as just and fair Also the penalty under Section 112 (a)(ii) and Section 114AA was upheld.

6. We find that the Bill of Entry in the present case is dated 31.08.2017 and 1.09.2017 whereas in the above referred case the Bill of Entry was dated 20.09.2017, which is soon thereafter and rather all are within a periodof 20 days and the plea taken in defence is also identical that due to fault of the supplier excess quantity has been sent. Moreover, as observed by the Adjudicating Authority there is a clear admission in the voluntary statement made under Section 108 of the Act that there is mistake and they are ready to discharge their duty liability along with fine and penalty. The Department has relied on the decisions of the Apex Court in **Commissioner of C. Ex, Madras versus Systems & Components Pvt. Ltd. - 2004(165) ELT 136(SC)** and also on the decision in **Surjit Singh Chhabra versus Union of India - 1997(89) ELT 646(SC),** laying down the principle that what is admitted need not be proved and the confession even though retracted is anadmission and binds the appellant.

7. Considering the repeated attempts of the appellant to fraudulently evade the liability of customs duty by deliberately mis-declaring the actual quantity of the goods, we reject the contention of the appellant that no intentional mis-declaration has been made by them and they knowingly did not make any false and incorrect statement with respect to the quantity and value of the goods. The plea taken by the appellant that the error was onthe part of the supplier who sent excess quantity, is absolutely unbelievable and unpractical as business dealings and more so in overseas transactions are conducted as per the agreement between the parties and as per the settled procedure. There is no scope of any variation without the consent of both the parties. The supplier would be more cautious that supply is made only as per the order placed by the importer and there is no reason or justification for the supplier to indulge in repeatedly supplying excess quantity. It is surprising as to what benefit would accrue to the supplier by exporting excess quantity.

8. The case law referred to by the appellant does not require any consideration in view of the order passed by this Tribunal in the case of the appellant. There is no reason for us to differ from the view taken by theother Bench of this Tribunal in **Final Order No.50956/2023 dated 24.7.2023** titled as **M/s.Surendra Electricals Vs. Principal Commissioner, Customs (Export), New Delhi (ICD-TKD).**

9. Following the said order, we are of the view that the present casebeing of mis-declaration which has been detected only on examination of the goods, it was justified for the department to reject the transaction value andredetermine the same in terms of the Customs Valuation Rules which has been done as per Rule 5. The appellant has contravened the provisions of Section 17 and 46(4) of the Act by intentionally filing wrong declarations and by their acts of omissions and commissions had rendered the goods liable for confiscation under Section 111(l) and 111(m) of the Act. The appellant filing the Bill of Entry under self-assessment was duty bound to submit true and correct details. No interference is called for in the quantum of redemption fine as the redetermined value is Rs.50,27,992 + 41,12,991 total Rs.91,40,983/- and redemption fine is Rs.10,00,000/-, and

the same is within the prescribed limit as prescribed under Section 125 which provides that the amount of redemption fine shall not exceed the market value of the goods. Suffice it to say that the appellant is a habitual defaulter importing goods by mis-declaring both on account of quantity and value is liable to penalty under Section 112(a)(ii) and section 114AA of theAct.

10. We accordingly, uphold the impugned order and dismiss the appeal.

[Order pronounced on 10th January, 2024]

(Binu Tamta) Member (Judicial)

(P.V. Subba Rao) Member (Technical)

Ckp.

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI. PRINCIPAL BENCH – COURT NO.III

Customs Appeal No.50097 of 2020 (DB)

(Arising out of Order-in-Original No.98/MK/COMMR/Policy/2019 dated 13.09.2019 passed by theCommissioner of Customs (Airport & General), New Customs House, Near IGI Airport, New Delhi.)

M/s. Vijendra Singh — **Appellant**
D-1007, Om Enclave,
Part-II, Galin No.2,Near Masjid,
Faridabad, Haryana-121 003.

Versus

Commissioner of Customs(Airport & General), — **Respondent**
New Customs House,
Near IGI Airport, New Delhi-110 037.

APPEARANCE:

None for the appellant.
Shri Rakesh Kumar, Authorised Representative for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL) HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.50035/2024

DATE OF HEARING:16.10.2023 DATE OF DECISION:10.01.2024

BINU TAMTA:

1. The appellant, a Custom Broker has challenged the Order-in-Original No.98/MK/COMMR/Policy/2019 dated 13.09.2019, whereby theCommissioner of Customs has ordered for forfeiture of the security depositof Rs.75,000 under Regulation 14(b) of Customs Broker LicensingRegulations, 2018, (hereinafter referred to as the CBLR 2018) and also imposed penalty of Rs.50,000 under Regulation 18(1) of CBLR, 2018.

2. The present appeal has been adjourned on several occasions eitherdue to the absence of the appellant or on his request. On 21.08.2023, when the matter was listed, the following order was passed:-

"It transpires from the ordersheet that the appellant has been seeking adjournments and even today when the matter has been called out, no one has appeared on behalf of the appellant. The appeal is of the year 2019. List the appeal on October 16, 2023. We make it clear if the appellant does not appear, the matter may be decided on merits."

On the next date of hearing on 16.10.2023, again, nobody appeared on behalf of the appellant despite seeking a pass over. We, therefore, took up the appeal for hearing and after perusing the grounds of appeal and the submissions made by of the Authorised Representative for the Revenue, we reserved

the order, however, granting opportunity to the appellant to file written submissions within a period of one week. It is more than 2 and 1/2 months but the appellant has not filed any synopsis or written submissions post hearing. Hence we are deciding the appeal on the basis of the available record, the grounds of appeal taken by the appellant and also the submissions made by the learned Authorised Representative for the Revenuewhere he has relied on the findings of the impugned order and submittedthat the factual matrix of the case proves that it is the Customs Broker who apart from filing the bills of entry for consignments was instrumental in filing the documents with the customs authorities without verifying the credentialsof the importer though he had the knowledge that the IEC Code does not belong to the actual importer, he chose to file the documents received from courier without verifying them. He neither advised his clients properly nordid he bring to the notice of the Customs Department.

3. Briefly stated, Bill of Entry No.7738176, dated 07.12.2016 was filed by the importer through the appellant, Customs broker for clearance of Resin Beads, Hot Fix Stone, Imitation Cup Chain Brass (Studded), Plastic/Aluminium Sheets with Chaton Studded, Plastic Beads (PS), Resin Stone, Plastic Patta, Glass Seed Beads (Non Faceted), Plastic Baby Toy Doll, Glass Beads (Faceted) 5MM-7MM, Glass Beads (Faceted) 8MM-12MM, glass Beads, Paper Tape Roll and Swimming Goggles. On specific information, the goods were detained and examined and it was found that there was excess quantity of 540.4 Kg. Later, on examination of the container it was found to be 346,01 Kg. excess of net weight. Show cause notice dated 19.06.2018 was issued to the importer as the goods were found to be mis-declared in terms of quantity/weight and its value with an intention to evade customs duty and also to the appellant as to why penalty should not be imposed under Section 114 AA of the Customs Act, 1962.

4. Action was taken against the appellant under the provisions of CBLR, 2018, suspending the customs broker license vide order dated 8.2.2017. Theappellant submitted his response and requested for personal hearing which was granted to him on 22.02.2017. The suspension of the license was revoked by the Commissioner vide order dated 9.03.2017, observing that:-

"In view of the above, I find that till date no concreteevidence against the said CB has been brought out onrecord to establish the contravention of provisions of Regulation 11(a), 11(d) and 11(m) of CBLR 2013 or any other role in the said offence against the said CB. However, so far as allegation of contravention of Regulation 11(n) of CBLR 2013 on the part of noticee is concerned. | note that Shashikant Maruti Pol, one of the employee of noticee in his voluntary statement has accepted that the Bill of Entrydated 07.12.2016 had been filed by him without verifying KYC norms and that the import documents had been received by him from Shri Mehul Shah through courier.

Thus, I observed that the noticee has not verified theantecedent, identity and functioning of his client, ie., M/sPacific Imports, the said importer at his declared addressthrough reliable and independent means. Thus I hold thatthe notiçee has prima facie contravened the provisions of Regulation 11(n) of CBLR, 2013. I, however, after goingthrough all the facts and circumstances of the case andconsidering that as per preliminary investigation report, noallegation against violation of provisions of the Customs Act,1962, or any other Act has been alleged against the CB onthe basis of investigation conducted so far, and accordingly, the suspension of CB License of the noticee for long timewould be a harsh punishment. However, on conclusion ofthe investigation and on availability of all facts of the casepenal action in terms of provisions of CBLR, 2013 may betaken against the said CB."

5. Subsequently, show cause notice dated 15.4.2019 was issued as the appellant failed to comply with the provisions of Regulation 10(d),10(e),10(n) and 13(12) of CBLR, 2018. The appellant submitted his response to the show cause notice by his reply dated 18.4.2019. In terms ofRegulation 17(1) of CBLR, 2018, enquiry officer was appointed and hesubmitted his report dated 18.06.2019, observing that the appellant had violated the provisions of the CBLR, 2018. The appellant submitted detailed representation dated 4.07.2019, in response to the enquiry report. After granting personal hearing to the appellant, the Commissioner Customs passed the impugned order, whereby the security deposit of Rs.75,000 was forfeited and penalty of Rs.50,000 was imposed under Regulation 18(1) of the CBLR 2018, however, he refrained from revoking the customs broker license of the appellant. Being aggrieved, the appellant has filed the present appeal before this Tribunal.

6. In the grounds of appeal, the appellant had submitted that the order isviolative of principles of natural justice since none of the grounds taken by him were appreciated and the order has been passed mechanically. We do not find any substance in the submission as the records show that sufficient opportunity has been granted to the appellant at all the stages and he has submitted detailed representation dated 22.02.2017 and response dated 28.04.2019 to the show cause notice and submitted reply dated 4.07.2019to the Inquiry Report and has been granted personal hearing. The Adjudicating Authority had considered the statements of the employee of theCustoms Broker and also of Shri Prashav Himanshu Shah, Proprietor of M/s. Pacific Imports, whereby the compliance of the Regulations had been appreciated. We are of the opinion that in the proceedings conducted under the Regulations the principles of natural justice have been followed and the findings are justified on the basis of the material on record.

7. The main submission raised in the grounds of appeal is that after the earlier order dated 9.03.2017, whereby the suspension of his license was revoked, there is no fresh material on record and no substantial evidence against him to establish the contravention of the provisions of the Regulations. In the absence of further material, it is not proper to reversethe findings of the Commissioner. From the paragraph quoted above from the order of the Commissioner on the earlier occasion, we find that he has specifically observed that the appellant has prima-facie contravened the provisions of Regulation 11(n) of CBLR 2013, (equivalent to Regulation10(n) of CBLR 2018) as his employee Shashikant Maruti Pol had accepted in his voluntary statement that the bill of entry dated 7.12.2016 had been filed by him without verifying KYC norms and that the import documents had been received by him from Shri Mehul Shah through courier and, therefore, the appellant had not verified the antecedent, identity and functioning of his client, M/s Pacific Imports. Further, the Commissioner left the liberty to proceed on conclusion of the investigation and on availability of all facts of the case, penal action in terms of provisions of CBLR, 2013 be taken against the Customs Broker. It is clear that violation of 11(n) was noted by the Commissioner even at that stage. In that view it cannot be said that on the basis of the inquiry report no further action is maintainable. Under theRegulations, the immediate action required in such like cases is to pass a suspension order to restrain the Customs broker to act any further on the basis of the license. It is thereafter that the Regulation provides for detailed investigation, by holding an enquiry and then proceed further as provided therein.

8. In the present case, the Inquiry Officer considered the statements recorded under Section 108 of the Customs Act of Shri Prashv Himanshu Shah, proprietor of M/s Pacific Imports, Shri Mehul Shah, Shri Ketur Bhavsar and Shri Shashikant Maruti Pol, employee of the appellant in the light of the various provisions of the Regulations which were alleged to have been violated by the appellant and found the same to be proved. In his statement, Shri Prashv Himanshu Shah stated that his uncle Shri Mehul Shah was using the IEC for import of goods and is doing business in the name of his IEC and he does not have any knowledge about import and export of goods. In other words, he is a dummy IEC holder and Shri Mehul Shah is the actual importer.

9. The statement of Shri Shashikant Maruti Pol, who was handling the work of import clearances is important to ascertain the compliance of the provisions of CBLR as noted in the impugned order which reads as under : -

"8. Shri Shashikant Maruti Pol, in his statement dated 26.12.2016 inter alia stated that he is one of the employee in the CB firm M/s Vijender Singh; that the licence of M/s. Vijender Singh has been made operative vide order dated 16.11.2015; that he is handling the import clearances ofM/s Pacific Imports; that his registered office address in Mumbai Customs is 5/6, Ram Smruti Apartment, Plot No. H-11, Sector 14, CBD Belapur, Navi Mumbai-400614; that he has shifted his office to Shop No. 2, Trantrasangam, CHS Sector 42, Seawoods, Navi Mumbai-400615 and notintimated the present address to CB Department, New Custom House, Mumbai; that he has never met Shri Mehul Shah or the IEC holder of M/s Pacific Imports; that the Billof Entry no. 7738176 dated 07.12.2016 was filed by them on authorisation and instructions from M/s Pacific Imports; that Shri Mehul Shah gave the Invoice, Packing list, COOand Bill of Lading through courier; that he did not check the documents and filed the bill of entry without tallying the weight mentioned in the Certificate of Origin, Bill of Lading and packing list. In his further statement dated 10.01.17 hisemployee Shri Ramesh Mange contacts Shri Mehul Shah,the real importer of M/s. Pacific Imports, and the documentsfor the clearance of the goods under Bill of Entry No. 7738176 dated 07.12.2016 were received by Shri

Ramesh, Manager through courier; that Ramesh Manger, their employee, handles the Import documents forwarded by ShriMehul Shah in the name of M/s Pacific Imports. The Container No. APHU6448133 was weighed at a weighbridge of Navkar CFS. The importer has declared the gross weight of the subject container as 25900 kgs. However, on weighment it was found 27270 kgs. Thus, there is an excessof 1370 Kgs. as per the weighment slip provided by theCFS. Thereafter, the container was de-stuffed and the goodswere segregated according to the marks and numbers on the packages. The total number of packages found were the same as declared packages i.e. 927. During the course of examination, 11 cartons appearing to be Cubic Crystal Zircon were found which were neither declared in the Bill of Entry nor in the Invoice & Packing List. The item at Sr. No. 12 of the packing list i.e. 11 cartons of Glass beads were notfound during examination."

10. We may now examine the provisions of the Regulations which the appellant has failed to comply.

10(i). Regulation 10(d) of CBLR, 2018, (erstwhile regulation 11(d) of CBLR, 2013) reads as:

"That Customs Broker shall advise his client to comply with the provisions of the Act and in case of non-compliance,shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be."

As per the statement of Shri Shashikant Maruti Pol, he admitted that he has never met Shri Mehul Shah or the IEC holder of M/s Pacific Imports. The documents, i.e., the invoice, packing list, COO and bill of lading were sent by Shri Mehul Shah through courier. He filed the Bill of Entry without checking the documents and without tallying the weight as per the documents. Though he was aware that the IEC of M/s. Pacific Import was being misused by Shri Mehul Shah and instead of intimating it to the customauthorities he facilitated the clearance of the goods. From this, it is evident that if the appellant had not even met Shri Mehul Shah how he could have advised him in terms of regulation 10(d). The appellant therefore, failed to discharge the obligation and is liable for penal action.

10(ii) Regulation 10(e) of CBLR 2018, erstwhile Regulation 11 (e) of CBR, 2013, reads under:—

"A Customs Broker shall exercise due diligence to ascertain the correctness of an information which he imparts to a client with reference to any work related to clearance of cargo or baggage."

From the statement of Shri Shashikant Maruti Pol, it is evident that the quantity of the goods was mis-declared as the quantity was found to be in much excess on examination. He categorically admitted that he did not check the documents submitted by Shri Mehul Shah. This reflects that the Customs Broker failed to verify the documents submitted and therefore did not exercise due diligence in asserting the correct weight of the goods and thereby violated the obligation cast upon him under Regulation 10(e)ofCBLR, 2018.

We may refer to some of the decisions relied on by Shri Rakesh Kumar. In **Millennium Express Cargo Pvt. Ltd vs Commissioner of Customs, New Delhi – 2017 (346) ELT 471 (Tribunal-Delhi)**, where also the weight of the container was found to be in excess than what was declared, the Tribunal observed that mere obtaining of documents does not tantamount to fulfilment of the said obligation and therefore concluded that violation of Regulation 13(e) of CBLR, 2004 is established. Referring to the CBEC Circular No.9/2008, dated 8.2.2010, which laid down the requirementsof verification and documents, it was observed :

Sl. No.	Form of Organization	Features to be verified	Documents to be obtained
1.	Individual	Legal name and any other namesused Present and permanent address,in full, complete and correct	(i)Passport (ii)Pan Card (iii)Voter's identity card (iv)Driving Licence (v)Bank account statement (vi)Ration card Note: Any two of the documents listed above, which provides client, customer information to the satisfaction of the CHA will

			suffice.

"Thus, the appellant was required to inter-alia verify present andpermanent address in full, complete and correct, which the appellant did not do. Merely because the appellant obtaineddocuments as per Column 4 of the above table does not tantamount to fulfilment of requirement of Column 3 relating to features to be verified because if that was not so, then there wasno need to have Column 3. As seen from Regulation 13(o) quoted above, the Customs House Agent is obliged to inter-alia verify antecedent, correctness of Importer Exporter Code, identity of the importer and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information. The appellant has not evenclaimed that it had ever verified the existence of the importer at the given address. Obviously, the appellant failed to fulfil the requirement of Regulation 13(o) ibid.

7. The documents filed by CHA are treated with a certain degree of trust by the Customs and such trust was completely violated in the present case. Filing of bill of entry filed in the name of a non-existent importer is a grave offence on the part ofCHA and it becomes graver when it turns out that CHA did not make minimum efforts to verify the genuineness of the importer and its address. Such acts of omission and commission on the part of CHA can potentially have even more serious financial/security consequences and therefore such a CHA hardly deserves any leniency."

Earlier in the case of **Universal Agency Vs. Commr. of Cus (Airport & Admn.), Kolkata – 2015 (323)ELT 153 (Tribunal-Kolkata)**, the Tribunal agreed with the contention of the Revenue that the representative of CHA was aware of the discrepancies in the consignment both in the quality of the goods as well as weight of the goods but the same were not brought to the notice of the customs authorities and further observed as :

"We find that the Hon'ble Delhi High Court in the **Jasjeet Singh Marwah** (cited supra) held that CHA acts on behalf of the importer, it is not only his obligation to ensure thatthe entries made in the bill of entry are correct but also thatthe true and correct declaration of value and description of goods is made, and the CHA can penalize under the Customs Act."

10(iii) Regulation 10(n) of CBLR 2018 (erstwhile Regulation 11(n) of CBLR 2013) reads as under:-

"A Customs Broker shall verify antecedent, correctness of Importer Exporter code (IEC) number, identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents data or information."

In terms of the aforesaid provisions of regulation 10(n) it is an admitted position that KYC norms were not verified before filing the bill of entry. Shri Shashikant Maruti Pol also admitted that he did not know the IEC holder of M/s. Pacific Imports as the work of import clearances were accepted from Shri Mehul Shah without even knowing him. Therefore, there is a clear violation by the Customs broker to know the antecedents, correctness of the IEC number, the identity and functioning of his client at the declared addressas per the obligation cast on him under regulation 10(n). Even at the timeof revocation of the suspension order, the Commissioner had also observed that there is prima-facie contravention of the provisions of Regulation 11(n) of CBLR, 2013. The appellant along with his representation dated 22.02.2017, had supplied copies of documents, KYC, reflecting the identity and antecedents of the importer, procured by the client and some of the documents such as authorisation letter dated 1.11.2016 for appointment of CHA, by the importer, M/s Pacific Imports, IEC copy of the importer, TIN, registration of the importer (State), TIN registration of the importer(Central)and proprietor's PAN was submitted at the time of personal hearing on 1.06.2019. However, as noted by the Commissioner Customs, these documents except the authorisation letter were not procured at the time of filing the bill of entry on 07.12.2016. The issue of submitting the KYC documents belatedly has been dealt in **Multi Wings Clearing & Forwarding P.Ltd Vs.**

C.C. (General),New Delhi – 2019 (369) ELT820, which was also a case of misuse of CB license in imports claiming to bethe employee of the assessee and submission of KYC documents belatedly, the Tribunal observed, the fact that the appellant produced the required KYCto the Department at the later stage to the licensing issuing authority andnot to the investigating agency suggests that the necessary KYC documentswere actually not present with the appellant when the investigating agency visited and asked them to produce the KYC documents of the importer firm. 10(iv) Regulation 13(12) of CBLR 2018 (erstwhile 17(9) of CBLR 2013)provides,

"CB shall exercise such supervision as may be necessary toensure proper conduct of his employees in the transaction of business and he shall be responsible for all acts or omissions of his employees."

It is an admitted position that the entire work of handling the import clearances was done by Shri Shashikant Maruti Pol, the employee of the appellant, and hence he is responsible for his conduct in not complying with the provisions of the regulations which cast special obligations on the Customs broker. The appellant has miserably failed to supervise the working and the conduct of his employee in terms of Regulation 13(12) and is therefore liable for all the acts and omissions of his employee.

11. We may refer to the decision cited by the Revenue in the case of **Bhaskar Logistic Services Pvt. Ltd. Vs. Union of India – 2016 (340) ELT 17**, where the Patna High Court summed up as :

"35. From the pleadings and other materials on record, we find that there has been no violation of principles of natural justice. The petitioner was given due opportunity of being heard, which it had availed. The competent authority came to a conclusion that the petitioner had failed to exercise due diligence to ascertain correctness of any information which it imparts to a client with reference to anywork relating to clearance of cargo or baggage. What we notice in the present case is that Sheikh Khursheed of the petitioner-company knew that the IEC holder, Izahar Hussain, was not the importer. From the statement of Sheikh Khursheed, recorded under Section 108 of the Customs Act, it transpires that he did not try to ascertain as to who was the importer. Only in course of investigation, it came to light that the goods were imported by Ramesh and Kamlesh in the name of M/s. Regent Enterprises, whichwere undervalued for the purpose of evading Customs duties. It is difficult for this Court to arrive at a conclusion that no violation of Regulation 11(e) of the Customs Broker Licensing Regulations, 2013 is made out. The plea thatSheikh Khursheed disassociated himself from the affairs of the petitioner-company, may make the case of thepetitioner worse inasmuch as there is requirement under Clause (5) of Regulation 17 of Customs Broker Licensing Regulations, 2013, that "Where the Customs Broker has authorized any person employed by him to sign documents relating to his business on his behalf, he shall file with the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, a written authority in this behalf and give "prompt notice in writing if such authorization is modified or withdrawn". It is not the case of the petitioner that after said Sheikh Khursheedsevered his relationship with the petitioner-company, it informed the concerned Deputy Commissioner of Customsor Assistant Commissioner of Customs withdrawing authorization given by it to said Sheikh Khursheed. Clause
(9) of Regulation 17 of Customs Broker Licensing Regulations, 2013, casts obligation on the Customs Brokerto exercise such supervision as may be necessary to ensure proper conduct of his employees in the transaction of business and he shall be held responsible for all acts or omissions of his employees during their employment.

12. The Apex Court in **Commissioner of Customs Vs. K.M.Ganatra & Co. – 2016 (332) ELT 15 (SC),** quoted the decision in **Noble Agency Vs. Commissioner of Customs, Mumbai - 2002(142) ELT 84** as under :

"15. In this regard, Ms. Mohana, learned senior counsel for the appellant, has placed reliance on the decision in *Noble Agency* v. *Commissioner of Customs, Mumbai* [2002 (142)

E.L.T. 84 (Tri. - Mumbai)] wherein a Division Bench of the CEGAT, West Zonal Bench, Mumbai has observed :-

"The CHA occupies a very important position in the Customs House. The Customs procedures are complicated. The importers have to deal with a multiplicity of agencies viz. carriers, custodians like BPTas well as the Customs. The importer would find it impossible to clear his goods through these agencies without wasting valuable energy and time. The CHA is supposed to safeguard the interests

of both the importers and the Customs. A lot of trust is kept in CHAby the importers/exporters as well as by the Government Agencies. To ensure appropriate dischargeof such trust, the relevant regulations are framed. Regulation 14 of the CHA Licensing Regulations lists outobligations of the CHA. Any contravention of such obligations even without intent would be sufficient to invite upon the CHA the punishment listed in the Regulations....

We approve the aforesaid observations of the CEGAT, West Zonal Bench, Mumbai and unhesitatingly hold thatthis misconduct has to be seriously viewed."

Along with this, we need to refer to the decision of Delhi High Court in **Ashiana Cargo Services Vs. Commissioner of Customs - 2014 (302) ELT 161** that the role of CHA does not come to an end till the goods are stuffed and the containers get sealed. His responsibility comes to an end only when the sealed containers are moved out of his supervision.

13. We are therefore of the considered opinion that the appellant hasfailed to comply with the obligations under the Regulations as discussed above. This now brings us to the penalty to be imposed on the appellant. The regulations provide for various penalties which can be imposed on the customs broker for violation of the provisions thereof. Regulation 17 provides for revocation of the license of a customs broker and for forfeiture of whole or part of the security. Regulation 18 provides for imposing penalty on the customs broker not exceeding Rs.50,000/-. The punishment of revocation of license has been held to be a very harsh punishment as it takes away the livelihood of a person onabsolute basis. The Commissioner in the impugned order has taken a very fair and balanced view in refraining to order for revocation of licence and merely ordered for forfeiture of the security amount and imposing penalty ofRs.50,000/-, which would act as a deterrent to the appellant to be more cautious and diligent in executing his work.

14. We are of the opinion that the impugned order does not call for any interference and deserves to be upheld. The appeal, is accordingly dismissed.
[Order pronounced on 10th January, 2024]

(Binu Tamta) Member (Judicial)

(P. V. Subba Rao) Member (Technical)

Ckp.

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 3

Customs Appeal No. 55232 of 2023

(Arising out of Order-in-Original No. 28/ZR/Suspension-Confirmation/Policy/2023 dated 09.05.2023 passed by the Commissioner of Customs (Airport & General), New Delhi)

M/s Global Links **Appellant**
105, Bhanot Corner, Pamposh Enclave,Greater Kailash-1,

New Delhi-110048

Versus

Commissioner of Customs **Respondent**
New Customs House, Near IGI Airport,New Delhi - 110037

APPEARANCE:

Dr. Prabhat Kumar & Shri Karan Kanwal, Advocates for the Appellant Shri Munshi Ram Dhania, Authorized Representative for the Appellant

CORAM :

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 18.10.2023Date of Decision: 15.01.2024

FINAL ORDER NO. 50049/2024

HEMAMBIKA R. PRIYA

M/s Global Links (hereinafter referred to as the appellant) hasfiled this appeal against the order-in-original No. 28/ZR/Suspension-Confirmation/Policy/2023 dated 09.05.2023 passed by the Commissioner wherein the revocation of Customs Broker License and forfeiture of security deposit has been confirmed.

2. The brief facts of the case are that on the basis of the offencereport dated 20.02.2023 forwarded from Additional Commissionerof Customs, CIU, NCH, Mumbai, Zone-I, inquiry of violation under CBLR, 2018 was initiated against the appellant. Accordingly, CB licence of the appellant was suspended vide Order No. 26/ZR/Suspension-Confirmation/Policy/2023 dated 13.04.2023 for the violation of provisions of Regulation 10(d), (e), (m) and 13(12) of the CBLR. Thereafter, the suspension of the CB licence was confirmed vide order No. 28/ZR/Suspension-Confirmation/Policy/2023 dated 09.05.2023, against which the present appeal has been filed.

3. The learned counsel submitted that the impugned order is illegal and improper as the appellant had always conducted the business by adhering to the provisions of the Customs Act and the rules and regulations framed thereunder. All the requirements under CBLR were fulfilled. The learned counsel contended that all the charges were denied as they have always conducted their CHA business by following the provisions of Customs Act and the regulations and rules framed thereunder. The learned counselfurther contended that no offence had been committed by

them in Delhi and they were facing action in Mumbai jurisdiction, where the show cause notice had been issued. As there was no offence reportfrom Delhi jurisdiction, hence no action was warranted in Delhi jurisdiction. The counsel stated that Bills of Entry were filed on the basis of the documents provided by the importers. The Commissioner had failed to appreciate that the appellant had filed the respective Bills of Entry on the basis of import documents provided by the importers, and he was unaware of any alleged manipulation of import invoices. The appellant had no personal interest in the imports, except for clearance of the same which ishis profession. Hence, CB licence is not liable to be revoked. The ld counsel placed reliance on the following case laws:

(i) Bharat Overseas Communicators Vs. Commissioner of Customs(General), Mumbai – 2007 (209) ELT 142 (Tri.-Mumbai);

(ii) Kunal Travels (Cargo) Vs. CC (I & G), IGI Airport, New Delhi –2017 (354) ELT 447 (Del.)

4. Learned Authorised Representative submitted that it is evident that there were apparent mis-declaration with reference to description, quantity and value of the goods. The declared goods were also in contravention of other allied Acts such as non- compliance of Legal Metrology Act, non-compliance of BISprovisions, WPC provisions, IPR violations and non-payment ofappropriate Anti-Dumping Duty. It was also accepted by the importer in his statement that Customs Broker did not inform him anything about the compliance of other allied Acts such as IPR,ADD etc. Therefore, the mis-declaration, non-compliance of various allied Act and as per the statement of importer, it isapparent that M/s Global Links had violated Regulations 10(d), 10(e) and 10(m) of the CBLR. Hence the appellant was liable for action under Regulation 16 of CBLR 2018 as it was his duty to properly guide his client to comply with the law and if the importer was not able to comply with law, the CB has to bring it to thenotice of Assistant/Deputy Commissioner of Customs but the CB failed to do so. Therefore, they have violated Rule 10(d)/(e) of CBLR, 2018.

5. The learned Authorised Representative further submitted that the appellant was responsible for the conduct of his employee Shri Jitesh P Mav, G card holder employee of M/s Global Links, as per CBLR, 2018, as during the examination of the consignments, he neither brought out the discrepancies in the goods regarding quantity, undeclared goods, non-compliance of RB-44 provisions, statutory compliance of BIS norms and mandatory ETA certification for wireless items covered under subject Bills of Entry before the dock officer nor did he inform the importer and DC/Docks. Thus, the employee of appellant had failed to comply with the provisions of Regulation 10(m). The learned Authorised Representative further submitted that the appellant is bound by the act of his G- card/H-card holder. In the case of **Skytrain Services Vs. Commissioner of Customs (Airport & General), New Delhi – 2019 (369) ELT 1739 (Tri.-Delhi),** this Tribunal has held that:

"21. Admittedly, Shri Chaman Kumar Verma is the G- Card holder of the appellant who was physically and actually involved in the entire series of acts. Apparently and admittedly his activities had never been objected by the appellant nor ever had been questioned nor even been informed to the competent authorities. The appellant is otherwise bound by the act of his G-Card holder. Otherwise also, without the knowledge of the Customs Broker, the goods could not have been diverted. He is equally bound by the act of his authorised representative/agent. Keeping in view the same and the observation of Hon'ble Supreme Court in *K.M. Ganatra & Co.* (supra) case about the important duties of the CHA and the amount of due diligence as is required to beobserved on their part, we are of the firm opinion that CHAhas violated the obligations imposed upon him under CBLR, 2013/2018. The above observations are sufficient tohold that the violation of relevant Regulations is so grave that principle of proportionality is not opined to have been compromised as is impressed upon by the appellant. The failure thereof invites the penalty as that of revocation of licence."

6. We have gone through the records and heard the arguments of the appellant and the department. The main issue to be decided is whether the gravity of the offence of the appellant is grave

enough for revocation of license. To conclude the same it would be appropriate to understand the requirements of the CBLR vis a vis the offence of the appellant. To recount the facts, the importer M/s Dreeams Inc had imported goods from China and filed Bills of Entry as per the details given in the table below.

Sl no	B/E no.	Declared value (in Rs)
1	4324995	1631679.98
2	4325182	3099218.41

6.1 Thereafter, post clearance of the goods, the CIU wing examined the goods and noted that there were several violations including undeclared goods, requirements of BIS, misdeclaration of quantity, violation of import conditions under DGFT notification, and misdeclaration of value. Statements were recorded of the importer Sh Pankaj Bansal, G card holders of the appellant Sh Vinod P Nandaand Jitesh P Mav. The importer in his statement dated 06.02.2023 stated that the mistake was that of the supplier in China. He also stated that the appellant as his Customs Broker did not inform him the requirements of compliance of RE-44 and other statutory requirements. Consequently, he did not inform the other Government agencies regarding his business. Sh Vinod P Nanda, G card holder and holder of the Power of Attorney of the appellant in his statement stated that he was present during the re-examinationof the goods imported vide the two Bills of Entry. He admitted thatit was the duty of the appellant, i.e. CB to inform the compliance requirements to the importer, and also to the competent authority. In his statement dated 06.02.23, Sh Jitesh P Mav, also a G card holder admitted that he was present at the initial examination of goods by the Dock officers on 25.01.23, and the dock officers did not examine all the packages as required and also did not raise anyquery with regard to the discrepancies in quantity and other violations. He admitted that he also did not inform the AC/DC,Docks regarding the discrepancies. It is based on this admissions that the CB license has been revoked for having contravened the provisions of CBLR, 2018.It is within this factual matrix that onehas to view the contraventions of the CBLR, 2018. We may examinethe violations in respect of the provisions of the CBLR, 2018.

Regulation 10(d):*advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;*

The facts as indicated above clearly establishes that the G card holder Sh Jitesh P Mav, who was present during the initial examination of the goods did not inform either the dock officers or the AC/DC regarding the non-compliance of BIS regulations and other clear violations of quantity, Anti dumping duty etc. It has alsobeen stated by the importer that he was not informed by the CB regarding the other compliance requirements. This shows clearfailure on the part of the appellant in his duties, as required under 10d of CBLR, 2018.

Regulation 10(e):*exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage;*

As per the facts of the case, it is seen that the appellant had not informed the importer regarding the compliance requirements for import of digital smart watches, the RE-44 and mandatory WPC ETA certification etc. This points to a clear failure of the appellant's G card holder, which is a violation of the aforesaid provision.

Regulation 10(m):*discharge his duties as a Customs Broker with utmost speed and efficiency and without any delay;*

The statement of the importer clearly evidences that the appellant did not discharge his duties in an efficient manner.

Regulation 13(12): *The Customs Broker shall exercise such supervision as may be necessary to ensure proper conduct of his employees in the transaction of business and he shall be held responsible for all acts or omissions of his employees during their employment.*

6.2 This above regulation places the responsibility on the appellant, a CB for the omissions committed by his employees. The facts of the case establish the failure of the G card holder Jitesh P Mav in discharging his duties as the customs broker in the said importation. Therefore, the violations of the various provisions of the CBLR, 2018 stands proved.

6.3 The learned Counsel has submitted that the offence wascommitted in Bombay whereas the CB license has been revoked in New Delhi. This argument is specious as the appellant is registered

as Customs Broker in New Delhi. Therefore, the jurisdiction for any action against the appellant lies with the jurisdictional authority only. The action against the CB was initiated based on an offence report which was received from the Customs office at the port.

6.4 It has also been argued before us that the appellant was not aware of any alleged manipulation of import invoices or valuation of goods. In the instant case, there is no allegation of any such violation. Infact the provisions of CBLR, 2018 as invoked in theshow cause notice read with the facts of case clearly establishes thefailure of the appellant in discharging his responsibilities as per the CBLR, 2018.

7. We now address the issue of whether the said violationsattracted the punishment of revocation of the CB license. The roleof the Customs broker is one of great responsibility in the customs operations and it is for this reason, a licence is issued only after conducting an examination and after necessary backgroundverifications. It is true that the Customs broker is not an inspector to examine the goods and cannot exercise any powers available to the officers. All that is required of the Customs broker is to fulfill its obligations under the CBLR, 2018. Once it fulfils all its obligations, ifan exporter or importer attempts to deal in contraband by bringing goods which are not declared in the documents, the customs brokercannot be held responsible for such violations unless there is evidence that the Customs broker had the knowledge of or was colluding in the offence. In the instant case, it is established that the G Card holder was present during the examination of the goods by the Dock officers, and did not inform the authorities as required under Regulation 10(d) and 10(m) of the CBLR, 2018. It is also an admitted fact that the importer in his statement has claimed that the appellant did not inform him of other regulatory compliance requirements for the goods imported by him. This is a clear failure of appellant's duties as a Customs Broker. Infact, the G card holder has accepted that he failed to bring the discrepancies to the notice of the concerned Assistant/Deputy Commissioner as the dock officers did not raise any query. This is not acceptable, as it clearly indicates the abdication of the responsibility by the appellant/his employee, and highlights the mala fide intent of the appellant.

8. We hold that once a violation of CBLR Regulations is admitted, the Revenue has to follow the discipline governing the Customs House Agents and as such, the Commissioner of Customs is empowered to revoke the license of Customs House Agent and also to forfeit his security if such agent fails to comply with the provisions of Regulation or gets involved in the Act which would amount to mis-conduct/offence under the Act. The High Court of Andhra Pradesh in the case of **Commissioner of Customs and Central Excise Vs. H.B. Cargo Services reported as [MANU/AP/0060/2011 = 2011 (268) E.L.T. 448 (A.P.)]** held that in disciplinary matters, the Commissioner is responsible for happenings in Customs area, and for discipline to be maintained, if he takes a decision necessary for that purpose, CESTAT would, ordinarily, not interfere on the basis of its own notions of the difficulties likely to be faced by the CHA or their employees. Decision is best left to the disciplinary authority, save in exceptionalcases where punishment imposed is shockingly disproportionate or is mala fide. Interference with punishment imposed would be justified only when it shocks conscience of CESTAT.

9. In view of the discussions above, we hold that there is no irregularity committed by the Adjudicating Authority while revoking the license of the appellant and imposing the consequential punishments under the Regulations. We do not find any infirmity in the impugned order. Consequently the appeal stands dismissed.

(Pronounced in open Court on 15.01.2024)

(Binu Tamta)Member (Judicial)

(Hemambika R. Priya)Member (Technical)

RM

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI
PRINCIPAL BENCH – COURT NO.III

Customs Appeal No.50415 of 2021 (DB)

[Arising out of Order-in-Appeal No.CC(A)Customs/DII/ICD/PPG/1042/2020-21 dated 29.10.2020/03.11.2020 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi].

M/s. Jain Wooltex, **Appellant**

Kabri Road,
Near Shri Ram Dharamkanta, Panipat, Haryana-122 001.

Versus

Commissioner of Customs, **Respondent**

Inland Container Depot, Patparganj,
Delhi. APPEARANCE:

Shri Mayank Sharma, Advocate for the appellant.
Shri Rajesh Singh, Authorised Representative for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No.50052/2024

DATE OF HEARING:14.11.2023 DATE OF DECISION:15.01.2024

BINU TAMTA:

1. The present appeal has been filed challenging the Order-in-Appeal No.CC(A)Customs/DII/ICD/PPG/1042/2020-21 dated 29.10.2020/ 03.11.2020, whereby the Commissioner (Appeals), dismissed the appeal and affirmed the order-in -original redetermining the assessable value of the imported goods, ordering for confiscation of the said goods under Section 111(d) and 111(m) of the Customs Act, 1962 (hereinafter referred to as the

Act) and imposed redemption fine of Rs.4,50,000 and also imposed penalty of Rs.6 lakhs under Section 112(a) of the Act.

1. Briefly stated, the appellant filed the Bill of Entry No.9659490 dated 12.05.2017 for clearance of goods imported and declared as "Old Original Completely Pre-Mutated and Fumigated Mixed Hosiery Rags" and classified them under CTH 63109010. The declared weight of the goods was 27572 kgs. total 59 bales and the declared value of the goods was US$5652.26, CIF. The assessable value was Rs.3,71,641.75 and duty thereon was Rs.34,771/-.

2. The Bill of Entry was taken for assessment under first check of appraisement for 100% examination to verify whether the goods are as per the invoice, packing, list, bill of lading and declaration on bill of entry regarding weight, quantity, country of origin, description and compliance of Government Instructions issued in that regard. On examination with the help of empanelled Chartered Engineer, "Old un-mutilated mixed Hosiery clothings" were found "used or little used

clothings, but were not to the extent of clothing becoming rags" and hence could achieve higher value. Thus the consignment did not contain merely old and completely pre- mutilated mixed hosiery rags (8130 kg.) as declared and classified under Tariff Item 63109050 but old un-mutilated mixed Hosiery clothing (19960 kg. which was classifiable under Tarrif Item 63090000 which were restricted as per Indian Trade Classification (Harmonised System) of Import Items, 2017. As the description, weight and value of the goods imported were found misdeclared they were liable for confiscation and penalty under the provisions of the Act.

3. The appellant while submitting his reply stated that they did not want any show cause notice and personal hearing against the same and requested

to adjudicate the bill of entry. The Adjudicating Authority vide order dated 25.08.2017 rejected the assessable value and redetermined the same to be Rs.22,90,920/- under Customs Valuation, Determination of Value of Imported Goods Rules, 2007 confirmed the confiscation, giving an option to the importer to redeem the goods on payment of redemption fine of Rs.4,50,000/- and imposing penalty under Section 112(a) of Rs.6 lakhs on the importer. Being aggrieved, the appellant filed an appeal, which has been rejected by the impugned order by the Commissioner (Appeals). Hence, the present appeal has been filed by the appellant before this Tribunal.

1. The main contention of the appellant is that the goods have been declared as "Old Original Completely Pre-Mutated and Fumigated Mixed Hosiery Rags" as per the declaration made in the Bill of Entry, invoice and so was the quantity as per the declaration made therein. The appellant pleaded that he acted in a bonafide manner as they were unaware about the mis- declaration of the goods. According to him, the only difference was that certain rags though declared as pre-mutilated were found to be un-mutilated and hence there was no mis-declaration.

2. The Authorised Representative for the Revenue reiterated the findings of the Authorities below and submitted that the description of goods were declared and mis-classified to avoid the DGFT Policy restriction and since they were not as per the declared description, the value had to be redetermined with the help of the approved valuer. He submitted that the present appeal is against the imposition of redemption fine and penalty as the importer has not redeemed the goods nor relinquished the title of the goods.

3. Having heard both sides, we find that old un-mutialted mixed hosiery clothing classifiable under Tarrif item 63090000 is a restricted item as per Indian Trade Classification (Harmonised System) of Import Items, 2017 (ITC) (HS), 2017 notified by the Central Government under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (as amended from time to time) read with paragraph 2.01 of the Foreign Trade Policy, 2015– 2020. As per para 2.08 of the Foreign Trade Policy, restricted items are permitted under an import License/Authorisation/Permission granted by the Director General of Foreign Trade. The appellant has not submitted any such license and therefore the total duty evaded is Rs.3,05,641/-.

4. It is an undisputed fact that on examination the goods were not found to be in conformity with the description in the Bill of Entry and so was the weight of the goods was in excess. We may refer to the provisions of Section 46 of the Act which deals with entry of goods on importation. In terms of sub-section (1) of Section 46, the importer of any goods other than goods intended for transit or transshipment is required to make entry thereof by presenting electronically to the proper officer, a Bill of Entry for home consumption or warehousing in the prescribed form. Further, sub-section (4) of Section 46 requires the importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry. There is clear violation of these provisions as the goods are found to be mis-declared in their description, weight and consequential value. The appellant having filed the bill of entry on self assessment basis under Section 17(1) is required to furnish correct information in the bill of entry. The law casts duty on the appellant to declare true and correct information of the goods while filing the bill of entry and self assess the duty accordingly. In the event of any violation, the importer is liable for the consequences under the Act.

5. We feel that the present case is squarely covered by the decision in the case of **B.K. Spinning Mills (P) Ltd. versus Collector Customs, Cochin, 2000 (117)ELT 604**, where the Bills of Entry were assessed to duty by classifying them under Customs Heading 6310.90 as "Completely Pre-mutilated Synthetic/Woollen rags" which were allowed to be imported without license as per the provisions of the export import policy, however, on examination they were found to contain serviceable, non-mutilated used clothes and also the declared value was not found to be correct transaction value. The Tribunal relying on the decision of the Apex Court in **Garg Mills (P)Ltd versus Additional Collector - 1998(104) ELT 306 (SC)** held that the goods are used and worn clothing, classified under Customs Heading 6309 and confiscation of goods under Section 111(m) of the Act is sustainable.

6. In this regard, we need to mention the CBEC Circular dated 8.5.2000, laying down the guidelines for import of impugned goods which has been referred to by the learned Authorised Representative, the same reads as under:-

"a. (0If garments are only old and used but serviceable after repair they must be classified under CTH 63.09. Only such garments which are totally unserviceable and beyond repair, should be classified under CTH 63.10.

b. In cases where garments declared to be rags are actually found to be only old and used garments falling under heading 63.09, as is mostly the case, the imposition of fine and penalty for violation of EXIM Policy should be such that it not only wipes out the Margin of Profit (MOP) but also acts as a deterrent against repeated imports.

c. Rags to be considered as completely mutilated should be totally unserviceable and beyond repair, and this can be ensured by applying criteria of three cuts or more, through the entire length of the garment, in a crisscross manner, not along the seams.

d. Only such garments, which are found to be completely mutilated rags, as imported, should be allowed clearance without licence clearance subject to post importation mutilation must not be allowed.

e. In case, it is found that garments are not completely mutilated rags i.e. garments having less than 3 cuts, the same should be allowed clearance only on such fine and penalty which not only wipes out the MOP but also acts as a deterrent against future imports."

7. The goods imported were restricted goods and could have been imported on the basis of the Licence issued by the DGFT and being mis- declared in respect of description, weight and value were liable for confiscation and penalty under Section 112(a) of the Act for his act of omissions and commissions. The redemption fine imposed on the appellant of Rs.4,50,000/- is commensurate with the assessable value of the goods of
₹22, 90, 920/ and hence requires no interference.

8. We do not find any merits in this appeal hence the impugned order is affirmed. The appeal is, accordingly dismissed.

[order pronounced on 15th January, 2024]

(BINU TAMTA)
Member (Judicial)

(HEMAMBIKA R. PRIYA)
Member (Technical)

Ckp.

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 3

Customs Appeal No. 50499 of 2021

(Arising out of Order-in-Original No. 120/MK/Policy/2020 dated 29.12.2020 passed by the Commissioner of Customs (Airport & General), New Delhi)

M/s Air Impex Cargo Agency **Appellant**
6/26, K.D. House, 3rd Floor, W.E.A.,Karol Bagh, New Delhi-110005.

Versus

Commissioner of Customs **Respondent**
(Airport & General)
New Customs House, Near IGI Airport,New Delhi - 110037

APPEARANCE:

Shri Vaibhav Singh, Advocate for the Appellant

Shri Rajesh Singh, Authorized Representative for the Respondent

CORAM :

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 12.09.2023 Date of Decision: 30.1.2024

FINAL ORDER NO. 50131/2024

HEMAMBIKA R. PRIYA

This is an appeal filed by M/s Air Impex Cargo Agency, 6/26, K.D. House, 3rd Floor, W.E.A., Karol Bagh, New Delhi-110005 (hereinafter referred to as the appellant) against the Order-in-Original No. 120/MK/Policy/2020 dated 29.12.2020passed by the Commissioner of Customs (Airport & General), NewCustoms House, Near IGI Airport, New Delhi-110027, wherein the Customs Broker[1] license of the appellant was revoked, security deposit was ordered to be forfeited and penalty was also imposed.

2. The brief facts of the case are that M/s Air Impex Cargo Agencywas issued CHA license No. R-21/98 (PAN No. AAGFA478IN) issued by the Commissioner of Customs (I&G), NewDelhi under Regulation 9(1) of CHALR, 2004[2]. An offence report, in the form of the show cause notice VIII/ICD/06/TKD/SIIB- Exp/DRI-SCN/Floor Covering/66/2017/8770 dated 22.10.2019 was received from the Additional Commissioner of Customs (Import), ICD, TKD, New Delhi on 31.10.2019 informing of the modus operandi of unscrupulous traders/exporters who were exporting goods described as Floor Covering (Braided) of Man Made Fiber under claim of Duty Drawback provisions and Focus Product

Scheme (in short, "FPS") by resorting to mis-declarationof description and value. It was alleged that the appellant M/s AirImpex Cargo Agency, had facilitated the Customs clearance forthe said unscrupulous traders/exporters. This was based on an intelligence received by the Directorate of Revenue Intelligence. The unscrupulous traders/exporters were:

(i) M/s Dwarka Trading Company, A-418, Mansa RamPark, Uttam Nagar, New Delhi.
(ii) M/s Adarsh Enterprises, B-99, Patel Garden, UttamNagar, New Delhi.
(iii) M/s Shree Balaji Trading, Plot No. 13, B-I, NanheyPark, Uttam Nagar, Matiyala, New Delhi.
(iv) M/s Shree Durga Fashion, 92-B, Nawada Village,Uttam Nagar, New Delhi.
(v) M/a Apex Trading, A-421A, Mansa Ram Park, UttamNagar, New Delhi;
(vi) M/s Kanak Fashion, Plot No. 13, Block B, NanheyPark, Uttam Nagar, New Delhi.

The aforesaid exporters had consigned their goods to (i) M/s K.K.S. General Trading L.L.C., PO Box-49320, Dubai, UAE and (ii) M/s Gremix General Trading LLC, PO Box 234350, Dubai UAE. The export goods declared as 'Floor Covering (Braided) of Man- Made Fiber' and classified under CTH No. 57049090 were filed for clearance under claim of Duty Drawback @ 9.1% ad-valorem and also for benefit under Chapter 3 of Focus Product Scheme (FPS). The FPS benefit being claimed under Chapter 3 of FTP 2009-14 was for product code 11, which was @ 5% ad-valorem,as admissible to specified goods of Chapter 57. In terms of Appendix 37D Focus Product Scheme, the benefit for the sole entry pertaining to goods of chapter 57 was admissible to all handmade carpet and other Textile Floor Coverings, whether or not made ups. The expression Handmade would include Hand Made, hand knotted, hand-tufted, hand woven, handloom and Braided. In the FTP scheme, for Chapter III of FTP goodscovered under Chapter 57, are also entitled to Bonus of 2%; thus the cumulative benefit for goods of the said heading is equivalent to 5%+2% for exports made from 01.01.2011 onwards. DRI vide letter DRI F.No. DRI/HQ-CI/50D/Int-13/2014-CI dated 03.11.2014, requested for detailed examination of the export cargo seized at ICD Loni, Ghaziabad, ICD PPG, New Delhi, CFS Mundra and ICD, Patparganj, New Delhi.

3. Physical verification of the detained goods revealed that the floor covering measuring about four square meter, weighing approximately 2500 gms. were machine made and not handmade or braided as declared in the export documents. The goods were subsequently seized vide Seizure memos dated 18.12.2014 and 18.03.2015 & 25.03.2015. Further investigations also revealed that the registered premises of M/s Dwarka Trading Company, IEC No. 0514009489 dated 05.05.2014, A-418, Mansa Ram Park, Uttam Nagar, New Delhi and that of its proprietor Shri Vipin Kumar, A-418, Mansa Ram Park, Uttam Nagar, New Delhi-110059was non-existent.M/s Adarsh Enterprises (IEC No.051401037) was found to be locked with mobile no. 9136298434 painted onits gate. Telephonic enquiry with Shri Surender, the holder of mobile no.9136298434 revealed that he was not aware of any firm by the name of M/s Adarsh Enterprises.

4. Shri Moti Khanna, Director, M/s Air Impex Cargo Agency was summoned and in his statement dated 31.12.2014 recorded under Section 108 of the Customs Act, 1962, inter alia, statedthat all new clients were advised to first fulfil the KYC norms/formalities and only after that he handled their Customs clearance work. He stated that they had verified the KYC documents with the original and that they did not verify theexistence of the declared office or residential address of the client.He further submitted that he had started with export clearance since January, 2014. In order to increase his business he had cleared the first consignment of floor coverings in the month of June 2014. His employee namely Shri Suresh Kumar used to lookafter the clearance work in ICD, Patparganj. He admitted that he used to send the documents to Shri Suresh Kumar who after receiving the Shipping Bills and other documents used to complete further formalities like examination and obtaining let export order. He himself had never seen the consignment of floorcovering prior to shipment

and they had filed the documents given by the exporter on the basis of which they proceeded with the Customs formalities. Shri Khanna submitted that they could not ascertain the value declared by the exporter or importer that the CTH of the goods being exported vide S/B No. 5190603, 5190606, 5190607, 5201651, 5201652, 5201661 and 5201662 all dated 25.09.2014. On completion of the investigations, show cause notice was issued to the exporters. Meanwhile, the offence report dated 22.10.2019 was issued based on which the impugned order was passed after following the procedure as laid down in CHALR, 2004.

6. The learned counsel for the appellant submitted that the impugned order dated 29.12.2020 passed by the Commissioner ofCustoms (Airport & General), NCH, New Delhi is not legal and proper and not sustainable on facts and circumstances of the caseas the said order had been passed on ex-parte basis without seeking clarification from the appellant and without appreciating any evidence with regard to compliance of KYC norms. The learned counsel further submitted that the appellant is not liable to get the client premises like office and residence physically verified. The learned counsel further stated that the KYC documents had been seized by DRI at his business premisesduring the investigation of the case. Therefore, the appellant did not have the KYC documents readily available with him and that iswhy he requested that the case may be decided on merits onbasis of records available with them. He contended that all the relevant documents had been taken over by Customs/DRI at the time of investigation. Inspite of the above said situation,the learned counsel submitted that the Commissioner of Customs had passed the order ex-parte without appreciating the evidence available with the Customs in their investigation file. Since the above said order has been passed violating the principle of naturaljustice, hence the said order revoking the CB License and forfeiting the security amount and levying penalty of Rs. 50,000/- under Regulation 17 of CBLR, 2018 is not sustainable. Further, he contended that as the shipping bill pertains to period year 2014, hence the CBLR, 2018 is not applicable at all. The learned counselsubmitted that Shri Moti Khanna in his statement dated 31.12.2014 had categorically stated that new clients were advised to first fulfill the KYC norms/formalities and only after which he handled their customs clearance work; that the invoice, packing list and other documents forms the basis of customs documentation; that they verified the KYC documents with the original; at the time of filing shipping bill IEC details are verified through DGFT site only then the same are filed before Customs. Thus, it was an incorrect observation by the Adjudicating Authority that the appellant had failed to comply with the provisions of Regulation 10(a).

7. The learned counsel also submitted that the statements of persons relied upon in the impugned order were not made available to the appellant, and hence could not be rebutted by them.He contended that the impugned order had held that the appellant had contravened the provisions of Regulation 10(e) of CBLR, 2018, as he was aware of the inferior quality of the goods and of overvaluation of the goods made by exporter, and had willfully and intentionally did not verify the correctness of the value, which was incorrect. The learned counsel submitted that the Noticee and his employee were not aware about such mis- declaration of goods and value as the said mis-declaration came to the notice to the department only after due examination and investigation by the DRI.

8. The learned counsel also reiterated that as per the statement of Shri Moti Khanna, the shipping bills were filed after complying with the KYC norms and all the related documents were seized by DRI made at office/business premises of theappellant. He stated that the department gathered all the evidences which was on record, whereas the Adjudicating Authority has passed the ex-parte order based on assumptions and presumptions. The learned counsel relied on the order in original No. 55/SM/Suspension/Policy/2016 dated 05.08.2016 andOIO No. 56/SM/Suspension/Policy/2016 dated 05.08.2016 passedby Shri Sanjay Mangal, Commissioner of Customs (General), NCH, New Delhi wherein on similar investigation made by ADG DRI and based on offence report F.No. DRI/HQ/CI/50D/Enq-39(NT- 13/2014 dated 16.02.2015 against other exporter who had attempted to export floor covering by overvaluing the same in order to avail undue drawback etc. He contended that show cause notices No. 04 to 09 dated 02.02.2016 were issued which indicates that the show cause notice were issued after 347 days from receipt of the offence report. He relied on the order of High

Court Delhi in M/s HLPL Global Logistics wherein the show cause notice for suspension of Customs Broker license was quashed on time bar.He also contended that for past exports of five export firms, the show cause notice dated 22.10.2019 and 2020 was issued which was time barred as the offence was reported in 2014and 2015 by DRI and different show cause notice for suspension of appellant's license and others were initiated. Thereafter in 2020, the department issued separate notice for revocation of license on the similar matter, similar issue, similar investigation. Consequently the Commissioner of Custom's order dated 05.08.2016 was totally time barred.

9. The learned counsel placed reliance on the following judicial pronouncements wherein CHA was not held responsible for overvaluation of goods being unaware of such overvaluation.

(i) P.D. Prasad & Sons Pvt. Ltd. Vs. Commissioner of Customs(Export), New Delhi – 2017 (358) ELT 1004 (Tri.-Del.);

(ii) Akanksha Enterprises Vs. Commissioner of Customs, Mumbai-I – 2006 (203) ELT 125 (Tri.-Del);

(iii) Apson Enterprises Vs. Commissioner of Customs (EP),ACC, Mumbai – 2017 (358) ELT 817 (Tri.-Mumbai).

On the issue of knowledge and abetment, and livelihood, the LdCounsel relied on the following decisions:

i. Arif I. Patel Vs. Commissioner of Customs (Prev.), Mumbai – 2014 (308) ELT 698 (Tri.-Mumbai);

ii. Commissioner of Customs (Export), Chennai Vs. Sahaya Edin Pabhu – 2015 (320) ELT 264 (Mad.);

iii. Sij Electronics Com. Tech. Pvt. Ltd. Vs. Commissioner of Customs, Kochi – 2001 (129) ELT
528 (Tri.-Bangalore) – it was decided that in absence of mens rea penalty was imposable for technical breach oflaw when there is no defiance of law or conduct which is contentious or dishonest.

iv. Akbar Badruddin Jiwani Vs. Collector – 1990 (47) ELT 161 (SC).

v. Landing & Shipping Agency Vs. Commissioner ofCustoms (Admn.), Kolkata – 2003 (158) ELT 78 (Tri.-Kolkata);

vi. International Shipping Agency Vs. Commissioner of Customs (Gen.), Mumbai – 2006 (196) ELT 439 (Tri.-Mumbai);

vii. Falcon Air Cargo & Travel (P) Ltd. Vs. Commissionerof Customs, New Delhi – 2002 (141) ELT 284 (Tri.- Delhi) – it was held that it is well settled law that punishment should be commensurate with offence in the facts and circumstances of the case and in view of inquiry officer's report it was not found fit case for revoking the license and depriving of the appellant of their means of livelihood.

viii. Overland Agency Vs. Commissioner of Customs (Preventive), Kolkata – 2004 (166) ELT 258 (Tri.- Kolkata) – In this case it was held that suspension of license deprives the licensee as also a number of workerof their livelihood. In absence of serious irregularity committed by the CHA, license should not be suspended.

10. The learned Authorized Representative submitted on theissue of time bar that the Taxation and other Laws (Relaxation of Certain Provisions) Ordinance 2020 (No. 2 of 2020) dated 31st March 2020, the time limits as specified in or prescribed or notified under the Customs Act, 1962 and falling during the periodfrom the 20th day of March, 2020 to the 29th June, 2020 for completion of any proceeding or issuance of any order, notice, intimation, notification or sanction or approval, by whatever namecalled, by any authority, commission, tribunal by whatever name called, was extended by the Central Government to the 30th June 2020, which subsequently has been extended till 30.09.2020 by the Central Government vide Notification issue under GSR 418(E). Again it was extended till 31.12.2020 by the Central Government vide Notification issued under GSR 601 (E) dated 30.09.2020. He further submitted that as per Regulation 10(a), every CB is required to obtain an authorization from each of the companies, firms or individuals by whom he is for the time being employed as a CB and produce such authorization wheneverrequired by DC/AC, Customs. However, as was evident from the impugned order, it was apparent that the appellant were not aware about the exporter's details nor did they have the authorization and other KYC details.

11. The learned Authorized Representative further submittedthat from the facts of the case, it is evident that the appellant(CB) had been in touch with Shri Kultar Singh and relied upon him for the verification of the IEC codes. Shri Kultar Singh in hisstatement dated 10.03.2015 inter alia stated that he had never met any of the proprietors of the said firm; that all the documentsfor exports transacted in the name of the said six firms had been prepared in his office; that he used to hand over the same to Shri Vinay Kumar to obtain the signatures from the respective proprietors; that he could not affirm the actual identity of the signatories of the export documents; that he had contacted Shri Moti Khanna of M/s Air Impex Cargo Agency for customs clearance of the floor coverings exported in the name of the said firms. Further, the learned Authorised Representative contended that there is nothing on record to indicate that his statement recorded under Section 108 of the Customs Act, 1962 was retracted. Further, the statement given by him was without any contradiction and the appellant had admitted to complicity. Furthermore, the facts narrated in the statement are consistent with the other evidences gathered during investigations. He relied on the decision in the case of **Percy Rustomji Basta Vs. State of Maharastra – AIR 1971-SC-1087** wherein the Supreme Court held that a person summoned under Section 108is told by the statute itself that under threat of criminal prosecution, he is bound to speak what he knows and states it truthfully. The Supreme Court in the case of **Surjeet Singh Chhabra Vs. Union of India – 1997 (89) ELT 646 (SC)** has held that the customs officers are not police officers, therefore, the confession, is an admission and binds the appellant. Therefore, the aforementioned statements are authentic and reliable having evidentiary value in view of the above established law.

12. The learned Authorized Representative stated that it is well established that Shri Kultar Singh did not have the authorization from any of the said six firms. The appellant was well aware of the fact that the IECs in question were dummy firms and were being illegally used by Shri Kultar Singh for export of undervaluedand mis-classified goods in order to avail undue and inadmissible benefits of Duty Drawback and Focus Product Scheme. Despite being aware of the knowing all those facts, the appellant had accepted the customs clearance work of impugned exports consignments from Shri Kultar Singh without obtaining authorization from actual exporter for monetary consideration. Hecontended that the appellant was well aware of the modus operandi being adopted by Shri Kultar Singh to avail undue and inadmissible benefits of Duty Drawback and Focus Product Scheme. But the appellant did not advise his clients to comply with the provisions of the Act, other allied Acts and the Rules and Regulations thereof nor did he inform the matter to the concerned AC/DC of Customs. Thus, the appellant had connived with Shri Kultar Singh, intentionally and willfully facilitated the customsclearance for impugned export goods, for monetary considerations. Consequently he had violated Regulation 10(d) ofCBLR, 2018.Regulation 10(e) required the appellant to exercise due diligence to ascertain the correctness of any information to any work related to clearance of cargo. The AR submitted that the appellant

was aware that the goods exported were inferior quality GUDDAD, whereas the same was being declared as 'floor covering (Braided) of Manmade Fibre and the value and the actual description of the said goods was misdeclared intentionally. The appellant had not asked the exporter to submit the invoice mentioning correct value of the same. In fact, the CB willfully andintentionally did not ascertain correct value of the subject export goods for pecuniary benefits, which had resulted in huge loss of Government treasury.

13. The Ld AR relied on the decision in **Skytrain Services Vs.**

Commissioner of Customs (Airport & General), New Delhi –2019 (369) ELT 1739 (Tri.-Delhi),wherein this Tribunal has held that

"21. Admittedly, Shri Chaman Kumar Verma is the G-Card holder of the appellant who was physically and actually involved in the entire series of acts. Apparentlyand admittedly his activities had never been objected bythe appellant nor ever had been questioned nor even been informed to the competent authorities. The appellant is otherwise bound by the act of his G-Card holder. Otherwisealso, without the knowledge of the Customs Broker, the goods could not have been diverted. He is equally bound bythe act of his authorised representative/agent. Keeping in view the same and the observation of Hon'ble Supreme Court in *K.M. Ganatra & Co.* (supra) case about the important duties of the CHA and the amount of due diligence as is required to be observed on their part, we areof the firm opinion that CHA has violated the obligations imposed upon him under CBLR, 2013/2018. The above observations are sufficient to hold that the violation ofrelevant Regulations is so grave that principle of proportionality is not opined to have been compromised as is impressed upon by the appellant. The failure thereof invites the penalty as that of revocation of licence."

In the instant case, the appellant had not exercised due diligence and had deliberately facilitated illegal exports from his firm. Consequently, the appellant had violated the various provisions ofRegulation 10 of CBLR, 2018. Therefore, he prayed for dismissal of the appeal.

14. We have heard the learned counsel and the learned Authorised Representative. In order to appreciate the arguments, it would be imperative to revisit the facts of the case in brief. Based on an intelligence received from DRI, the export consignments of goods described as "Floor Covering (Braided) of ManMadeFibre" pertaining to 6 traders/exporters were examinedin in several ports viz., ICD, Loni, ICD Tkd, ICD Ppg, and CFS Mundra, and were seized. Subsequent investigations revealed thatthe alleged trader/exporters were mostly non-existent or fictitious, and ineligible drawback had been claimed by these exporters. It was also noted that the appellant was the Customs Broker who had filed the export documents, and had actively facilitated the fraudulent exports. Hence vide the impugned order the CB license has been revoked, security deposit forfeited and penalty has been imposed.

15. The learned counsel has argued before us that there were two offence reports viz., 2014 and 2015 by DRI based on which different show cause notices have been issued for suspension of CB license of the appellant and in 2020, another notice for revocation of license has been issued. In view of the same, the revocation of license by the Commissioner is not sustainable in the eyes of law. We note that the show cause notice in the instantcase was issued based on the offence report received in October 2019. A perusal of the order in original no. 56/SM/Policy/2016 dated July 2016, clearly indicates that the said order is limited to the investigations conducted by DRI in respect of six different exporters, who are not subject matter in the impugned order. Based on the facts of the case at that point in time, the adjudicating authority had dropped the proceeding on time bar. Inthe instant case, this notice has been issued within 90 days of the offence report. Therefore, we are unable to accept the argument of the learned counsel that this impugned order is hitby time bar.

16. The learned counsel has also submitted that the order had been passed *ex- parte*. He also stated that as the KYC documents had been seized by DRI, they were unable to submit the same before the adjudicating authority. Perusal of impugned order shows that the opportunity for personal hearing was granted on 28.10.20 and 10.12.20. However, neither the appellant appeared either in person nor through any authorised representative. The appellant by the letter dated 10.12.20 sought for an adjournment and the hearing was fixed for 16.12.20. Sh Rajkumar Sharma, F card holder and Sh Satyapal Bharti, Accountant appeared forpersonal hearing. The argument that the case was heard *ex parte* does not hold water.

17. As regards the violations of various provisions of the CBLR stands proved, we note that the impugned order has clearlyelucidated the manner in which the appellant had contravened theprovisions of the CBLR, 2018. We take note of the fact that investigations have revealed that the appellant was in touch with Shri Kultar Singh and relied on him for the IEC codes. We also find that the appellant did not independently verify the actual IECs holder of the said six firms i.e. M/s Dwarka Trading Company, M/s Aadarsh Enterprises, M/s Shree Balaji Trading, M/sShree Durga Fashion, M/s Apex Trading and M/s Kanak Fashion.It is also established that the appellant was well aware that Shri Kultar Singh was exporting the goods through dummy firms. It is thus evident that the appellant had not verified the correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address as required under the CBLR, 2018.We also note that Shri Vaibhav Goel(controller of two export firms)in his statement dated 03.06.2015 has admitted that the description of the goods as mentioned in the export documents as Floor Covering (Braided) of Manmade Fibre was suggested by the appellant. Shri Vaibhav Goel had gone on to depose that in addition to the clearing charges of Rs. 10,000/- percontainer, the clearing agent had charged him Rs. 60,000/- per container in cash for which no bill was issued by them. This established that the appellant had connived for primary consideration. Shri Amit Arora, in his statement dated 21.01.2015 (who had exported the similar goods)also deposed that he had shown a sample of floor coverings to the appellant before exporting them. Shri Vinay Kumar Singh, in his statement dated 10.02.2015 had also clearly stated that before export, the samples were shown to the appellant. In view of the above, we are unable to accept the arguments of the learned counsel that the appellant was unaware of the nature of the goods, nor was heaware of the misdeclaration or undervaluation of the export goods. The serious contraventions of the CBLR, 2018 stand established.

18. The Learned Counsel has also submitted that the appellant cannot be held responsible for valuation of goods as he was unaware of such overvaluation. Consequently, no action can be taken by the Department for violation under section 113 read withsection 114 of the Customs Act or under Customs Broker Licensing Regulations. As discussed above, Shri Vaibhav Goel in his statement dated 03.06.2015 has admitted that the description of the goods as mentioned in the export documents as Floor Covering (Braided) of Manmade Fibre was suggested by the appellant.Shri Amit Arora, in his statement dated 21.01.2015(who had exported the similar goods) also deposed that he had shown a sample of floor coverings to the appellants before exporting them. Shri Vinay Kumar Singh, in his statement dated 10.02.2015 had also clearly stated that before export, the samples were shown to the appellant. Consequently, we are unable to the accept argument of the learned counsel that the appellant was unaware of the nature of the goods, nor was he aware of the misdeclaration or undervaluation of the export goods.

19. The learned counsel also submitted that in the absence of mensrea, no penalty is impossible for technical breach of law. He also stated that the punishment should be commensurate with theoffence, and suspension of license deprives the licencee and his workers their livelihood. In the absence of serious irregularity, license should not be revoked. In this context, we once again revert to the statement of Sh Vaibhav Goel wherein he stated thatin addition to the clearing charges of Rs. 10,000/- per container, the appellant had charged him Rs. 60,000/- per container in cash for which no bill was issued by them. This clearly

establishes the mensrea of the appellant in this charging extra in order to facilitate the clearance of the impugned goods.

20. We observe that the High Court of Delhi in its decision in the case of Bhaskar Logistic Services Pvt Ltd., Vs Union of India [2016(340)ELT 17(Del)] held as follows:-

*"**33**. As regards the role and responsibility of a CHA/Customs Broker in such clearance, Regulation 11(n) of CBLR clearly provides that Customs Broker shall verify the antecedent, correctness of IEC, identity of his client andfunctioning of his client at the given address by using reliable independent authentic documents/data/information. Identical provision was there under CHALR under Regulation 13(o) of the CHALR. Thus, if a Customs Broker facilitates the filing/processing of a Bill of Entry by a person other than a valid IEC holder using IEC of a different person, it will amount to violation of the provisions of Regulation 11(n) of CBLR/Regulation 13(o) of CHALR.*

34. *In the case of Arvind C. Bhagat v. Commissioner of Customs, reported in 2000 (122) E.L.T. 678 (Mad.). TheDivision Bench of Madras High Court upheld the Department'saction on the CHA, who had stood for surety of his client- importer, who was found to be a fictitious firm. When a Customs Broker is aware that the IEC holder and the person importing/exporting is different and despite that, he does notbring this fact to the notice of the Department, this would amount to clear violation of the obligations cast upon the Customs Broker under CHALR/CBLR. Our view finds support from the said decision.*

35. *From the pleadings and other materials on record, we find that there has been no violation of principles of natural justice. The petitioner was given due opportunity of being heard, which it had availed. The competent authority came toa conclusion that the petitioner had failed to exercise due diligence to ascertain correctness of any information which it imparts to a client with reference to any work relating to clearance of cargo or baggage. What we notice in the present case is that Sheikh Khursheed of the petitioner-companyknew that the IEC holder, Izahar Hussain, was not the importer. From the statement of Sheikh Khursheed, recordedunder Section 108 of the Customs Act, it transpires that he did not try to ascertain as to who was the importer. Only in course of investigation, it came to light that the goods were imported by Ramesh and Kamlesh in the name of M/s. Regent Enterprises, which were undervalued for the purpose of evading Customs duties. It is difficult for this Court to arrive at a conclusion that no violation of Regulation 11(e) of the Customs Broker Licensing Regulations, 2013 is made out.The plea that Sheikh Khursheed disassociated himself from the affairs of the petitioner-company, may make the case of the petitioner worse inasmuch as there is requirement under Clause (5) of Regulation 17 of Customs Broker LicensingRegulations, 2013, that "Where the Customs Broker has authorized any person employed by him to sign documents relating to his business on his behalf, he shall file with the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, a written authority in this behalf and give "prompt notice in writing if such authorizationis modified or withdrawn". It is not the case of the petitioner that after said Sheikh Khursheed severed his relationship with the petitioner-company, it informed the concerned Deputy Commissioner of Customs or Assistant Commissioner of Customs withdrawing authorization given by it to saidSheikh Khursheed. Clause (9) of Regulation 17 of Customs Broker Licensing Regulations, 2013, casts obligation on the Customs Broker to exercise such supervision as may benecessary to ensure proper conduct of his employees in the transaction of business and he shall be held responsible for all acts or omissions of his employees during their employment."*

21. We also take note of the decision of the Tribunal in the case of Noble Agency Vs Commissioner of Customs, Mumbai [2002 (142)LT 84(Tri-Mum)] highlighting the role of the CHA/CB, which has subsequently been upheld by the Supreme Court. The relevant paragraph of the Tribunal order is reproduced:-

"12. The CHA occupies a very important position in the Customs House. The Customs procedures are complicated. The importers have to deal with a multiplicity of agencies viz.carriers, custodians like BPT as well as the Customs. The importer would find it impossible to clear his goods through these agencies without wasting valuable energy and time. The CHA is supposed to safeguard the interests of both the importers and the Customs. A lot of trust is kept in CHA by the importers/exporters as well as by the Government Agencies. To ensure appropriate discharge of such trust, the relevant regulations are framed. Regulation 14 of the CHA Licensing Regulations lists out obligations of the CHA. Any contravention of such obligations even without intent would be sufficient to invite upon the CHA the punishment listed in the Regulations…."

21.1. The above judgment was relied upon by the Supreme Court in its judgment in the case of Commissioner of Customs Vs K.M. Ganatra[2016(332) ELT 15(SC)].

22. From the above it is clear that the CHA/CB is not an agent of the Custom House or of the importer. Duty/responsibility has been cast on the CHA/CB under the CHALR/ CBLR, 2018 to ascertain the correctness of the information related to the clearance of cargo in a diligent manner. He is not only supposedto advise the importer/exporter about the relevant provisions of the law, but is also liable to inform the Department of any violation of the provisions of the Customs Act. It is reiterated that we do not differ from the case laws as cited by the appellant that the revocation of license is a grave punishment and should not be imposed against the principle of proportionality. There is no dispute on the issue that CHA/CB is not an Inspector to weigh the genuineness of the transaction and that he is merely a processing agent of documents with respect to clearance of goodseither himself or through his authorised person. Penalty as that ofrevocation of license cannot be imposed upon the CHA/CB in the absence of any active or passive facilitation. However, in the instant case, it has been noted above that the appellant had actively connived with the main player Shri Kultar Singh. It is alsoon record that it was the appellant who had suggested the description of the goods in the export documents. It is also on record that the appellant charged extra for clearance of the cargo,which was paid in cash without any bill. It is also on record that samples of the goods sought to be exported were shown to the appellant. However, the appellant neither advised his client correctly nor did he inform the appropriate authorities. The facts and circumstances of the case as discussed above are sufficient toestablish the mensrea of the appellant.

23. Accordingly, we hold that the adjudicating authority has not committed any error in holding that the Custom Broker Firm/appellant have failed in the compliance of the responsibilities cast upon them as per Regulation 10(a), (d), (e) and (n) of the Customs Broker Licensing Regulation, 2018, and the consequent action for revoking the CB license, forfeiting the security deposit and imposing penalty. Consequently, the appeal stands dismissed.

(pronounced in the open court on 30.1.2024)

(BINU TAMTA)MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)

MEMBER(TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH – COURT NO. III

Customs Appeal No. 50944 of 2021

(Arising out of Order-in-Original No. 75/MK/Policy/2021 dated 22.07.2021 passed by the Commissioner of Customs (Airport & General), New Delhi)

M/s Freight Logistics **Appellant**

RZ – 2048, Lane No. 26

Tughlakabad Extension New Delhi – 110019.

VERSUS

Commissioner of Customs (Airport & General) Respondent New Custom House, New Delhi-110037.

Appearance

Dr. Prabhat Kumar and Shri Karan Kanwal, Advocates – for the Appellant.

Shri Girijesh Kumar, Authorized Representative – for the Respondent

AND

Customs Appeal No. 51839 of 2021

(Arising out of Order-in-Original No. 75/MK/Policy/2021 dated 22.07.2021 passed by the Commissioner of Customs (Airport & General), New Delhi)

Commissioner of Customs (Airport & General) Appellant Commissionerate, New Custom House, New Delhi-110037.

VERSUS

M/s Freight Logistics **Respondent**

RZ – 2048, Lane No. 26

Tughlakabad Extension New Delhi – 110019.

Appearance

Shri Girijesh Kumar, Authorized Representative – for the Appellant

Dr. Prabhat Kumar and Shri Karan Kanwal, Advocates – for the Respondent

CORAM :

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 05/01/2024 Date of Decision: 02/02/2024

Final Order Nos. 50161-50162/2024

Binu Tamta

The Order-in-Original No. 75/MK/POLICY/2021 dated 22.07.2021 is under challenge both by the Customs Broker and also by the Revenue. The challenge by the appellant Customs Broker is to the forfeiture of the security deposit and imposition of penalty of Rs. 50,000/-. The Revenue on the other hand has challenged the impugned order as it refrained from revoking the Customs Broker License of the appellant. Hence the two appeals.

2. The facts leading to the present petition are that the appellant is a holder of Customs Broker License which is valid up to 28.08.2027. On the basis of specific information/input by the DRI, Delhi Zonal Unit that one syndicate was attempting to export mask/fabric of mask to China by way of mis-declaring it as "Packing Materials" and one such consignment of 2480 Kg. was going to be exported vide Airway Bill No. 87612324992 and name of the IEC holder could be M/s Ala Foodstuff Pvt. Ltd. The shipment of the goods attempted to be exported vide Shipping Bill No. 2619886 dated 11.05.2020 was put on hold for further detailed examination by SIIB, Air Cargo Export, New Delhi. The Shipping Bill had been filed by the Customs Broker M/s Freight Logistics. As per the shipping bill, the export goods pertained to the exporter M/s Ala Foodstuff Pvt. Ltd. (IEC No. 1207001406) GSTIN No. 03AAGCA3947FIZY), Amritsar, Punjab. The goods were declared as "packing material for pouch" (RITC Code 48239090). However, on examination by SIIB on 13.05.2020, the goods were found as "non-woven fabrics" appeared to be used in the manufacturing of Mask, which was prohibited for export vide Notification No. 52/2015-2020 dated 19.03.2020, issued by the Director General of Foreign Trade (DGFT). Thus, the goods were mis-declared and also found to be prohibited. Accordingly, the impugned goods were seized vide seizure memo dated 13.05.2020 under Section 110 of the Customs Act, 1962. 3. Show cause notice dated 22.12.2020 was issued by Additional Commissioner of Customs, Air Cargo Export, New Delhi, wherein M/s Freight Logistics was also made a party as they failed to obtain any authorization from the exporter and did not verify the correctness of KYC documents. In addition,, they were also found to be concerned with those goods which were found liable for confiscation under Customs Act, 1962 and were therefore, called upon to show cause to the Additional Commissioner of Customs Air Cargo Export, New Delhi as to why the penalty should not be imposed on them under Section 114(i) and 114AA of the Customs Act, 1962. On the basis of said show cause notice dated 22.12.2020, an inquiry for violation under CBLR, 2018 was initiated against the appellant. Accordingly, the license of the appellant was suspended vide order-in-original dated 07.01.2021 in terms of Regulation 16(1) of the CBLR, 2018. Thereafter, vide order-in-original dated 15.01.2021, the suspension order was confirmed in terms of the Regulation 16(2) of the CBLR, 2018.

4. The exporter M/s Ala Foodstuff Pvt. Ltd. vide their letter dated 21.05.2020 addressed to the Supdt. of SIIB stated that they are completely unaware about the export consignment under shipping bill No. 2619886 dated 11.05.2020 and the invoice no. against which the shipping bill has been filed do not pertain to them as they do not use series like A/B. Shri Akshit Arora, General Manager of the exporter company in his statement dated 01.06.2020 recorded under Section 108 of the Customs Act stated that their company is exclusively involved in exporting of rice under the brand name of ALA for the past 10 years to various countries like UAE, Yamen, Oman etc. but they have never exported their goods to China. It was also stated that they had exported three consignments through the forwarder named M/s CAG Shipping Pvt. Ltd. and M/s Smooth Cargo Mover Pvt. Ltd. who had appointed the Customs Broker named as Freight Logistics and M/s Green View Logistics. On examination of the invoice in question, it appeared that the invoice no. is 830 A dated 05.05.2020 whereas the company had raised the invoice number as 894 dated 05.05.2020. The exporter had also submitted a list containing the past export of their consignments, where no such invoice has been found mentioning as A or B.

5. Further, CB in his statement dated 15.07.2021 submitted that the documents were checked by one Shri Kumud Kumar Choudhary who was their employee and he may have committed a mistake in not checking up the authorisation in the shipping bill in question. The Customs Broker pleaded ignorance and that he had no knowledge about the mistake committed by Shri Kumod Kumar Choudhary.

6. Accordingly, show cause notice dated 28.01.2021 was issued to the appellant for violation of the provisions of Regulation 10(a), 10(e) and 10(n) of CBLR, 2018 and for taking action for revocation of the license and forfeiture of the security amount in terms of Regulation 14 read with Regulation 17 of CBLR, 2018 and also for imposition of penalty under Regulation 18 of CBLR, 2018 read with Regulation 17 of CBLR, 2018. On adjudication, the Commissioner concluded that active role was played by Shri Kumod Kumar Choudhary, employee of the CB and Shri Pushpraj Yadav. Also that role of CB has not come out anywhere in the investigation and that he had taken immediate action by terminating the services of Shri Kumod Kumar Choudhary with effect from 16.05.2020 and also by lodging an FIR with the Police on the said date. Having noted that it does not prima facie appear to be judicious enough to continue suspension of the CB license especially where no role of CB has come out in the instant case, the following order was passed:

"In exercise of powers conferred in terms of Regulation 14 & 18 read with Regulation 17(7) of CBLR, 2018 (erstwhile Regulation 18

& 22 read with Regulation 20(7) of CBLR, 2013).

(i) I refrain from revoking the CB License No. R- 05/DEL/CUS/2008 (PAN : AABFF2641R) vlaid upto 28.08.2027 of M/s Freight Logistics, RZ-2048, Lane No. 26, Tugalakabad Extension, New Delhi-110019.

(ii) I order for forfeiture of the whole amount of security deposit furnished by them;

(iii) I impose penalty of Rs.50,000/- on M/s Freight Logistics."

7. Being aggrieved, both the Customs Broker and the Revenue has filed the appeal before this Tribunal.

8. The appellant had led much emphasis on the fact that it was a mistake of their employee for it he had taken the immediate action. He also relied on the findings of the Commissioner holding Shri Kumod Kumar Choudhary and Shri Pushpraj Yadav responsible and yet action has been taken against the Customs Broker. According to the learned counsel there is no justification for forfeiture of security amount and imposition of penalty. He referred to the export made in the past in the name of the same exporter where no discrepancy has been found. It was also stated that the KYC documents of the exporter already existed in the records and referred to the following documents which were reliably authenticated such as under:

(a) Copy of Aadhar card of the person concerned.
(b) IEC number's copy of exporter was obtained which is on record. (verification of IEC No. Was done online).

(c) Exporter's KYC form was obtained.
(d) The Pan Card of exporter was obtained (on record).
(e) Copy of GSTIN was obtained which is on record. Verification of the same was done online.

The learned counsel challenged the forfeiture of the security deposit and the imposition of penalty basically on the ground that no role has been played by the CB and there is no finding arrived at by the adjudicating authority against the CB. The learned counsel referred to several judgements which we would be dealing later.

9. The contention raised by the department is that the appellant had not obtained the authorisation from the exporter and have, therefore, violated Regulation 10(a). They had also not obtained

the export documents from the exporter and refuted the argument that one of their employee did not verify the authorisation as it was obligatory on the Customs Broker to verify the authorisation.

The learned Authorised Representative referred to CBEC Circular No. 9/2010-Cus. dated 08.04.2010 and submitted that the CB failed to obtain proper KYC sheet from the exporter without photograph and signature. The learned Authorised Representative relied on the decision in **Skytrain Services Vs. Commissioner of Customs (Airport & General), New Delhi – 2019 (369) ELT 1739 (Tri.-Delhi)** and **Commissioner of Customs Vs. K.M. Ganatra & Co. – 2016 (332) ELT 15 (SC).** The department in support of their appeal has also submitted that violation of Regulation 10(a), 10(e) and 10(n) of CBLR, 2018 are grave in nature and the role of the Customs Broker is not limited to an act of omission or commission committed by their staff as he could not have done it without the knowledge of the seniors of the company and hence prayed for revocation of the Customs Broker License.

10. We have heard the learned counsel for the appellant and also the learned Authorised Representative for the Revenue and have perused the records of the case.

11. Before adverting to the merits of the matter on the allegations pertaining to Regulation 10(a), 10(e) and 10(n), we may quote the relevant provisions:

—10. Obligations of Customs Broker.—A Customs Broker shall —

(a) obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;

(e) exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage;

(n) verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information".

12. What we find from the facts of the present case is that there have been deep rooted conspiracy to manipulate the export consignment without the knowledge of the exporter, M/s Ala Food Stuff Pvt. Ltd. who are actually in the export of RICE only for the past 10 years to various countries, UAE, Yemen, Oman, etc. and had never exported to China. Sh. Akshit Arora, General Manager of the exporter in his statement recorded under Section 108 of the Customs Act stated that the said consignment did not belong to their company and the alleged invoice No. 830A dated 5.5.2020 which was part of the export document did not pertain to them as they do not have series A/B. From his statement, we find that under invoice no. 830 dated 05.03.2020 the exporter had exported rice shipment to Seychelles and on 5.5.2020 the invoice no. 894 was raised. Therefore, invoice no. 830A dated 05.05.2020 was manipulated to illegally export the prohibited goods behind the back of the exporter.

13. Similarly as part of the conspiracy, the services of the appellant as customs broker was availed by concealing the involvement of the persons behind this manipulation. We find that Shri Manish Sharma, partner and F Card holder of the appellant company tendered his voluntary statement that the shipping bill was filed on the basis of export documents received from Shri Pushpraj Yadav who is running forwarding firm in the name of M/s POL Enterprises and had received the KYC documents from him but did not receive any authority letter from the exporter and also that he did not verify the address of the exporting firm as being located at Amritsar. Further, it has come on record that Mr. Kumod Kumar Choudhary, an employee of the CB firm was in charge of checking the documents and the submission on behalf of the appellant is that he could have committed the mistake in not checking the authorisation in the impugned shipping bill. We cannot rule out this possibility and the benefit of doubt will go in favour of the appellant, more so when he had promptly taken the requisite action against Sh. Kumod Kumar Choudhary by terminating his services with effect from 16.05.2020 and also by registering FIR on the same day. The fact that within three days from the date the consignment was kept on hold on 13.05.2020, the appellant had acted diligently and there was no delay on the part of the appellant, therefore, no mala fides can be attributed on CHA. Even Sh. Kumod Kumar Choudhary who was absconding had surrendered H Card. In this regard, we may refer to the decision of the Delhi High Court in **Kunal Travels (Cargo) Vs. CC (I &G), IGI Airport, New Delhi - 2017 (354) ELT 447, (Del.)** where the contention of the appellant had

been that the documents were filed unauthorisedly by a person incompetent to do so and the action of the employee has not been defended and claimed ignorance and innocence of the contents of the consignment, it was held that there cannot be a presumption of its deliberate act or intention to defraud and the appellant cannot be faulted or punished in the manner it has been. The court also observed that given the factual finding that the CHA was not aware of the misuse of the G cards, (and thus, also unaware of the contents being smuggled), no additional blame can be heaped upon the CHA on that count alone.

14. There appears to be no doubt that fraud has been committed by manipulating the documents to enable the illegal export of prohibited goods but there is no evidence to say that the appellant connived or was aware of the modus-operandi. However, we cannot ignore that by virtue of a license granted under the Regulations, a customs broker is eligible and entitle to carry on the work of clearance of goods for import and export. As laid down in various decisions, CHA occupies a very important position in the Customs House. He is supposed to safeguard the interests of both the importers and the Customs and therefore a lot of trust is kept in CHA by the importers or exporters as well as by the Government Agencies, **Noble Agency Vs. Commissioner of Customs, Mumbai 2002 (142) ELT 84.** Therefore, the appellant when he admits that he did not verify the address of the exporting company as they were in Amritsar and also did not raise any query for non production of the authorization from the exporter company had violated the obligations cast on a customs broker under the Regulations. Considering the extent of violation that can be attributed to the appellant and the fact noted by the Commissioner that active role was played by Shri Kumod Kumar Choudhary, employee of the CB and role of CB has not come out anywhere in the investigation as also CB has taken immediate action against the employee, we feel that applying the doctrine of proportionality the forfeiture of security deposit is far beyond proportion and imposition of penalty of Rs. 50,000/- is sufficient. We therefore modify the impugned order to the extent that forfeiture of the security deposit needs to be set aside and only the order whereby the penalty has been imposed is affirmed. We therefore, partly allow the appeal filed by the appellant, customs broker as referred above.

Appeal No. 51839/2021

15. The appeal filed by the department against the impugned order for not revoking the customs broker license needs to be dismissed for the reasons stated while considering the appeal of the customs broker. Moreover, it has been settled over the period that no doubt, CHA is a link between the Customs Authorities and the importer and the CBLR Regulations imposes obligation upon them which have to be taken as mandatory but any and every infraction of the CHA Regulations do not justify the imposition of punishment of revocation of license.

16. We may refer to the decision of this Tribunal in **Falcon Air Cargo and Travels (P) Ltd. Vs. Commissioner of Customs, New Delhi - 2002 (141) ELT 284** where one of the charges related to improper employee supervision and it was observed that:

"7. …….The Delhi High Court, while remanding the matter, had expressed the view that "when revocation is directed it has to be only in cases where infraction is of a very serious nature warranting exemplary action on the part of the authorities, otherwise two types of actions (suspension and revocation) would not have been provided for.....the authorities while dealing with the consequences of any action which may give rise to action for suspension, revocation or non-renewal have to keep several aspects in mind. Primarily, the effect of the action vis-a-vis right to carry on trade or profession in the background of Article 19(1)(g) of the Constitution has to be noted. It has also to be borne in mind that the proportionality question is of great significance as action is under a fiscal statute and may ultimately lead to a civil death". Similar views were echoed by the Tribunal in the case of *Lohia Travel & Cargo*, supra, wherein the Tribunal held that "revocation of licence..... is a grave punishment as it deprives permanently a person of the means of livelihood". In the said case where the allegations were short shipment with the connivance of CHA's employee and export of hasish by the employee, the Tribunal held that no case for revocation of CHA's licence had been made as the CHA was not aware of the fraud committed by their employees. The Tribunal also took into consideration the fact that "the CHA has already suffered hardship, for being out of business during the period of suspension of the licence..... and thereafter during the refusal of temporary renewal of licence .... and since August, 2000 when the Adjudicating Authority revoked their licence". In the present matter also, the licence was not functional after 13-1- 2000, as observed by the High Court, and it was revoked by the impugned Order dated 13-7-2000. The charges against the Appellants, in our view are not so grave that a grave punishment of revocation of licence is called for. It is well settled law that punishment should be commensurate with the offence. In the facts

and circumstances of the present matter and particularly in view of the findings of two Inquiry Officers, we feel that it is not a fit case for revoking the licence and depriving of the Appellants of their means of livelihood……"

17. In **Ashiana Cargo Services Vs. Commissioner of Customs, 2014 (302) ELT 161,** the Delhi High Court dealt with the issue of proportionality of the penalty to be awarded to the CHA under the Regulations and observed that revocation is justified only in case of aggravating factors that allow infraction to be levelled as grave and though it is not possible to make exhaustive list of such aggravating factors, precedent cases show that revocation of license has been upheld, where there was element of active facilitation of infraction, i .e. finding of mens-rea or a gross and flagrant violation of CHA Regulations. In the present case also we do not find that the appellant had any knowledge that illegal exports were attempted or there was any active or passive facilitation on the part of the appellant. There was no finding of any mala fide on the part of CHA such that trust operating between CHA and customs authorities was violated or irritably lost for future operation of the license. We may also take note of a later decision in **Exim Cargo Service Vs. Commissioner of Customs (General) – 2019 (368) ELT 1024** where the High Court of Delhi set aside the revocation of license on the ground that there is no corroborative evidence or statement of anybody that CHA had information, knowledge, or connived in alleged forgery of invoices, mis-declaration and undervaluation.

18. In view of the various pronouncements, we do not find any merit in the appeal filed by the department and the impugned order is thereby upheld. Accordingly, the department's appeal is dismissed. (Pronounced in open Court on 2nd February, 2024)

(Binu Tamta*)* Member (Judicial)

(P.V. Subba Rao) Member (Technical)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. III

(E-HEARING)

Customs Appeal No. 50490 of 2019

(Arising out of Order-in-Original No. 07/MK/POLICY/2019 dated 04.02.2019passed by the Commissioner of Customs (Airport & General), New Delhi)

M/s R.P. Cargo Handling Services **Appellant**
(Through its proprietor Mr. Rajat Prabhakar)A-8/C, 2nd Floor,
Room No. 12, Vishwakaram Colony,
M.B. Road, New Delhi-11004.

VERSUS

Commissioner of Customs (Airport & General) RespondentNew Custom House, Near IGI Airport, New Delhi-110037.

Appearance

Shri Priyadarshi Manish, Advocate – for the Appellant.

Shri Nagendra Yadav, Authorized Representative – for the Respondent

CORAM :

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL) HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 04/01/2024Date of Decision: 02/02/2024

Final Order No. 50160/2024

Binu Tamta

Challenge in the present appeal is to the Order-in-OriginalNo. 07/MK/POLICY/2019 dated 04.02.2019 whereby the revocation of the Customs Broker License, forfeiture of security deposit of Rs. 5 lakhs and penalty of Rs. 50,000/- was affirmed.

2. The appellant a Customs Broker is holding a License, which isvalid up to 01.09.2026. Investigation was initiated against M/s LeoCargo Services Pvt. Ltd., M/s D.S. Cargo Agency and M/s R.P. Cargo Handling Services. On the basis of investigation report dated 10.05.2018 (received on 18.05.2018) forwarded from DRI, HQs. forinitiating proceedings against the appellant and others respectively,on the allegation that Shri Ramesh Wadhera and Shri Sanjeev Maggu were engaged in evasion of customs duty by way of diverting the goods stored in customs bonded warehouse into the domestic market without payment of customs duty. It was further revealed that the documents were forged/fabricated to show re-export warehoused goods. For this purpose, Shri Ramesh Wadhera and Shri Sanjeev Maggu created dummy firms and obtained IEC in their names, the details whereof are:

(i) M/s Accturists Overseas (OPC) Pvt. Ltd.
(ii) M/s Spark Exports
(iii) M/s Shree Shyam Enterprises
(iv) M/s Horrens Exim

During the course of investigation, statement of Shri Rajat Prabhakar, CHA, M/s R.P. Cargo Handling Services was recorded on25.07.2017, wherein he admitted that he had filed the papers for 16 consignments for two importers i.e. M/s Accturist Overseas(OPC) Pvt. Ltd., New Delhi and M/s Sparx Exports, New Delhi, that he had not physically verified the premises of M/s Accturist Overseas OPC Pvt. Ltd., New Delhi and M/s Sparx Exports, New Delhi, however in order to verify the existence of their premises he had sent a letter by speed post, asking for submitting their KYC documents; that in response to the said letter M/s Sparx Exports, New Delhi had submitted their documents but M/s Accturist Overseas OPC Pvt. Ltd. did not respond to it; that he received the KYC documents in respect of both above mentioned firms through Shri Sanjeev Maggu; that as per his understanding Shri Sanjeev Maggu was the actual controller of both above said firms; that he was working first time as Custom Broker and had received the workof above said firms after making so much effort, therefore, he thought that if he would raise questions about discrepancies of the above said firms, the clearance work of these firms would be done by some other Customs Broker, that he did not charge exorbitant charges to take benefit of the said discrepancies; that he was underthe bona fide belief that nothing wrong could be done in the case of Warehousing Bonds but later on he came to know that Shri SanjeevMaggu was a Customs Broker himself and he was carrying out clearance work of the above mentioned firms through him just to clear the goods that were imported under Warehouse Bonds in the local market by showing re-export to other foreign countries; that Shri Sanjeev Maggu was doing that just to evade his identity; that once he raised his concern to Shri Sanjeev Maggu and in response of which he threatened him to stop his payment which he was to receive from him and also threatened to give the work to some other Customs Broker; that Shri Sanjeev Maggu also threatened him dare not to contact Customs Authorities so he kept his mouth shut; that his mistake may please be condoned as that was not intentional.

3. Statement dated 19.08.2017 of Shri Lalit Dogra, proprietor and IEC holder of M/s Accturist Overseas (OPC) Pvt. Ltd. wasrecorded wherein he inter alia, stated that he was informed by Shri Sanjeev Maggu that a firm would be opened in his name and that he will be paid Rs. 15,000/- per month; that Shri Sanjeev Maggu had informed him that he would forge documents in which thename would be Shri Lalit Dogra but the photograph would be of some other person; that Shri Sanjeev Maggu told him to accompany Shri Samar Arora to Lakshmi Vilas Bank, Ashok Vihar tohelp in opening the account of M/s Sparx Exports and represent himself as Shri Rahul Sharma; that he was also told by Shri Sanjeev Maggu that Shri Ramesh Wadhera was the financer behindthis scheme. Accordingly, show cause notice dated 10.08.2018 was issued to the appellant for contravening the provisions ofRegulation 10(b), 10(d), 10(e) and 10(n) of the Customs Broker Licensing Regulations (CBLR, 2018). In terms of Regulation 17(1) of CBLR, 2018 inquiry officer was appointed who submitted his report dated 16.11.2018 whereby he dropped the charges against the appellant. However, the adjudicating authority based his disagreement note dated 30.11.2018 against the inquiry officer.On adjudication, vide order dated 04.02.2019 the license of the appellant has been revoked under Regulation 17 of CBLR along with forfeiture of the security deposit and imposition of fine of Rs. 50 lakhs.

4. The appellant challenged the order dated 4.2.2019 before thisTribunal, which was disposed of vide order dated 26.4.2019 and the appeal was allowed on a preliminary objection that the notice under regulation 20 of CBLR was required to be received by the Customs broker within 90 days of the receipt of the offence report and since in the present case, it was beyond the said period, the show cause notice was barred by limitation. The department challenged the order of this Tribunal in Customs Appeal No. 223/2019 before the Delhi High Court, where the issue was decidedin favour of the department that the Commissioner was only required to issue notice within the period of 90 days as it is not the requirement under Regulation 20 of CBLR, 2018 to serve a notice to the party within a period of 90 days from the date of receipt of the offence report. Accordingly, vide order dated 2.3.2023, the matter was remanded back to the Tribunal to decide the appeal on merits. Hence the appeal is listed before us.

5. We have heard both the parties at length and have perused the records of the case.

6. The learned counsel for the appellant had raised preliminary objection that show cause notice is barred by limitation and the same stands concluded by the judgment of the Delhi High Court.On merits, the learned counsel submitted that the appellant had transacted business either personally or through employees of the firm. Shri Sanjeev Maggu had never dealt with the customs authority on behalf of the Customs Broker and hence there is no violation of Regulation 10(b). According to him, the actual offence had occurred at the time of clearance of the goods from thewarehouse and for which act neither

the appellant was involved norhe performed any work in connection there with. Thus there is no link between the offence and the duty/obligation assigned on the CHA and, therefore, there is no violation of Regulation 10(d). The learned counsel further submitted that the appellant had conductedthe transaction with due diligence and explained the process that he received the KYC documents from the importer and verified it from the respective sources. They have checked the IEC number of the website of the DGFT and found the same to be correct. The learned counsel relied on several judgments in support of the submissions that CHA is not supposed to look into the details of genuineness of the importer once the IEC number is produced by the importer. He argued that physical verification of the official premises or the residential premises of the importer is not required,though by way of abundant caution he had sent letters through speed post at the given address of the importers for submitting the requisite documents and which was responded thereto.

7. The learned Authorized Representative for the Revenue reiterated the findings of the adjudicating authority and submitted that as per statement dated 25.07.2017, the appellant had admitted that he knew that Shri Sanjeev Maggo is the actual ownerbut he never informed the department of this fact and thereby he connived with Shri Sanjeev Maggu in the fraud caused to thegovernment exchequer and thereby violated the provisions of Regulation 10(d). Similarly, the appellant failed to exercise due diligence to ascertain the correctness of the information whichresulted in contravention of Regulation 10(e). He further relied on the statement dated 19.08.2017 of Shri Lalit Dogra, dummy proprietor of M/s Accturist Overseas, which clearly shows that Shri Sanjeev Maggu opened the firm in his name and promised to pay him Rs. 15,000/- per month and also informed him that ShriSanjeev Maggu would forge his photograph, in his KYC i.e. voter id.The appellant having failed to notice the discrepancy in the KYC document contravened the provisions of Regulation 10(n) of CBLR, 2018. In nutshell, he submitted that the appellant did not take authorization and KYC details from the concerned importers and failed to verify the correctness of the IEC, GSTIN, identity of his client and functioning of his client at the declared address by using reliable and independent data or information it was mandatory as per Regulation 10(n). He relied on the decision of this Tribunal in the case of **D.S. Cargo Agency Vs. Commissioner of Customs, New Delhi – 2021 (376) ETL 724** where the revocation of the Customs Broker License was upheld in similar circumstances.

8. Before adverting to the merits of the matter, it is relevant to note that the decision of the Tribunal in **D.S. Cargo** (supra) was challenged before the Delhi High Court in (CUSAA No. 2/2022) and vide judgment dated 25.09.2023 the appeal has been decided in favour of the Customs Broker by setting aside the revocation of thelicense and forfeiture of the security deposit. From the impugned order here, we find that the department had initiated proceedings both against M/s D.S. Cargo and M/s R. P. Cargo, the appellant herein as their services were utilised by Sh. Ramesh Wadhera and Sh. Sanjeev Maggu by opening importer companies in the name of other persons. Therefore, the case of the appellant as well that of DS Cargo had arisen from the same modus-operandi, where the public warehouses were used for diversion of the warehoused goods in the domestic market without payment of customs duty. The importer firms involved in the two cases are also the same.

9. The allegations raised in both the cases is identical thatimporter firms were actually controlled and operated by Shri Ramesh Wadhera and Shri Sanjeev Maggu and the imported goods meant for re-export stored at public bonded warehouses were diverted into the domestic markets without payment of the customsduty which caused loss to the government exchequer. On thatbasis, the Customs broker had been charged for violation of the provisions of Regulation 10(b), 10(d), 10(e) and 10(n) of CBLR, 2018. Having given our anxious consideration to the decision of theDelhi High Court in D S Cargo, we are of the view that the same is squarely applicable to the present case and we would therefore liketo quote in extenso the paragraphs of the decision in D S Cargo as under :

“Regulation 10(b) of CBLR, 2018 read with 11(b) of CBLR, 2013

“11. The Commissioner has held the Appellant guilty of contravention of this Regulation on the finding that the Appellant herein has admitted that Mr. Sanjeev Maggu used to perform various functions pertaining to these importer firms such as bond approval from the New Custom House, New Delhi. The Commissioner held that the Appellant had become aware that the importer firms were dummy firms being (illegally) run by Mr. Ramesh Wadhera in connivance withSh. Sanjeev Maggu and yet he allowed Sh. Sanjeev Maggu to transact business with Customs authorities; and this act and omissionof the Appellant was in contravention of this Regulation.

11.1. The Tribunal while upholding the said finding of theCommissioner opined that the said Regulation has been contravened since Mr. Sanjeev Maggu transacted business at the Customs Station despite not being the authorized representative either of the importerfirms or the Appellant herein.

12. In the facts of this case admittedly, Mr. Sanjeev Maggu never acted on behalf of the Appellant but was acting only on behalf of the importer firms. There is no material placed on record to show that Mr. Sanjeev Maggu ever acted on behalf of the Appellant at the Customs Station.

12.1. On a plain textual reading of the Regulation, it is apparent that a Customs Broker is required to transact the business at the CustomsStation either personally or through his/her authorized employee. In the facts of this case, there is no material on record toindicate/suggest that the Appellant had not carried out the work of filing the B/Es either personally or through his authorized employee.

12.2. The finding of the Commissioner and the learned Tribunal that Mr. Sanjeev Maggu was not authorized to act on behalf of the importer firms cannot form the basis of holding the Appellant guilty of violation of this Regulation. In the facts of this case, the sine qua nonfor attracting Regulation 10(b) of CBLR, 2018 is not present and the impugned order invoking the said Regulation is erroneous.

12.3. Therefore, in the opinion of this Court there has been noviolation of Regulation 10(b) of CBLR, 2018 read with 11(b) of CBLR, 2013 and the learned Tribunal erred in holding that Mr. Sanjeev Maggu acted on behalf of the Appellant at the Customs Station.

Regulation 10(d) of CBLR, 2018 read with 11(d) of CBLR,2013.

13. The Commissioner held that the Appellant had contravened this Regulation in view of his reply to question no. 8 in the statement recorded before the DRI on 14.07.2017, since he failed to advice the importer firms to comply with the provisions of the Act as regards re- export of the warehoused goods. The Commissioner further held that the Appellant contravened this Regulation by failing to report the wrongdoings of the importer firms to the Customs authorities after learning about their illegal actions in diverting the goods into the domestic market.

13.1. The learned Tribunal as well upheld the findings of the Commissioner in view of the answer of the Appellant to question no.
8 in the statement recorded before the DRI on 14.07.2017 andopined that the Appellant failed to seek clarification from the importerfirms as regards the re-exports.

14. As per Section 146 of the Act, the role of a custom agent is related to the business of entry or departure of goods at any CustomsStation. The obligation of the Appellant in the facts of this case was tofacilitate clearance of goods for warehousing, at the Customs Station and no further. Therefore, the duty of the Appellant as a Customs Broker came to an end once the imported goods, after its clearance from the Customs Station, reached the public bonded warehouse.

14.1. The Appellant, admittedly was not charged with any responsibility for clearance of the goods from the public bondedwarehouse for the purpose of re-export.

14.2. The imported goods meant for the re-export were stored at the public bonded warehouses and the illegality by the importer firms wascommitted when the said goods were diverted by them into the domestic market without payment of the applicable custom duty. It isstated by the Respondent that the said importer firms filed fabricated documents to falsely show the re-export of the goods. However, admittedly, the Appellant herein had no role to play at this stagewhen the false documents of re-export were filed by the importer firms with the Customs authorities.

14.3. In the facts of this case, it has come on record that the persons controlling the importer firms acted on their ownaccord when they conspired to defraud the revenue; there is no allegation that they were acting on the aid or advice of the Appellant. There is admittedly no allegation against the Appellant that he abetted the diversion of the imported goods.

14.4. The proprietor of Appellant, in reply to question no. 8 in the statement recorded by DRI on 14.07.2017, stated that he 'subsequently' learnt that the goods which had been imported for re- export were being sold in the domestic market. In this statement there is no admission that the Appellant was aware at the time of the filing of the warehousing bill of entry with the Customs Station that the importer firms intended to divert the imported goods into the domestic market.

14.5. In the aforesaid facts, the findings of the Commissioner and thelearned Tribunal to the effect that

the Appellant failed to advice the importer firms with respect to their obligation on re-export of the goods is unjustified as the Appellant was not responsible for the discharge of said obligation by the importer firms.

15. In the opinion of this Court, the Appellant cannot be held guilty ofcontravention of this Regulation on account of the personal acts and omissions of the importer firms.

15.1. The Appellant specifically raised a contention before the Commissioner that he cannot be held liable for the illegal acts of the importer firms subsequent to the clearance of the goods from the Customs Station; however, this issue has neither been answered by the Commissioner nor analyzed by the learned Tribunal.

15.2. The Supreme Court in the case of Collector of Customs, Cochin v. Trivandrum Rubber Works Ltd., Chacki, (1999) 2 SCC 553, held that a Customs Broker is an agent for only limited purpose of arranging release of goods and once the goods are cleared, he has nofurther function and he is not liable for any duty, liability or other actions, which are required to be initiated only against the importer. The relevant portion of the aforesaid judgment reads as under:

"8. In the present case, notice has been given under Section 28 to the owner/importer as a person chargeable to duty. The notice must, therefore, be served on the owner/importer. A service on the clearing agent of the owner/importer long after the clearing agent has ceased to deal with the goods in question under the Customs Act, cannot be treated as valid service of notice on the owner/importer.

9. Learned counsel for the appellant relied uponSection 229 of the Contract Act, 1872 under which any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties,have the same legal consequences as if it had been given to or obtained by the principal. A contractbetween the importer and his clearing agent, however, is a special contract under which a clearingagent is authorised to perform various functions under the Customs Act for the purpose of clearing the goods from the Customs. Once he has discharged all his duties and functions as such agent and the goods in question have been cleared and delivered to the importer/owner, his work as a clearing agent in respect of the goods ordinarilycomes to an end. Any notice served on him thereafter in respect of goods already cleared cannotbe construed as a notice given in the course ofbusiness of clearing the goods concerned, transactedby him for the principal."

15.3. The obligation of the Customs Broker under this Regulation has to be read in the context of the duties discharged by him/her under Section 146 of the Act. There is no duty imposed on the Customs Broker under the parent Act to report commission of acts or omissions of its principal, which are in violation of the provisions of the Act.

Since the CBLR, 2018 have been made under Section 146(2) of the Act and are intended to regulate the grant of license to a Customs Broker, the scope of this Regulation cannot be enlarged to read into ita general duty to report violations of the provisions of the Act by his/her clients which come to his/her knowledge after his/her professional role has come to an end.

15.4. The Customs Broker acts under the CBLR, 2018, and his/her function under the license is only to transact any business relating to entry or departure of conveyances or the import or export of goods atany Customs Station. Therefore, in the facts of this case, the duty to report non- compliance under this Regulation can only be confined to reporting the non- compliances of the declaration signed by the Customs Broker and the importer while presenting the bills of entry to the Customs authorities, which come to his attention after submitting the bills of entry. For instance, if the Customs Broker findsout that the documents filed by the importer with the Bill of Entry areforged, he/she would be required to apprise this fact to the Customs authorities. Further, the obligation of the Customs Broker to not file documents, which to his knowledge are incorrect does not require any reiteration.

15.5. In the opinion of this Court, the Appellant is not liablefor reporting an offence committed by the importer firms in relation to goods stored in the public bonded warehouse after the professional role of Customs Broker in the clearance of goods has ended and no such responsibility of reporting offences can be read into Regulation 10(d) of CBLR, 2018. The

obligation of the Appellant to bring the issue of non- compliance to the Customs authorities can only be confined to documents submitted by the Customs Broker himself/herself for the clearance of the goods from the Customs Station at thetime of entry or departure. In the facts of this case there is no finding that there was any error or discrepancy in the warehousing bill of entry submitted by the Appellant at the Customs Station.

15.6. Therefore, in the facts of this case, in the opinion of this Court there has been no violation of Regulation 10(d) of CBLR, 2018 read with 11(d) of CBLR, 2013.

15.7. The question framed at paragraph no. 3, is accordingly, answered in the aforesaid terms.

Regulation 10(e) of CBLR, 2018 read with 11(e) of CBLR,2013.

16. In the facts of this case, this Court is of the opinion that there hasbeen no violation of Regulation 10(e) of CBLR, 2018 read with Regulation 11(e) of CBLR, 2013. The Commissioner held that the Appellant by dealing with Sh. Sanjeev Maggu on behalf of the importer firms in clearance of the cargo, failed to exercise due diligence and thereby causing loss to the revenue. The learned Tribunal referred to the answer given by the Appellant to question no. 8 in the statement dated 14.07.2017 to uphold this finding of the Commissioner.

16.1. The said Regulation casts a duty on the Customs Broker to exercise due diligence in communicating correct information to a client with reference to any work related to clearance of cargo. The said Regulation has no concern/application with the acts or omissions of the importer firms itself. (Re: Kunal Travels (Cargo) v.Commissioner of Customs (Import & General), 2017 SCC OnLine Del 7683)

17. There is no finding in the order of the Commissioner that the Appellant had given any incorrect information to the importer firms in the process adopted for the clearance of the goods at the Customs Station or in any manner abetted the importer firms in the diversion of the goods from the public bonded warehouse to the domestic market. In the opinion of this Court, the findings of the Commissioner and the learned Tribunal do not furnish any ground for alleging contravention of this Regulation. The illegal actions of the importer firms subsequent to the clearance of the cargo from the Customs Station do not attract the violation of Regulation 10(e) ofCBLR, 2018 read with Regulation 11(e) of CBLR, 2013, by the Appellant.

Regulation 10(n) of CBLR, 2018 read with 11(n) of CBLR,2013.

18. The aforesaid Regulation requires the Customs Broker to verify the identity of his client, which includes the identification documents as well as the information provided by the client.

18.1. The Commissioner and the learned Tribunal have held that the Appellant failed to verify the identity of the importer firms and the antecedents of Mr. Sanjeev Maggu with whom the Appellant had dealtwith and exchanged the documents for filing before the Customs Station. The Commissioner concluded that since the KYC documents provided by the importer firms were forged, an early detection by Customs Broker could have prevented the evasion of customs duty.

18.2. The Appellant has stated that he relied upon the result of verification of the original Importer Exporter Code (hereafter 'IEC'), which were mandatorily supplied on the functional address of the importer. It is stated that the IEC number was duly verified by the Appellant from the website of Directorate General of Foreign Trade (hereafter 'DGFT') and found the same to be valid. The IEC number was standing in the name of the importer firms and the physical addresses mentioned therein duly matched with the declared addressfurnished by the importer firms. The said fact of valid IEC has not been disputed by the Respondent.

18.3. In this regard, it would be relevant to refer to the judgment ofa Coordinate Bench of this Court

in Kunal Travels (Cargo) (supra), wherein this Court held that when an importer firm holds an IEC, there is a presumption attached that the KYC of the importer by physical verification of the address would have been done by the Customs authorities. The relevant portion of the judgment in Kunal Travels (Cargo) (supra) reads as under:

"12. Clause (e) of the aforesaid Regulation requires exercise of due diligence by the CHA regarding such information which he may give to his client withreference to any work related to clearance of cargo. Clause (l) requires that all documents submitted,such as bills of entry and shipping bills delivered etc. reflect the name of the importer/exporter and the name of the CHA prominently at the top of such documents. The aforesaid clauses do not obligate theCHA to look into such information which may be made available to it from the exporter/importer. The CHA is not an inspector to weigh the genuineness of the transaction. It is a processing agent of documents with respect to clearance of goods through customs house and in that process onlysuch authorized personnel of the CHA can enter the customs house area. What is noteworthy is that the IE Code of the exporter M/s. H.M. Impex was mentioned in the shipping bills, this itself reflectsthat before the grant of said IE Code, the background check of the said importer/exporter had been undertaken by the customs authorities, therefore, there was no doubt about the identity of the said exporter. It would be far too onerous to expect the CHA to inquire into and verify the genuineness of the IE Code given to it by a client for each import/export transaction. When such code is mentioned, there is a presumption that an appropriate background check in this regard i.e. KYCetc. would have been done by the customs authorities. There is nothing on record to show that the appellant had knowledge that the goods mentioned in the shipping bills did not reflect the truth of the consignment sought to be exported. In the absence of such knowledge, there cannot be any mens rea attributed to the appellant or its proprietor. Whatever may be the value of the goods,in the present case, simply because upon inspection of the goods they did not corroborate with what was declared in the shipping bills, cannot be deemed as mis-declaration by the CHA because the saiddocument was filed on the basis of information provided to it by M/s. H.M. Impex, which had already been granted an IE Code by the DGFT. The grant of the IE Code presupposes a verification of facts etc. made in such application with respect tothe concern or entity. If the grant of such IE Code toa non- existent entity at the address WZ-156, Madipur, New Delhi - 63 is in doubt, then for such erroneous grant of the IE Code, the appellant cannotbe faulted. The IE Code is the proof of locus standi ofthe exporter. The CHA is not expected to do a background check of the exporter/client who approaches it for facilitation services in export and imports. Regulation 13(e) of the CHALR 2004 requires the CHA to:"exercise due diligence to ascertain the correctness of any information whichhe imparts to a client with reference to any work related to clearance of cargo or baggage" (emphasis supplied). The CHAs due diligence is for information that he may give to its client and not necessarily to do a background check of either the client or of the consignment. Documents prepared or filed by a CHA are on the basis of instructions/documents received from its client/importer/exporter. Furnishing of wrong or incorrect information cannot be attributed to the CHA if it was innocently filed in the belief and faith that its client has furnished correct information and veritable documents. The misdeclaration would be attributable to the client if wrong informationwere deliberately supplied to the CHA. Hence there could be no guilt, wrong, fault or penalty on the appellant apropos the contents of the shipping bills. Apropos any doubt about the issuance of the IE Codeto M/s. H.S. Impex, it was for the respondents to take appropriate action. Furthermore, the inquiryreport revealed that there was no delay in processing the documents by the appellant under Regulation 13(n)."

18.4. The Appellant has stated that there is no dispute that importer firms exist and they have participated in the investigation conducted by DRI. It is stated that the fact that these firms are dummy firms which are controlled by third parties was a fact which was not within the knowledge of the Appellant while he was initially dealing with the said firms for clearance of cargo; and was a fact which came to his knowledge subsequently after the goods had already been cleared by the Customs Station.

18.5. Appellant also states that the reliance placed by theCommissioner on the statement of Mr. Lalit Dongra is not justified since the Aadhar Card which is alleged to have been forged has not been placed on record.

19. A perusal of the written submissions filed by the Respondent would show that the Respondents have found the Appellant 'negligent' in verifying the KYC documents of the importer firms as hefailed to obtain the requisite KYC documents and/or verify the documents made available to him by the importer

firms.

20. This Court has perused the record. In the facts of this case, there is no allegation of impersonation in the name of importer firms. **The finding of DRI is that these importer firms were not being run and operated by the persons in whose name the importerfirms were incorporated. The allegation is not that these firms are fictitious and do not exist. The finding is that these firms are being run and remotely controlled by Mr. Sanjeev Maggu and Mr. Ramesh Wadhera. The Regulation requires the Customs Broker to verify the identity of the client (i.e., importer firms) and in the facts of this case since the clients (i.e., importer firms) exist as is evident from the functionality of the IEC (as discussed above), it is not possible to hold that there has been a blatant violation of this Regulation, which would justify the revocation of CB license."**

10. From the submissions made by the Revenue it appears that they have not pressed on the violation of the provisions of Regulation 10(b) of CBLR, 2018. Also from the records, we find that Shri Sanjeev Maggu never acted on behalf of the appellant (Customs Broker) but acted on behalf of the importer. The appellant either himself or through his employees transacted with the Customs authority for clearance of the goods. Thus, there is noviolation of Regulation 10(b) of CBLR, 2018. On the basis of the statement of the appellant dated 25.07.2017, the allegations levelled by the Revenue in nutshell are that the appellant knew thatSh. Sanjeev Maggu is the actual owner but he never informed this fact to the department and thus he connived with Shri Sanjeev Maggu in the fraud. The fraud alleged here is of diverting the goods from the warehouse instead of re-exporting, which had occurred after the role of the appellant had come to an end as the goods had reached the customs bonded warehouse. Hence the appellant cannot be linked to the fraud and the same cannot be stretched to contravention of the provisions of the Regulations. We find from the records of the case that the appellant in order to verify the existence of the premises of the two importer firms had sent letters by speed post asking them to submit the requisite documents and in response thereto he received the KYC documents. It has been repeatedly held that it is not the legal requirement to physically verify the business premises or the residential premises of the importer, i.e., **M/s Setwin Shipping Agency Vs. Commissioner of Customs (General) Mumbai 2010 (250) ELT, 141 (Tri.-Mum), M/s Him Logistics Pvt. Ltd. vs. Commissioner of Customs 2016 (338) ELT, 725 (Tri.-Del.) and Commissioner of Customs Vs. Yogesh Kumar, 2017 (349) ELT 12 (Del.).** The fact that the appellant had sent the letter by speed post at the given address and M/s Spark Exportshad responded and the KYC documents were submitted by both theimporters shows that the appellant had fulfilled the obligation underthe Regulations. The appellant verified the IEC number from the site of the DGFT and personally met Sh. Lalit Dogra and Sh. Samar Arora, proprietors of the two firms. As noted above, the High Court in **Kunal Travels** (supra) held that grant of IEC Code presupposesa verification of facts etc. made in such application with respect to the concern or entity.

11. We also find that in the inquiry report, the findings of the inquiry officer were in favour of the appellant on the basis of the reasoning which is now accepted by the High Court in D S Cargo. We may quote the observations of the inquiry officer as under:

" They performed their work in the capacity of Customs Broker upto warehousing of the goods. The importer had never admitted that they have committed this fraud with the help of M/s R P Cargo and they have taken assistance in clearance of warehoused goods. There is no link between the offence and the duty assigned on CHA / Customs Broker." Itwas therefore, concluded :

"I find that M/s R. P. Cargo, the customs broker has not violated the provisions of Regulations 10(b), 10 (d), 10(e) & 10(n) of CBLR, 2018 read with 11(b), 11 (d), 11(e) & 11(n) of CBLR, 2013."

The case of the appellant is on a better footing since in the case of **D.S. Cargo,** the Inquiry Officer recorded the finding that the allegation made in the show cause notice are proved againstthe appellant and recommended action.

12. On the issue of proportionality of imposing the punishment, we are again guided by the decision of the Delhi High Court in **D.S. Cargo** (supra) where the Court took note of the fact that the revocation of the license came into effect on 4.2.2019 and more than 4 1/2 years had lapsed which itself is a severe punishmentand will serve as a reprimand to the appellant to conduct its affairs with more alacrity, the

same order needs to be maintained. In the present case also, the order of revocation came into effect on 4.2.2019 and almost more than five years have lapsed since the appellant has been out of work on that account and which is a sufficient punishment for him to be cautious in future. In the facts of the present case, the punishment by way of revocation of licenseand forfeiture of security deposit is too harsh.

13. The decision of the High Court in **D.S. Cargo** (supra) clarifying that the illegal actions of the importer firms subsequentto the clearance of the cargo from the Customs Station do not attract the violation on the part of the Customs Broker is binding onus and we do not find any reason to differ from the same as the controversy had arisen in the same set of facts in both the cases. Hence the impugned order upholding the revocation of the license and also the forfeiture of the security amount is set aside, however the penalty imposed is upheld. The impugned order is modified to that extent. Accordingly, the appeal is partly allowed.

(Pronounced in open Court on 2nd February, 2024)

(Binu Tamta)Member (Judicial)

(P.V. Subba Rao)Member (Technical)

RM

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI
PRINCIPAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 52773 OF 2019

[Arising out of Order-in-Original No. 104/MK/Policy/2019 dated 04.10.2019 passed by the Commissioner of Customs (Airport & General) New Delhi]

Appellan

M/S ANANYA EXIM
RZG-266/11, Rajnagar-2,
Palam Colony, Bagdola, Raj Nagar-II,South West Delhi, Delhi-110077

And also at:

Plot No. 444-A, Kh No. 289,
Shyam Vihar, Phase-I
E-Block, Near Max Garden Najafgarh, New Delhi-110043

VERSUS

COMMISSIONER OF CUSTOMS (AIRPORT& GENERAL),
Office of the Commissioner of Customs,
New Customs House, Near IGI AirportNew Delhi-110037

Respondent

Appearance:
Present for the Appellant : Shri Priyadarshi Manish and Shri Anmol Arya,Advocates

Present for the Respondent: Shri Rakesh Kumar, Authorised Representative

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)

Final Order No. 50224 /2024

Date of Hearing : 03/01/2024Date of Decision : 09/02/2024

P V SUBBA RAO:

M/s. Ananya Exim[1] filed this appeal to assail the Order-in- Original[2]dated 04.10.2019 passed by the Commissioner of Customs(General), New Delhi whereby he revoked the Customs Brokers licence of the appellant, forfeited its security deposit and imposed apenalty of Rs. 50,000/- under the Customs Broker Licensing Regulations, 2018[3].

2. The facts of the case, in brief, are that the appellant was a licensed Customs Broker and had filed two Bills of Entry dated 25.1.2019 and 28.1.2019 with M/s. Angel Incorporation as the importer and describing the imported goods as ‘Green Tea’. Receiving intelligence that there was an attempt to import ‘Dry Khat’ leaves, a psychotropic substance listed at S.No. 110xof the ‘List of Psychotropic Substances’ in the Schedule to the Narcotic Drugs and Psychotropic Substances Act, 1985 through these Bills ofEntry,

the imported goods were examined and tested and it was, indeed, found to be 'dry khat' and not 'green tea'. The goods were accordingly seized and samples were tested by the Central Revenue Control Laboratory[4] and investigations were carried out which established that imported goods were dry khat and not green tea.

3. Further investigations revealed that the appellant had previously filed four bills of entry in the name of the same importer describing the goods as 'green tea' or 'dried green leaf' which were cleared through the Risk Management System[5] of the Customs based on self-assessment, i.e., without assessment or examination by the officers and they were also investigated.

4. To fully comprehend the facts of this case and examine this appeal, it would be necessary to discuss, the standard method of documentation in imports by air.

5. When goods are imported by air, the airline receives the goods from the exporter and issues an Airway Bill which is the counterpart of the Bill of Lading issued by Shipping lines (if goods are imported by sea) and is the document of title. The exporter sends the Airway Bill issued by the airline to the importer. The airline transports the goods into India and gives their custody to the custodian of the air cargo complex (which is the counterpart of the port/inland container depot/container freight station). The importer (or on his behalf, his Customs Broker) files the Bill of Entry with the Customs giving details of the goods imported, duty payable, etc. and after Customs clears the goods for home consumption, the importer receives the goods from the custodian of the air cargo complex showing the Bill of Entry (evidencing that the consignment was cleared by the Customs) and the Airway bill (evidencing his title to the goods). A gate pass is also issued so that the security guard at the exit gate of the air cargo complex knows that the consignment can be taken out.

6. If the individual consignments are small, usually an aggregator collects them and packs them onto a larger pallet and gives them to the airline. In such a case, the airline issues the Master Airway Bill in the name of the aggregator who, in turn, issues house airway bills for each of the consignments indicating the names of the exporter and importer in each case. These are similar to the Master Bill of Lading and House Bills of Lading issued when several small consignments (less than container load or LCL) are exported and imported by sea.

7. In this case, although the term 'Master Airway Bill' was used (somewhat inaccurately) in the impugned order, a perusal of the airway bill in question shows that there was only an airway bill which was issued by the airline and there were no separate 'master airway bill' and 'house airway bill'.

8. Since the airline is responsible to deliver the goods to the custodian who, in turn, is responsible to deliver them to the importer, the nature of the goods received, quantity, marks and numbers, etc. are clearly mentioned in the Airway Bill. Of course, if a packet is delivered which is said to contain X and it actually contains Y, the airway bill will indicate that it received a packet said to contain X (because the airlines cannot open and check the contents of each packet).

9. The importer has to file the Bill of Entry indicating the nature of the goods, quantity, etc. in the Bill of Entry, which, has to match the goods actually imported. Since the Airway bill (or Bill of Lading in case of imports by sea) also contains these details, the airway bill has to match with the Bill of Entry.

10. In all these imports, the Airway Bills issued by the airlines clearly indicated 'Dry Khat' as the goods imported while in the Bills of Entry, the goods were described as 'green tea' or 'dried green leaves.

11. If articles of food are imported, a No Objection Certificate[6] is required from the Foods Safety Standards Authority of India[7] for which an online system is available in which also the goods were described in all these Bills of Entry as 'green tea' and NOT as 'dry khat' and the NOC was obtained in these imports. **Thus, there was a clear mis-declaration of the nature of the goods in the Bills of Entry as well as in the documentation provided to obtain an NOC from the FSSAI for import.**

12. The Joint Commissioner of the Air Cargo Complex Import, New Delhi through which the import was made, and which discovered the mis-declaration of dry khat and its import in violation of the NDPS Act, sent a letter dated 12.2.2019 to the Commissioner of Customs (General), New Delhi (who had issued the licence to the Customs Broker) intimating about the import of dry khat. The Commissioner of Customs (General) issued a Show Cause Notice[8] dated 9.5.2019 to the appellant and appointed an Inquiry officer under the CBLR, 2018 who submitted his report stating that the appellant had violated Regulations

10(a), 10(d),10(e), 10(m) and 10(n) but found that the appellant had notviolated Regulation 10 (j). The appellant submitted its reply to the findings of the Inquiry Report. After following due process, the Commissioner passed the impugned order holding that the appellant had violated regulations 10(a), 10(d), 10(e), 10(m) and 10(n) of CBLR 2018 and revoked its licence, forfeited securitydeposit of Rs. 5,00,000/- and imposed penalty amount of Rs.50,000 under Regulation 17 of CBLR 2018.

Submissions on behalf of the appellant

13. Learned counsel for the appellant made the following submissions.

13.1 The Commissioner has, in the impugned order atparagraph 21.1, recorded that the appellant had admitted that he did not have the KYC documents in possession which is factually incorrect because when the appellantwas summoned on 4.2.2018, he had submitted all the KYCdocuments which, were, however, not acknowledged bythe department;

13.2 The statements of the appellant recorded on 2.2.2018 and4.2.2018 were not in his handwriting but were typed and the appellant was simply asked to sign and he did so. **Therefore, the allegation that the appellant had violated Regulation 10(a) is not correct**;

13.3 In paragraph 21.2 of the impugned order, the Commissioner recorded that the appellant did not know about the whereabouts of Shri Samir kumar @ Rajaji, the importer and despite knowing that the IEC being used is a dummy, he continued to file the Bill of Entry. This finding is not correct because the appellant had clearly filed theBill of Entry in discharge of his obligations. The whereabouts of the importer and his authorised representative were found on verification. **Therefore, the allegations that the appellant had violated Regulations 10(d) and 10(e) are not correct;**

13.4 In paragraph 21.4 of the impugned order, the Commissioner observed that the importer was not existingat the declared address and the appellant was also not aware of the post clearance destination of the goods.Therefore, he held that the appellant had violated Regulation 10(m). This finding is not correct as the appellant had discharged its responsibilities and even obtained a No Objection Certificate from the FSSAI and cleared the goods with utmost efficiency. **Therefore, there was no violation of Regulation 10(m);**

13.5 In paragraph 21.5 of the impugned order, the Commissioner observed that since the importer was non- existing at the declared address and the appellant had no knowledge about his whereabouts, it was concluded that the appellant had not verified the identity of the clients as well as functioning of the client at that address. Regulation10(n) requires the Customs Broker to verify the identity ofthe client and its functioning at the declared address by using reliable, independent, authentic documents, data or information. The appellant had submitted two documents to prove the identity of the importer and its functioning at the given address. **Thus, the appellant had not violated Regulation 10(n).**

Submissions on behalf of the Revenue

14. Learned authorised representative for the Revenue supportedthe impugned order and asserted that it calls for no interference.He submitted that the appellant, as a Customs Broker, was required to file the Bills of Entry correctly after obtaining an authorization from the importer. The appellant had not even contacted M/s Angel Corporation but had filed Bills of Entry in its name based on the documents provided to it by one Shri Tarakeshwar Dubey who supplied Airway Bills after charging the description of the goods. The appellant filed these benami Bills of Entry through which the psychotropic substance was imported. In doing so, the appellant violated CBLR 2018 held in the impugned order.

Findings

15. The questions before us are whether the appellant had violated Regulations 10(a), 10(d), 10(e), 10(m) and 10 (n) and if so, whether revocation of licence, forfeiture of security deposit and imposition of penalty under Regulation 17 in the impugned order can be sustained. These Regulations read as follows:

1. Short title, commencement and application. —

(1) These regulations may be called the Customs BrokersLicensing Regulations, 2018.

(2) They shall come into force on the date of publication inthe Official Gazette.

(3) These regulations shall apply to, a Customs Broker who has been licensed and such other persons who have been employed or engaged by a licensed Customs Broker under these regulations or the Customs House Agents Licensing Regulations, 1984 or the Customs House Agents Licensing Regulations, 2004 or

the Customs Brokers Licensing Regulations, 2013.

(4) Every license granted or renewed under these regulations shall be deemed to have been granted or renewed in favour of the licensee, and no license shall be sold or otherwise transferred.

……

10. Obligations of Customs Broker. A Customs Broker shall —

(a) obtain an authorisation from each of the companies,firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the DeputyCommissioner of Customs or Assistant Commissioner of Customs, as the case may be;

……..

(d) advise his client to comply with the provisions of the Act,other allied Acts and the rules and regulations thereof, andin case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;

(e) exercise due diligence to ascertain the correctness of anyinformation which he imparts to a client with reference toany work related to clearance of cargo or baggage;

……

(m) A Custom Broker shall discharge his duties with utmostspeed and efficiency and without any delay;

(n) verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent,authentic documents, data or information;

16. We now proceed to examine the alleged violations of each of these clauses:

Regulation 10(a)

17. It requires the Customs Broker to obtain an authorisationfrom each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be.

18. In the impugned order, the Commissioner held that Regulation 10(a) was violated as the appellant had not obtained any authorization for the consignments from the importer M/s. Angel Corporation at all. When the goods were examined in the presence of the G card holder of the appellant, he said that the documents for this import were obtained by Shri Ashutosh Shukla, the 'F' card holder of the appellant from one Shri TarkeshwarDubey alias Deepak. Shri Shukla also admitted that the authorization to clear the consignment was not obtained from the importer M/s. Angel Corporation and that he had received the documents from Shri Tarkeshwar Dubey and the credentials of the importer firm M/s. Angel Corporation were not verified at all.

19. The submission of the learned counsel for the appellant isthat since the documents of the importer have been obtained by it, there is no violation of Regulation 10(a) at all.

20. However, we find that in this case, investigations revealed that M/s. Angel corporation had nothing to do with the imports and Shri Tarkeshwar Dubey was the master mind of the operationwhich he undertook for some Somalians. The Airway Bill issued by the airline showed the goods as 'Dry Khat' but Shri Dubey changed the description of the goods in the Airway Bill and sent them to the appellant who filed the Bills of Entry with wrong description of the goods. There is nothing on record to show that the appellant was involved in the smuggling of Dry Khat or profited from it. However, the question in this appeal is simply whether the appellant had obtained the authorization from the importer firm, as was required as per Regulation 10(a) or not.

21. Had the appellant approached M/s. Angel Corporation, the importer and obtained the documents from them, or at least,checked with M/s. Angel Corporation even through a phone call or email, it would

have known in no time that the consignment wasnot imported at all by M/s. Angel Corporation and the entire racket of smuggling of the psychotropic substance would have come to light. **In this factual matrix, we have no hesitation in holding that the appellant had failed to obtain authorization from M/s. Angel Corporation, the importer and thereby violatedits obligation under Regulation 10(a).**

Regulation 10(d)

22. Regulation 10(d) requires that the Customs Broker to advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs,as the case may be. Learned counsel for the appellant denies that there was any violation of Regulation 10(d) at all.

23. In this case, the client of the appellant on paper is M/s. AngelCorporation. Not only did the appellant not advise Angel Corporation to comply with the provisions of the Act and allied Acts, but it has not even contacted the client. In fact, it filed the Bill of Entry in the name of M/s. Angel Corporation without even contacting them and thus the import of the psychotropic substance 'dry khat' took place. **We, therefore, have no hesitation inholding that the appellant had violated Regulation 10(d).**

Regulation 10(e)

24. This Regulation requires the Customs Broker to exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearanceof cargo or baggage.

25. The entire facts of the case are not that the appellant had provided wrong or incorrect information to its clients but that it hadfiled Bills of Entry on the basis of the wrong information provided by a person who was not the importer but some other person.

26. We, therefore, do not find on the facts of this case that the appellant had provided any wrong or incorrect information. Therefore, the appellant did not violate Regulation 10(e).

Regulation 10(m)

27. This Regulation requires the Custom Broker to discharge his duties with utmost speed and efficiency and without any delay. From the facts of this case, it does not appear that the appellant had delayed any processing. In fact, the problem is that it had processed them carelessly without taking due care. **We, therefore,do not find that the appellant had violated regulation 10(m).**

Regulation 10(n)

28. This Regulation requires the Customs Broker to verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by usingreliable, independent, authentic documents, data or information.

29. The submission of the learned counsel for the appellant isthat the appellant had no obligation to physically verify the identity of the importer and whether it was operating at the declaredaddress. It would suffice if it obtains at least two KYC documents which it did. Therefore, according to him, there was no violation of Regulation 10(n) at all.

30. The appellant would have been correct if it had obtained the documents from the importer M/s. Angel Corporation. Obtaining the documents from some other person and filing benami Bills of Entry to clear mis-declared cargo, which in this case, happens to be a psychotropicsubstance banned under NDPS Act cannot, in our view, constitute fulfilment of Regulation 10(n).

31. To sum up, we find that the Commissioner was correct in holding in the impugned order that the appellant hadviolated Regulations 10(a), 10(d) and 10(n).

32. The next question is if in the factual matrix of this case, if therevocation of the Customs Brokers

licence of the appellant, forfeiture of its security deposit and imposition of a penalty of Rs. 50,000/- is warranted and if it is proportionate to the violations.

33. The appellant had, in this case, effectively filed *benami* (pseudonymous) Bills of Entry in the name of an IEC holder who had nothing to do with the imports at all. If Shri Tarkeshwar Dubey had provided the documents to the appellant (howsoever he may have obtained them), the appellant was at least required to obtain the authorisation from the importer or check with the importer if it had imported the goods. Simply by obtaining photocopies of two documents of any importer from anyone else and filing the Bill of Entry is to say the least, will have disastrous consequences. This is like an advocate filing a Writ Petition or an appeal in the name of a person without his knowledge by obtaining the documents through someone else. When an agent represents someone, the least thatis expected is that he is authorised to represent the principal. Once this obligation is fulfilled, if the principal commits any illegality without the knowledge of the agent, the agent cannot be held responsible. However, in this case, the Angel Corporation in whose name the Bills of Entry were filed had nothing to do with theimports at all. On the other hand, the appellant obtained documents from Tarakeshwar Dubey who is neither the importer onthe Bills of Entry nor were any of his KYC documents used to filethe Bill of Entry. This resulted in the psychotropic substance being imported through these benami imports.

34. A Customs Broker is expected to behave and operate responsibly and he cannot simply file *benami* Bills of Entry which, inthis case, resulted in import of a psychotropic substance. Filing of *Benami* Bills of Entry, if condoned, can have severe consequences. Customs procedures are based on trust and selective controls based on risk assessment. If Customs Brokers start filing *Benami Bills of Entry,* in the name of any importer, it can open the floodgates for free import of any contraband including, drugs, arms and explosives. Since examination is on selective basis, chances are that the contraband may not be detected (especially if mis- declared as a low risk import good). If caught, the importer will have nothing to do with it because the Bill of Entry is *benami* and the Customs Broker cannot wash off his hands saying that he had obtained copies of KYC documents through someone and not the importer which is sufficient.

35. In our considered view, filing *Benami Bills of Entry* is aserious violation and calls for toughest action.

36. We, therefore, find no reason to interfere with the impugned order and uphold it. The appeal is, accordingly, rejected.

[Order pronounced on **09.02.2024]**

(JUSTICE DILIP GUPTA)
PRESIDENT

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(P.V. SUBBA RAO)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

CUSTOMS APPEAL NO. 52684 OF 2019

(Arising out of Order in Original No. 04-05/Commr/Cus/Ind/2019-20 dated 30.07.2019 passed by Commissioner of Customs, Indore)

M/s. Subhrabrata Chattaraj ...Appellant

C-20, Purba Diganta, Santoshpur Kolkata West Bengal-700001

Versus

Commissioner of Customs, Indore..... Respondent

Post, Box, NO. 10, Manik Bagh Road, Manik Bagh Palace, Indore, Madhya Pradesh 452001

APPEARANCE:

Mr. Abhijit Biswas, Advocate for the appellant

Mr. Nagendra Yadav, Authorized Representative for the Respondent

Coram:

HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)

HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 05.12.2023 DATE OF DECISION: 15.02.2024

FINAL ORDER NO. 50249/2024

DR. RACHNA GUPTA

The appeal has been filed being aggrieved of the Order-in- Original No. 04-05/COMMR/CUS/IND/2019-20 dated 30.07.2019 vide which Shri Kirit Shrimankar is held to be an importer of 189 consignments imported in past and cleared in proxy using dummy IECs from ICD Dhannad/Kheda during the period from December 2011 to May 2013. The CIF value declared of Rs. 10,46,01,717/- in respect of 189 consignments has been rejected and has been re- assessed at Rs. 167,90,71,403/- with the demand of differential duty, the CIF value of Rs. 6,53,99,126/- in respect of 4 live consignments has also been rejected and re-determined at Rs. 14,45,64,928/-, the value of six other live consignments valued at Rs. 3,38,99,169/- has also been rejected and the goods covered under these consignments have been ordered confiscation and the various penalties have been imposed upon all found concerned with the impugned consignments.

2. The facts, in brief, as relevant for the present purpose are that an intelligence was received with respect to a container destined for ICD, Dhannad, Madhya Pradesh in the name of M/s Topper Milk (India) Pvt. Ltd. Indore with the manifest mentioning the goods as 'Footwear and Fabric' and that the consignment was intercepted by the Hong Kong, Customs where on examination, the goods were found to be ingots, Electroshok Batons, Knuckle Dusters and suspected counterfeit personal care products thus were seized by Hong Kong Customs after receiving the said intelligence, Directorate of Revenue

Intelligence, (DRI) Mumbai Zonal Unit, Mumbai investigated the matter by foremost checking about the Importer Exporter Code (IEC) of Topper Milk (India) Pvt. Ltd. It was found that the said IEC No. 0310056659 was showing that Mr. Ajay Upadhyay and his wife Mrs. Smita Upadhyay as to Director of the said company with their office in Indore, however, the said premises were found un- occupied and an another firm in the name of M/s Sai Raj Enterprises was also found registered at the said address instead of M/s Topper Milk (India) Pvt. Ltd. The statement of Mr. Ajay Upadhyay was recorded on 24.05.2013 who stated that M/s Topper Milk (India) Pvt. Ltd. company was incorporated by him for doing the business of milk trading and the processed milk was supplied to diaries owned by his family in Mumbai, however, the business was not profitable, he stopped the business and sold the private company to one M/s Ajay Misra in the year 2010.

2.1 While further investigating the matter, a chain of sequences was created and various other statements were recorded. It was found as follows:-

(i) During the period 15.12.2011 to 22.05.2013, 189 consignments were imported and cleared from ICD, Dhannad/ ICD, Kheda. All the aforesaid 189 consignments were imported through JNPT port near Mumbai, transported to ICD Dhannad/ICD Kheda (both were non- EDI ports) at Indore (which is about 600 Kms from Mumbai) for Customs clearance and then transported back to Mumbai for sale to various consumers. This is contrary to all commercial sense and prudence. Department opined that the goods were trans-shipped to ICD Dhannad / ICD Kheda with intent to get them cleared by resorting to mis-declaration of description and value, as a part of an arrangement.

(ii) During investigations, in addition to 10 containers detained at ICD Dhannad, 9 more containers, which were in transit at Nhava Sheva & were being attempted to be sent back to China to evade interception by DRI, were detained. Enquiries caused with the Shipping lines revealed that they had indeed received requests from their overseas office that the shippers have instructed that the containers detained at Nhava Sheva be re-shipped to the country of export, as nobody was available at ICD Dhannad to take delivery of the said consignments. All the aforesaid 19 containers were examined in detail and the goods contained therein were seized under the provisions of the Customs Act, 1962.

(iii) the aforesaid consignments were imported in furtherance of criminal conspiracy hatched by Kirit Shrimankar in association with Manjit Singh Sandh@ Ajay Sandhu, Ajay Mishra, S. Chattaraj, Sanjay Kundra, Ankit Mehta, unknown overseas suppliers of China / Hong Kong/ Thailand & others to defraud the government exchequer in the import of consumer & miscellaneous goods by resorting to fraudulent means, which included inter alia mis- declaration of the description and value of the goods, imported in proxy, using IECs of others.

(iv) that in the past all the 189 consignments (179 consignments from ICD Dhannad & 10 consignments from ICD Kheda) of consumer & miscellaneous goods were cleared from ICD Dhannad/ICD Kheda, on the strength of manipulated invoices showing a few items, with grossly understated values with the motive of evading payment of appropriate custom duty. Besides, 19 consignments imported by the syndicate in proxy, which were intended to be cleared in the same fashion were seized by DRI at ICD Dhannad (10 consignments) & Nhava Sheva port (9 consignments):

(v) 16 IECs were used in these 208 consignments (189 past and 19 live) out of which 12 IECs were found to be non-existent. The 4 (four) IEC holders who could be located, each one of them have stated in their statement under Section 108 of the Customs Act, 1962 that they have not imported any goods and that they had only lent their names for small consideration. They also did not have the financial wherewithal to affect such huge imports.

(vi) No outward remittances have been sent to the overseas suppliers in respect of any of the consignments. That it has been sent by hawala is self-evident. All the goods, imported in the past consignments were sold without maintaining any records, thereby evading Income Tax, VAT and other local levies thereon.

(vii) Apart from declared goods, there were undeclared' goods like huge quantities of chatons. ladies undergarments, gent's undergarments, Jackets. In three of the live consignments, huge quantity of restricted goods like Refrigerant R-22 gas was recovered. Likewise, in one consignment, seized at Nhava Sheva, prohibited goods like Sex Toys (replicas of male and female sex organs) were recovered.

(viii) The officers of Customs posted at the above ICD have actively colluded with the members of the syndicate in effecting fraudulent clearance of the 189 consignments, cleared in the past. It would have continued but for the intelligence and investigation by DRI.

(ix) Export declarations submitted by the Chinese exporters in respect of 148 consignments (i.e Load Port Documents), imported by the above syndicate in the past, have been obtained through Shipping Lines/CGI, Hong Kong. Comparison of these declarations with the bills of entry filed for clearance of the respective consignments at ICD Dhannad/ ICD Kheda reveal huge mis-match of value and it appears that only a few items with meagre values were declared to Indian Customs.

(x) Kirit Shrimankar did not fully cooperate in the foregoing investigations. Kirit Shrimankar did not furnish basic details like address, phone number or company name of Pawan Mishra, for whom he claims to have made part of imports (which appears to be a diversionary tactics) (b) nor gave tangible details of Ajay Mishra, who had provided him the IECs for fraudulent imports (c) nor disclosed any information about the IEC holders (d) denied to access the e-mail account used by him for forwarding the import documents of the aforesaid consignments to CHA (e) claimed to have destroyed his laptop & mobiles which amounts to destroying evidence.

(xi) Manjit Singh also did not fully cooperate in the investigations. He claimed that the 104 consignments imported and cleared by him in the past belonged to one Hussain of China, who was the supplier as well as importer of the goods into India. However, the above claim appears to be unsubstantiated as he could not furnish any details about the said Hussain or his employee Ahmed. Similarly, his contention that the 12 live consignments have been supplied to him by one Jacky of China, on credit, is untenable, as he could not furnish even the basic details like full name, address, etc of Jacky. Manjit Singh was asked to furnish details about supplier of the goods, the quantity and description of the goods imported in the aforesaid containers, the value of the goods etc. However, Shri Manjit Singh could not give any satisfactory answers on above aspects and thus failed to establish his claim on the aforesaid goods.

(xii) The import documents such as invoice, bill of lading etc, are in the name of dummy IECs with which he has no relation or connection whatsoever. Further, Manjit Singh has neither paid for the goods nor has any documentary proof of ownership of said goods in a manner known to law. Thus, his claim of ownership of said twelve containers, while disowning the past ownership, appears to be motivated to seek provisional release of high value seized goods to the prejudice of public revenue.

3. With these observations, a show cause notice dated 13.09.2014 served upon all those who were found involved in the alleged act/acts, including the present appellant. The appellant has been alleged to have abated the illegal import of goods by a mis- declaration of description and value. While adjudicating the said show cause notice, in addition to confirming the proposal as noted above, the penalty of Rs. 25,00,000/- has been imposed upon the appellant vide the order under challenge (OIO dated 13.07.2019). Being aggrieved, the appellant is before this Tribunal.

4. We have heard Shri Abhijit Biswas, Advocate for the appellant and Shri Nagendra Yadav, Authorized Representative for the Department.

5. Learned Counsel for the appellant has mentioned that the allegations against the appellant are based on surmises and conjectures, no details of the act done or omitted to have been done by the appellant which rendered the goods liable to confiscation, have been given. There is no evidence, except from procured statements of Kirit Shrimankar, Sanajay Kundra, M.S. Sandhu, Ajay Sandhu and Dayal Singh Bisht. It is mentioned that the appellant was not given any opportunity to cross examine any of these witnesses, despite the request made for the purpose. It is further submitted that mere the Act of introducing an old acquaintance to a person and requesting him to find a Customs House Agent (CHA) for clearance of goods through the subject ICDs and/or providing of a mobile sim card by the said person, cannot in any manner establish that the appellant was aware of the nature of the goods being imported by the said persons or was aware of the fact of mis-declaration in such imports/use of Dummy IECs. Appellant denied every meeting with Shri Sanjay Kundra. It is submitted that the allegations of 'conspiracy' as are confirmed in the subsequent order-in-original dated 24.05.2018 have already been set-aside with setting aside of the order of imposition of penalty vide the final order of the Tribunal dated 12.11.2018. Finally, it is impressed upon that the appellant has not physically examined even a single consignment of the important goods. As a supervisory officer he was required to only countersign the assessment made by the proper officer based on the importer's declarations and NIDB data, which he duly complied with. The allegations against the other five proper officers have been set-aside by the Adjudicating Authority itself, proceedings against them have been dropped and no penalty has been imposed. With the submissions of the order under challenge, is prayed to be set-aside and appeal is prayed

to be allowed.

6. While rebutting these submissions, it is mentioned by the Learned Authorized Representative that the appellant had all knowledge of the impugned illegal imports, he knew that the imports are actually made by Kirit Shrimankar, the appellant only had introduced Ajay Sandhu with Manjeet Singh. They both have admitted in their various statements that they were importing goods in proxy, using Dummy IECs and were clearing the goods from ICD Dhannad/Kheda on the strength of manipulated invoices showing very few items, with grossly under stated values with an intent to evade the customs duties. The admissions need no further proof. Though the admissions of others cannot be read against anyone else at least not for penalizing the later. But we observe that there is no denial of appellant that he knew kirit well and that he had acquaintances with him. Based on these, it is rightly held that appellant being in the department has mis-utilized his position and had abated the impugned illegal imports such an Act invites penalty under Section 112(a) of Customs Act, 1962. Impressing upon no infirmity in the order under challenge which is based on meticulous investigation and sufficient evidence against the appellant, the appeal in hand is prayed to be dismissed.

7. After hearing both the parties at length, we observe and hold as follows:-

In the present case, the appellant has challenged the imposition of penalty under Section 112(a) of the Customs Act, 1962. Under this Section, penalty can be imposed on the person who does an act or omission which renders the goods liable for confiscation under Section 111 or a person who **abets** the doing or omission of such an act which renderer the goods liable for confiscation. In the present case, the goods are held to have been fraudulently imported in the name of dummy IECs with mis-declaration in description and value inputs. Beneficial importers/dummy have not come forward to challenge these findings and the orders of confiscation under Section 111 (d), (f), (I) &
(m) of the Customs Act of these goods and not even qua imposition of penalties upon thereon. Thus, the appellant is held to have abetted in clearance of such goods, therefore, is held liable for penalty under Section 112(a). Appellant is a Government servant serving the customs department. We are of the opinion that the scope of present appeal is: whether the appellant has abetted the fraudulent export or he had acted in good faith.

Foremost, we need to know the definition of abetment Section 107 Indian Penal Code defines it as follows:-

Section 107 of Indian Penal Code 1862 defines abetment to include instigating any person to do a thing or engaging with one or more persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing, or intentional aid by any act or illegal omissions to the doing of the said act. Thus, abetment under the Indian Penal Code basically takes place when a person abets the doing of a thing by following:-

1) Instigating a person to commit an offence, or,
2) Engaging in a conspiracy to commit it, or
3) Intentionally aiding a person to commit it

Instigation basically means suggesting, encouraging or inciting a person to do or abstain from doing something. Thus, instigation is something which must be sufficient to actively encourage a person to commit an offence. It should not be mere advice or simple suggestion. Conspiracy on the other hand means an agreement between two or more persons to commit an unlawful act where conspirators must actively agree and prepare themselves to commit that offence. For intentionally aiding the offender the abettor has to facilitate the crime or has to help the offender in committing the crime/offence. In any case, the intention to instigate or conspire or aid the offender to commit an illegal act/omission is utmost important.

Reverting back to the facts of the present case, we observe from the record that the appellant himself vide his statement has acknowledged that he was fully aware that Ajay and Kirit were using proxy importers using dummy IECs for importing goods from his port. Kirit and Ajay Sandhu both have admitted this in their statement. There is no apparent denial that there are 427 calls between the appellant and kirit during the impugned period and that the appellant was entertained many times by said Kirit in Kirit's guest house. Admittedly, the appellant also attended marriage of Kirit's son in Mumbai in January 2013 at Kirit's expense as his guest and had also availed the flight tickets for to & fro travel for self and his family and stayed in five star hotel in Mumbai with family at kirit's expenses. The entire trip was financed by Kirit. A postpaid mobile SIM No. 8120100005, with appellant was also taken from kirit only. All

these facts apparent on record are sufficient to hold that appellant was intentionally aiding kirit and all his associates to let them commit illegal imports. Hence, we hold that there are sufficient ingredients for commission of offence by the appellant.

The documents in the form of statements, investigations etc. also reveal that the appellant knew Manjit Sandhu @ Ajay Sandhu and he introduced Ajay with Kirit Shrimankar and told Kirit to help Ajay in importation. He was informed by Kirit that Kirit had met Ajay and they had made some arrangement for import of goods at Indore where Kirit would be providing IEC Codes, CHA and transport to Ajay against some consideration; that thereafter, Kirit started importing for Ajay apart from his own imports; that during one of the meeting Ajay told him that Ajay was not the owner of goods imported by him and he simply takes delivery of goods overseas from the owners and gives it to them after clearance from customs in India and he charged some amount for his services. Therefore, it is clear that the Appellant was well aware about the proxy imports of Ajay and Kirit which were being cleared from a non-EDI port which was under the Appellant's control. Being the in charge of the customs port it was his duty to discourage this fraudulent practice. However, he not only kept mum but also encouraged the proxy importers to undertake such proxy imports from his port and even facilitated such proxy importers which clearly show his connivance in promoting the fraudulent practices. Kirit and Ajay have admitted in various statements that they were importing goods in proxy, using dummy IECs and cleared the said goods from ICD Dhannad/ Kheda on the strength of manipulated invoices showing only a few items, which grossly understated values to evade duty.

Though the appellant has taken plea that the statement as relied upon by the Adjudicating Authorities are of those, who were not allowed to be cross-examined by the appellant. But, we observe that the appellant's own statement afford sufficient corroboration to those statements. Cross-examination is vital for meeting out the allegations But when there is sufficient corroboration to those allegations, denial of cross-examination cannot be held prejudicial. Appellant has also taken plea that mere introducing an old acquaintance to a person and requesting him to find a CHA for clearance of goods through the subject ICDs and/ or providing of a mobile sim card by the said person, cannot and does not in any manner whatsoever establish, even prima facie, that the appellant was aware of the nature of the goods being imported by the said persons and/ or the fact of mis-declaration in such importation on their part and/or use of 'dummy' IECs. It is also mentioned that not only Kirit Singh, but so many other persons used to frequently call the appellant on his mobile to know about his whereabouts so that the CHA employees could contact him for counter singing of the documents. But, we observe that CDR produced on record showing 427 numbers of calls made by the appellant to Kirit Singh during the relevant time are too many in number to prove that there was no bonafide or reasonableness on part of appellant. Phonecalls as many as 427 calls to one single person, do not justify the defence taken that the purpose was only to ascertain the whereabouts.

The plea of being a supervisory office who just had to countersign the assessment made by the proper officer also is insufficient to prove appellant's innocent. The five other concerned officers have been exonerated as no connect was found between them and the importers/dummy which is not true for the appellant as discussed above. Similarly, the Final Order of this Tribunal dated 12.11.2018 against the order-in-original dated 24.05.2018; setting aside the said order-in-original is of no benefit to the appellant as it has been brought to notice that the Department has not accepted the CESTAT order dated 12.11.2018 but has filed an appeal before the Hon'ble High Court of Madhya Pradesh which is pending for disposal and was last listed on 20.01.2020. The case laws relied upon by the appellant is also found not applicable to the facts of the present case.

(vi) In the light of the entire above discussion, we do not find any infirmity in the order under challenge, the same is therefore upheld. Consequently, the appeal stands dismissed.

[Pronounced in the open Court on 15.02.2024]

(DR. RACHNA GUPTA) MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA) MEMBER (TECHNICAL)

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Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI
PRINCIPAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 51911 OF 2018

[Arising out of Order-in-Original No. 10/2018/RNS/COMMR/IMP/ICD dated 30.03.2018 passed by the Commissioner of Customs, (Import) New Delhi]

BHALINDER SINGH MANN,
A-2/207, First Floor, Janakpuri New Delhi-110058 **Appellant**

VERSUS

COMMISSIONER OF CUSTOMS (IMPORT) **Respondent**
Inland Container Depot, Tughlakabad,

New Delhi

Appearance:
Ms. Reena Rawat, Advocate for the appellant

Shri Rakesh Kumar, Authorised Representative for the Department

WITH

CUSTOMS APPEAL NO. 52193 OF 2018

[Arising out of Order-in-Original No. 10/2018/RNS/COMMR/IMP/ICD/TKD dated 30.03.2018 passed by the Pr. Commissioner of Customs, (Import) Tughlakabad, New Delhi]

SHRI ROHIT SHARMA
R/o 34 MC Colony Near Tikona Park Hissar, Haryana **Appellant**

VERSUS

COMMISSIONER OF CUSTOMS (IMPORT) **Respondent**
Inland Container Depot, Tughlakabad,

New Delhi-110044

Appearance:
Shri Ashutosh, Advocate for the appellant

Shri Rakesh Kumar, Authorised Representative for the Department

Date of Hearing : 17/01/2024 Date of Decision: 26/02/2024

AND

CUSTOMS APPEAL NO. 52419 OF 2018

[Arising out of Order-in-Original No. 10/2018/RNS/COMMR/IMP/ICD dated 30.03.2018 passed by the Commissioner of Customs, (Import) New Delhi]

CONTAINER CORPORATION OF INDIA LIMITED
Inland Container Depot, Tughlakabad, New Delhi **Appellant**

VERSUS

COMMISSIONER OF CUSTOMS (IMPORT) **Respondent**
Inland Container Depot, Tughlakabad,

New Delhi

Appearance:
Shri Usmaan Khan, Advocate for the appellant

Shri Rakesh Kumar, Authorised Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Final Order Nos. 54487-54489 /2024

Date of Hearing : 22/01/2024 Date of Decision: 26/02/2024

P V SUBBA RAO:

1. These three appeals have been filed to assail the Order-in- Original[1] dated 30.03.2018 passed by the Commissioner of Customs (Import) ICD TKD whereby he decided the proposals made in the show cause notice dated 18.11.2015. The operative part of this order is as follows:

ORDER

1. I reject the declared value of Rs. 19,20,433/-in r/o bill of entry no. 7418730 dt. 18.11.2014 under Rule-12 of the Customs Valuation (Determination of Value of Import Goods) Rules, 2007 and re-determine the same as Rs. 5,93,25,481/- under Rule-9 of the rules ibid.

2. I hold that the goods with re-determined value of Rs. 5,93,25,481/- are liable for confiscation under Section 111
(1) & (m) and 119 of the Customs Act, 1962 but refrain from imposing redemption fine as the said goods have been pilfered and are not available for confiscation.

3. Against the total duty of Rs. 1,71,16,587/-, I appropriate Rs. 2,82,534/- already deposited by M/s Nomita International and demand the differential duty amounting to Rs. 1,68,34,053/- from M/s Container Corporation of India Ltd. under Section 45 of the Customs Act, 1962.

4. I impose a penalty of Rs. 1,00,000/- (Rupees one lakh only) on M/s CONCOR under Section 117 of Customs Act, 1962.

5. I impose a penalty of Rs. 1,00,00,000/- (Rupees one crore) under Section 112(a)(v) of the Customs Act, 1962 and of Rs. 50,00,000/- (Rupees fifty lakh only) under Section 114AA of the Act ibid on M/s Nomita International (Prop. Sh. Lalit Kumar).

6. I impose a penalty of Rs. 2,00,00,000/- (Rupees two crore) under Section 112(a)(v) of the Customs Act, 1962 and of Rs. 50,00,000/- (Rupees fifty lakh only) under Section 114 AA of the Act ibid on Sh.

Atal Bhushan Bhatt.

7. I impose a penalty of Rs. 20,00,000/- (Rupees twenty lakh only) under Section 112(a)of the Customs Act, 1962 and of Rs. 10,00,000/- (Rupees ten lakh only) under Section 114 AA of the Act ibid on Sh. B.S.Mann.

8. I impose a penalty of Rs. 5,00,000/- (Rupees five lakh only) under Section 112(a) of the Customs Act, 1962 and of Rs. 50,000/- (Rupees fifty thousand only) under Section 114 AA of the Act ibid on Sh. Rohit Sharma.

2. **Customs Appeal No. 52419 of 2018 filed by M/s Container Corporation of India Limited**[2] to assail the demand of duty amounting to Rs. 1,68,34,053/- made under section 45 of the Customs Act, 1962[3] on the goods lost while under its custody and imposition of penalty of Rs. 1 lakh under section 117.

3. **Customs Appeal No. 51911 of 2018 filed by Shri Bhalinder Singh Mann** assailing the imposition of penalty of Rs. 20 lakhs under section 112(a) and Rs. 10 lakhs under section 114 AA on him.

4. **Customs Appeal No. 52193 of 2018 is filed by Shri Rohit Sharma** to assail the imposition of penalty of Rs. 5 lakhs under section 112 (a) and Rs. 50,000/- under section 114 AA of him.

5. The facts of the case in brief are that a Bill of Entry dated 18.11.2014 was filed by one M/s Nomita International having IEC No. 0513081143 in the Inland Container Depot[4] declaring the imported goods as "glass beads with holes" through their Customs Broker M/s B S Mann, a proprietary firm. These goods were imported from China stuffed in Container No. OOLU1372503. The description of the goods in the Bill of Entry is as follows:

S No.	Description of goods as per imported documents	Unit	Quantity declared	Value declared	Duty paid
1.	Glass Beads with two holes	KGS	14,652	18,32,057	2,69,532
2.	Glass seeds beads with holes	KGS	942	88,377	13,002
		Tota	**15,594**	**19,20,434**	**2,82,534**

6. The Bill of Entry was initially marked for 10% examination and since some boxes appeared to contain glass chatons, which were not declared in the Bill of Entry the case was handed over to a Special Intelligence and Investigation Branch[5] who carried out 100% examination of the goods on 20.11.2014 in the presence of Shri Rajesh Jha "G" card holder and Shri Akhilesh Kumar, "H" card holder of the Customs Broker M/s B S Mann. On examination, the following goods were found:

S. No.	Description of goods	CTH	Quantity (in KGS)
1	Glass beads (with two holes) and Glass seed beads (with holes)	70181020	3,971
2	Glass beads (with two holes) and Glass seed beads (with holes)	70181020	936
3	Glass Chatons (undeclared)	70181090	19,104
TOTAL			24,011

7. Since samples could not be drawn, the container was resealed with Customs Seal Nos. 227352 and 227353 and it was re-opened the next day on 21.11.2014 in the presence of Shri Rajesh Jha and Shri Akhilesh Kumar. Samples were drawn from for further investigation under Panchanama dated 21.11.2014. However, as gate pass to take out the samples from the investigation area could not be obtained after completing of proceedings, the drawn samples were put inside the container and it was sealed with Customs Seal Nos. 227376 and 227377. The container was reopened on next date on

22.11.2014 in the presence of panchas and in the presence of Shri Rajesh Jha and Shri AKhilesh Kumar by Panchnama dated 22.11.2014 and samples were taken out from the container and it was sealed with Customs Seal Nos. 227393 and 227394. The container was lying in the ICD Tughlakabad and by Seizure Memo dated 23.02.2015, the goods were seized under section 110 as they were found to be liable to confiscation under section 111. Voluntary statements of various persons connected with the said imports were recorded, investigation was completed from which the following facts emerged:

(a) M/s Nomita International, 0-158, Geeta Enclave, Vani Vihar, Uttam Nagar, New Delhi - 59 having IEC No. 0513081143 had filed Bill of Entry No. 7418730 dated 18.11.2014 for clearance of goods declared as Glass Beads with holes and Glass Seed Beads with holes through their Custom Broker M/s B. S. Mann (CHA No. AIQPM7764HCH001).

(b) On examination, 564 cartons of undeclared Glass Chatons weighing 19,104 kg along with 209 cartons of 3,971 kgs and 39 plastic bags of 936 kgs of declared Glass Beads of both types were found

(c) Shri Lalit Kumar who was the Proprietor of M/s Nomita International was in judicial custody in connection with some attempt to murder charge and thus his statement could not be recorded.

(d) Shri Atal Bhushan Bhatt (Marketing Manager of the CHA firm) was aware of the mis-declaration since the importer had provided him with samples of goods prior to imports as revealed in the various statements recorded.

(e) Shri Atal Bhushan Bhatt, who himself was owner of a logistics company in the name of M/s LCLSHIP Logistics, was also working with CHA firm and was well aware of Customs laws and procedures since he had also cleared CHALR Exams in 2012

(f) Shri Bhatt did not inform the Customs authorities about the misdeclaration and instead filed documents through his CHA Firm B S Mann.

(g) Shri Bhatt paid Customs duty through his account whereas the duty ought to be paid by the importer or Customs Broker account which again proved his malafide intention.

(h) Shri Bhatt tried to mislead the investigations by giving wrong statements inasmuch as earlier he had wrongly stated that in the case of Nomita International, money emanated from M/s Krishna Logistics account, but in all the imports of M/s Nomita International, the duty deposits were made in cash by him as received from Mr. Lalit Kumar (importer) and Rohit Kumar (Manger of the Importer).

(j) Shri Rohit Sharma (Manager of M/s Nomita International) was aware of the mis- declaration in the import consignment as well as about the nature of sample; he was actually participating in getting his mis- declared goods cleared from Customs.

(k) Shri B. S. Mann, CHA knew Sh. Lalit Kumar and M/s Nomita International and was aware of mis-declartion made in respect of the impugned Bill of Entry, as well as violation of CBLR Rules by himself/ by his CHA firm/ by Marketing Manger of his CHA firm.

(I) The seized goods lying in Container No. OOLU1372503 which were required to be kept in safe custody by CONCOR were stolen for which an FIR was also lodged with Delhi Police and thus CONCOR also failed to discharge it's duties and obligations."

8. Accordingly, a show cause notice dated 18.11.2014 was issued which culminated in the issue of the impugned order.

9. CONCOR in its reply dated 26.10.2016 submitted as follows:

1. That container was shipped from China to India and had moved under transhipment bond of the shipping line to ICD Tughlakabad by train and it was shifted to import warehouse on 19.11.2014. The seal was intact and it was cut on 20.11.2014 in the presence of representative of Customs, CONCOR, CISF and Shipper/CHA;

2. By a letter dated 24.02.2015 customs reported that the container was seized and sealed by Customs Seal No. 227393 and 227394 by Seizure Memo dated 23.02.2015 and it had requested to keep the goods under safe custody;

3. A letter dated 24.02.2015 was written after gap of 94 days after the examination of the goods on 20.11.2014, 21.11.2014 and 22.11.2014 by the Customs;

4. After seal cutting by customs on 20.11.2014, CONCOR received a letter for conducting a joint survey on 05.03.2015 and the purported theft of goods came to knowledge of CONCOR and, accordingly, an FIR was registered with the Police on 07.03.2015. On 20.11.2014 it was originally sealed with Seal No. 227393 of the shipping line was intact. However, on 03.03.2015 container was found with a private red colour seal whose number was not visible as it was completely mutilated. After opening the container it was found completely empty;

5. No Customs seal number was made available on 22.02.2015 although the goods were examined on 20.11.2014 and 22.11.2014 and resealed with the customs seals. Thus, the CONCOR was neither a witness to the presence of glass chatons in the container nor was it advised either by the importer CHA about the presence of glass chatons in the said container;

6. After preparation of the Panchanama and annexure to the panchnama, the container was again examined and a panchnama was again prepared on 21.11.2014 and again sealed with different customs seal numbers and the same were conducted on 20.11.2014. The seizure memo prepared on 23.02.2015 was not sent to CONCOR but it was only sent to the importer;

7. CONCOR received information about the seizure only by the customs letter dated 23.02.2015 which it had received on 22.04.2015 and thereafter it checked the container and found that there is no customs seal and there was only a red coloured private seal without any seal number. The CONCOR was not at all aware of happenings until it tried to handover the container to the CISF for safe custody by which time the goods had gone. CONCOR is not liable to pay customs duty under section 45 (3) and is also not liable for any penalty under section 117;

8. There is a severe lapse on the part of the customs as proper investigation would reveal, therefore, the demand of duty and imposition of penalty on CONCOR cannot be sustained.

9. During the personal hearing held on 26.10.2016 Shri P L Kaul, Manager CONCOR along with Ms. Yuktri Anand, learned counsel for CONCOR appeared and reiterated the submissions.

10. Learned counsel for CONCOR asserted that the demand of duty on CONCOR was not sustainable for the reason that it was not part of Panchnama drawn under which the goods were seized by the customs. It became aware of the seizure only when it received a letter from the Customs on 24.02.2015 when it found the customs seal was missing and replaced by a red colour private seal with no number. He further asserted that penalty under section 117 was wrongly imposed on CONCOR.

11. Learned authorized representative appearing for the department placed on record a letter dated 24.02.2015 sent by the Superintendent SIIB to the General Manager of CONCOR intimating that the goods contained in the aforesaid container were seized under section 110 by seizure memo dated 23.02.2015 and sealed with customs seal Nos. 227393 and 227394 and requesting the CONCOR to keep the goods under safe custody until further orders from the customs. In response, CONCOR sent a letter dated 28.02.2015 intimating that the container was found without customs seals and with only a red colour private seal without any seal number.

12. Learned authorized representative appearing for the department submitted that the goods had not left the customs area within which the custodian of the goods was CONCOR.

13. It is not disputed that the goods were handed over in the container by the shipping line to CONCOR and during examination of goods by the customs the responsibility for presenting the goods for examination rests on the custodian which in this case was CONCOR.

14. Elaborating on the chain of custody of the goods, learned authorized representative submitted that the exporter hands the goods over to the shipping line. The master of the goods of the shipping line issues a Bill of Lading acknowledging receipt of the goods said to be in the container. Thereafter, the Bill of Lading is sent by the exporter to the importer with which it can claim the goods. The Bill of Lading is the document of title. The shipping line which takes responsibility for the goods hands over the goods to the custodian of the customs premises such as the CONCOR. This exchange takes place under a document known as the Equipment Interchange Received (EIR). In this case the undisputed fact is that

this container was handed over by the shipping line to CONCOR. Thereafter, the responsibility of the goods lies with CONCOR and it does not shift to the customs even if the goods have to be examined.

15. Once the importer files the Bill of Entry, pays duty and obtains an order permitting clearance of goods for home consumption from customs, he can obtain the goods from the custodian showing the Bill of Entry (with clearance from the customs), the Bill of Lading and the delivery order issued by the shipping line.

16. It is only in cases where the goods are seized by the customs that the custody of the goods switches to the customs. However, in case the goods are within the customs area, the practice is for the customs to seize the goods and hand over the custody back to the custodian who will be required to keep them in safe custody until further orders. If the seized goods are confiscated, they become the property of the Central Government and will, accordingly, be disposed of. If they are released either unconditionally or on redemption fine, the custodian will have to hand over the goods to the importer. In this case the goods are lost while they were in the custody of the CONCOR. The fact that the seizure was done after three months after the examination makes no difference to the case because even if the goods were not seized, the custody will continue to be with the custodian CONCOR. After the goods were seized on 23.03.2015, a letter was immediately sent to CONCOR intimating about the seizure, and asking it to keep the goods in safe custody. At no point of time had the goods left the custody of CONCOR. Therefore, the responsibility for safe custody of the goods lies with CONCOR.

17. Therefore, CONCOR was liable to pay the duty under section

45 for the goods lost. Since part of duty was already paid, the demand was made confirmed only to the extent of duty not paid or short paid. He also asserts that the penalty under section 117 was correctly imposed on CONCOR.

18. We have considered the submissions with respect to this appeal on both sides.

19. The undisputed facts of the case are that the container was handed over by the shipping line to ICD TKD and the seal was intact at that time. The goods which are imported and are in the customs area shall remain in the custody of the custodian approved by the Commissioner of Customs until they are cleared for home consumption or for warehousing or transhipment. It is the responsibility of the custodian to keep a record of such goods and send a copy thereof to the proper officer and not permit such goods to be removed from the customs area or otherwise dealt with except under and in accordance with the permission in writing of the proper officer. In this case the container, along with imported goods was in the custody of the custodian, namely, CONCOR. Until the goods are cleared for home consumption, warehousing or for transshipment by the proper officer, it is the responsibility of the custodian to keep them safely. After the proper officer clears the goods the custodian is required to hand them over to the importer for home consumption or to the concerned person or to the transshipment or for warehousing. In the case of transshipment or warehousing, the goods move under bond.

20. Duty of customs is levied on the goods imported into India at the rates specified in the schedules of the Customs Tariff Act, 1975. It needs to be pointed out that the charge of the customs duty is on the goods and not on any person. Consequently, once the goods change hands so will the liability to pay customs duty. The charge of customs duty applies even to goods belonging to the Government as it applies to goods not belonging to the Government. Section 12 of the Customs Act, the charging section, is reproduced below:

“12. Dutiable goods.

(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under Section 13, for " Indian Tariff Act, 1934 (32 of 1934)" , or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.”

21. It is for this reason that if goods are imported the importer is liable to pay duty as it is he who owns the goods. If the goods are confiscated, the title passes on to the Central Government and the duty is recoverable from the sale proceeds of the confiscated goods. If the goods are allowed to be redeemed after confiscation after paying the fine under section 125, the title of the confiscated goods goes back to the importer and, therefore, in terms of section
125 (2), the importer has to pay the duty in addition to the redemption fine.

22. The owner of any imported goods may, at any time, before their clearance for home consumption relinquish its title to the goods and thereupon he shall not be liable to pay the duty thereon as per section 23 (2). In short, the liability to pay duty travels along with the imported goods.

23. The question which arises is if the goods get lost while they are in the custody of the custodian before they are cleared for home consumption, who is liable to pay duty? As per section 45 (3) the custodian is liable to pay duty if any good are pilfered after unloading thereof in the customs area while in the custody of the custodian.

24. **Section 45** reads as follows:

" (1) Save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the [1][Principal Commissioner of Customs or Commissioner of Customs] until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.

(2) The person having custody of any imported goods in a customs area, whether under the provisions of *(1)* sub- section or under any law for the time being in force,--

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer or in such manner as may be prescribed.

(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilferred after unloading thereof in a customs area while in the custody of a person referred to in sub- section *(1),* that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an [4][arrival manifest or import manifest] or, as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried."

25. In this case it is undisputed that the goods were lost while they were in the custody of the custodian. It is true that after finding the discrepancies in the declaration on 24.11.2014 the officer of customs took time and seized them only by seizure memo dated 23.02.2015 under section 110. He also sealed the container with container customs seal numbers 227393 and 227394. He handed over the goods along with sealed container to CONCOR on 24.02.2015. There is nothing on record to show that the customs officers had taken the goods out of the customs area. There is also nothing on record to show that anybody else was permitted to and had taken the goods from customs area. With reference to a letter dated 24.02.2015 the custodian found on 28.2.2015 that the container seal was broken and there was a private seal in red colour without any seal number. On opening, they found the goods were lost. Clearly, there is no scope of any interpretation in this chain of events except that the goods were pilfered while they were in the custody of the custodian CONCOR. Therefore, we find that in terms of section 45 (3), the CONCOR had to pay customs duty. Since part of the duty was already paid by the importer only the differential duty was demanded from CONCOR in the impugned order. We, therefore, find infirmity in the impugned order in so far as the confirmation of demand of duty under section 45 (iii) on CONCOR is concerned.

26. As far as the imposition of penalty under section 117 is concerned, we find that this section is a residual provision for imposition of penalty and it reads as follows:

"117. Penalties for contravention, etc., not expressly mentioned.

- Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding one lakh rupees."

27. Clearly, there is violation of section 45 by the CONCOR inasmuch as it had not taken proper care of the goods in its custody and as a result they were pilfered. The value of the goods which were pilfered is Rs. 5,93,25,481/-. Considering this amount, we find that penalty of Rs. 1 Lakh imposed on CONCOR under section 117 is fair and reasonable and calls for no interference.

Customs Appeal No. 51911 of 2018 filed by Shri Bhalinder Singh

28. Shri Bhalinder Singh is assailing penalty of Rs. 20 lakhs under section 112(a) and Rs. 10 lakhs under section 114 AA imposed upon him.

29. Learned counsel for the appellant made the following submissions;

1. B S Mann, the Proprietary firm, is licensed as a Customs Broker. Shri B S Mann duly obtained all the KYC documents and verified the credentials of the importer and its address before the filing Bill of Entry which is the subject matter of this appeal. Shri B S Mann had previously filed four Bills of Entry to clear consignments for radiators for tractors on behalf of the same importer and these Bills of Entry were assessed and cleared;

2. In November, 2014 the representative of M/s Nomita International inquired from the appellant about clearance of consignment of glass beads and also showed samples of the goods to be imported. The appellant appraised Shri Rohit Sharma, the Manager of M/s Nomita International about the classification and other formalities were to clear the glass beads and prepared the Bill of Entry. Before the consignment was cleared, the officers of SIIB investigated the matter and found that 90% of the goods were glass chatons instead of glass beads as declared. Shri Mann filed the Bill of Entry based on the import documents supplied by the importer and had no prior knowledge of the presence of glass chatons. The appellant knew that Shri Lalit kumar was the proprietor of the M/s Nomita International, the importer. But he was not aware of any mis-declaration and, therefore, he had performed his responsibility under customs Brokers licensing regulations diligently.

3. Regarding the department contention that Shri Atal Bhushan Bhatt the appellant's permanant employee who, in his statements, confirmed that samples of glass chatons were shown to him by the importer prior to file the Bills of Entry, he submitted that the department cannot fasten a case against Shri Mann only on the statement of Shri Bhatt without any corroborative evidence.

4. It is pertinent to mention that the customs officers never took the statement of Shri Lalit Kumar, proprietor of the importer firm despite the fact that he was available in Tihar Jail during the relevant period on an attempt to murder charge.

5. The appellant's only association with the impugned goods was to the extent of filing of a Bill of Entry on the basis of the documents produced by the importer and any mis-declaration in the documents rendering the goods to liable to confiscation should not render the appellant liable to penalty under section 112(a).

6. Penalty under section 114 AA also cannot be imposed upon the appellant because prior knowledge or intention is required to impose penalty under section 114 AA and Shri Mann had no such knowledge.

30. On behalf of the Department, learned authorized representative for the revenue made the following submissions;

1. During the relevant period Shri Atal Bhushan Bhatt, was the Marketing Manager of Shri B S Mann, CHA, whose statement were recorded on 20.11.2014 under section 108. This statement has not been retracted by Shri Bhatt till date. He confirmed in his statement and that the sample of glass beads was shown to him and that he was aware of the undeclared item i.e., glass chatons and that he was a "G" card holder of Shri B S Mann. Shri B S Mann, the "F" card holder, made his statement on 21.11.2014 in which he confirmed the sample of imported goods were shown before the import and that these samples were handed over to Shri Bhatt which are glass chatons.

2. During the relevant period Shri Lalit Kumar the proprietor of the importer was in Jail in connection with an attempt to murder charge on 15.11.2014 even before the Bill of Entry was filed on 18.11.2014.

3. Shri Bhatt was the employee of Shri B S Mann, and, therefore, during the relevant period Shri B S Mann is liable for any action or inaction by Shri Bhatt in his capacity as the representative of Shri B S Mann.

4. On request of Shri B S Mann, Shri Atal Bhushan Bhatt was cross-examined before the Commissioner on 04.01.2017. During the cross-examination he confirmed that he had a forwarding agency with a name of LCL Ship Logistics and he also bring clients to Shri B S Mann and that he was introduced the owner of M/s Nomita International through Shri Ashok Garg and that he had provided the invoice, packing list and bill of lading from Shri Rohit Sharma, the Manager of M/s Nomita International and that he had also shown samples provided to him by Shri Rohit Sharma and then description of which was glass beads and that he did not know whether the same actually glass beads or glass chatons.

31. We have considered the submissions on both sides with respect to the appeal filed by Shri B S Mann.

32. The facts of the case are clear Shri Atal Bhushan Bhatt was the Manager of Shri B S Mann during the relevant period and in that capacity he had obtained the documents pertaining to the importer of the disputed consignment and also saw the samples of the goods which are actually being imported. During cross examination by Shri B S Mann, before the Commissioner he confirmed that he had received the samples of the goods imported through Shri Rohit Sharma and that he had shown them to Shri B S Mann. Under such circumstances, it cannot be said that either Shri Bhatt or Shri B S Mann was not aware of the goods which were being actually imported. On examination by the SIIB the goods which are imported were found to be the glass chatons while the Bill of Entry was filed for the importer glass beads was of the invoice and packing list all showed the glass beads. In fact, 90% of the imported goods were glass chatons. This is not a case where the CHA had, merely based on the documents produced by the importer, filed the Bill of Entry. Had such been the case then the CHA would have had no responsibility as to the actual contends of the goods. In this case, the importer is not in the business of importing the glass beads or glass chatons and was indeed a regular importer of radiators for tractors. This consignment was different and the importer had provided samples of the goods to be imported to Shri Bhatt who was the Manager of Shri B S Mann. In turn, Shri Bhatt had shown those samples to Shri Mann. In this factual matrix we find no reason to believe that Shri Mann had innocently filed the Bill of Entry with a wrong declaration. Both Shri Mann and his Manager were fully aware of actual goods being imported and had filed Bills of Entry with the wrong description.

33. Therefore, the goods were correctly held to be liable for confiscation under section 111 (l)and (n) of the Customs Act. However, before the goods could be confiscated they were pilfered after their seizure while in the custody of the CONCOR. The Commissioner had, therefore, not imposed any redemption fine. Penalty under section 112 (a) can be imposed on any person who, in relation to a goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act. In this case, the glass chatons were imported and having seen the samples even after the import Shri B S Mann and through his employees filed a Bill of Entry for glass beads. In fact, 90% of the goods were glass chatons. We, therefore, find that Shri B S Mann was correctly held liable to penalty under section 112(a).

34. Penalty under section 114AA can be imposed if any person knowingly or intentionally makes, signs or uses or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material fact in the transaction of any business for the purpose of this Act. The maximum penalty imposable is five times the value of the goods. The value of the goods in this case was Rs. 5,92,25,481/-. Shri B S Mann, through his employees, filed the Bill of Entry mis-declaring the nature of goods having first obtained samples of the goods even before filing the Bill of Entry. As is clear from the cross-examination by Shri B S Mann, Manager of Shri Bhatt that not only he but also Shri B S Mann, himself had seen the samples before filing the Bill of Entry. We, therefore, have no hesitation in finding that the Bill of Entry filed knowingly mis-declaring the nature of goods.

35. In view of above, we find that the penalty under section 114 AA imposed on Shri B S Mann needs to be sustained. In view of above, we uphold the impugned order in so far as it pertains Shri B S Mann and reject his appeal.

Customs Appeal No. 52193 of 2018 filed by Shri Rohit Sharma.

36. This appeal is filed by Shri Rohit Sharma assailing the penalty of Rs. 5,00,000/- under section 112 (a) and Rs. 52,000/- under section 114 AA imposed upon him. During investigation Shri Rohit Sharma appeared before the Superintendent (SIIB) of Customs and tendered his statement on 21.11.2014 in which he stated that he was working as the Manager with M/s Nomita International, the

importer, and looked after the work of import and other work such as sale of radiators at auto market, Haryana, that he fully aware of both the recovery of undeclared glass chatons by the customs authorities and that they belong to M/s Nomita International. He had given all the documents related to the import of above goods to Shri Bhatt which were given to him by Shri Lalit Kumar, the owner of M/s Nomita International. He said that was not getting any salary from the proprietor Shri Lalit Kumar's but he was working for him on commission basis. Shri Lalit Kumar's residence was searched and nothing incriminating was found. From this statement and the statement of others and the investigation it is clear that Shri Rohit Sharma was aware of the mis-declaration of the import consignment and was also aware of the nature of the sample and further that he was actually participated in getting the mis-declared goods cleared from customs.

37. Accordingly, the SCN was issued to him also. In reply, Shri Rohit Sharma sent written replies on 23.03.2016 and 21.04.2016 and had appeared for personal hearing on 24.01.2016 through his advocate Shri Vipin Yadav. The defense of Shri Rohit Sharma as follows:

i. That he had no knowledge of the goods in question imported under the Bill of Entry but he was induced/coerced by Shri Atal Bhushan Bhatt to say before the Superintendent that he was working with M/s Nomita International as its manager. That he had neither any role in the import nor any knowledge of the goods which were imported and that he had subsequently severed all connections with Shri Bhatt.

ii. He was the employee of Shri Bhatt and was working for him since November, 2014 and was looking after the transportation of goods. Shri Bhatt was in the business of transportation and logistics and was also working for Customs Broker Shri B S Mann as his employee.

iii. His responsibility was confined to arrange transportation on daily basis containers to transport imported goods to godowns for which purpose he would keep a personal diary regarding movements of all vehicles. He worked for Shri Bhatt since November, 2014. On 20.11.2019 he went to the office of Shri Bhatt to report about his work when Shri Bhatt informed him about M/s Nomita International and forced him to represent him as a manager of M/s Nomita International before the Customs authorities "as the owner of M/s Nomita International was not in India and somebody had to represent him for the customs authorities". Although he had objected to the proposals, Shri Bhatt pressurized him into making the presentation and giving the false statement before the Superintendent of customs.

38. On behalf of the appellant the following submissions sent in writing by his counsel.

1. No one has come on record that the appellant had knowledge about the discrepancies of the goods imported in the Bill of Entry and the only averment was that the was fully aware about the recovery of undeclared glass chatons by the customs authorities;

2. Even if the statement is accepted as true, it does not prove that he was aware of the mis-declaration;

3. Shri Rohit Sharma was, in fact, working as transport in-charge for Shri Bhatt in his freight forwarder firm M/s LCL shipping Logistics. Shri Bhatt uses the CHA licence of Shri B S Maan to clear the goods. The personal diary maintained by Shri Rohit Sharma recorded his day-to-day work with Shri Bhatt on whose insistence he made statement that he was a manager of M/s Nomita International. The statement was voluntary and he was forced him to make the statement by Shri Bhatt. In fact, he was not even paid salary for one month because of the altercation with Shri Bhatt in this case.

4. These facts were presented before the adjudicating authority in defense reply but were not accepted by him. There is no finding with respect to the personal diary maintained by Shri Rohit Sharma in the impugned order by the adjudicating authority.

5. During the relevant time the owner of M/s Nomita International was in jail;

6. Shri Rohit Sharma neither signed nor filed any documents what so ever for clearance of the consignments and even implicated by his co-noticee Shri Bhatt. Therefore, the penalty imposed on Shri Rohit Sharma may be set aside and the appeal may be allowed.

39. Learned authorized representative appearing for the department supports the findings of the impugned order and asserts that it calls for no interference what so ever.

40. We have considered the submissions on both sides in this appeal and perused the records.

41. Admittedly, Shri Rohit Sharma made a categorical statement under section 108 of the Customs Act before the Superintendent that he was the Manager of M/s Nomita International and that he had obtained the documents related to the import from owner of M/s Nomita International and handed them to Shri Bhatt for further processing and filing the Bill of Entry, and that he aware of the undeclared chatons which were seized by the customs authorities. This statement was made on 21.11.2014 and has not been retracted. All the material facts which were indicated in the statement such as the address of M/s Nomita International and the nature of its business matched with the facts available on record. We, therefore, find no reason to believe that the statement was made incorrectly or and under pressure or coercion. We also find that there was no retraction of the statement since November, 2014 until the issue of the show cause notice more than a year later. Any person who makes a statement under threat or coercion retracts it once the threat or coercion is removed. In this case, the appellant claims that he had left the service of Shri Bhatt in November, 2014 itself. That being the case, there was no scope for Shri Bhatt to exert any pressure on the appellant after that date.

Learned counsel for the appellant also submitted that the appellant had a diary in which he had records of the transportation details carried out by him. We, however, find that those details are not relevant to the facts in question as the dispute is regarding the mis-declaration in the Bill of Entry which according to both the CHA and the appellant, was prepared on the basis of the information provided by the appellant to the CHA.

42. Such being the case, we find no reason to interfere with the impugned order. The impugned order is upheld and the appeal is rejected in so far as Shri Rohit Sharma is concerned.

43. All the three appeals are dismissed and the impugned order is upheld.

[Order pronounced on **26.02.2024**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI
PRINCIPAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 50198 OF 2024WITH

CUSTOMS MISCELANEOUS APPLICATION NO. 50214 OF 2024AND

CUSTOMS EARLY HEARING APPLICATION NO. 50213 OF 2024

[Arising out of Letter having C. No. VIII/ICD/TKD/6/Adj./Imp/Pr. Commissioner/36/2022 dated 12.10.2023 passed by the Pr. Commissioner of Customs (Imports) ICD Tughlakabad, New Delhi]

MAHALAXMI VALVES PVT LTD. **Appellant**
B-68 Site-4, Sahibabad Industrial AreaSahibabad, Uttar Pradesh

VERSUS

THE COMMISSIONER OF CUSTOMS (IMPORT) **Respondent**

Inland Container Depot, Tughlakabad,

New Delhi

Appearance:

Present for the Appellant : Shri Chinmaya Seth and Shri A K Seth,Advocates

Present for the Respondent: Shri Rakesh Kumar, Authorised Representative

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 54525 /2024

Date of Hearing/Decision : 27/02/2024JUSTICE DILIP GUPTA

1. This appeal seeks the quashing of the communication dated 12.10.2023 sent by the Superintendent (Adjudication). This communication not only seeks to inform the appellant that the personal hearing in respect of the show cause notice dated 20.10.2022 issued to the appellant and its Director has been fixed for final hearing on 08.11.2023 but also informs the appellant that the competent authority has observed that the request for cross- examination made by the appellant is not covered under section 138(B) of the Customs Act, 1962.

2. The appellant appeared before the Principal Commissionerand submitted an interim reply dated September 12, 2023. The personal hearing was thereafter conducted on December 01, 2023, on which date the appellant filed a detailed interim reply. The nextdate of personal hearing is fixed for 28.02.2024.

3. Though, learned counsel for the appellant contended that denial of cross-examination would prejudice the case of the appellant, but in our opinion it would always be open to the appellant to raise this issue once the final order is passed by the Principal Commissioner. It would not be appropriate, at this stage,when the Principal Commissioner is in the process of adjudicating the show cause notice, to examine this issue.

4. The appeal is, accordingly, dismissed with liberty to the appellant to raise the issue of denial of cross-examination beforethe Tribunal after the Principal Commissioner decides the matter. The miscellaneous application and the early hearing application alsostand disposed of.

(Dictated and pronounced in open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI PRINCIPAL BENCH – COURT NO. 3

CUSTOMS APPEAL NO. 50536 OF 2022

(Arising out of Order-in-Appeal No. CCA(A) Cus/D-II/Prev./NCH/1471/2021-22 dated 10.12.2021 passed by the Commissioner of Customs (Appeals), NewCustom House, Near IGI Airport, New Delhi 110037)

Kashi Kumar Aggarwal **Appellant**
H.No. 91, Gali Hanuman, Pacca Danga,Jammu 180001

VERSUS

Commissioner of Customs (Preventive) **Respondent**
New Custom House, Near IGI AirportNew Delhi

APPEARANCE:

Shri Aditya Giri, Advocate for the Appellant

Ms. Jaya Kumari, Authorized Representative for the Department

CORAM :
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)HON'BLE MS. BINU TAMTA, MEMBER(JUDICIAL)

DATE OF HEARING: 15.02.2023DATE OF DECISION: 23.03.2023

FINAL ORDER NO. 50387/2023

P.V. Subba Rao

Shri Kashi Kumar Agarwal[1] filed this appeal to assail order-in-appeal[2] dated 10.12.2021 passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi upholding the order-in- original[3] dated 20.3.2019 passed by the Additional Commissionerof Customs deciding on a Show Cause [4] Notice dated 21.2.2018 issued by the Additional Director, Directorate of Revenue Intelligence [5], New Delhi insofar as it relates to the appellant. It needs to be pointed out that against the same order-in-original, in addition to the appellant, two other persons- Shri Deepak Handa and Shri Ravi Handa- had filed appeals before the Commissioner (Appeals) who decided the three appeals separately. Against the orders of the Commissioner (Appeals), Shri Deepak Handa filed appeal **C/52922 of 2016** and Shri Ravi Handa filed **C/52923 of 2016.** Both these appeals have been disposed of by Final Order No.51520-51521/2021 dated 25.5.2021. The order, in a nutshell, upheld the confiscation of the primary gold with foreign markings but set aside the confiscation of the gold ornaments and the cash. Consequently, the penalties were also reduced.

2. After the above order, the Commissioner (Appeals) passedthe impugned order in respect of the appellant which also involves confiscation of the primary gold, confiscation of the jewellery, confiscation of money and imposition of penalty. In this appeal, the appellant is assailing the following:

a) Confiscation of 2776.94 grams of gold valued at Rs. 72,21,040/- seized from the appellant by a Panchnama dated 24.8.2017. This gold includes (i) one kg gold bar of 995 purity with marking „Argos Heraeuss"; (ii) one kg gold bar of 995 purity with marking " Rand refinery"; (iii) one cut piece of gold of 995 purity weighing 195.23 grams; (iv) a plastic box with jewellery

weighing 246.37 grams;and (v) a plastic pouch with jewellery weighing 335.34 grams;

b) Confiscation of Indian currency of Rs. 8,86,500/- seized from the appellant by a Panchnama dated 24.8.2017; and

c) Penalty of Rs. 25,00,000/- imposed on the appellant under section 112(b) (i).

3. The factual matrix of the case is as follows. Acting on specific information, officers of DRI intercepted two persons sitting on seatsC7 and C9 of Delhi Udhampur Express train (No. 22401) on 23.8.2017 while the train was still at Delhi Rohilla Railway Station. They identified themselves as Shri Deepak Handa[6], (the appellant in appeal No. 52922) S/o Shri Vijay Kumar and Shri SurinderSingh, S/o Shri Bansi Singh. When asked, they denied that they were carrying any gold in any form. Officers searched them and their baggage under Section 102 of the Customs Act, 1962 [7] and recovered 9 gold bars of foreign origin weighing 1,000 grams each and gold jewellery weighing 5.429 kg and 120 gold coins suspectedto be of foreign origin totally weighing 0.96 kg. Shri SurinderSingh, in his statement dated 24.8.2017, said that he worked as a casual labourer in the shop of Deepak on a salary of Rs. 7,500 per month and the statement of Deepak on 24.8.2017 corroboratedthat Shri Surinder Singh was only his employee.

4. While the jewellery was recovered from their bags, four of theforeign marked gold bars were recovered from the shoes of Deepakin which they were concealed. The remaining five gold bars and the gold coins were wrapped in brown colour tape and concealed in the specially designed secret pockets in the back pack.

5. The total gold weighing 15.389 kg estimated to be worth about Rs. 4.6 crores was seized under the Customs Act as Deepak did not have any bills for the gold nor any documents to show that the foreign marked gold was legally imported into India.

6. During investigation, Deepak said that the **gold bars were purchased from one, Shri Kashi Kumar Aggarwal**, **the appellant**. Investigations were conducted and the SCN was issued and adjudication order was passed which was partly set aside by Final Order dated 25.5.2021 insofar as Shri Deepak Handa and ShriRavi Handa were concerned.

7. In the follow up operations, gold bars with foreignmarkings weighing 2000 grams, one cut piece of gold of 995purity weighing 195 grams, gold ornaments weighing 246.37 grams in a plastic box and ornaments weighing 334.34 grams in a plastic pouch and cash of Rs. 8,86,500 were seized from the shop of the appellant in Delhi whichare the subject matter of this appeal and the impugnedorder.

8. Investigations were completed and the SCN was issued and itwas adjudicated by the Additional Commissioner of Customs who passed the OIO as follows:

i. I confiscate the seized gold weighing 15.3890 kg (recovered from Shri Deepak Handa) valued at Rs. 4,60,02,337, seized vide panchnama dated 23/24-8-2017 under section 111(d), 111 (i) and 111(p) read withsection 120 of the Customs Act, 1962.

ii. I confiscate the seized gold weighing 2776.94 grams (recovered from Shri Kashi Kumar Aggarwal) valued at Rs. 72,21,040/- seized vide panchnama dated 24.8.2017 under section 111(d),111(i) and 111(p) read with section 120 of the Customs Act, 1962

iii. I confiscate the seized gold weighing 1,118.24 grams (recovered from M/s. Baibhav Ornaments) valued at Rs. 46,83,820/- seized vide panchnama dated 24.8.2017 under sections 11(d), 111(i) and 111(p) read with section 120 of the Customs Act, 1962.

iv. I confiscate Indian currency amounting to Rs. 8,86,500 seized vide panchnama dated 24.8.2017 under section 121 of the Customs Act, 1962.

v. I confiscate Indian currency amounting to Rs. 9,64,600 seized from the business premises of M/s. Baibhav Ornaments and I confiscate Indian currency amounting to R.s 3,64,500/- from the premises of M/s. Radhika Jewellers (Ground Floor) vide panchnama dated 24.8.2017 under section 121 of the Customs Act, 1962.

(b) I impose a penalty of Rs. 50,00,000 under section 112 (i) of the Customs Act, 192 on Shri Deepak Handafor his acts of omission and commission stated above.

vi. I impose a penalty of Rs. 25,00,000 under section112 (b) (i) of the Customs Act, 192 on Shri Kashi Kumar Aggarwal for his acts of omission and commission stated above.

(b) I impose a penalty of Rs. 10,00,000 under section 112 of the Customs Act, 1962 on

Shri Ravi Handa for his acts of omission and commission stated above.

vii. I do not impose any penalty under section 114AA of the Customs Act, 1962 on Shri Deepak Handa, Shri Kashi Kumar Aggarwal and Shri Ravi Handa, for the reasons mentioned above.

9. In the impugned order, the Commissioner (Appeals) upheld the OIO insofar as the appellant is concerned. In this appeal, the appellant is assailing the impugned order upholding the decision of the Additional Commissioner insofar as it relates to the confiscationof the gold, gold ornaments and cash from the appellant and the imposition of penalty on the appellant.

10. Learned Counsel for the appellant made the following submissions:

a) The adjudicating authority did not consider the appellant"srequest for summoning as witnesses Deepak Handa and Ravi Handa for cross examination on whose statements the whole case is based.

b) The appellant and Deeepak Handa had retracted their statements at the first available opportunity on 28.8.2017and 24.9.2017 which was recorded by the learned Chief Metropolitan Magistrate when the appellant was producedafter arrest.

c) The gold ornaments weighing 246.37 grams (10 necklaces and 4 sets of earrings) belong to M/s. Jeet Jewellers of Mumbai which were kept with the appellantto take care of them. They do not belong to the appellant.

d) Ornaments weighing 335.34 grams belong to M/s. Raghav Jewellers, Saharanpur, UP which they purchased from M/s. Heera Jewellers of Chadni Chowk which was also kept with the appellant.

e) The two gold bars weighing 1000 grams each havingpurity of 995 and foreign markings were purchased by M/s. Easy Trading from M/s. Pinki Chains. The appellant produced invoice dated 19.8.2017 and a copy of ledger account, copy of Form DVAT-56, copy of GST R2A of M/s. Pinki Chains along with other supporting documents and evidences.

f) Revenue has not adduced any evidence to show that the seized gold was smuggled.

g) The bills produced show that the gold was legally purchased from the local market. The appellant was onlya broker and was not the importer or owner of the seized gold.

h) Section 111 (d) of the Customs Act does not apply to town seizures of goods. It applies to those cases where the goods have been imported in violation of any prohibition.

i) Section 111(i) applies only when any dutiable orprohibited goods are found concealed in any package either before or after unloading thereof. It should not apply to any goods which were seized from the shop of the appellant.

j) Section 111(p) applies only to goods notified under Chapter IVA of the Act and gold is not notified under this section.

k) Section 120 applies to those cases where the smuggled goods have been modified in form and it does not applyto the present case.

l) Section 121 applies to sale proceeds of smuggled goods and in this case, since the goods themselves are not smuggled, section 121 does not apply.

m) Section 123 shifts the burden of proof to the person from whom the goods are seized if the goods are notified and there was reasonable belief that the goods weresmuggled. In this case, there was no reasonable belief. Therefore, it is for the department to prove that theywere smuggled goods and the department has not discharged this burden.

n) The gold bars were imported by an approved agency and were freely available in the open market. The appellant purchased them from the open market.

o) The gold ornaments had no foreign markings on them to show that the jewellery was smuggled. Confiscation of jewellery seized from co-accused Deepak Handa and Ravi Handa was set aside by this Tribunal.

p) The Indian currency seized under section 121 as alleged sale proceeds of the smuggled gold is not sustainable as there was no evidence that the currency were the sale proceeds of smuggled gold.

q) The penalty imposed on the appellant under section 112 needs to be set aside.

11. Learned authorized representative for the Revenue reiterated the findings of the impugned order and asserted that the impugnedorder is correct and proper and calls for no interference. He

made the following further submissions:

a) The appellant had, in his voluntary statement dated25.8.2017 admitted that he sold illegally imported gold from local market to Shri Deepak Hand without invoice or receipt. He had also arranged the jewellery and coins from market as evident from his statements, corroborated by the statements of **Deepak Handa and Surinder Singh.**

b) The appellant could not produce any valid documents regarding the two pieces of foreign origin gold bars of one kg each seized from his shop along with the gold ornaments andcash.

c) In his statement dated 24.8.2017, the appellant confirmed that the 9 gold bars seized from **Deepak** with foreign markings were sold through him and further confirmed that he would sell gold bars to Deepak at least 2 to 3 times a month. In follow up investigation, he was found to have two gold bars with foreign markings and he was unable to produce any document to prove their licit possession although he claimed to have purchased them from M/s. Uma Traders.

d) No prejudice is caused to the appellant from not allowing cross examination of the co-accused as they were in cahoots.The appellant also confessed to having dealt with the seized smuggled gold to Deepak. What is admitted need not be proved. Reliance is placed on **Mohammed Muzzamil vsCBIC[8].**

e) In case of gold notified under section 123 which is seized under reasonable belief that it is smuggled, the burden of proving that it is not rests on the person from who it is seized.

12. We proceed to examine the relevant legal provisions of the Act and then examine each of the four issues viz., the confiscation of the gold bars, confiscation of the jewellery, confiscation of the seized cash and imposition of penalty upon the appellant.

Legal provisions

13. The Customs Act, 1962 regulates imports and exports and provides for confiscation of certain goods, imposition of penalty on individuals and also has provisions for arrest and prosecution of theoffenders. The provisions relevant to this appeal are sections 2(22),(33) and (39), 111(d), (i) and (p), 112, 120, 121 and 123. These read as follows:

Section 2: Definitions

(22) "**goods**" includes -

(a) vessels, aircrafts and vehicles;

(b) stores;

(c) baggage;

(d) **currency** and negotiable instruments; and

(e) any other kind of movable property

(33) "prohibited goods" means any goods **the import or exportof which is subject to any prohibition under this Act or any other law for the time being in force** but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with;

(39) "**smuggling**", in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113;

SECTION 111. Confiscation of improperly imported goods, etc.

- The following goods brought from a place outside India shall beliable to confiscation: -

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose ofbeing imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(i) any dutiable or prohibited goods found concealed in any mannerin any package either before or after the unloading thereof;

(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

SECTION 112. Penalty for improper importation of goods, etc.-Any person, -

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable,-

(i) in the case of goods in respect of which any prohibition is in forceunder this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;……."

SECTION 120. Confiscation of smuggled goods notwithstanding any change in form, etc. -
(1) Smuggled goods may be confiscated notwithstanding any change in their form.

(2) Where smuggled goods are mixed with other goods in such manner that the smuggled goods cannot be separated from such other goods, the whole of the goods shall be liable to confiscation: Provided that where the owner of such goods proves that he had no knowledge or reason to believe that they included any smuggled goods, only such part of the goods the value of which is equal to the value of the smuggled goods shall be liable to confiscation.

SECTION 121. Confiscation of sale-proceeds of smuggled goods. - Where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods,the sale-proceeds thereof shall be liable to confiscation.

SECTION 123. Burden of proof in certain cases. (1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be –

(a) in a case where such seizure is made from the possession of anyperson,-

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold, and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify.

14. The gold (both the gold bars and gold jewellery) were confiscated in this case under sections 111(d) (i) and (p) read with section 120. The currency was seized under section 121. Section 123 was invoked to shift the burden of proof to the appellant.

15. It is important to first examine the scope of section123 with respect to this appeal so that it is established who (Revenue or the appellant) has to prove and then further examine if the burden is discharged. This section shifts the burden of proving that the goods are not smuggled to the person from whom they seized if (a) the goods are notified under this section; and further (b) the seizure was under reasonable belief that the goods were smuggled goods. This leads us to the next question as to what are „smuggled goods".There is no definition of „smuggled goods" in the Act and therefore,the natural meaning of the expression should be taken which is „goods" which are „smuggled". Both „goods" and „smuggling" are defined in the Act. Goods, as defined in section 2(22) is an inclusive definition and it includes, inter alia, vessels, currency and

negotiable instruments. Therefore, there cannot be any doubt that the gold bars, gold ornaments and the cash seized in this case are clearly „goods". This leads to the next question as to what is smuggling. Section 2(39) defines "**smuggling**", in relation to any goods, as any act or omission which will render such goods liable toconfiscation under section 111 or section 113. Thus, the definition of smuggling under the Customs Act is very wide and any act or omission which renders the goods liable to confiscation under section 111 or section 113 falls within its ambit. For the purpose of this case, only section 111 is relevant.

16. Thus, to sum up, if any goods including cash, are liable to confiscation under section 111, they constitute smuggled goods andif they are seized under the reasonable belief that they are smuggled goods and if such goods are also notified under section 123, the burden of proving that they are not smuggled rests on theperson from who the goods are seized. Otherwise it rests on the Revenue. It is undisputed that gold is covered under section 123 and cash is not. Therefore, the burden of proof insofar as the cash is concerned, rests on the Revenue. The burden of proof shifts to the appellant with respect to gold depending on whether it was seized under the reasonable belief that it was „smuggled goods". Ifso, the burden shifts to the appellant and not otherwise.

17. The next important section is 121 which provides for confiscation of the sale proceeds of the smuggled goods. This is thesection under which the cash has been confiscated. What is different between sections 111 and 121 is that the former provides for confiscation of smuggled goods whereas the latter provides for confiscation of the sale proceeds of smuggled goods. Naturally, such sale would take place after smuggling and such proceeds will be of Indian origin. On the other hand, if anyone smuggles currency (Indian or foreign) into India, such currency will be smuggled goods" themselves.

18. The third important section is 120 which states that thesmuggled goods will be liable for confiscation not withstanding any change in the form. For instance, if one smuggles silver bars and then melts them and converts them into some other form, the mere fact that they were converted makes no difference and they will still be liable to be confiscated. The gold jewellery was confiscated under section 111 read with this section.

19. The next section to be examined is 2(33) which defines"prohibited goods" as any goods **the import or export of whichis subject to any prohibition under this Act or any other law for the time being in force** but does not include any such goodsin respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with. Thus, the definition of „prohibited goods" is wide and includes goodswhose import is prohibited fully either under this Act or under any law and further includes goods whose import is permitted only subject to some conditions and such conditions have not been fulfilled. This definition becomes significant when examining the confiscability under section 111.

20. The last section to be examined is section 111, specifically, clauses (d), (p) and (i) under which the gold was confiscated.Under section 111 (d) "*any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force*"can be confiscated. Gold is a prohibited good inasmuch as itsimport was permitted during the relevant period only by the designated agencies under the Foreign Trade (Development & Regulation) Act, 1992.

21. As far as section 111(i) is concerned, it provides for confiscation of *"**any dutiable or prohibited goods found concealed** in any manner in any package either before or after the unloading thereof"*.

22. As far as section 111(p) is concerned, it provides for confiscation of "*any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened*".

Issues in this case

23. We proceed to examine the submissions by both sides with respect to each of the issues in this case and decide.

A. Foreign marked gold bars, two, weighing 2 kg in total and having a purity of 99.5%, one cut piece of yellow metal of the same purity weighing 195.23 grams seized from the appellant (part of S.No.(ii) of the operative part of the Order in Original)

24. These two gold bars and the cut gold piece had extremely high levels of purity and were in primary form and the gold bars had foreign markings. They were seized from the appellant in a follow up operation to the seizure of foreign marked gold bars from Deepak andSurinder. They were found in the premises of the appellant. When theofficers questioned the appellant on 25.8.2017, the appellant admitted that he had sold foreign marked gold to Deepak without invoice or receipt and further that he would sell so to Deepak 2 or 3 times a month. The appellant had no receipts or documents to show that the gold was not of foreign origin. In fact, even in the appeal before us, the appellant does not dispute that the gold was of foreign origin. The officers, therefore, had a reasonable belief that they were smuggled goods and accordingly, seized them. The burden of proof is on the person from who they are seized, viz., the appellant to prove that they were not smuggled as per section 123.

25. The submission of the learned counsel for the appellant isthat gold can be imported by authorized agencies (such as banks) who can further sell them to others in India. Therefore, it is his submission that the gold was legally imported into India and therefore is not smuggled. There is an ambiguity in the submissionsbefore us inasmuch as at one point in the synopsis it is submitted that the appellant purchased it from the agency and at another he states that the gold belonged to Easy Trading. The question is not just who purchased from whom but whether the gold is smuggledor not and the burden of proof is on the appellant. The mere fact that gold is imported by various agencies like banks also makes no difference to the case and neither does the fact that smugglers smuggle gold into India on a regular basis. What is important is to see from the evidence available on records if the seized gold was legally imported. It needs to be pointed out that gold bars manufactured by refineries is in bars of specific weights, purity and are embossed with the name of the firm, the purity, weight and even a serial number. Thus, when an agency imports gold, the details of the bars which are imported will be mentioned in the invoices and in the import documents. The designated agencies arebanks and other well reputed firms and when they sell the bars further, such sales are well documented. The least one would expect to have is a copy of the Bill of Entry or document under which the gold was imported. No duty paid document or Bill of Entry is produced before us or before the lower authorities to establish that the seized gold was legally imported. If any duty paid document was produced, it could have been verified with the import documents. Therefore, it has not been established that the seized gold was not smuggled.

26. Learned counsel submitted that the adjudicating authority didnot consider the appellant‟s request for summoning as witnesses Deepak Handa and Ravi Handa for cross examination on whose statements the whole case is based. He further submitted that the appellant had retracted their statements at the first available opportunity which was recorded by the learned Chief Metropolitan Magistrate when the appellant was produced after arrest. We find while the case emanated from the seizure of gold bars from Shri Deepak Handa and follow up investigation was conducted based on the statements of Deepak and Ravi, insofar as this gold is concerned, it stands on its own footing. Even if the statements of Deepak and Ravi are ignored, the fact that the gold bars were seized from the appellant is not in dispute. It is also not in dispute that they are of foreign origin and had foreign markings and were of very high purity is not in dispute. It is also not in dispute that no duty paid documents in the form of Bill of Entry (whether the dutyis paid by the appellant or the importer from whom the appellant claims to have purchased) is available. No such document is produced till date even before us. Therefore, the case against the appellant does not in any way get diluted. The fact that the appellant had given his statements on 24.8.2017 and 25.8.2017but subsequently retracted them when produced before the Ld. CMM was also examined. The statements give out several personal details which are likely to be in the exclusive knowledge of the appellant. It is inconceivable that the officer recording the statement had these details. It suggests that the statements were voluntary. These statements also indicate the appellant‟srelationship with Deepak Handa and that the appellant would sell gold to

Deepak. The retraction does not indicate what part of the statement recorded by the officers was incorrect and what the truthis- his personal details, the fact that he would sell gold to Deepak or the nature of the seized gold. If officers had compelled him to write incorrect facts, the retraction should have brought out the correct facts. We find nothing to this effect. If one has legitimately bought foreign marked gold and is accused by DRI officers ofpossessing smuggled gold, it is inconceivable that when one is produced before the learned CMM that one would NOT say that he had actually bought duty paid gold and produce the documents. It needs to be reiterated that no duty paid documents have been produced till date even before us. Therefore, these submissions of the learned counsel will not carry the case of the appellant any further.

27. Learned counsel submits that the two gold bars weighing1000 grams each having purity of 995 and foreign markings were purchased by M/s. Easy Trading from M/s. Pinki Chains and produced invoice dated 19.8.2017 and a copy of ledger account, copy of Form DVAT-56, copy of GST R2A of M/s. Pinki Chains along with other supporting documents and evidences. The gold barswere imported by an approved agency and were freely available in the open market. The appellant purchased them from the open market. He further submits that Revenue has not adduced any evidence to show that the seized gold was smuggled. We find that none of the documents establish that the gold was duty paid. Whileit is true that gold imported by an approved agency can be and is sold in the market, it is the responsibility of the person who is in possession of the gold to establish that it is not smuggled. All that one needs to get a copy of the duty paid document such as Bill of Entry and the relevant documents to show that the gold bar which one is in possession of was duty paid. It is as simple as that.

28. Learned counsel for the appellant further submitted that in this case, there was no reasonable belief for seizing the gold.Therefore, it is for the department to prove that they were smuggled goods and the department has not discharged this burden. We disagree. The appellant was in possession of foreign marked gold and had no documents to show that duty was paid on it. This gave the department reasonable belief to seize. The burden of proof is on the appellant. If one has duty paid gold bars which are seized and confiscated, it will not be unreasonable to expectthat one would obtain the duty paid documents and produce instead of letting the gold be confiscated and getting oneself arrested. If the gold which the appellant was in possession was, indeed, duty paid, the documents to show that must be with the appellant and in his exclusive knowledge which he must produce, however no such documents have been produced not only before the investigating officers or the adjudicating authority but even before us. We are therefore, satisfied that the appellant has not discharged his burden of proving that the gold bars and the cut piece were not smuggled.

29. Learned counsel further submitted that Section 111 (d) of theCustoms Act does not apply to town seizures of goods. It applies tothose cases where the goods have been imported in violation ofany prohibition. He submits that Section 111(i) applies only when any dutiable or prohibited goods are found concealed in any package either before or after unloading thereof. It should notapply to any goods which were seized from the shop of the appellant. Section 111(p) applies only to goods notified underChapter IVA of the Act and gold is not notified under this section.

30. We find that section 111(d) nowhere indicates whether it applies to town seizures or seizures at the ports and airports. All that it states is that „*any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being* ***imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force***‟ are liable for confiscation. Gold is not freely importable. Import of gold in any form, is prohibited except by nominated agencies as per the Foreign Trade Policy notification above issued under the Foreign Trade (Development and Regulation) Act, 1992. Unless this condition of the import (only bya notified agency) is fulfilled, gold is a prohibited good. The appellant also does not dispute that the gold can be imported only by the nominated agencies. If gold is imported by anyone else, it will be prohibited goods. Hon‟ble High Court of Delhi in**Commissioner of Customs & Central Excise Delhi IV vs Achiever International**[9] held that the prohibition under Section 11 of the Customs Act is different from confiscation under section 111(d) of the Customs Act. While section 11 deals with prohibitionsunder the Customs Act only, confiscation under Section 111(d) can be done even if the import violated any other

law for the time beingforce. In the case before the Hon‟ble High Court, section 3 of the Imports and Exports (Control) Act, 1947 was violated which is the predecessor law of Foreign Trade (Development and Regulation) Act, 1992 which has been violated in this case. Hon‟ble Apex Court has in **Om Prakash Bhatiya**[10] and **Sheikh Mohd. Omer**[11] has held that Sec 2(33) of the Customs Act has wider connotations thanSec 11 of the Act. Even if gold is not notified separately under Sec 11 of the Act, the prohibition flows from the statue i.e., Sec 123 of the Act. Further, in **Sheikh Mohd Omer** it is held that any prohibition referred in Sec 111 applies to every type of prohibition and that may be partial or complete. Any restriction to import or Export is to an extent a prohibition. We, therefore, find section 111(d) applies to this case.

31. We, however, agree with the submission of the appellant thatsection 111(i) applies only when any dutiable or prohibited goods are found concealed in any package either before or after unloadingthereof. It should not apply to any goods which were seized from the shop of the appellant. Section 111(p) applies only to goods notified under Chapter IVA of the Act and that gold is not notified under this Chapter is not in dispute. Therefore, confiscation under sections 111(i) and (p) are not sustainable.

32. To sum up, we find that the gold bars and piece of gold were correctly held liable for confiscation under section 111(d) by the adjudicating authority and such confiscation was correctly upheld in the impugned order. Confiscation under sections 111(i) and (p) need to be set aside.

33. **Gold jewellery weighing 581.71 grams seized from the appellant (part of S.No.(ii) of the operative part of the Order in original)**

34. These gold ornaments were confiscated in the order in original and the confiscation was upheld in the impugned order under sections 111(d), 111(i) and 111(p) read with section 120 of the Customs Act. Section 120 provides that *Smuggled goods may be confiscated notwithstanding any change in their form.* Further, italso provides that *where smuggled goods are mixed with other goods in such manner that the smuggled goods cannot be separated from such other goods, the whole of the goods shall be liable to confiscation*. It is the case of the department that the seized jewellery was made out of smuggled gold and NOT that it itself was smuggled. There were also no foreign markings on them to show that the jewellery is smuggled. Thus, it is not in dispute that the gold jewellery was not smuggled but is made in India. If it was established with some evidence that the jewellery was manufactured out of smuggled gold, then such smuggled goldwould have been covered under Section 123 and by virtue ofsection 120, would have been liable for confiscation notwithstanding the change in its form into jewellery. However, there is no such evidence on record. In our considered view,therefore, the jewellery is not liable to confiscation in the absence of any evidence that it is smuggled or it has been made by converting smuggled gold. The mere fact that the jewellery was found along with the smuggled gold bars makes no difference. Confiscation of the gold jewellery cannot be sustained and needs tobe set aside and we do so. In Final Order dated 25.5.2021, this tribunal had taken a similar view with respect to the jewelleryseized from others in this case.

B. Indian currency amounting to Rs. 8,86,500 seized from the appellant (S.no. (iv) of the operative part of the order in original)

35. While section 123 shifts the burden of proof to the person from whom the goods were seized in case of gold, it does not do so, in respect of cash. The currency was seized under section 121as „sale proceeds of smuggled goods‟. This section states that „*Where any smuggled goods are sold by a person having knowledgeor reason to believe that the goods are smuggled goods, the sale- proceeds thereof shall be liable to confiscation'*. This section does not shift the burden of proof to the person(s) from whom the cashis seized. It is for the Revenue to establish that the cash which has been seized are (a) the sale proceeds; (b) the goods that were soldwere smuggled goods; and (c) the person who has so sold the goods had either the knowledge or had reason to believe that the goods were smuggled. Merely because some unaccounted cash is lying, it cannot be confiscated unless the three conditions in Section 121 are fulfilled. From the records of this case, we do not find that the Revenue has established any of these factors or even identified which were the smuggled goods which were sold by the personfrom whom the cash is seized. Confiscation of this cash is therefore, liable to be set

aside and we do so. It also needs to be noted that an identical view was taken with respect to the cash seized from Baibhav Ornaments and Radhika Jewellers in this Tribunal‟s Final Order dated 25.5.2021.

C. Penalty of Rs. 25,00,000 imposed on the appellant underSection 112 (S.No. (vii) of the operative part of the Order inOriginal)

36. Penalty under section 112 is imposable for any acts or omissions which render the goods liable to confiscation under section 111 of the Act. This section reads as follows:

SECTION 112. Penalty for improper importation ofgoods, etc.- Any person, -

(a) **who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act**, or

(b) who acquires possession of or is in any way concerned incarrying, removing, depositing, harbouring, keeping,concealing, selling or purchasing, or in any other mannerdealing with any goods which he knows or has reason tobelieve are liable to confiscation under section 111, shall be liable,-

(i) **in the case of goods in respect of which any prohibition is in force under this Act or any other law forthe time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever isthe greater**;

37. We note that we had, by final order dated 25.5.2021, reducedthe penalties imposed on Shri Deepak Handa and Shri Ravi Handa. We also set aside the confiscation of the cash and jewellery seized from the appellant. We, therefore find it fit to reduce the penalty imposed on the appellant also to Rs. 5,00,000/- (Rupees five lakhs only).

38. The appeal is partly allowed and the impugned order is partly modified as follows:

a) Confiscation of foreign marked gold bars, two, weighing 2 kg in total and having a purity of 99.5%, one cut piece of yellow metal of the same purity weighing 195.23 grams seized from the appellant (part of S.No.(ii) of the operative part of the Order in Original) under section 111(d) is upheld and confiscation under sections 111(p) and 111(i) are set aside.

b) Confiscation of Gold jewellery weighing 581.71 grams seized from the appellant (part of S.No.(ii) of the operative part of the Order in original) under section 111 read with section 120is set aside.

c) Confiscation of the seized Indian currency (cash) under section 121 is set aside.

d) The penalty imposed on the appellant under section 112 is reduced to Rs. 5,00,000/-

39. The appeal is disposed of as above with consequential relief.

(Order Pronounced on 23.03.2023)

(P.V. SUBBA RAO)MEMBER (TECHNICAL)

(BINU TAMTA)MEMBER (JUDICIAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH - COURT NO. I

Defect Diary No. 51190 of 2023

(Arising out of Order in Appeal no. CC(A)CUS/D-II/ICD/TKD/EXPORT/1460-2022-23dated 24.02.2023 passed by Commissioner of Customs (Appeal), New Delhi)

Harish Choudhary **Appellant**
S/O Shri Ved Prakash Chaudhary, WZ-II/105, New Mahavir Nagar,
New Delhi- 110018

Versus

Commissioner of Customs Export, NewDelhi **Respondent**
Inland Container Depot, Tughlakabad,New Delhi

With

Defect Diary No. 51675 of 2023

(Arising out of Order in Appeal no. CC(A)CUS/D-II/ICD/TKD/EXPORT/1460-2022-23dated 24.02.2023 passed by Commissioner of Customs (Appeal), New Delhi)

Harish Choudhary **Appellant**
S/O Shri Ved Prakash Chaudhary, WZ-II/105, New Mahavir Nagar,
New Delhi- 110018

Versus

Commissioner of Customs Export, NewDelhi **Respondent**
Inland Container Depot, Tughlakabad,New Delhi

With

Defect Diary No. 51677 of 2023

(Arising out of Order in Appeal no. CC(A)CUS/D-II/ICD/TKD/EXPORT/1460-2022-23dated 24.02.2023 passed by Commissioner of Customs (Appeal), New Delhi)

Harish Choudhary **Appellant**
S/O Shri Ved Prakash Chaudhary, WZ-II/105, New Mahavir Nagar,
New Delhi- 110018

Versus

Commissioner of Customs Export, NewDelhi **Respondent**
Inland Container Depot, Tughlakabad,New Delhi

With

Defect Diary No. 51679 of 2023

(Arising out of Order in Appeal no. CC(A)CUS/D-II/ICD/TKD/EXPORT/1460-2022-23dated 24.02.2023 passed by Commissioner of Customs (Appeal), New Delhi)

Harish Choudhary **Appellant**
S/O Shri Ved Prakash Chaudhary, WZ-II/105, New Mahavir Nagar,
New Delhi- 110018

Versus

Commissioner of Customs Export, NewDelhi **Respondent**
Inland Container Depot, Tughlakabad,New Delhi

Appearance:
Ms. Gunjan Tanvar, Advocate for the Appellant
Shri Rakesh Kumar, Authorised Representative for the Department

CORAM :

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: February 26, 2024DEFECT MISCELLANEOUS ORDER NO. 39-42/2024

JUSTICE DILIP GUPTA:

On January 2, 2024, learned counsel for the appellant had prayed for and was granted six weeks time to make the pre deposit. The order is reproduced below:
"A perusal of the letter dated 07.10.2023 sent by the Assistant Commissioner clearly shows that out of the cash amount of Rs. 98 lakhs that were found andseized under a panchnama dated 25.10.2009 from the premises of the appellant, only an amount of Rs. 20 lakhs was deposited in the Government account through TRC-6 challans on 30.01.2010 towards wronglyavailed drawback and this amount has also been appropriated in the order dated 20.03.2019.

2. It is pointed out by the learned counsel for the appellant that the drawback amount that was appropriated was against the liability of some other person and not the appellant.

3. In this view of the matter, the amount of Rs. 20 lakhs cannot be considered towards the pre-deposit in these appeals.

4. Learned counsel for the appellant prays for and is granted six weeks" time to make the pre-deposit in all the four appeals. List on February 26, 2024."

2. Learned counsel for the appellant states that she has not received any instructions from the appellant.
3. It, therefore, transpires that the appellant has not made the pre-deposit contemplated under section 129E of the Customs Act, as amended on 06.08.2014.
4. Section 129E of the Customs Act is reproduced:-

"SECTION 129E. Deposit of certain percentage of dutydemanded or penalty imposed before filing appeal.

The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal,-

—

(i) under sub-section (1) of section 128, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are indispute, or penalty, where such penalty is in dispute,in pursuance of a decision or an order passed by an officer of customs lower in rank than the Principal Commissioner of Customs or Commissioner of Customs;

(ii) against the decision or order referred to in clause (a)of sub-section (1) of section 129A, unless theappellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are indispute, or penalty, where such penalty is in dispute,in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b)of sub-section (1) of section 129A, unless theappellant has deposited ten per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuanceof the decision or order appealed against :

PROVIDED that the amount required to be deposited under this section shall not exceed rupees ten crores:

PROVIDED FURTHER that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014."

5. It would be seen from a bare perusal of section 129E of the Customs Act that after 6.8.2014 neither the Tribunal nor the Commissioner (Appeals) have the power to waive the requirement of pre-deposit, unlike the situation which existed prior to the amendment made in section 129E on 06.08.2014 when the Tribunal, if it was of theopinion that the deposit of duty and interest demanded or penalty levied would cause undue hardship, could dispense the said deposit on such conditions as it deemed fit to impose so as to safeguard the interest of the Revenue.

6. The Supreme Court in Narayan Chandra Ghosh vs. UCO Bankand Others[1], examined the provisions contained in section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 relating to pre deposit in order to avail the remedy of appeal. The provisions are similar to the provisions of section 129E of the Customs Act. The Supreme Court emphasised that when a Statue confers a right to appeal, conditions can be imposed forexercising of such a right and unless the condition precedent for filing appeal is fulfilled, the appeal cannot be entertained. The Supreme Court, therefore, heldthat deposit under the second proviso to section 18(1) of the Act, being a condition precedent for preferring an appeal, the Appellate Tribunal erred in law in entertaining the appeal. The Supreme Court also held that the Appellate Tribunal could not have granted waiver of pre-deposit beyond the provisions of the Act. The relevant portion of the judgment of the Supreme Court is reproduced below:

"7. **Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt** due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. **However, under the third proviso to the sub section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to inthe second proviso.** Thus, there is an absolute bar to entertainment of an appeal underSection 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, apre- deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the saidproviso is clear and admits of no ambiguity.

8. **It is well-settled that when a Statute confersa right of appeal, while granting the right, the Legislature can impose conditions for theexercise of such right,** so long as the conditionsare not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to beonerous. **Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18of the Act. Inthat view of the matter, no court, much less theAppellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisionsof the Statute. We have no hesitation inholding that deposit under the second proviso toSection 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erredin law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement**.

9. The argument of learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, appeal could be entertained by the AppellateTribunal without insisting on pre-deposit, is equally fallacious. Under the second proviso to sub- section (1) of Section 18 of the Act the amount of fifty per cent, which is required to be deposited by the borrower, is computed either with reference to the debt due from him as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less. Obviously, where theamount of debt is yet to be determined by the Debts Recovery Tribunal, the borrower, while preferring appeal, would be liable to deposit fifty per cent of the debt due from him as claimed by the secured creditors. **Therefore, the condition of pre- deposit being mandatory, a complete waiver ofdeposit by the appellant with the Appellate Tribunal, was beyond the provisions of the Act, as is evident from the second and third provisos to the said Section.** At best, the Appellate Tribunal could have, after recording the reasons, reduced the amount of deposit of fifty per cent to an amount not less than twenty-five per cent of the debt referred to in the second proviso. **We are convinced that the order of the Appellate Tribunal, entertaining appellant's appeal without insisting on predeposit was clearly unsustainable and, therefore, the decision of the High Court in setting aside the same cannotbe flawed."**

7. The principles laid down in the aforesaid decision of the Supreme Court in **Narayan Chandra Ghosh** were reiterated by the Supreme Court in **Kotak Mahindra Bank Pvt. Limited** vs. **Ambuj A.Kasiwal & Ors**[2]**.**

8. In Chandra Sekhar Jha, the Supreme Court noted that the Tribunal had rejected the appeal filed under section 129A of theCustoms Act for the reason that the appellant had not complied with the requirement of pre-deposit under section 129E of the Customs Act.Though the contention of the appellant that the provisions of section 129E of the Customs Act as it stood prior to 06.08.2014 should be applied, was rejected by the Supreme Court for the reason that the order was passed by the Commissioner on 23.11.2015 and the appeal was filed in 2017, but the Supreme Court also observed:-

"8. It is in sharp departure from the previous regime that the new provisions has been enacted. Under the new regime, on the one hand, the amount to be deposited to maintain the appeal has been reduced from 100% to 7.5% but the discretion which was madeavailable to the appellate body to scale down the pre- deposit has been taken away.

11. We would think that the legislative intention wouldclearly be to not to allow the appellant to avail the benefit of the discretionary power available under the proviso to the substituted provisions under section 129E. When the appellant is not being called upon to pay the full amount but is only asked to pay the amount which is fixed under the substituted provisions, we do nt find any merit in the contention of theappellant. "

9. In this connection, it will also be appropriate to refer to adecision of the Delhi High Court in Dish TV India Limited vs. Union of India & Ors.[3]**, wherein the requirement of pre-deposit under section 129E of the Customs Act, came up for consideration. The High Court held that when the Statue itself provided wavier of pre- deposit to the extent of 90% or 92.5% of the duty amount and made it mandatory to deposit 7.5% or 10% of duty amount, the Courts cannot**

waive this requirement of deposit. The observations of the Delhi High Court are as follows:

"7. Previously, prior to amendments of the statue, applications for wavier of the pre-deposit were being preferred. Several litigations have travelled up to theHon"ble Supreme Court upon such applications for waiver of pre-deposit.

10. In view of the aforesaid statutory provisions ofthe Act, it appears that the statue has now effected wavier of pre-deposit to the extent of 90% or 92.5% of the duty amount and has made it mandatory to deposit 7.5% or 10% of the duty amount, as the case may be. Itought to be kept in mind that the relief is granted by the law itself. Courts cannot be more charitable than the law. When the provisions of the law are explicitly clear or where the provisions of law are absolutely unambiguous, such type of pre-deposits cannotbe waived by the courts.

14. In view of the amendment in the Act, especially Section 129E thereof, there is no question whatsoever of the waiver of predeposit. As stated hereinabove, the statue itself has waived 90% or 92.5% of the duty amount, as the case may be, assessed by the authorities under the Customs Act,1962. **The petitioner- assessee has to deposit only 7.5% or 10% (as the case may be) of the duty assessed. Thus, there is no question of further waiver of the amount which is required to be deposited under Section 129E of the Customs Act, 1962.**"

A Division Bench of Delhi High Court in M/s Vish Wind Infrastructure LLP v/s Additional Director General (Adjudication), New Delhi[4] examined the provisions of section 35Fof the Central Excise Act, 1944 which are pari materia to section 129E of the Customs Act and held that every appeal filed before the Tribunalafter the amendment made in section 35F of the Excise Act andsection 129E of the Customs Act on 06.08.2014 would be maintainableonly if the mandatory pre-deposit was made. In coming to this conclusion, the Division Bench relied upon the judgment of the Delhi High Court in Anjani Technoplast Ltd. v/s Commissioner of Customs[5] and also observed that in view of the peremptory words „shall not", there is an absolute bar on the Tribunal to entertain any appeal unless the requirement of pre-deposit is satisfied. The Division Bench further observed as follows:-

"28. Equally, it is trite that no court can issue a direction to any authority, to act in violation of the law. A reading of section 35F of the Central Excise Act reveals, by the usage of the peremptory words "shall not" therein, that there is an absolute bar on the CESTAT entertaining any appeal, under Section 35 of the said Act, unless the appellant has deposited 7.5 % of the duty confirmed against it by the authority below.

29. The two provisos in section 35F relax the rigour of this
command only in two respects, the first being that the amount to be deposited would not exceed 10 crores, and the second being that the requirement of pre-deposit would not apply to stay applications or appeals pending before any authority before the commencement of the Finance (No.2) Act, 2014, i.e. before 6" August, 2014.

30. Allowing the CESTAT to entertain an appeal,preferred by an assessee after 6" August, 2014, would, therefore, amount to allowing the CESTAT to act in violation, not only of the main body of section 35F but also of the second proviso thereto, and would reduce the command of the legislature to a dead letter.

31. That no court can direct an authority to act in violation of the law is settled in innumerable authorities, including, inter alia, **Vice-Chancellor, University of Allahabad v. Dr. Anand Prakash Mishra[6], A.B.Bhaskara Rao v. C.B.I[7], , Manish Goel v. Rohini Goel[8], and State of Bihar v. Arvind Kumar[9].**

33. In view of the aforesaid facts, reasons and judicial pronouncements, the prayer of the petitioner for being permitted to prosecute its appeal before the CESTAT without complying with the condition of

mandatory pre-deposit, cannot be granted. There is, therefore no substance in these writ petitions which are, consequently, dismissed."

11. The same view was taken by the Division Bench of the Delhi High Court in **Diamond Entertainment Techno. P. Ltd. v/s Commissioner of CGST, Dehradun**[10]**.**

12. The Madhya Pradesh High Court in Ankit Mehta v/s Commissioner, CGST Indore[11] **also dismissed the Writ Petition that had been filed against the order of the Tribunal dismissing the appeal for the reason that the required pre-deposit was not made. The contention that was advanced before the Tribunal and before theMadhya Pradesh High Court was that the appellant was not in aposition to make the pre-deposit due to financial constraints. After examining the provisions of section 129E of the Customs Act, the Madhya Pradesh High Court observed as follows:-**

"The aforesaid statutory provision of law makes it very clear that it is mandatory for an appellant to deposit seven and a half percent of the duty demanded or penalty imposed or both. The petitioner has not deposited a single rupee and in those circumstances, keeping in view the provisions of section 129E, the appeal itself has been dismissed.

This Court after careful consideration of theaforesaid judgments is of the opinion that section 129E does not empower the Tribunal or the Commissioner (Appeals) to waive the pre-deposit or to reduce the pre-deposit , this Court is also not inclined, keeping in view the aforesaid statutory provisions of law to waive or reduce the pre-deposit and, therefore, no case for interference is made out in the matter. Accordingly, theWrit Petition is dismissed."

13. The appellant has not made the pre-deposit. As the law relating to pre-deposit has been settled by the Supreme Court and the High Courts, the appeal would have to be dismissed for non-compliance of the statutory mandatory requirement.

14. The appeal, therefore, is dismissed.

(Order dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI.

PRINCIPAL BENCH,COURT NO. I

CUSTOMS APPEAL NO. 50657 OF 2021

[Arising out of the Order-in-Appeal No. CC (A)/CUS/D-I/Import/NCH/773/2020-21 dated 25/11/2020 passed by The Commissioner of Customs (Appeals), New Customs House, New Delhi.]

M/s Ingram Micro India Private Limited, **Appellant**
Empire Plaza, Building A, Fifth Floor,

Lal Bahadur Shastri Road, Chandan Nagar,Vikhroli (West), Mumbai – 400 083.

VERSUS

Commissioner of Customs, ACC (Imports), **Respondent**
Air Cargo Complex, Near IGI Airport,New Customs House,

New Delhi – 110 037.

APPEARANCE

Shri B.L. Narasimhan, Advocate – for the appellant.

Shri Rakesh Kumar, Authorized Representative (DR) – for the Department

CORAM : **HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT HON'BLE SHRI P.V. SUBBA RAO, MEMBER (TECHNICAL)**

FINAL ORDER NO. 50266/2024

DATE OF HEARING : 23.01.2024

JUSTICE DILIP GUPTA

The order dated 25.11.2020 passed by the Commissionerof Customs (Appeals)[1] to the extent it upholds the order dated 24.07.2017 passed by the Assistant Commissioner of Customs rejecting the refund application filed by the appellant in respect of eight Bills of Entry is sought to be assailed in this appeal. It needs to be noted that the Commissioner (Appeals), by the said order, had allowed the appeal in respect of three Bills of Entry.

2. The appellant had imported "Fitbit Wearable Devices" by classifying them under Customs Tariff Item[2] 9031 80 00/8423 1000 of the Customs Tariff Act, 1985[3] and had cleared them after payment of duty as per the self-assessment. The appellant, however, subsequently realized that the said item was incorrectlyclassified and that it would correctly be classifiable under CTI 8517 62 90 of the Tariff Act attracting Nil Basic Customs Duty in terms of Serial No. 13 of the Notification dated 01.03.2005.Accordingly, the appellant filed a refund claim in respect of the eleven Bills of Entry before the Assistant Commissioner of Customs (Refund) under section 27 of the Customs Act, 1962[4]. The refund applications were rejected by order dated 25.07.2017 holding that the Bills of Entry had not been re-assessed and that the appellant had also failed to submit certificates from statutory auditors

that the excess duty of customs had not been passedon. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals), in view ofthe judgment of the Supreme Court in **ITC Ltd.** versus **Commissioner of Central Excise, Kolkata – IV**[5], held that theprovisions of section 27 of the Customs Act cannot be invoked in the absence of amendment or modification of the Bills of Entry on the basis of which the self-assessment was made. The Commissioner (Appeals) noted that the appellant had neither filed appeals against eight assessment orders, nor it had sought amendment/modification of the assessment orders before filing the refund application on 13.06.2016, though in respect of three assessment orders the appellant had filed appeals which were allowed by order dated 23.10.2017 and re-assessment as per theclassification sought by the appellant was allowed. The Commissioner (Appeals) also noted that in respect of eight Bills of Entry, the appellant had filed applications for amendmentunder the Customs Act, which applications were pending before the Deputy Commissioner.

3. Thus, as re-assessment was allowed in respect of threeBills of Entry, the impugned order dated 25.07.2017 in so far asit rejected the refund claim in regard to these three Bills of Entry was set aside by the Commissioner (Appeals) and the refund claim was directed to be re-examined in accordance with law. In respect of eight Bills of Entry, the Commissioner (Appeals) observed that the request of the appellant for directing the Deputy Commissioner to decide the application filed for amendment of the Bills of Entry under section 149 of the Customs Act cannot be entertained in the absence of a provision under the Customs Act to issue such a direction.

4. Shri B.L. Narasimhan, learned counsel for the appellant hasvery fairly stated that in view of the decision of the Supreme Court in **ITC**, it will not be appropriate for him to make submission on the merits of the appeal, but a direction that he seeks in the present appeal is that the Deputy Commissioner, before whom the application dated 11.07.2019 was filed under section 149 of the Customs Act for amendment of the Bills of Entry, may be directed to decide. In support of this contention, learned counsel place reliance upon a decision of the Tribunal in **Principal Commissioner of Customs, New Delhi (Import)**vs. **M/s Vivo Mobile India Pvt. Ltd.**[6]

5. Shri Rakesh Kumar, learned authorized representative appearing for the department, however, submitted that in view ofthe facts and circumstances of the case it may not be necessary for the Tribunal to issue a direction at this stage. Learned authorized representative appearing for the department submitted that in two matters before the Bombay High Court andthe Telangana High Court referred to in **Vivo Mobile** Writ- Petitions had been filed to challenge the orders rejecting the amendment applications filed under section 149 of the Customs Act, but in the present case, the amendment applications have not been rejected and are pending disposal.

6. The submissions advanced by learned counsel for the appellant as also the learned authorized representative appearingfor the department have been considered.

6. It is not in dispute that in respect of eight Bills of Entry the appellant had not filed any appeal before the Commissioner (Appeals) for re-assessment. In this view of the matter, the Commissioner (Appeals) was justified in holding that the refund applications would not be maintainable in view of the decision of the Supreme Court in **ITC**.

7. The sole question that arises for consideration in this appeal is whether a direction should be issued to the Deputy Commissioner to decide pending application filed by the appellantunder section 149 of the Customs Act for amendment in the Bills of Entry.

8. Section 149 of the Customs Act, on which reliance has beenplaced, is as follows :-

"**149. Amendment of documents**

Save as otherwise provided in sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the customs house to be amended in such form and manner, within such time, subject to such restrictions and conditions,as may be prescribed:

PROVIDED that no amendment of a bill of entry or a shipping bill or bill of export shall be so authorised to be amended after the importedgoods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time thegoods were cleared, deposited or exported, as the case may be".

9. After referring to the decision of the Bombay High Court in **Dimension Data India Private Ltd.** vs. **Commissioner ofCustoms**[7] and the Telangana High court in **M/s Sony India Pvt. Ltd.** vs. **Union of India**[8], the Division Bench of the Tribunalin **Mobile India** observed as follows :-

"29. Thus, in view of the aforesaid decisions of the Bombay High Court in **Dimension Data India** and the Telangana High Court in **Sony India**, the respondent can take recourse to appropriate proceedings, including the provisions of sections 149 and 154 of the Customs Act for either amendment of the Bills of Entry or for correction of the Bills of Entry. These two decisions have considered the decision of the Supreme Court in **ITC**.

30. It is expected that if such applications are now filed by Vivo Mobile, the same would be adjudicated expeditiously as the refund applications were filed in 2015. It is, therefore, ordered that in the event applications are now filed by Vivo Mobile, they shall be decided expeditiously and preferably within a period of three months from thedate of filing of the applications. The refund applications, if any filed after the decision is taken on such applications, shall also be decided expeditiously".

10. The distinction sought to be drawn by the learned authorized representative appearing for the department is mis- conceived. Once an application for amendment has been filed, itis the duty of the Adjudicating Authority to decide it in view of the specific provisions contained under section 149 of the Customs Act and the said application cannot be kept pending indefinitely. It is not open to the department to raise a plea inthis appeal that a direction should not be issued by the Tribunal for deciding the appellant as it may ultimately lead to a situation that the application filed by the appellant under section 149 of the Customs Act would remain undecided as the Deputy Commissioner will not decide and the Tribunal cannot issue a direction. A statutory duty is cast upon the Deputy Commissionerto decide the application at the earliest and the said application cannot be kept pending indefinitely.

11. In the present appeal it is the contention of the appellant that the application for amendment of the Bills of Entry under section 149 of the Customs Act was filed on 11.07.2019, but it has not been decided as yet and in fact the Commissioner (Appeals) before whom a direction was sought also refused to grant such a relief holding that such a power is not vested in him under the provisions of the Customs Act.

12. It would, therefore, be appropriate that in case the application has already not been decided, it should be decided expeditiously and preferably within a period of three months fromthe date of filing of this order before the Deputy Commissioner. Such a direction is necessary as the application was filed in the year 2019 and almost more than three years have lapsed.

13. The appeal is, accordingly, disposed of with the aforesaid direction.

(Dictated and pronounced in open court.)

JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)MEMBER (TECHNICAL)

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Customs, Excise & Service Tax Appellate Tribunal West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO. 1

CUSTOMS Appeal No. 10849 of 2021-DB

(Arising out of OIA-MUN-CUS-000-APP-279-307-19-20 dated 28.02.2020passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax- MUNDRA)

GLANBIA PERFORMANCE NUTRITION ..... APPELLANT

INDIA PVT LIMITED

502/504, 5TH FLOOR, STAR HUB, BUILDING, NO.2, NEAR ITC MARATHA HOTEL, SAHAR ROAD, ANDHEDI MUMBAI-MAHARASHTRA

VERSUS

COMMISSIONER OF CUSTOMS –MUNDRA ..... RESPONDENT

OFFICE OF THE PRINCIPAL COMMISSIONERATE OF CUSTOMS, PORT USER BULD. CUSTOM HOUSE MUNDRA KUTCH,GUJARAT-370421

WITH

(i) **Customs Appeal No. 10850 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(ii) **Customs Appeal No. 10851 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(iii) **Customs Appeal No. 10852 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(iv) **Customs Appeal No. 10853 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(v) **Customs Appeal No. 10854 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(vi) **Customs Appeal No. 10855 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(vii) **Customs Appeal No. 10856 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(viii) **Customs Appeal No. 10857 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(ix) **Customs Appeal No. 10858 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(x) **Customs Appeal No. 10859 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xi) **Customs Appeal No. 10860 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xii) **Customs Appeal No. 10861 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xiii) **Customs Appeal No. 10862 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xiv) **Customs Appeal No. 10863 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xv) **Customs Appeal No. 10864 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xvi) **Customs Appeal No. 10865 of 2021 (GLANBIA**

PERFORMANCE NUTRITION INDIA PVT LIMITED);

(xvii) **Customs Appeal No. 10866 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xviii) **Customs Appeal No. 10867 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xix) **Customs Appeal No. 10868 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xx) **Customs Appeal No. 10869 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xxi) **Customs Appeal No. 10870 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xxii) **Customs Appeal No. 10871 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xxiii) **Customs Appeal No. 10872 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xxiv) **Customs Appeal No. 10873 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xxv) **Customs Appeal No. 10874 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xxvi) **Customs Appeal No. 10875 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xxvii) **Customs Appeal No. 10876 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(xxviii) **Customs Appeal No. 10877 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);**

(Arising out of OIA-MUN-CUS-000-APP-279-307-19-20 dated 28.02.2020passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax- MUNDRA)

APPEARANCE:

Shri. V. Lakshmikumaran, Sh.Manish Jain, Sh. Sidhant Indrajeet and Ms. Shruti Khanna, Advocates, for the Appellant

Shri. G. Kirupanandan, Superintendent (Authorized Representative)for the Respondent

CORAM: HON"BLE MR. RAJU, MEMBER (TECHNICAL)

HON"BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)

Final Order No. A/ 11846-11874 /2023

These appeals have been filed by the appellants against change of classification of the goods by the original and first appellate authority.

2. Learned counsel for the appellant stated that M/s. Glanbia Performance Nutrition (India) Pvt. Ltd., the Appellant, is engaged in the business of importing and selling nutritional supplements in India. In this batch of appeals, the Appellant is contesting the combined first appellate order issued vide Order-in-Appeal No. MUN-CUSTM-000-APP-279 to 307- 19-20 dated 28.02.2020 passed by Commissioner of Customs (Appeals), Ahmedabad. Learned counsel for the appellant pointed out that Commissioner (Appeals) changed the classification for impugned goods as detailed in Table below:

Summary of classification dispute

S. No.	**Product Name**	**Department"s Classification**	**Appellant"s Classification**
1.	BSN Syntha 6 Chocolate	21061000	18069040
2.	BSN Truemass 1200 Chocolate	21061000	18069040
3.	Isopure Low Carb – Chocolate	21061000	18069040
4.	Isopure Zero Carb – Chocolate Mint	21061000	18069040
5.	Optimum Nutrition 100% Casein- Chocolate Supreme	21061000	18069040
6.	Optimum Nutrition 100% Whey Gold Standard- Chocolate	21061000	18069040
7.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Hazelnut	21061000	18069040
8.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Malt	21061000	18069040
9.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Mint	21061000	18069040
10.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Peanut Butter	21061000	18069040
11.	Optimum Nutrition 100% Whey Gold Standard- Cookies and Cream	21061000	18069040
12.	Optimum Nutrition 100% Whey Gold Standard- Double Rich Chocolate	21061000	18069040
13.	Optimum Nutrition 100% Whey Gold Standard Isolate – Chocolate	21061000	18069040
14.	Optimum Nutrition 100% Whey Gold Standard Isolate – Chocolate Bliss	21061000	18069040
15.	Optimum Nutrition 100% Whey Gold Standard- Mocha Cappuccino	21061000	18069040

16.	Optimum Nutrition 100% Whey Gold Standard- Rocky Road	21061000	18069040
17.	Optimum Nutrition Serious Mass – Chocolate	21061000	18069040

Learned counsel for the appellant argued that Ld. Commissioner (Appeals) and Learned AC have failed to consider the nature and composition of the impugned goods, and simplistically re-classified the impugned goods under residual tariff heading 2106 of Customs Tariff.

3. Learned counsel for the appellant stated that the Appellant is engaged, *inter alia*, in the import, storage, marketing, sales, and distribution of impugned goods in India. Appellant have started directly importing the impugned goods into India from March 2019from its related supplier, *i.e.*, M/s. Glanbia Nutritionals (Ireland) Ltd. In view of the Appellant‟s relationship with the foreign supplier, valuation aspect of the transaction was referred to Special Valuation Branch (**SVB**) for further scrutiny. Accordingly, the goods imported by the Appellant have been assessed provisionally in terms of Section 18. The bills of entry against which impugned OIO and Order in Appeal was issued, have not yet been finalised.

4. Learned counsel for the appellant pointed out that while the assessments continued to be provisional for the afore-mentioned reasons in respect of the impugned bills of entry, the Respondent alleged that the impugned goods are properly classifiable under CTH 2106 of Customs Tariff. For this reason, the clearance in some of the Bills of Entry was not permitted. Learned counsel for the appellant pointed out that notwithstanding the provisional nature of assessments due to ongoing SVB proceeding, the Respondent chose to issue a speaking order under Section 17 of the Customs Act, 1962 seeking to classify the impugned goods under CTI 2106 10 00 and re-assessed the Bills of Entry. This required the appellant to deposit additional duty and interest under protest and seek clearance of the impugned goods. Ld counsel for the appellant pointed out that aggrieved by the impugned OIO, the Appellant filed appeals before Learned Commissioner (Appeals)disputing the re- assessment and change in classification of the goods mentioned in **Table** above. The Learned Commissioner (Appeals)upheld the classification concluded by Learned AC vide a common impugned order. Learned counsel for the appellant pointed out that the primary reasons for finding against the Appellant are provided below:

- Predominant ingredient:Impugned goods contain 72% protein with

„Whey Protein Isolate“ and „Whey Protein Concentrate“ being the main ingredients.

- Common Parlance:In common parlance the impugned goods are known as nutritional supplements consisting of whey protein concentrates.
- Note 5 to Chapter 21 of Customs Tariff includes Protein Concentrates and suggests classification under CTH 2106.
- Cocoa is not the main ingredient in the impugned goods.

5. Learned counsel for the appellant argued that without considering the submissions made by the Appellant, the classification mentioned in **Column-3** to **Table** above was upheld by Ld. Commissioner (Appeals).Ld counsel for the appellant pointed out that aggrieved by the classification of impugned goods concluded vide the impugned order, Appellant filed 29 individual appeals before the Tribunal stated to be involving same issue.

6. Learned counsel for the appellant argued that the products mentioned in **Table** above, include nutritional supplements, pre-workout beverages and general health products, sports supplements, protein products in powder format and ready-to-drink format. These products are whey protein powders containing cocoa in different proportions.

Accordingly, the impugned goods in the general trade parlance are considered as **nutritional products broadly understood as protein powders with cocoa**. In other words, the impugned goods are **identifiable as chocolate protein powders/chocolate-flavoured protein powders**. Ld counsel for the appellant argued that the aforementioned understanding in the trade parlance is

further contributed by the fact that the labels of impugned goods refer such products as "*Gold Standard 100% Whey (Chocolate Peanut Butter)*", "*Isopure Low Carb (Naturally and Artificially Flavoured Chocolate)*", amongst others. He pointed out that the ingredients mentioned on the label also mention cocoa as an ingredient in the food preparation. He argued that on perusal of Bills of Material, it is evident that the impugned goods contain differential amount cocoa and protein content. However, the impugned goods have been classified merely on the basis of the presence of protein content without reference to the appropriate chapter headings and discussion on the General Rules of Interpretation of the Customs Tariff. The supplier of the Appellant has shared a bill of material for each impugned product indicating the raw materials used in the food preparation.

7. Learned counsel for the appellant argued that the following are key issue under consideration before this Hon"ble Tribunal:

(i) Whether the impugned goods are classifiable under CTH 1806 or CTH 2106of Customs Tariff?

(ii) Whether the Respondent is entitled to do piece-meal finalisation of provisional assessment?

The Ld counsel has conceded on the second issue and sought that the issue of classification may be finalised by the tribunal as is apparent from the submissions recorded in para 30below. Therefore the only issue which remains to be decided is if the impugned goods are classifiable under CTH 1806 or CTH 2106of Customs Tariff.

8. On the merits of classification Learned counsel for the appellant argued that before getting into the classification of impugned goods, it is important to analyse the general rules governing classification of goods under Customs Tariff. He argued that it is trite law that a product is to be classified basis the condition in which such goods are presented for clearance to the Customs Authorities. He relied on the following decisions

(i) ***Dunlop India Ltd. v. UOI*****1983 (13) E.L.T. 1566 (SC)**;

(ii) ***Commissioner v. Sony India Ltd.*****2008 (231) E.L.T. 385 (S.C.)**].

He further argued that the appropriate classification of goods is determined by following the General Rules for the Interpretation of Import Tariff ("**GIR**"). He argued that for the purposes of present submission, it is important to consider GIR Rule 1, 3(a) and 6, which must be applied sequentially. He relied on the following

(i) ***Taj Sats Air Catering Ltd. v. CC Ex., Delhi-II*****, 2016 (334) E.L.T. 680 (Tri-Del.)**;

(ii) **Circular 36/2013-Cus. Dated 05.09.2013**

He argued that as per the GIR Rule 1, the classification of goods must be done in accordance with the Chapter Heading (CTH) and any relevant Section and Chapter Notes. These Notes provide detailed explanation as to the scope and ambit of the respective Sections and Chapters under Customs Tariff. He relied on the following decisions

(i) ***Saurashtra Chemical, Porbandar vs. Collector of Customs*****, 1986 (23) ELT 283 (Tri-LB) [upheld in1997 (95) ELT 455 (SC)];**

(ii) ***Central Excise vs. Simplex Mills Co. Ltd*****, 2005(181) E.L.T. 345 (S.C) and**

(iii) ***CC, ICD, New Delhi v. Industrial Importers*****, 2014 (300) E.L.T. 584 (Tri-Del)**].

He argued that only when the goods cannot be classified in terms of GIR Rule 1 and 2, recourse can be made to GIR Rule 3(a), which provides that the heading which provides the most specific description must be preferred. Lastly, GIR Rule 6 requires that while interpreting the sub- headings of the tariff for classification, the guidance of the GIRs can be applied *mutatis mutandis* to other levels. He further argued that in addition to the foregoing rules of classification, for purposes of uniform interpretation of the Harmonized System of Nomenclature (hereinafter referred to as "**HSN**"), WCO has published detailed **Explanatory Notes to HSN** which have long been recognized as a safe guide to interpret the Customs Tariff. He relied on the following decisions

(i) ***O.K. Play (India) vs. CCE*****, (2005) 180 ELT 300 (SC 3-member bench);**

(ii) ***CC. Ex., Pune-I v. Praj Industries*****, 2009 (242) E.L.T. 430 (Tri- Mum);**

9. He argued that on application of GIR Rule 1, the following are the relevant CTH under

consideration:

CTH	PARTICULARS
1806	Chocolate and other food preparations containing cocoa
1901	Malt extract; Food preparations of flour, groats, meal,
	starch or malt extract, not containing cocoa or containing less than 40% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; Food preparations of goods of headings 0401 to 0404, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included
2106	Food preparations not elsewhere specified or included

He argued that in the light of the aforementioned relevant CTHs, it would be prudent to now examine the scope of each of the aforementioned CTHs.He argued that that CTH 1806 of Customs Tariff covers "*Chocolate and other food preparations containing cocoa*". The precise heading along with the entry has been provided hereinbelow for the ease of reference:

Tariff Item	**Description of goods**	**Unit**	**Rate of duty**	
			Std.	**Pref. Areas**
(1)	(2)	(3)	(4)	(5)
1806	**Chocolate and other food preparations containing cocoa**	Kg.		-
[…]	**[…]**	[…]	[…]	[…]
1806 90	- **Other**	Kg.	30%	-
1806 90 10	--- Chocolate and chocolate products		30%	
1806 90 20	--- Sugar confectionary containing cocoa		30%	
1806 90 30	---- Spreads containing cocoa		30%	
1806 90 40	---- **Preparations containing cocoa for making beverages**		30%	
1806 90 90	---- Other			

He argued that the phrase "*food preparation*" have not been defined in the Customs Tariff Act or Explanatory Notes. Hence, emphasis must be laid on the plain meaning of the phrase and its use in general parlance. He argued that the term „preparation" has been defined in ***Kothari Chemicals v. UOI*, 1996 (86) E.L.T.** and ***Reckitt and Colman of India Ltd., Calcutta v. CCE, Calcutta*, 1985 (22) ELT 216 (Tribunal)** as products made from separate components. Thus, a product can be categorized as „food preparation" when there is a process undertaken to give rise to a „prepared food" that is different from its ingredients. He argued that all the CTHs under consideration deal with "food preparation".

10. He argued that GIR Rule 1 provides that the classification of products must also be in

terms of relative Section and Chapter Notes. In this regard, Chapter Note to Chapter 18 of Customs Tariff provides the following:

"*This Chapter **does not cover the preparations** of headings 04.03, **19.01**, 19.04. 19.05, 21.05, 22.02, 22.08, 30.03 or*

30.04"

He argued that that Chapter 18 only covers such cocoa and cocoa preparations which are not covered any of the aforementioned headings. He argued that HSN General Explanatory Notes to Chapter 18 provides that this Chapter covers "*cocoa (including cocoa beans) in all forms, cocoa butter, fat and oil and preparations **containing cocoa (in any proportion)***", except for the aforementioned exclusions. He argued that this view is further corroborated by the fact that HSN Explanatory Notes to CTH 1806provides that it includes "*all food preparations containing cocoa (other than those excluded in the General Explanatory Note to this Chapter)*".He argued that mere perusal of the aforementioned enlisted headings, it can be seen that the goods under consideration are not likely to be covered under any other CTH, except CTH 1901 of Customs Tariff, which requires further analysis. The CTH 1901 is extracted hereinunder:

1901	*Malt extract; food preparations of flour, groats, meal , starch or malt extract, not containing cocoa or containing less than 40% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; **food preparations of goods of headings 0401 to 0404, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included***

He argued that CTH 1901 of Customs Tariff covers "*food preparations of goods of headings 0401 to 0404, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included*". He pointed out that similar narration has also been provided in HSN General Explanatory Notes to Chapter 19. CTH 1901 covers the following:

(i) „food preparations" of CTH 0401 to CTH 0404 of Customs Tariff; and
(ii) It contains „less than 5%" of defatted cocoa by weight.

He argued that in case of food preparation of whey of CTH 0401 to CTH 0404 containing defatted cocoa more than or equal to 5% by weight (defatted), such food preparation would not be classified under CTH 1901 of Customs Tariff. He argued that this view is further augmented by specific exclusion provided in **HSN Explanatory Note to Chapter 18**, **HSN Explanatory Note to CTH 1901**, and **HSN Explanatory Notes to CTH 2106**which provides that food preparations of CTH 0401 to CTH 0404 containing less than 5% cocoa (by weight) are instead covered under CTH 1901.He argued that if the product under consideration does not satisfy the dual condition as summarised in Para above, such goods irrespective of their cocoa content are classifiable under CTH 1806 of Customs Tariff. He relied on HSN Explanatory Notes to CTH 2106 and HSN Explanatory Notes to CTH 1806.

11. He argued that CTH 2106, covers "*Food preparations* not elsewhere specified or included". In other words, for classification under CTH 2106 of Customs Tariff requires two conditions to be satisfied, namely:

a. It must a food preparation;
b. It must not be specified or included elsewhere.

He argued that similar interpretation has also been provided under **HSN Explanatory Note to CTH 2106** which specifically mentions that CTH 2106 only covers those goods which are not covered under any other heading of the Nomenclature. He argued that the point of distinction as per **HSN Explanatory Notes** read with Customs Tariff in respect of CTH 1806, CTH 1901 and CTH 2106 is as follows:

(i) If a food preparation contains cocoa (other than defatted cocoa) in **any**

proportion, then it is classifiable under CTH 1806

(ii) Food preparations of CTH 0401 to CTH 0404 containing **less than or equal to** 5% of cocoa on defatted basis are classifiable under CTH 1901;

(iii) Food preparations of CTH 0401 to CTH 0404 **containing more than** or equal to 5% of cocoa (defatted basis) are classifiable under CTH 1806;

(iv) Lastly, if the goods under consideration are not classifiable under the aforementioned CTHs, such goods can be classified under CTH 2106 of Customs Tariff.

He argued that in respect of classification under CTH 1806, CTH 1901 and CTH 2106, the impugned goods being in the nature of „food preparations", the preliminary condition under each of the aforementioned CTH is satisfied. He argued that for classification under CTH 1901, the impugned goods contain albumin and other protein concentrates which are acting as the base material. He argued that the impugned goods are food preparations having constituent ingredients from CTH 3502 and CTH 3504, and are not food preparations of CTH 0401 to CTH 0404. He argued that the impugned goods do not satisfy the condition of classification under CTH 1901 of Customs Tariff.

Furthermore, he argued that cocoa used in the food preparation is not defatted cocoa. He argued that the impugned goods are in the nature of "*food preparations*". This fact is undisputed between the parties. It is on this ground alone, classification under CTH 3502 and CTH 3504 of Customs Tariff are ousted as they do not relate to food preparations.

12. He argued that a combined reading of HSN Explanatory Notes to CTH 2106, HSN Explanatory Notes to CTH 1806 read with HSN General Explanatory Notes to Chapter 18 shows that CTH 1806 covers all other food preparations containing any amount of cocoa. He argued that in the present case, the impugned goods have cocoa content (not defatted) between the range of 1to 10%. Therefore, he argued that the impugned goods merit classification under CTH 1806 of Customs Tariff, which covers "*Chocolate and other food preparations containing cocoa*".

13. He relied on similar observations made by the Authority on Advance Ruling (AAR) in the decision of *In Re: Karnataka Co-operative Milk Producers Federation Ltd.,* 2021 (46) G.S.T.L. 160 (A.A.R. - GST - Kar.).He argued that on logically extending GIR Rule 6 read with GIR Rule 1 to sixth and eight-digit level, the impugned goods are appropriately classifiable under CTI 1806 90 40 of Customs Tariff, which reads as "*Chocolate and other food preparations containing cocoa: Other: Preparations containing cocoa for making beverages".*

14. He further argued that the issue in respect of "Cookies & Cream" flavoured whey protein powder came up for discussion before the 68th WCO"s Harmonized System Committee of September 2021.He argued that this decision, having Doc. NC2855Eb/K/6, WCO"s HS Committee concluded that "Cookies & Cream" flavoured whey protein powder containing cocoa (along with processed alkali) of~1%are appropriately classifiable under CTSH 1806 90. He argued that the product at S. No. 11 of Table above are similar to the goods under consideration before WCO"s HS Committee. Hence, the WCO"s HS Committee decision applies to the present case.

15. He argued that in the light of the foregoing submissions, the classification undertaken by the Appellant and appearing in Column (4) of Table (above) is correct. Thus, the duty incidence in respect of impugned goods have been correctly discharged by the Appellant.

16. Ld Counsel relied on the WCO"s HS Committee decision, and other international rulings passed by the National Commodity Specialist Division, US Customs and Border Protection (US Customs) to hold that impugned goods are classifiable under CTSH 1806 90 of HTSUS. Reliance was placed on

***(i) US Cross Ruling N025135* dated 15.04.2008**and

***(ii) US Cross Ruling N204559* dated 02.03.2012**

dealing with similar product classification wherein it was held that "*100% Whey Classic-Chocolate*" and "*100% Whey Gold Standard-Chocolate*" are classifiable under CTSH 1806.90.

17. Learned Counsel also relied on *Ruling No. 1E17NT-14-4988-04* dated 08.06.3027, EU Taxation and Customs Union wherein it was held that impugned goods are classifiable under CTSH 1806 90 of HSN. Ld Counsel also relied on Canada Border Services Agency *Advance Ruling No. C-2016-002882* dated 19.10.2016, wherein it was held that pre and post-workout

protein snack based on whey protein isolate and containing cocoa powder are classifiable under CTSH 1806 90. Ld Counsel also relied on *WCO"s 58th Session of Harmonized System Committee* in October 2016which classified „sugar coated milk chocolate sweets" under CTH 1806 merely because of the cocoa content. Similar conclusions were also reached in *WCO"s 68th Session of HS Committee in September 2021* pertaining to "Cookies & Cream" flavoured whey protein powder.

18. Learned Counsel argued that in the case of *Jagson International Ltd. v. CC*, 2006 (199) E.L.T. 553 (T), the Tribunal held as follows:

"*India is a signatory to the International Convention on the Harmonized Commodity Description and Coding System which was devised, inter alia, to facilitate international trade and to facilitate the standardization of trade documentation and the transmission of data. The Harmonised System was intended to be used for the purposes of freight tariffs and transport statistics and intended to be incorporated into commercial commodity description and coding systems to the greatest extent possible, as contemplated by the preamble to the Convention. It was undertaken by its "Contracting Parties" that from the date on which the convention entered into force in respect of it, its customs tariff and statistical nomenclatures shall be in conformity with the Harmonised System. Each contracting party undertook in respect of its Customs tariff and statistical nomenclatures that: -*

"(i) it shall use all the headings and subheadings of the Harmonised System without addition or modification, together with their related numerical codes;

(ii) it shall apply the General Rules for the interpretation of the Harmonised System and all the Section, Chapter and Subheading Notes, and shall not modify the scope of the Sections, Chapters, headings or subheadings of the Harmonised System; and

(iii) it shall follow the numerical sequence of the Harmonised System." (Emphasis Supplied) Learned Counsel argued that the HSN acts as the basis for the classification of the goods across the world. He submitted that the Indian Courts must also march hand-in-hand with the decisions rendered by the foreign counterparts in interpreting the treaties to which India is signatory relating to classification of goods. Reliance in this regard was placed on the decision of the Hon"ble Supreme Court in ***CC v. G.M. Exports*, 2015 (324) ELT 209 (SC)**. Similarly, reliance was also be placed on the decision of ***CC v. C-Net Communication (I) Pvt. Ltd.*, 2007 (216) E.L.T.** wherein the Hon"ble Supreme Court relied upon the decision of Canadian Customs Tribunal.

19. Learned Counsel argued that globally the impugned goods are classified under CTH 1806 only. Reliance in this regard is placed on sample import documents on import of cocoa-based whey protein powders. Therefore, Ld Counsel argued that, impugned goods containing cocoa are appropriately classifiable under CTSH 1806 90 of Customs Tariff.

20. Learned counsel submitted that Ld. Commissioner (Appeals) classified the impugned goods under CTH 2106 of Customs Tariff. CTH 2106 of Customs Tariff reads as under:

Tariff Item	***Description***
2106	***Food Preparations Not elsewhere specified or included***
2106 10 00	*- Protein concentrates and texture protein substances*

21. Learned Counsel argued that Ld. Commissioner (Appeals), owing to the high protein content in the goods, directly jumped to the conclusion that such goods are specifically covered under CTI 2106 10 00 which covers "*Protein concentrates and texture protein substances*" without exhausting sequential application of GIR Rules.Ld Counsel argued that it is important to revisit GIR Rule 1 for the purpose of classification of goods under Customs Tariff. Under this rule, the goods under consideration must be classified in accordance with the terms of the Headings. In other words, the impugned goods must first satisfy the heading of CTH 2106, which covers "*Food preparations not elsewhere*

specified or included", before moving to the sub-heading level which *inter alia* covers "Protein concentrates".

22. Learned Counsel argued that the impugned goods on the basis of their cocoa content is specifically covered under CTH 1806, and therefore, condition (ii) i.e.
"It must not be specified or included elsewhere."

under CTH 2106 is not satisfied. Hence, the impugned goodsare not classifiable under CTH 2106 of Customs Tariff. Ld Counsel argued that such goods would also not be classifiable under tariff sub-heading 2106 10 00 of Customs Tariff.

23. Learned Counsel also relied on the HSN Explanatory Note to CTH 2106which specifically mentions that CTH 2106 only covers those goods which are not covered under any other heading of the Nomenclature. Relevant extract reproduced hereinunder:

"***Provided that they are not covered by any other heading of the Nomenclature****, this heading covers:*

(A) Preparations for use, either directly or after processing […]

(B) Preparations consisting wholly or partly of food stuffs […]"

Ld Counsel argued that the aforementioned conclusion is also supported by virtue of specific exclusion provided under HSN Explanatory Notes of 2022 for CTH 2106. Here, it is relevant to note that under HSN Explanatory Notes of 2022 of CTH 2106, food preparations containing cocoa have been specifically excluded from falling under CTH 2106. Relevant extract reproduced hereinunder:

"[…] This heading further excludes

(a) Preparations containing cocoa, put up as food supplements for human consumption (heading 18.06)"

Learned Counsel argued that impugned goods are correctly classifiable under CTH 1806 and therefore they are *ipso facto* excluded from the scope of CTH 2106 of Customs Tariff.

24. Learned Counsel argued that as per GIR Rule 3(a), the heading that provides the most specific description of the goods shall be preferred to headings providing a more general description. It is pertinent to note that GIR Rule 3(a) envisages comparison at the CTH level only. Ld Counsel argued that a bare perusal of CTH 1806 which covers „*Chocolate and other food preparations containing cocoa*"and CTH 2106 which covers „*Food preparations not elsewhere specified or included*", it is evident that impugned goods are covered more specifically under CTH 1806or CTH 1901. Thus, on application of GIR Rule 3(a), the impugned goods are rightly classifiable under CTH 1806. He placed reliance on the case of *CC (Import) vs Abbott Healthcare Pvt. Ltd.,* 2015 (2) TMI 740wherein the CESTAT has held that preparations for infant should not be classified under CTH 2106 which covers "*Food preparations not elsewhere specified or included*" as they are specifically covered by CTH 1901 which reads as "*Preparations for infant use*". He also placed reliance on the case of *Mauri Yeast India Pvt. Ltd. vs. State of UP*, 2008 (225) ELT 321 (S.C.)wherein it was held by the Hon"ble Supreme Court that if there is a conflict between two entries one leading to an opinion that it comes within purview of tariff entry and another the residuary entry, the former should be preferred.

25. He argued that it is settled law that in cases of the disputes involving classification of goods if two views are possible then the one in favour of the assessee should be preferred. Reliance in this regard was placed on the following judicial precedents:

- *India Steel Industries v. UOI*, 2018 (359) ELT 465 (Bom)
- *CC, Madras vs. Lotus Links* 1996 (87) E.L.T. 580 (S.C.);

- *Poulose and Mathen vs. CCE*, 1997 (90) E.L.T. 264 (S.C.);
- *CCE, Calcutta vs. Calcutta Springs Ltd.,* 2008 (229) E.L.T. 161 (S.C.);
- *Ocean Marketing v. CCEx&ST, Jaipur,* 2017 (348) E.L.T. 269 (Tri-Del).

Learned Counsel argued that Commissioner (Appeals) in Para 6.1 and Para 6.2 of the impugned order has relied upon the observations by Ld. AC regarding treatment of the product in the commercial parlance as

„nutritional supplements". Accordingly, Ld. Commissioner (Appeals) confirmed the classification under CTH 2106 of Customs Tariff. He argued that the doctrine of commercial nomenclature or trade understanding must be departed where the statutory context in which the tariff item appears requires such departure. He placed reliance on decision of the Hon"ble Supreme Court in the case of *Akbar Badruddin Jiwani v. Collector of Customs*, 1990 (47) ELT 161 (SC). The Hon"ble Supreme Court in this case was dealing with the classification of „marble". This term in the technical criteria required gravity of 2.5% or more. Accordingly, the Hon"ble Supreme Court discarded the commercial understanding of the product and held that where HSN contains specific definition then such definition must be preferred, and doctrine of commercial nomenclature must not be applied. Ld Counsel argued that similar observations have also been made by the Hon"ble High Court of Mumbai in the case of *Kulkarni Black & Decker Ltd. v. UOI*, 1992 (57) E.L.T. 401 (Bom). The relevant extract from *Kulkarni (Supra)*summarizing the legal position has been extracted herein under for ease of reference:

"*It is now settled by catena of decisions of the Supreme Court and this Court that* ***it is not permissible to take into consideration the trade meaning or commercial nomenclature when the definition provided in the statute is extremely clear and does not suffer from any ambiguity. In case where the application of commercial meaning or trade nomenclature runs counter to the statutory context in which the word is used in the Tariff Item, then the trade meaning or commercial nomenclature should be ignored.****"*

(Emphasis Supplied) Learned Counsel argued that the trade/ commercial parlance is to be examined only if the tariff entry is ambiguous. Reliance in this regard is being placed on *Nirlon Synthetic Fibres v. UOI*, (1999) 110 E.L.T. 445 (Bom) (DB) and *Panama Chemical Works v. UOI*, 1992 (2) E.L.T. 241 (M.P). Ld Counsel argued that in the present case, cocoa products have been defined under the HSN Explanatory Notes to CTH 1806, CTH 1901 and CTH 2106. Ld Counsel argued that there is no ambiguity in respect of classification under such CTH. Hence, the reliance placed on the commercial parlance for the purpose of concluding classification of the impugned goods is incorrect.

26. Learned Counsel argued that the impugned goods are marketed as cocoa flavoured product only. Further, as submitted above, the impugned goods contain cocoa (along with alkali) within the range of 1 to 10 %, thereby providing cocoa benefits to the user of impugned goods. Ld Counsel argued that the impugned goods are commercially recognised as cocoa flavoured food preparations only.

27. Learned Counsel argued that Commissioner (Appeals) in Para 6.1 and 6.2 of the impugned order took a simplistic way of deciding the classification of impugned goods basis the pre-dominant weight or volume of the protein content. Ld Counsel argued that Commissioner (Appeals) directly applied the essential character test laid down under GIR Rule 3(b). He argued that it is trite law that GIR Rules must be applied in a sequential manner. Thus, before applying GIR Rule 3(b), the classification of goods must be undertaken in terms of GIR Rule 1, GIR Rule 2 and GIR Rule 3(a).

28. Learned Counsel argued that merely on application of GIR Rule 1, *i.e.*, relying upon Section and Chapter Notes read with HSN Explanatory Notes, the impugned goods are classifiable under CTH 1806. Ld Counsel argued that the classification of impugned goods basis the pre-dominant weight [GIR Rule 3(b)] is erroneous. Reliance in this regard is being placed on the decision of *CC (Prev) Kolkata v. Anutham Exim Pvt. Ltd.*, 2021 (378) E.L.T. 611,wherein the Hon"ble CESTAT at Kolkata held that classification based on predominant test based on composition of the product is incorrect in law and may give rise to absurd classification result.

29. Learned Counsel argued that Ld. Commissioner (Appeals) in Para 6.1 of impugned order, observed that cocoa has not been mentioned as the main ingredient on the label of the product. He pointed out that the name on the label and Bills of Material gives reference

to the cocoa content of the product. Ld Counsel argued that the label of the impugned goods invariably mentions the presence of cocoa on the product name.

30. Learned Counsel argued that the impugned goods are more appropriately classifiable under CTH 1806 of Customs Tariff and on account of failure of revenue to justify classification under the CTH 2106 of Customs Tariff, the entire proceedings initiated by the Department is unsustainable. He placed reliance on the decision of *L&T v. CC, Mundra*, 2021-VIL-224-CESTAT-AHM-CUwherein this Hon‟ble Tribunal whilst relying on the *dictum* of *Hindustan Ferrodo Ltd. v. Collector of Central Excise, Bombay*, 997 (89) E.L.T. 16 (S.C.), *HP Chemicals Ltd. v. CCEx., Chandigarh*, 2006 (197) E.L.T. 324 (S.C.),*Pepsico Holding Pvt. Ltd. v. CCEx, Pune-III*, 2019 (25) G.S.T.L. 271 (Tri. – Mum)and *Warner Hindustan Ltd. v. Collector of CE, Hyderabad*, 1999 (113) E.L.T. 24 (SC)held as follows:

"*10. In view of the above settled law, irrespective whether the classification claimed by the Appellant is correct or not since the classification proposed by the Revenue is absolutely incorrect, the entire case of the Revenue will not sustain. Therefore, we are not addressing the issue that whether the Appellant's classification was correct or otherwise. The Appellant also made an alternate submission that even if the classification declared by them under CTH 8306 2110 is incorrect the goods are otherwise classifiable under CTH 9703 in such tariff entry also the IGST Rate is 12% and therefore, there will be no revenue implication. Though alternate classification suggested by the Appellant appears to be prima facie correct but since we have already taken a view that Revenue's claim of classification under CTH 8311 is absolutely incorrect and it is nobody's case in the Show Cause Notice that the goods are classified under CTH 9703 we are not addressing this issue. However, since the Revenue's claim of classification is held to be incorrect the entire proceeding of the Revenue is quashed. The impugned order is set aside. The appeal is allowed with consequential relief, if any arise, in accordance with law*."

Learned Counsel argued that Ld. AC and Ld. Commissioner (Appeals) passed the orders while the assessment was provisional due to matter pending with SVB. Ld Counsel argued that the assessments cannot be finalised in a piecemeal manner. Ld Counsel argued that that a request for provisional assessment was made consequent to investigations initiated by the SVB in respect of imports from related party. However, till the date of hearing (25.08.2022), no Investigation Report pertaining to the import of goods from related party has been issued by the SVB. Thus, the provisional assessment of impugned BOE‟s are yet to be finalised by the proper officer in terms of Customs Act.Learned Counsel argued that despite the provisional nature of assessment, speaking order was passed in terms of Section 17(4) read with Section 17(5) of Customs Act on the issue of classification. Ld Counsel argued that it is trite law that the assessment cannot be undertaken by Learned AC in a piecemeal manner. Learned Counsel argued that during the pendency of the SVB investigation, passing of speaking order on issue of classification under Section 17(5) of Customs Act must be discouraged. He places reliance on the decision of *CCEx, Madras v. Enfield India Ltd.*, 1999 (114) E.L.T. 162 (Tri) wherein the Hon‟ble CEGAT held that more than one order finalising the assessment cannot be made by the proper officer. In this case, the Hon‟ble Tribunal noted that once an assessment is provisional, it is deemed to be provisional on all counts. He also relied on the case of *ITC Ltd. v. Collector of Central Excise, Patna*, 1998 (102) E.L.T. 660 (Tri),where the Tribunal held that issues of classification cannot be separated from the question of valuation. Thus, provisional assessment remains provisional in respect of all issues, which must be adjudicated together and not in a piecemeal manner. Accordingly, the Tribunal remanded the matter back for fresh adjudication including all the issues involved therein [*In Re: Castrol India Ltd*., 2001 (138) E.L.T. 979 (Commr. Appls)]. He also relied on the case of *Nitco Tiles Ltd. v. CC (Export Promotion), Mumbai*, in Order No. S/491 to 497/08/CSTB/C-II and A/485 to 491/08/CSTB/C-II dated 20.08.2008 [*Compilation*, p. 150]where taking note of the above-mentioned decision, remanded the case for fresh adjudication citing finalisation of provisional assessment in piecemeal manner. Ld Counsel argued that the impugned order results in multiplicity of proceedings and challenges the grundnorm as envisaged under the Customs Act. **Ld Counsel submitted that in order to conclude the classification dispute Tribunal may pass orders on the classification of the impugned goods determinatively.**

31. Learned AR pointed out that the goods imported and classification claimed by the appellant are as follows:-

Sl. No.	Name of product	CTH as per importer	Description in CTH
1	Nutritional Supplements Containing Cocoa	18069040	Preparations containing cocoa for making beverages.
2	Unflavoured Nutritional Substances	35040099	Peptones and their derivatives; other protein substances and their derivatives, not elsewhere specified or included; hide powder, whether or not chromed – Others.
3	Glutamine Powder	29241900	Acyclic amides (including acyclic carbamates) and their derivatives; salts therefor; - Others.
4	Creatine Powder	29252990	Carboxyimide-Function Compounds (Cluding Saccharin and its salts) and Imine-Function Compounts – Imines and their derivatives; salts thereof – Others

Learned AR pointed out that the Assessment of imported impugned goods was done provisionally for the following reasons:-

(a) The issue regarding the relationship of the appellant with the foreign supplier viz., M/s. Glanbia Nutritionals (Ireland) Ltd, Ireland is under investigation before the Special Valuation Bench, Mumbai for SVB Investigation.

(b) In addition to the above, the import goods have been mis- classified by the appellant instead of classifying them appropriately as given below:

Sl. No.	Name of product	CTH claimed by the appellant	CTH as per Department
(1)	**(2)**	**(3)**	**(4)**
1	Nutritional Supplements Containing Cocoa	18069040	21061000
2	Unflavoured Nutritional Substances	35040099	21061000
3	Glutamine Powder	29241900	21069099
4	Creatine Powder	29252990	21069099

Learned AR pointed out that the appellant has paid duty under protest on the imported goods under CTH No. 21061000 and CTH No. 21069099.

32. The Bills of Entry were re-assessed by way of Speaking Orders under Section 17(4) of the Customs Act, 1962 thereby the import goods are ordered to be classified under CTH 21061000 for Nutritional Supplements and under CTH No. 21069099 for Glutamine Powder and Creatine Powder. It was also ordered for vacation of protest for payment of customs duty. Aggrieved with the order of the assessment, the appellant have filed appeal before the

Commissioner(Appeals), Customs, Ahmedabad. Ld AR pointed out that the appellant vide their letter dated 26-08-2022 have accepted the classification of Creatine Powder and Glutamine Powder under CTH No. 21069099.

33. Learned AR pointed out that the Labels of all the products produced by the appellant clearly mention that the main ingredients of the imported goods are "**Whey Protein Isolate (WPI) and Whey Protein Concentrate (WPC)**". For example, the actual description of the import goods as declared in Bill of Entry No. 3139731 dated 07-05- 2019 and their protein content per 100 grams as appearing in the label produced by the appellant, are given below:-

TABLE-A

Sl. No.	Description of the import goods	Unit Qty. in grams	Protein content in the import goods per 100 grams
1	On Ind 100% WGS AF/GF DBL Rich Choc 5 LB	100	78.90
2	On Ind 100% WGS AF Cookies & Cream 5 LB	100	72.70
3	BSN India True Mass Chocolate 5.82 LB	100	28.00
4	On Ind 100% WGS AF Cookies & Cream 5 LB	100	72.70
5	On Ind 100% WGS AF/GF DBL Rich Choc 5 LB	100	78.90
6	On Ind 100% WGS AF/GF DBL Choc 907 G	100	78.90
7	On Ind 100% WGS AF/GF DBL Choc 907 G	100	78.90
8	On Ind 100% WGS AF/GF DBL Choc 907 G	100	78.90
9	On Ind 100% WGS AF/GF DBL Choc 907 G	100	78.90
10	On Ind 100% WGS AF/GF Rocky Road 5 LB	100	76.00
11	On Ind 100% WGS AF/GF Mocha Capp 5 LB	100	75.00

Learned AR pointed out that from above table, it is evident that all the import items except item mentioned at Sl. No. 3 contain more than 72% protein in all the import goods. Thus, it is apparent that in the products imported as Nutritional Supplement, protein concentration is higher than 72%. Therefore, all the aforesaid products are clearly in the nature of protein concentrates and are also being sold in the market so, by the appellant, therefore all these products are classified under CTH No. 21061000.

34. In respect of product at Sl. No. 3 of above table, the same contains 28% of protein and 55% carbohydrates. Thus, even this product is having the essential character of whey protein with carbohydrates as base material has rightly been declared on the labels and also being sold in the market so. Label of this product vis., BSN India True Mass Chocolate 5.82 LB (Nutrition Supplement) specifies as nutrition information of the product as under:-

Sl. No.	Value For	Quantity Per Serving	Quantity per 100 gms.	% Daily Values
1	Energy	2941 kJ/704 kcal	1782 kJ/426 kcal	26%
2	Protein	46 gm	28 gm	77%
3	Fat Total	17 gm	10 gm	57%
4	Saturated	4 gm	2 gm	-

5	Carbohydrate	90 gm	55 gm	-
6	Sugars	14 gm	8 gm	-
7	Sodium	300 mg	182 mg	24%

Learned AR pointed out that the above table reveals that BSN India True Mass Chocolate 5.82 LB (Nutrition Supplement) has protein of "77% daily values" ingredients as protein concentrate, soy lecithin, calcium caseinate, milk protein isolate, whey protein isolate, micellar casein, hydrolysed whey protein, egg whites, etc....". Further, these products are known to buyers in the market as Whey Protein Concentrates. Therefore, in the trade and commercial parlance, identity/ classification of the import goods is clearly known as nutrition supplements consisting of whey protein concentrates which people take for the general well beings of humans.

35. Learned AR argued that the classification of import goodsis to be determined as per the guidelines enunciated in "General Rules for the Interpretation of the Harmonized System". It contains a set of 6 rules for classification of goods in the Tariff Schedule. These rules have to be applied sequentially.

36. Learned AR pointed out that the appellants have imported goods like Gold Standard 100% Whey, Isopure Protein Powder, Gold Standard 100% Isolate, Serious Mass, True Mass 1200, Syntha-6, etc. Ld AR pointed out that these products are known in the market and by the public as "Nutrition Supplements". There is no dispute that the appellants have also declared these products as "Nutrition Supplements" in the Bill of Entries. He pointed out that these products are marketed in different flavours such as vanilla, strawberry, chocolate/cocoa, double rich chocolate, etc. Ld AR argued that the appellants have claimed classification of these products under CTH No. 18069040 as "Preparations containing cocoa for making beverages" under Chapter –
18 of the Customs Tariff Act, 1975 which covers "Cocoa and Cocoa Preparations".Ld AR argued that the products made from whey such as Whey Protein Concentrates and Whey Protein Isolates are not covered under chapter 18. The adjudicating authority clearly held that none of the labels of the import products mention Cocoa as the main ingredient of the import items for which classification has been claimed as falling under Chapter-18. Ld AR pointed out that merely because cocoa is added as a flavoring agent does not change the content, composition and character of these products and they do not become cocoa and cocoa preparations.

37. He argued that as per Supplementary Note – 5(a), protein concentrates and textured protein substances are covered under CTH 2106. The appellant have produced images of labels of some of the import goods. Ld AR pointed out that in these labels, "Chocolate" is mentioned as only a flavour but not as main constituent of the product. These products" main constituent is "protein and carbohydrate"and these products are known in the market as protein powder/ protein powder neutraceutical. These products are marketed as "Nutrition Supplements" with different flavours. For example, "GOLD STANDARD 100% WHEY PROTEIN POWDER" is marketed in different flavours such as Extreme Milk Chocolate, Delicious Strawberry, Vanilla Ice Cream and Double Rich Chocolate.

38. Learned AR pointed out that the appellants have submitted copies of commercial invoices. It can be seen that they have shown classification of same products under two different chapters of 18 and 21 for two different Flavors. Wherein product with description, "ON INDIA 100% WGS AF/GF MOCHA CAP 907G" is shown as covered under CTH No. 18069040 whereas another product with description, "ON INDIA 100% WGS AF/GF BANANA CRM 907G & ON INDIA 100% WGS AF/GF STRAW 907G" are shown as covered under CTH No. 21061000. These products are known and sold in the market as "WHEY GOLD STANDARD". The only difference is their flavour. Ld AR argued that mere addition of flavouring agent does not change the character, use or classification of the product.

39. Learned AR relied on the case of Wander Ltd Vs. Collector of Central Excise, Bombay,

the Tribunal, Delhi – reported at 1999 (110) ELT 735 (Tribunal) to assert that protein concentrate are rightly classifiable under heading 2106 and not under chapter 4 as dairy product.

40. Learned AR relied on the case of Collector of Central Excise Vs. Frozen Foods Pvt. Ltd – reported at 1992 (59) ELT 279 (Tribunal), wherein it was held that dietary supplement „Surje", consisting of whey protein and casein peptides (37%), carrier and sweetening agents (62%) and flavouring and vitamins (1%), put up in unit containers classifiable under sub-heading 2107.91 (presently covered under sub-heading 2106)**.**Ld AR relied on the case of Commissioner of Customs(Import), Mumbai Vs. E. I. Dupant (I) Pvt. Ltd – reported at 2005 (190) ELT 20 (Tri.-Mumbai).Ld AR relied pointed out that theTribunal while deciding similar issue of classification of Kit-Kat coated with chocolate in the case Nestle (India) Ltd Vs. CCE, Mumbai – 2000 (124) ELT 898 held that

"*13. It might have been necessary, in view of the presence of chocolate, to refrigerate the product to prevent its melting or spoiling. That alone cannot justify the view that the product"s essential character of the product has been conferred upon it by chocolate. There is nothing to show that the buyers of the goods bought as chocolate, not as a combination of chocolate and biscuits; that it was the presence of the chocolate alone as distinct from the chocolate and biscuits which length of the product is appeal to customers. On the other hand, the market advertising brief produced by the appellant refers to the presence of the biscuit market as well as the chocolate market and it talks of the products as wafer covered with crisp chocolate and say that the product creates niche for itself, drawing from both the biscuit market as well as the chocolate market.*"

This judgement in the case of Nestle (India) Ltd is also followed by the in the case of Little Star Foods Pvt. Ltd Vs. Commissioner of Central Excise, Hyderabad reported at 2006 (199) ELT 451 (Tri.-Bang.).In the case of Dhariwal Industries Ltd Vs. Commissioner of Central Excise, Pune-III reported at 2014 (304) ELT 585 (Tri.-Mumbai), the Tribunal, has held that "4.2 ….As per Rule 3(b), "Mixtures, composite goods consisting of different materials or made up of different components, and goods put up for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character. If this rule is applied, then the material which gives the essential character is the Pan Leaf Powder. Pan Leaf is part of a plant and preparation of pan leaves with other ingredients would merit classification under Heading 20.01 as preparation of fruits, nuts and vegetables and other parts of a plant prior to March, 2005 and under CETH 2008.9200 on or after March, 2005."

As per this judgement, product is to be classified based on its essential character. In the instant case, there is no dispute that the import goods are Nutrition Supplements made from Whey Protein Concentrate and Whey Protein Isolate.Ld AR argued that Tribunalin the case of Raptakos Brett & Co. Ltd Vs. Commissioner of C. Ex., Raigad – 2014 (307) ELT 565 (Tri.-Mumbai) held that to constitute protein concentrate, at least 70% of protein is required. It can be seen from the Annexure-A, import goods except goods at Sl No. 7, 11 & 15, contain protein more than 70%. Hence these products can be classified as protein concentrates under CTH 21061000.

41. Learned AR argued that finalization of classification issue was under the competency of the adjudicating authority and the finalization on valuation issue was under SVB. That is the reason, the adjudicating authority in the order portion mentioned that "this order is issued without prejudice to the outcome of the issue of supplies from related party which is to be decided by the Special Valuation Branch, Mumbai".

42. Learned AR argued that it is not forthcoming whether the appellant have submitted labels of all their products, bills of materials, etc. before the adjudicating authority. It can be definitely said that all bills of materials submitted by the appellant before this hon"ble Tribunal are issued on 18-08-2022. These were not produced before the adjudicating authority or before the first appellate authority.

FINDINGS:

43. We have considered the rival submissions. After raising the ground of assessment being

provisional and piecemeal finalisation of assessment the appellants have given up this issue. The Ld counsel has sought that the issue of classification may be finalised by the tribunal as is apparent from the submissions recorded in para 30 above.The submission in this regard is reproduced below:

"Having said the foregoing, in order to conclude the classification dispute, it is most respectfully prayed before this Hon"ble Tribunal to pass orders on the classification of the impugned goods determinatively."

In view of above, we proceed to decide the classification issue despite the assessment being provisional on account of Valuation.

44 The following table contains the classification sought by the appellant and the classification adjudicated by the Revenue.

S.No.	Product Name	Department"s Classification	Appellant"s Classification
1.	BSN Syntha 6 Chocolate	21061000	18069040
2.	BSN Truemass 1200 Chocolate	21061000	18069040
3.	Isopure Low Carb – Chocolate	21061000	18069040
4.	Isopure Zero Carb – Chocolate Mint	21061000	18069040
5.	Optimum Nutrition 100% Casein- Chocolate Supreme	21061000	18069040
6.	Optimum Nutrition 100% Whey Gold Standard- Chocolate	21061000	18069040
7.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Hazelnut	21061000	18069040
8.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Malt	21061000	18069040
9.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Mint	21061000	18069040
10.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Peanut Butter	21061000	18069040
11.	Optimum Nutrition 100% Whey Gold Standard- Cookies and Cream	21061000	18069040
12.	Optimum Nutrition 100% Whey Gold Standard- Double Rich Chocolate	21061000	18069040
13.	Optimum Nutrition 100% Whey Gold Standard Isolate – Chocolate	21061000	18069040
14.	Optimum Nutrition 100% Whey Gold Standard Isolate – Chocolate Bliss	21061000	18069040
15.	Optimum Nutrition 100% Whey Gold Standard- Mocha Cappuccino	21061000	18069040
16.	Optimum Nutrition 100% Whey Gold Standard- Rocky Road	21061000	18069040
17.	Optimum Nutrition Serious Mass – Chocolate	21061000	18069040

45 The appellants have themselves ruled out the classification under chapter 4 or chapter 35 of the Customs tariff as the said headings do not relate to food preparations. In the written submissions they have argued as follows:

"B.2 Nature of food preparation: In the present case, on perusal of the Bills of Material and Labels available on **Page 288 and Page 273 of Additional Paper Book**, respectively, constituents of the impugned goods have undergone a process to make them independent of its constituents [**Process Chart**, *Additional Paper Book*, p. 305]. Hence, the impugned goods are in the nature of "*food preparations*". This fact is undisputed between the parties. It is on this ground alone, classification under CTH 3502 and CTH 3504 of Customs Tariff are ousted as they do not relate to food preparations [***HSN Explanatory Notes to CTH 3502***, **Para (1), pg. VI-3502-1**; and ***HSN Explanatory Notes to 3502*, Para B (6), pg. VI- 3504-1**] [*Compilation*, p. 33-34]

B.4 Coming to classification under CTH 1901, the impugned goods contain albumin and other protein concentrates which are acting as the base material [**Bill(s) of Material**, *Additional Paper Book*, p. 288-287].In other words, the impugned goods are food preparations of having constituent ingredients from CTH 3502 and CTH 3504, and are not food preparations of CTH 0401 to CTH 0404. Thus, it is submitted that the impugned goods do not satisfy the condition of classification under CTH 1901 of Customs Tariff. Furthermore, cocoa used in the food preparation is not defatted cocoa."

They have themselves argued that the impugned goods are food preparations having constituent ingredients from CTH 3502 and CTH 3504 and are not food preparations of CTH 0401 to CTH 0404. They have also argued that the impugned goods do not satisfy the condition of classification under CTH 1901 of the Customs Tariff Act. They have also argued that the coco used by them in the food preparation is not defatted coco as required for classification under heading 1901. In view of the above, the only contesting classification that remain are CTH 1806 and CTH 2106.

46 In this regard the competing heading in the schedule to Custom Tariff Act 1975 in the instant case are reproduced below:

1806	**CHOCOLATE AND OTHER FOOD PREPARATIONS CONTIANING COCOA**			
1806 10 00	- Cocoa powder and other food preparations	Kg.	30%	-
1806 20 00	- containing coca		30%	-
	- Other preparations in blocks, slabs or bars weighing more than 2 kg or in liquid, paste, powder, granular or other bulk form in containers or immediate packings, of a content exceeding 2 kg.	Kg.		
	- Other, in blocks, slabs or bars:			
	-- Filled			
1806 31 00	-- Not filled		30%	-
1806 32 00	- Other:		30%	-
1806 90	--- Chocolate and chocolate products	Kg.		
1806 90 10	--- Sugar confectionary containing cocoa	Kg.	30%	-
1806 90 20			30%	-
		Kg.		

		Kg.		
1806 90 30	--- Spreads containing cocoa	Kg.	30%	-
1806 90 40	--- **Preparations containing coca for making beverages**	Kg.	30%	-
1806 90 90	--- Other	Kg.	30%	-

2106	**FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED**			
2106 1000	- **Protein concentrates and textured protein substances**	Kg.	40%	-
2106 90	- Other :			-
2106 90 11	--- Soft drink concentrates :			-
2106 90 19	---- Sharbat		150%	-
2106 90 20	---- Other	Kg.	150%	-
2106 90 30	--- Pan masala	Kg.	150%	-
2106 90 40	--- Betel nut product known as “Supari”		150%	-
2106 90 50	--- Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrin syrup	Kg.	150%	-
2106 90 60	--- Compound preparations for making non-alcoholic beverages	Kg.	150%	-
2106 90 70	--- Food flavouring material		150%	-
2106 90 80	--- Churna for pan		150%	-
2106 90 91	--- Custard powder --- Other :	Kg.	150%	-
2106 90 92	---- Diabetic foods		150%	-
2106 90 99	---- Sterilized or pasteurized millstone	Kg.	150%	-
	---- Other	Kg.	150%	

		Kg. Kg. Kg. Kg.		

The products imported by the appellant are essentially Protein Concentrates of Whey Protein with additives, in different proportions. The other additives to the product can be of various kinds like flavouring agents, stabilisers etc. The argument of the appellant is that the description of Customs Tariff Heading 2106 which reads as under

"CHOCOLATE AND OTHER FOOD PREPARATIONS CONTIANING COCOA "

is more appropriate classification for the „Protein Concentrates containing Cocoa" as compared to the Customs Tariff Heading 1806 which reads as under

"FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED".

While doing so the Ld counsel has totally ignored the Supplementary Note 5(a) to Chapter 21. It is seen that the Supplementary Notes appearing in Chapter 21 distinguish the Chapter 21 of Customs Tariff from the Chapter 21 of the HSN (para 49 below). It is seen that in the entire appeal as well as written submissions the appellant has not dealt with the Supplementary Notes to Chapter 21. The argument of the appellants that while other „Protein Concentrates" imported by them are classifiable under Customs Tariff Heading 2106 (Sub Heading 2106 1000), the „Protein Concentrates containing Cocoa" are classifiable under Customs Tariff Heading 1806 (Sub Heading 1806 9040). This claim is solely based on the HSN ignoring the Supplementary Notes to Chapter 21. The competing subheadings are as follows

1806 **1806 90 40**	**CHOCOLATE AND OTHER FOOD PREPARATIONS CONTIANING COCOA** --- **Preparations containing coca for making beverages**	Kg.	30%	-

2106	**FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED**			
2106 1000	**- Protein concentrates and textured protein substances**	Kg.	40%	-

The heading 2106 is qualified by the Supplementary notes to Chapter 21. Therefore the Heading 2106 needs to be read with Supplementary Note 5(a) in terms of rule 1 of the Rules of Interpretation of Customs Tariff as discussed in para 49 onwards below..

47. Whey proteins are available in different flavours like Double Rich Chocolate, Chocolate Bliss, Cream Vanilla, Delicious Strawberry, Vanilla Ice-Cream, Mocha Cappuccino etc.The appellant has described the goods in the appeal memorandum as follows:

"The appellant is primarily engaged in the business of importing and selling nutritional supplements in India. In this regard, the appellant imported certain nutritional supplements containing cocoa, glutamine powder, creatine powder and certain unflavoured nutritional supplements from M/s Glanbia Nutritionals (Ireland) Ltd. The basic raw material of nutritional supplements imported by the appellant is „WHEY"."

Ld Counsel has described the product as "**chocolate protein powders/chocolate-flavoured protein powders"** as can be seen from his submissions in para 6 above.These powders are used by the athletes and sport persons as food supplements to supplement their protein intake. **The argument of the appellants is that mere presence of cocoa in the impugned products rules out classification under heading 2106 and takes it into heading 1806**.

48 Such Protein Concentrates of Whey Protein are made in many flavours like Double Rich Chocolate, Chocolate Bliss, Cream Vanilla, Delicious Strawberry, Vanilla Ice-Cream, Mocha Cappuccino etc. The compositions and the main ingredients of all such products is similar. **All such products, except those containing cocoa, are classified by appellants themselves under heading 2106.** The dispute is solely related to the Protein Concentrates of Whey Protein containing some amount of cocoa. The appellants are seeking to classify the same under heading 1806. The assertion is based on the Chapter and heading notes of the HSN to chapter 18 and 21 and some decisions of foreign countries and international bodies.

49 To examine the issue the comparative chart of relevant chapter notes appearing in HSN as compared to those appearing in Customs Tariff is reproduced below

COMPARISON OF CHAPTER 21 OF HSN with THE CHAPTER 21 OF THE CUSTOMS TARIFF

CHAPTER NOTES OF CHAPTER 21 OF CUSTOMS TARIFF ACT	**CHAPTER NOTES OF CHAPTER 21 OF HSN**
MISCELLANEOUS EDIBLE PREPARATIONS	**MISCELLANEOUS EDIBLE PREPARATIONS**
NOTES:-	**CHAPTER NOTES:-**

1.- This Chapter does not cover : (a)Mixed vegetables of heading 0712; (b) Roasted coffee substitutes containing coffee in any proportion (heading 0901); (c) Flavoured tea (heading 0902); (d) Spices or other products of headings 0904 to 0910; (e) Food preparations, other than the products described in heading 2103 or 2104, containing more than 20 % by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (Chapter 16); (f) Yeast put up as a medicament or other products of heading 3003 or 3004; or (g) Prepared enzymes of heading 3507.	1.- This Chapter does not cover : (a)Mixed vegetables of heading 0712; (b) Roasted coffee substitutes containing coffee in any proportion (heading 0901); (c) Flavoured tea (heading 0902); (d) Spices or other products of headings 0904 to 0910; (e) Food preparations, other than the products described in heading 2103 or 2104, containing more than 20 % by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (Chapter 16); (f) Yeast put up as a medicament or other products of heading 3003 or 3004; or (g) Prepared enzymes of heading 3507.
2.- Extracts of the substitutes referred to in Note 1 (b) above are to be classified in heading 2101.	2.- Extracts of the substitutes referred to in Note 1 (b) above are to be classified in heading 2101.
3.- For the purposes of heading 21.04, the expression “homogenised composite food preparations” mean s preparations consisting of a finely homogenised mixture of two or more basic ingredients such as meat, fish, vegetables or fruit, put up for retail sale as	3.- For the purposes of heading 21.04, the expression “homogenised composite food preparations” mean s preparations consisting of a finely homogenised mixture of two or more basic ingredients such as meat, fish, vegetables or fruit, put up for retail sale as
infants or young children or for dietetic purposes, in containers of a net weight content not exceeding 250g. For the application of this definition, no account is to be taken of small quantities of any ingredients which may be added to the mixture for seasoning, preservation or other purposes. Such preparations may contain a small quantity of visible pieces of ingredients.	infants or young children or for dietetic purposes, in containers of a net weight content not exceeding 250g. For the application of this definition, no account is to be taken of small quantities of any ingredients which may be added to the mixture for seasoning, preservation or other purposes. Such preparations may contain a small quantity of visible pieces of ingredients.

SUPPLEMENTRY NOTES : 1. In this Chapter, "Pan masala" means any preparation containing betel nuts and any one or more of the following ingredients, namely: lime, katha (catechu) and tobacco whether or not containing any other ingredient, such as cardamom, copra or menthol. 2. In this Chapter "betel nut product known as Supari" means any preparation containing betel nuts, but not containing any one or more of the following ingredients, namely: lime, katha (catechu) and tobacco whether or not containing any other ingredients, such as cardamom, copra or menthol. 3. For the purposes of tariff item 2106 90 11, the expression "Sharbat" means any non-alcoholic sweetened beverage or syrup containing not less than 10% fruit juice or flavoured with non-fruit flavours, such as rose, Khus, Kevara, but not including aerated preparations. 4. Tariff item 2106 90 50, inter alia, includes preparations for lemonades or other beverages, consisting, for example, of flavoured or coloured syrup, syrup flavoured with an added concentrated extract, syrup flavoured with fruit juice and intended for use in the manufacture of aerated water, such as in automatic vending machines. 5. **Heading 2106 (except tariff items 2106 90 20 and 2106 90 30), inter alia, includes:** **(a) protein concentrates and textured protein substances;** (b) preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk or other liquids), for human consumption; (c) preparations consisting wholly or partly of foodstuffs, used in the making of beverages of food preparations for human consumption;	

(d) powders for table creams, jellies, ice-creams and similar preparations, whether or not sweetened; (e) flavouring powders for making beverages, whether or not sweetened; (f) preparations consisting of tea or coffee and milk powder, sugar and any other added ingredients; (g) preparations (for example, tablets) consisting of saccharin and foodstuff, such as lactose, used for sweetening purposes; (h) pre-cooked rice, cooked either fully or partially and their dehydrates; and (i) preparations for lemonades or other beverages, consisting, for example, of flavoured or coloured syrups, syrup flavoured with an added concentrated extract, syrup flavoured with fruit juices and concentrated fruit juice with added ingredients. 6. Tariff item 2106 90 99 includes sweet meats commonly known as "Misthans" or "Mithai" or called by any other name. They also include products commonly known as "Namkeens", "mixtures", "Bhujia", "Chabena" or called by any other name. Such products remain classified in these sub-headings irrespective of the nature of their ingredients.	

COMPARISON of CHAPTER 18 of HSN with THE CHAPTER 18 OF THE CUSTOMS TARIFF

CHAPTER NOTES OF CHAPTER 18 OF CUSTOMS TARIFF ACT	**CHAPTER NOTES OF CHAPTER 18 OF HSN**
NOTES:-	**NOTES:-**
1. This Chapter does not cover the preparations of headings 0403, 1901, 1904, 1905, 2105, 2202, 2208, 3003 and 3004.	1. This Chapter does not cover the preparations of heading 04.03, 19.01, 19.04, 19.05, 21.05, 22.02, 22.08, 30.03 or 30.04.
2. Heading 1806 includes sugar confectionary containing cocoa and, subject to Note 1 to this Chapter, other food preparations containing cocoa.	2. Heading 18.06 includes sugar confectionery containing cocoa and, subject to Note 1 to this Chapter, other food preparations containing cocoa.
Not alligned	**GENERAL**

	This Chapter covers cocoa (including cocoa beans) in all
	forms, cocoa butter, fat and oil and preparations containing cocoa (in any proportion), **except**: (a) Yogurt and other products of **heading 04.03**. (b) White chocolate (**heading 17.04**). (c) Food preparations of flour, groats, meal, starch or malt extract, containing less than 40% by weight of cocoa calculated on a totally defatted basis, and food preparations of goods of headings 04.01 to 04.04 containing less than 5% by weight of cocoa calculated on a totally defatted basis, of **heading 19.01**. (d) Swelled or roasted cereals containing not more than 6% by weight of cocoa calculated on a totally defatted basis (**heading 19.04**). (e) Pastry, cakes, biscuits and other bakers' wares, containing cocoa (**heading 19.05**). (f) Ice cream and other edible ice, containing cocoa in any proportion (**heading 21.05**). (g) Beverages, non-alcoholic or alcoholic (e.g, "crème de cacao"), containing cocoa and ready for consumption (**Chapter 22**). (h) Medicaments (**heading 30.03 or 30.04**). The Chapter also excludes theobromine, an alkaloid extracted from cocoa (**heading 29.39**).

50. The dispute in the instant case relates to classification. For the purpose of classification, the Custom Tariff Act prescribes the general rules of interpretation. Rule 1, 2 and 3 of the said Rules are reproduced below:

"Classification of goods in the Nomenclature shall be governed by the following principles:

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only, for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule). presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

3. When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the beading which occurs last in numerical order among those which equally merit consideration."

We agree with the proposition made by the Ld counsel reproduced in para 8 above that product is to be classified basis the condition in which such goods are presented for clearance to the Customs Authorities referred to in para 8 above. He relied on the following

(i) ***Taj Sats Air Catering Ltd. v. CC Ex., Delhi-II*, 2016 (334) E.L.T. 680 (Tri-Del.)**;

(ii) **Circular 36/2013-Cus. Dated 05.09.2013**

We also agree to the proposition referred in para 8 above to the effect that the appropriate classification of goods is determined by following the General Rules for the Interpretation of Import Tariff which must be applied sequentially. We also agree in principle to the proposition that only if classification cannot be made following Rule 1, can resort be made to rule 2, and thereafter only if classification cannot be made by following rule 1 or 2 can a recourse to rule 3 be made, and so on.We also find support for this proposition in the following decisions

(i) In the case of CCE Nagpur vs Simplex Mills Co Ltd. 2005 (181) ELT 345 SC Hon"ble Apex Court has observed as follows:

"11.The rules for the interpretation of the Schedule to the Central Excise Tariff Act, 1985 have been framed pursuant to the powers under Section 2 of that Act. ***According to Rule 1 titles of Sections and Chapters in the Schedule are provided for ease of reference only. But for legal purposes, classification "shall be determined according to the terms of the headings and any relevant section or Chapter Notes". If neither the heading nor the notes suffice to clarify the scope of a heading, then it must be construed according to the other following provisions contained in the Rules. Rule-I gives primacy to the Section and Chapter Notes along with terms of the headings. They should be first applied. If no clear picture emerges then only can one resort to the subsequent rules.*** *The appellants have relied upon Rule 3. Rule 3 must be understood only in the context of sub-rule (b) of Rule 2 which says inter alia that the classification of goods consisting of more than one material or substance shall be according to the principles contained in Rule*

3. Therefore when goods are prima facie, classifiable under two or more headings, classification shall be effected according to sub-rules (a), (b) and (c) of Rule 3 and in that order. The sub-rules are quoted :-

"(a) The heading which provides the most specific description shall be preferred to heading providing a more general description. However when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in the numerical order among those which equally merit consideration."

12.*Applying the Rules of Interpretation particularly Rule 1, we are of the opinion that the reasoning of the Tribunal in Jyoti Overseas is unexceptionable and in our opinion the decision in Simplex-I was correctly overruled."*

(ii) The Hon"ble Apex Court in the case of C.C. Amritsar vs D.L. Steels 2022 (381) ELT 289 (SC) has observed as follows:

"10.*Classification under the Harmonised System is done by placing the good under the most apt and fitting sub-heading. This is done by choosing the appropriate Chapter, Heading, and sub-heading respectively. To facilitate interpretation and classification, each of the 97 Chapters in the HSN contain corresponding Chapter Notes, General Notes, and Explanatory Notes applicable to the Headings and sub-headings within that Chapter. In addition, there are six General Rules of Interpretation applicable to the Harmonised System as a whole.*

11.GRI-1 states that the titles of Sections, Chapters, and sub-chapters are provided for ease of reference only. Therefore, they have no legal bearing on classification. Classification is to be effected : (a) according to the terms of the Headings and any relative Section or Chapter Notes; and, (b) provided the Headings or Chapter Notes do not otherwise require according to the provisions thereinafter contained, viz., GRIs 2 to 6. Thus, it is clear from the above that : (i) the Headings, and, (ii) the relative Section or Chapter Notes must be considered before classification is done. Only after this exercise is done, if a conflict in classification still persists, the subsequent GRIs are to be resorted to. *GRI-2 is not germane to the present case and therefore, we make no reference to it. GRI-3 provides for classification in the event when the goods are classifiable under two or more Headings. As per GRI-3, when by application of GRI-2(b) or for any other reason, the goods are, prima facie, classifiable under more than one Heading, then; (a) the „most specific description" is preferred, (b) a mixture of different goods will be classified as that good which gives the mixture its*

„essential characteristic", and (c) when goods cannot be classified with reference to (a) or (b), they should be classified under the Heading which occurs last in the numerical order. The order of priority therefore is; (a) specific description, (b) essential character, and (c) the Heading which occurs last in numerical order. However, GRI-3 can only take effect provided the terms of the

Heading or Section or Chapter Notes do not otherwise require. GRI-4 states that when the goods cannot be classified in accordance with the aforementioned rules, they shall be classified under the heading appropriate for the goods "to which they are most akin". GRI-5 applies exclusively to cases and packing material, and therefore, is not apropos. GRI-6 states that the classification of goods in the sub-headings of a Heading shall be determined according to the terms of those sub-headings and any related Notes, and mutatis mutandis to the above GRIs, on the understanding that only sub-headings at the same level are comparable."

(iii) In the case of Westinghouse Saxby Farmers Ltd. 2021 (376) ELT 14 (SC) the Hon"ble Apex Court has observed as follows:

"31.But in invoking General Rule 3(a), the Authorities have omitted to take note of 2 things. They are : (i) that as laid down by this Court in *Commissioner of Central Excise* v. *Simplex Mills Co. Ltd.* [(2005) 3 SCC 51 = 2005

(181) E.L.T. 345 (S.C.)] the General Rules of Interpretation will come into play, as mandated in Rule 1 itself, only when no clear picture emerges from the terms of the Headings and the relevant section or chapter notes; and (ii) that in any case, Rule 3 of the General Rules can be invoked only when a particular goods is classifiable under two or more Headings, either by application of Rule 2(b) or for any other reason. Once the authorities have concluded that by virtue of Note 2(f) of Section XVII,

„relays' manufactured by the appellant are not even classifiable under Chapter Heading 8608, we do not know how the Authorities could fall back upon Rule 3(a) of the General Rules. There is a fundamental fallacy in the reasoning of the Authorities, that Rule 3(a) of the General Rules will apply, especially after they had found that „relays" are not classifiable under Chapter Heading 8608, on account of Note 2(f) of Section XVII."

In all the aforesaid cases, it has been held that when the classification can be made on the basis of Interpretative Rule 1, there is no need to go for rule 2 to 6.

51. The Hon Apex court has held in many cases that if there is a difference between the chapter notes and Section notes of the Customs Tariff and the chapter notes and Section notes appearing in HSN, then those appearing in the Customs Tariff take precedence over those appearing in the HSN. In other words HSN can be relied for the purposes of classification under Customs Tariff only if the HSN is harmonised with the Customs Tariff.

(i)We find that Hon"ble Apex Court in the case of Global Healthcare Products 2015 (322) ELT 365 (SC) has observed as follows:

"10. The Commissioner, thus, noted that in the HSN Notes, sub-heading 3306.10 deals with dentifrices. The Commissioner noted that the meaning of dentifrices as per the Concise Oxford Dictionary is *„a paste or powder for cleaning of teeth"*. On that basis, he concluded that the product in question was paste, namely, the toothpaste for cleaning the teeth and, therefore, would fall under sub- heading 3306.10. *En passe*, the Commissioner also observed that there is no major difference in these products, namely, Close-Up Whitening and Close-Up Red/Blue/Green, except one ingredient used in the manufacture of Close-Up Whitening and the addition of that ingredient does not change the purpose, nature as well as definition of the product in a common market parlance. He observed that in the market the product was known as toothpaste. He also observed that it is treated as toothpaste as per the product manual issued by the Dental Invocation Centre, Mumbai. Discussion is summed up in para 32 of the order passed by the Commissioner, which reads as under :

"32. As narrated in the SCN that the tooth paste, being dentifrice has been correctly classified under the HSN and the Central Excise Tariff has been based on HSN. Accordingly it is essential to follow the correct classification of the product in question as described and classified under the relevant chapter of HSN. In this connection it may be mentioned that the Hon"ble Supreme Court in the case of *CCE, Shillong* v. *Wood Craft Product Ltd.* reported in 1995

(77) E.L.T. 23 (S.C.) in para 18 has held that the structure of Central Excise Tariff is based on the internationally accepted nomenclature found in the HSN and therefore, any dispute relating to tariff classification must, as far as possible be resolved with reference to the nomenclature indicated by

the HSN unless there be an express different intention indicated in the Central Excise Tariff Act, 1985 itself.

Further it may be mentioned that the Hon‟ble Bombay High Court in the case of *Jagdish D. Devgekar* v. *Collector of Central Excise, Poona* reported in 1978 (2) E.L.T. (J581) in para 6 has held that the correct test in interpreting any item mentioned in the First Schedule to the Central Excise Act is to see the commercial sense in which the item is understood or the sense in which traders or persons dealing in that terms understand it and not the technical or scientific sense.

Even it may be mentioned that the Hon‟ble Tribunal in case *Veto Co.* v. *CCE* reported in 1992 (62) E.L.T. 584 (T) in para 6 has held that the goods have to be classified under the tariff schedule according to their popular meaning or as they are understood in their commercial sense and not as per their scientific or technical meaning. While holding so the Hon‟ble Tribunal has referred to the observations of the Hon‟ble Supreme Court‟s judgment in case of *Plasmac Machine Mfg. Co. Pvt. Ltd.* v. *CCE* reported in 1991 (51)

E.L.T. 161 (S.C.) (Para 13).”

> **11. The aforesaid approach adopted by the Commissioner has been found fault with by the Tribunal. The Tribunal pointed out that there was material difference in the sub-heading 3306.10 in the Indian statute when contrasted with Harmonized Commodity Description and Coding System. Whereas, as per the Tariff Entry 3306.10 in the Excise Act, it is „*tooth powder*‟ and „*toothpaste*‟, under the Harmonized Commodity Description and Coding System, what is mentioned is „*dentifrices*‟. It is further noticed by the Tribunal that dentifrices was more generic in nature as it recognized all three types of products, namely, (i) toothpaste, (ii) other preparations for teeth and (iii) denture cleaners, than tooth powders and toothpaste. Thus, when under Indian statutory regime there is a restricted sub-heading under 3306.10, namely, tooth powder and toothpaste only, the approach of the Commissioner in taking aid of HSN Notes was erroneous. Discussion on this aspect runs as follows**:

“A perusal of the HSN notes would indicate that all three types of „Dentifrices‟ are recognized as (i) „Toothpaste‟, (ii) Other preparations for teeth, and (iii) „Denture cleaners‟. The Note further explains that “Dentifrices” to include „toothpaste‟ and “other preparations for teeth” whether for cleaning or polishing the assessable surface of teeth or for other purposes such an Anticaries prophylactic treatment. The Note also enumerates that „toothpaste‟ and „other preparations for teeth‟ remains classified under Heading 3306 whether or not they contain abrasives and whether or not they are used by dentist. The correct scope of the heading as per the submission of the appellants is that when one refers to HSN Item 3306 and the bifurcations as also under CETA, 1985 there is a variance seen. In other words, this bifurcation under Heading 3306 for HSN and is not *pari materia* and under CETA, 1985 and therefore, the sub-heading structure of HSN would not apply to CETA.

The CETA proves preparation for oral or dental hygiene including Dentifrices and Denture Fixative paste and powders under Heading 3306 and at the four digit level it is para material HSN. The scope of sub-heading 3306.10 of CETA, 1985 restricts it to only

„tooth powder and paste‟ and any entity which is not a „toothpowder or toothpaste‟ would be covered under Heading 3306.90. This submission has to be upheld.”

We find ourselves in agreement with the aforesaid approach of the Tribunal having regard to the cogent reasons given by it.

> **12.** This Court in the case of *Camlin Limited* v. *Commissioner of Central Excise, Mumbai* - (2008) 9 SCC 82 = 2008 (230) E.L.T. 193 (S.C.) held that if the entries under HSN and the entries under the Central Excise Tariff are different, then reliance cannot be placed upon HSN Notes for the purposes of classification of goods under Central Excise Tariff. This is so stated in para 24 of the judgment that makes the following reading :

“24. In our considered view, the Tribunal erred in relying upon the HSN for the purpose of marker inks in classifying them under Chapter sub-heading 3215.90 of the said Tariff. The Tribunal failed

to appreciate that the entries under the HSN and the entries under the said Tariff are completely different. As mentioned above, it is settled law that when the entries in the HSN and the said Tariff are not aligned, reliance cannot be placed upon HSN for the purpose of classification of goods under the said Tariff. One of the factors on which the Tribunal based its conclusion is the entries in the HSN. The said conclusion in the order of the Tribunal is, therefore, vitiated and, accordingly, set aside. We agree with the findings recorded by the Commissioner (Appeals)."

(iii) Hon"ble Apex Court in the case of Camlin 2008 (230) ELT 193 (SC) has observed as follows:

"26. In our considered view, the Tribunal erred in relying upon the HSN for the purpose of marker inks in classifying them under Chapter Sub-Heading 3215.90 of the said Tariff. The Tribunal failed to appreciate that the entries under the HSN and the entries under the said Tariff are completely different. As mentioned above, it is settled law that when the entries in the HSN and the said Tariff are not aligned, reliance cannot be placed upon HSN for the purpose of classification of goods under the said Tariff. One of the factors on which the Tribunal based its conclusion is the entries in the HSN. The said conclusion in the Order of the Tribunal is, therefore, vitiated and, accordingly, set aside. We agree with the findings recorded by the Commissioner (Appeals)."

(iii) From the above decisions of Hon"ble Apex Court, it is apparent that reliance on the HSN Section Notes, Chapter Notes and Explanatory Notes can be placed only when the Customs Tariff is harmonized with HSN. Wherever there is a difference between the Customs Tariff and HSN reliance cannot be placed on HSN Section Notes, Chapter Notes and Explanatory Notes for the purpose of classification. In such cases reliance is to be placed on the Chapter Notes and Section Notes appearing in the Customs Tariff. The appellants have also relied on the decision of Tribunal in the case of Anutham Exim P. Ltd. 2021 (378) ELT 611 (T-Kol.). In the said decision also in para 13 following has been observed:

"13. The Schedule to the Customs Tariff Act, 1975 (commonly referred to as Customs Tariff) is based on, although it is not identical to, the Harmonised System of Nomenclature (HSN) - an internationally recognised scientific method of classifying all goods. Sometimes there are differences between the HSN and the Customs Tariff in which case, the latter is relevant for determining the duty liability under the Customs Act. In view of the explanation to this effect in the IGST Notification specifying the rates of IGST chargeable on different goods, IGST is also to be charged as per the classification under the Customs Tariff. Customs Tariff, groups goods into Sections, each of which is further divided into Chapters with a two digit Chapter number. Within each Chapter, there are four digit headings which are further divided into six digit and still further divided into eight digit tariff headings."

Thus even going by the decision cited by the appellant, it is seen that no reliance can be placed on HSN when the Schedule to the Customs Tariff Act is not aligned with the HSN.

52. It is seen that there are major differences between Customs Tariff and the HSN in respect of Chapter 21. A comparative table of the Chapter Notes appearing in Customs Tariff and the HSN is reproduced in para 49 above. It is noticed that while the Customs Tariff contains supplementary notes in Chapter 21, there are no such notes in the HSN. While supplementary notes are there in Chapter 21 of the Customs Tariff Act the same are not appearing in the HSN. In the HSN, there are only three chapter notes, which are as follows:

"**Chapter Notes to Chapter 21 of HSN (Harmonized System of Nomenclature)**

1- This Chapter does not cover:

(a) Mixed vegetables of heading 07.12;

(b) Roasted coffee substitutes containing coffee in any proportion (heading 09.01):

(c) Flavoured tea (heading 09.02);

(d) Spices or other products of headings 09.04 to 09.10;

(e) Food preparations, other than the products described in heading 21.03 or 21.04. containing more than 20% by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluses or other aquatic invertebrates, or any combination thereof (Chapter 16);

(f) Yeast put up as a medicament or other products of heading 30.03 or 30.04; or

(g) Prepared enzymes of heading 35.07.

2- Extracts of the substitutes referred to in Note 1 (b) above are to be classified in heading 21.01.

3- For the purposes of heading 21.04, the expression" homogenised composite food preparations" means preparations consisting of a finely homogenised mixture of two or more basic ingredients such as meat, fish, vegetables or fruit, put up for retail sale as infant food or for dietetic purposes, in containers of a net weight content not exceeding 250 g. For the application of this definition, no account is to be taken of small quantities of any ingredients which may be added to the mixture for seasoning. preservation or other purposes. Such preparations may contain a small quantity of visible pieces of ingredients."

In the Custom Tariff Act, notes apart from three chapter notes there are additional „Supplementary Notes‟ whichreads as follows:

"SUPPLEMENTRY NOTES :

1. In this Chapter, "Pan masala" means any preparation containing betel nuts and any one or more of the following ingredients, namely: lime, katha (catechu) and tobacco whether or not containing any other ingredient, such as cardamom, copra or menthol.

2. In this Chapter "betel nut product known as Supari" means any preparation containing betel nuts, but not containing any one or more of the following ingredients, namely: lime, katha (catechu) and tobacco whether or not containing any other ingredients, such as cardamom, copra or menthol.

3. For the purposes of tariff item 2106 90 11, the expression "Sharbat" means any non-alcoholic sweetened beverage or syrup containing not less than 10% fruit juice or flavoured with non-fruit flavours, such as rose, Khus, Kevara, but not including aerated preparations.

4. Tariff item 2106 90 50, inter alia, includes preparations for lemonades or other beverages, consisting, for example, of flavoured or coloured syrup, syrup flavoured with an added concentrated extract, syrup flavoured with fruit juice and intended for use in the manufacture of aerated water, such as in automatic vending machines.

5. **Heading 2106 (except tariff items 2106 90 20 and 2106 90 30), inter alia, includes:**

(a) protein concentrates and textured protein substances;

(b) preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk or other liquids), for human consumption;

(c) preparations consisting wholly or partly of foodstuffs, used in the making of beverages of food preparations for human consumption;

(d) powders for table creams, jellies, ice-creams and similar preparations, whether or not sweetened;

(e) flavouring powders for making beverages, whether or not sweetened;

(f) preparations consisting of tea or coffee and milk powder, sugar and any other added ingredients;

(g) preparations (for example, tablets) consisting of saccharin and foodstuff, such as lactose, used for sweetening purposes;

(h) pre-cooked rice, cooked either fully or partially and their dehydrates; and

(i) preparations for lemonades or other beverages, consisting, for example, of flavoured or coloured syrups, syrup flavoured with an added concentrated extract, syrup flavoured with fruit juices and concentrated fruit juice with added ingredients.

6. Tariff item 2106 90 99 includes sweet meats commonly known as "Misthans" or "Mithai" or called by any other name. They also include products commonly known as "Namkeens", "mixtures", "Bhujia", "Chabena" or called by any other name. Such products remain classified in these sub-headings irrespective of the nature of their

ingredients."

These supplementary notes appearing in Custom Tariff are not part of the HSN. In this background it is seen that the Customs Tariff Act is not aligned to the HSN (Harmonized System of Nomenclature) on account of the text contained in supplementary notes to Chapter 21**. Thus it is seen that Government of India has deliberately chosen to deviate from the Harmonised System of Nomenclature (HSN).By this Supplementary note the Government of India has chosen to enlarge the scope of the Heading 2106 by specifically including in it the various items listed in Supplementary note. In view of deliberate changes made in the Customs Tariff the HSN notes lose their relevance.**

53. The Supplementary notes of Chapter 21 of the Schedule to the Custom Tariff Act prescribes at S.No. 5(a) that „Protein Concentrate and Textured Protein Substances" would fall under heading 2106.The heading 2106 of the Custom Tariff Act reads as follows:

2106	**FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED**			
2106 1000	-Protein concentrates and textured protein substances	Kg.	40%	-
2106 90				
2106 90 11	- Other :			-
2106 90 19	--- Soft drink concentrates :			-
2106 90 20	---- Sharbat		150%	-
2106 90 30	---- Other	Kg.	150%	-
2106 90 40	--- Pan masala		150%	-
	--- Betel nut product known as "Supari"	Kg.	150%	-
2106 90 50	--- Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrin syrup	Kg.	150%	-
2106 90 60	--- Compound preparations for making non-alcoholic beverages	Kg.	150%	-
2106 90 70	--- Food flavouring material	Kg.	150%	-
2106 90 80	--- Churna for pan		150%	-
2106 90 91	--- Custard powder		150%	-
2106 90 92	--- Other :	Kg.	150%	-
2106 90 99	---- Diabetic foods	Kg.	150%	-
	---- Sterilized or pasteurized millstone	Kg.		
	---- Other	Kg.		
		Kg.		
		Kg.		
		Kg.		
		Kg.		

It is seen that OIA in the instant case relies on Supplementary Note 5(a) and interpretative Rule1 for the purpose of classifying the Protein Concentrates containing coco imported by the appellant under Heading 2106. There is no argument made in the appeal memorandum or in the written submissions of the appellant as to why the Supplementary Note 5(a) should not be followed in the instant case. It is apparent from the above reading of supplementary note 5(a) to Chapter 21 and that the "Protein Concentrate and Textured Protein Substances" would fall under the "heading 2106". It is seen that the sub heading 21061000 of Customs Tariff (just like HSN) specifically covers "Protein Concentrates and Textured Protein Substances", still a chapter supplementary note was introduced to place the „Protein Concentrate and Textured Protein Substances"under heading 2106. It is noted that the supplementary Note 5(a) does not prescribe that "Protein Concentrate and Textured Protein Substances" would fall under „sub heading 2106 1000" but it clearly states that "Protein Concentrate and Textured Protein Substances" would fall under „Heading 2106". This provision in the chapter notes has been prescribed specifically to place "Protein Concentrate and Textured Protein Substances" under the „heading 2106". Any other interpretation would make the said note 5(a) redundant since these goods are as it is covered under sub heading 2106 1000 in the tariff itself. In other words there was no need of the Supplementary Note 5(a) if the goods are already covered under sub heading 2106 1000. Hon"ble Supreme Court in the case of Oswal Agro Mills Ltd. 1993 (66) ELT 37 (SC) has observed as follows:

3. The provisions of the Tariff do not determine the relevant entity of the goods. They deal whether and under what entry, the identified entity attracts duty. The goods are to be identified and then to find the appropriate heading, sub-heading under which the identified goods/products would be classified. To find the appropriate classification description employed in the tariff nomenclature should be appreciated having regard to the terms of the headings read with the relevant provisions or statutory rules of interpretation put up thereon. For exigibility to excise duty the entity must be specified in positive terms under a particular tariff entry. In its absence be deduced from a proper construction of the tariff entry. There is neither intendment nor equity in a taxing statute. Nothing is implied. Neither can we insert nor anything can we delete but it should be interpreted and construed as per the words the legislature has chosen to employ in the Act or Rules. There is no room for assumption or presumptions. The object of the Parliament has to be gathered from the language used in the statute. The contention that toilet soap is commercially different from household and laundry soaps, as could be seen from the opening words of Entry 15, needs careful analysis. It is well, at the outset, to guard against confusion between the meaning and the legal effect of an expression used in a statute. Where the words of the statute are plain and clear, there is no room for applying any of the principles of interpretation which are merely presumption in cases of ambiguity in the statute. The court would interpret them as they stand. The object and purpose has to be gathered from such words themselves. Words should not be regarded as being surplus nor be rendered otiose. Strictly speaking there is no place in such cases for interpretation or construction except where the words of statute admit of two meanings. The safer and more correct course to deal with a question of construction of statute is to take the words themselves and arrive, if possible, at their meaning, without, in the first place, reference to cases or theories of construction. Let us, therefore, consider the meaning of the word soap "household". The word household signifies a family living together. In the simplistic language toilet soap being used by the family as household soap is too simplification to reach a conclusion. Therefore, one has to gather its meaning in the legal setting to discover the object which the Act seeks to serve and the purpose of the amendment brought about. The task of interpretation of the statute is not a mechanical one. It is more than mere reading of mathematical formula. It is an attempt to discover the intention of the legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human thoughts. It is also idle to expect that the draftsman drafted it with divine prescience and perfect and unequivocal clarity. Therefore, court would endeavour to eschew literal construction if it produces manifest absurdity or unjust result. In *Manmohan Das* v. *Vishnu Das* [AIR 1967 SC 643] a Constitution bench held as follows :

"The ordinary rule of construction is the provision of a statute must be construed in accordance with the language used therein unless there are compelling reasons, such as, where a literal construction would reduce the provision to absurdity or prevent manifest intention of the legislature from being carried out."

Hon"ble Apex Court in the case of Calcutta Jute Manufacturing Co. 1997

(93) ELT 657 has observed as follows:

"10. The State is empowered by the legislature to raise revenue through the mode prescribed in the Act so the State should not be the sufferer on account of the delay caused by the tax payer in payment of the tax due. The provision for charging interest would have been introduced in order to compensate the State (or the Revenue) for the loss occasioned due to delay in paying the tax [vide *Commissioner of Income Tax (A.P.)* v. *M. Chandra Sekhar* - 1985 (1) SCC 283 and *Central Provinces Manganese Ore Co. Ltd.* v. *Commissioner of Income Tax* - 1986 (3) SCC 461]. When interpreting such a provision in a taxing statue a construction which would preserve the purpose of the provision must be adopted. It is well-settled that in interpreting a taxing statute normally, there is no scope for consideration of principles of equity. It was so said by Rowlatt J. in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* [1921 (1) KB 64 at

page 71] :

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

The above observation has been quoted with approval by a Bench of three Judges of this Court in *Commissioner of Income Tax, Madras* v. *Ajax Products Ltd.* [55 STC 741]. In another decision rendered by a Bench of three Judges of this Court in *The State of Tamil Nadu* v. *M.K. Kandaswami and others* [36 STC 191] it has been observed thus:

"In interpreting such a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book should be eschewed. If more than one construction is possible, that which preserves its workability and efficacy is to be preferred to the one which would render it otiose or sterile."

In view of above, it is apparent that Supplementary Note 5(a) would be rendered otiose if we read it to mean that "Protein Concentrate and Textured Protein Substances" are to be classified under sub-heading 2106 1000. The note clearly means and states that the said goods are to be classified under "Heading 2106".

54. From the above proposition in para 49 to 53 above it is apparent that

(i) The Customs Tariff is not harmonized with the HSN, and therefore the conclusions based on HSN cannot be relied when it contradicts prescriptions of the Customs Tariff.

(ii) If the classification can be made relying on interpretative Rule 1 there is no need to proceed further on any other Rule.

(iii) The Supplementary Note 5(a) clearly provides that Protein Concentrate and Textured Substances would be classified under "Heading 2106".

Rule 1 of the General rules of interpretation is reproduced below:

"Classification of goods in the Nomenclature shall be governed by the following principles:

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only, for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

It is seen that it clearly states that „for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes". In the instant case Supplementary Note 5(a) clearly provides that Protein Concentrate and Textured Substances would

be classified under "Heading 2106".In view of above in terms of interpretative Rule–1, the goods imported by the appellant would be classified under Heading 2106 in terms of Supplementary Note 5(a). Any other interpretation would make Supplementary Note 5(a) otiose. Since the goods are specifically classified under heading 2106 by virtue of Supplementary Note 5(a), there is no need to further go into interpretative Rule 2 to 6.

55. The appellants have relied on various international decisions. The said decisions are examined as under:-

(I) In the decisions given by Thomas J Russo, in US Cross Ruling N204559 dated 02.03.2012, following has been observed:

"Ingredients breakdowns accompanied your November letter. Additional information was provided with your February letter and an email transmission dated February 29, 2012. Whey Protein Powder will be offered in two flavors-chocolate and vanilla. Ingredients common to both products are approximately 37-38 percent whey protein isolate, 34-36 percent whey protein concentrate, 12-13 percent fructose, 6 percent l-glutamine, 2-3 percent chicory root extract (inulin), one percent erythritol, and less than one percent, cach, colloid gum powder, sodium chloride, aminogen (plant enzyme), cream flavor, red orange extract, ascorbic acid and stevia- rebiana. Other ingredients, depending on the flavor, include about 2 percent cocoa (lecithinated), 2 percent chocolate flavor and I percent natural vanilla flavor. Both products will be put up for retail sale in containers holding 908 grams, net weight, and used as a food supplement.

You have suggested that the subject products are classifiable in subheading 0404.10.0500. Harmonized Tariff Schedule of the United States (HTSUS), which provides for whey protein concentrates. We disagree. Based on the ingredients breakdowns, they will be classified elsewhere.

The applicable subheading for the Chocolate Whey Protein Powder will be 1806.90.9090, HTSUS, which provides for other food preparations containing cocoa... other... other...other. The rate of duty will be 6 percent ad valorem.

The applicable subheading for the Vanilla Whey Protein Powder will be 2106.90.8200, HTSUS, which provides for food preparations not elsewhere specified or included… other… other…

containing over 10 percent by weight of milk solids... other... other. The rate of duty will be 6.4 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at http://www.usitc.gov/tata/hts/.

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at 301-575-0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Bruce N. Hadley, Jr. at (646) 733-3029."

From the above decision it is apparent that the said authority has held that:

(i) Vanilla Whey protein will be classifiable under heading 2106.90.8200 of HTSUS;

(ii) The chocolate whey protein powder will be classifiable under 1806 90.9090 HTSUS (Harmonized Tariff Schedule of United States);

(iii) Whey proteins of this kind will not be classified under heading 0404.10.0500 HTSUS.

(II) Similar conclusion has been reached in ruling No. 025135 dated 15.04.2008 given by Robert B. Swierupski Director National Commodity Special Division wherein he has clarified as follows:

"The subject merchandise is described as 100% Whey Classic - Chocolate and 100% Whey Gold Standard-Chocolate. The main ingredients in 100% Whey Classic-Chocolate are Protein Blend (Whey Protein Isolate, Whey Protein Concentrate and Whey Peptides), Cocoa (processed with alkali), Artificial Flavor, Lecithin and Acesulfame Potassium. The main ingredients in 100% Whey Gold Standard-Chocolate are Protein Blend (Whey Protein Isolate, Whey Protein, Concentrate and Whey Peptides), Cocoa (processed with alkali), Artificial Flavor, Lecithin and Acesulfame Potassium.

All products are in powder form, put up for retail sale in plastic containers. The 100% Whey Classic-Chocolate comes in sizes weighing either 2 pounds or 5 pounds. The 100% Whey Gold Standard - Chocolate comes in sizes weighing 1 pound, 2 pounds, 5 pounds or 10 pounds. The product is mixed with water, milk or other beverages to make a dietary supplement.

The applicable subheading for the 100% Whey Classic - Chocolate and 100% Whey Gold Standard-Chocolate will be 1806.90.90, Harmonized Tariff Schedule of the United States (HTSUS), which provides for chocolate and other food preparations containing cocoa… other… other… other. The rate of duty will be 6 percent ad valorem."

(III) Similarly in the tariff Ruling No. N028196 dated 02.06.2008 by Robert B. Swierupski Director National Commodity Specialist Division, has clarified as follows:

"Ingredients breakdowns, descriptive information, and a manufacturing flow chart for two products were submitted with your letter. The products, described as pink-colored, free-flowing powders, will be used as nutritional supplements. 100 percent Whey Gold Standard - Strawberry consists of approximately 55 9 percent whey protein isolate, 37.9 percent whey protein concentrate, 4.8 natural and artificial flavor, and less than one percent each of whey peptides, Sucralose, color, citric acid, aminogen, and lactase. Classic Whey-Strawberry consists of approximately 95.7 whey protein concentrate, 1.3 percent each of lactalbumen (whey peptides) and whey protein isolate, 1 percent natural and artificial flavors, and less than one percent each of Sucralose, acesulfame potassium, citric acid, and color. 100 percent Whey Gold Standard-Strawberry, containing approximately

78 percent protein, will be put up in 2-, 5-, and 10-pound containers. The Classic Whey- Strawberry product, containing approximately 69 percent protein, will be put up in 2- and 5-pound containers.

The applicable subheading for these products will be 2106.10.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for food preparations not elsewhere specified or included... protein concentrates and textured protein substances

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR. 177)."

From the above rulings, it is apparent that the various international rulings are based on harmonized system of nomenclature and have ruled that the "Protein Concentrates" of the kind imported by the appellant are to be classified under heading 21061000 if the same do not contain cocoa. However same product, "Protein Concentrates",if containing coco would be classifiable under 1806.90.90 of HTSUS. This conclusion is based on the reading of HSN and its chapter and section notes.**In most cases the HSN has been totally adopted in the Schedule to the Customs Tariff Act, 1975. However, in some cases, like in case of heading 2106, the**

government has chosen to deviate from the language and prescription of the HSN by introducing Supplementary Notes to Chapter 21. Since all international rulings are based on the HSN, which is different from the Customs Tariff in respect of Chapter Heading 2106, no reliance can be placed on these decisions.

56. Ld counsel has also relied on the fact that the Explanatory Notes to the HSN were amended by the HSN Committee in its 64th Session in September 2019 to introduce a specific exclusion for Chapter heading 2106 ("**Amendment to Chapter heading 2106"**). The amendments were made applicable from 1st December 2019. The relevant extract of the Amendment to Chapter heading 2106 is reproduced below for ease of reference-

.. CHAPTER 21

Heading 21.06

Page IV-2106-3. Item (16)

….

Insert a new exclusion note (c):

(c)Preparations containing cocoa, put up as food supplements for human consumption (heading 18.06).

While such amendments would have relevance if the Customs Tariff is aligned with the HSN, such changes have no relevance when Government of India has chosen to deviate from the HSN by specially prescribing that the impugned products would be classified under

„Heading 2106". The prescription in Chapter Supplementary Note 5(a) would take precedence over the HSN Heading Notes of the CTH 2106.**In case of heading 2106, the government has chosen to deviate from the prescription of the HSN by introducing Supplementary Notes to Chapter 21 which specifically classify the impugned products under „Heading 2106". In these circumstances the HSN notes to the Chapter heading, and amendments made therein, which are in conflict with the supplementary notes to the Chapter, are to be ignored.**

57. In view of above discussion we hold that the impugned goods are rightly classifiable under Heading 2106, sub heading 2106 1000 of the Customs Tariff. The impugned order is upheld and the appeals are dismissed.

(RAJU) MEMBER (TECHNICAL)

(SOMESH ARORA) MEMBER (JUDICIAL)

SOMESH ARORA, MEMBER (JUDICIAL)

58. I have gone through the above order, authored by my learned brother. I not only agree with his findings as well as, the analytical reasoning made available therein, but also appreciate the in-depth knowledge he has brought on record out of his expertise, experience of properly analyzing various headings and their background, including historical moorings of chapter 21. Same not having been aligned to the HSN in totality. It has been properly highlighted, how it needs to be correctly interpreted in view of peculiar changes brought in by Indian Custom Tariff, despite India being a signatory to HSN and agreeing largely to its frame work. It will not be out of place for me to appreciate the efforts which have been put in, both by the learned advocate as well as learned departmental representative including the appellate authority below, who analyzed the propositions involved. Proper assistance by officers of court sure enables better deliberation of the issues.

59. At the heart of the issue are the specific provisions which were created by Indian legislature, while being a signatory to the Customs Cooperation Council (which as an organization is now called World Customs Organization). The HSN is one of the most significant instrument, derived as an outcome of cooperativeefforts of the comity of nations in international trade that aims at bringing out not only uniformity of nomenclature for goods, but also the trade data and statistics compilation. All this to make the economic policy making of the member nations, reliable as well as conducive to comparison for the purpose of International Trade. Much later, after creation of HSN, the statistical data assumed importance when under aegis of World Trade organization, exceptional measures to liberalized tariff like Anti-Dumping, Safeguard and Countervailing duty, came to be implemented.

60. I would like to briefly dwell upon the evolution of public international law in Indian context and how entering into various international treaties did not circumscribe the sovereignty of member states including India. Whenever International Treaties were sought to be implemented by the sovereign states in their capacity as members of such treaties, reservations were either permitted by the treaties or were brought in for approval by member states to safeguard their own national interests.

61. As far as the Constitution of India is concerned which acts as a grundnorm, for all laws made by Indian Legislature. Validity of enactments by legislature is derived from Article 73 of the Constitution of India delineates the extent of executive power of the union which extends for all matters with respect to which the Parliament has a right to make laws and it extends to the exercise of such wide authority and jurisdiction as are excisable as a Central Government by virtue of any treaty or agreement.

62. This gives, through Article 73 (b), the Central Government a power to enter into international treaties/ agreement/ conventions under Article 73 and also to the Parliament the power to legislate in respect of such treaties/ agreements/ conventions. It is equally open to Parliament to refuse to perform such treaties/ agreements/ conventions. In such a case while the treaties made/ agreements/ conventions bind the Union of India as against the other contracting parties, Parliament may refuse to perform them leading the Union of India in default.

63. Regarding Course of action available to sovereign states and prevalence of municipal laws over public international law, following ruling of the apex court provides guidance:

"In Gramophone Company of India Ltd. v. Birendra Bahadur Pandey and Others [(1984) 2 SCC 534], the Apex Court held as under :

"5. There can be no question that nations must march with the international community and the Municipal law must respect rules of International law even as nations respect international opinion. The comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognizes the position that the

rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with Act of Parliament. Comity of Nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National Courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid conformation with the comity of Nations or the well-established principles of International law. But if conflict is inevitable, the latter must yield."

Therefore, it is brought out that sovereign states can not only bring about reservations in treaties, wherever allowed but also in case of any provision not being in tune with treaty provisions, it will be municipal law which shall prevail."

64. Now coming to specific provisions about HSN, the following are the relevant extracts as derived from HS Classification Handbook of World Custom Organization November-2013 Edition part II/1 following has been stated as object of bringing in world product nomenclature:

"*At its 1976 Sessions, the United Nations Statistical Commission took a policy decision that UN economic classifications should be harmonized by using HS subheadings as building blocks. The Standard International Trade Classification (SITC, Rev. 3), the International Standard Industrial Classification of all economic activities (ISIC) and the Central Products Classification (CPC) have been prepared on the basis of this decision.*

As regards the application of the Harmonized System by users other than Customs authorities and statisticians, good progress has been made in broadening the acceptance of the System. Several maritime conferences and numerous European and Asian railway networks associated with the International Union of Railways (UIC) have agreed to use the System as a basis for their freight tariffs.

The World Trade Organization (WTO) and individual countries are using the Harmonized System as a common language of trade for purposes of trade negotiations. In this connection, it should be noted that most countries' WTO schedules of tariff concessions are already written in terms of the Harmonized System and the process of converting the remaining WTO schedules to the Harmonized System continues. The Harmonized System is also providing a basis for new internationally accepted Rules of Origin which are being developed jointly by the WCO and the WTO."(Emphasis supplied

As far as Structure of HS is concerned same has been provided for in the Hand Book at Chapter 2 page II/5:

*"**2. Structure of the HS***

The Harmonized System comprises:

- *General Rules for the interpretation of the System:*
- *Section and Chapter Notes, including Subheading Notes:*
- *A list of headings arranged in systematic order and, where appropriate, subdivided into subheadings.*

(a) The Interpretative Rules

To be completely sound, a classification system must associate each individual product with a single heading (and, as the case may be, subheading), to which that product can be simply and unequivocally assigned. Hence it must contain rules designed to ensure that a given product is

always classified in one and the same heading (and subheading), to the exclusion of any others which might appear to merit consideration. All classification decisions must be based upon the application of these rules.

The text of the Harmonized System therefore incorporates a series of preliminary provisions codifying the principles on which the System is based and laying down general rules to ensure uniform legal interpretation.

There are six of these rules, known as the General Rules for the Interpretation, which are applied in hierarchical fashion, i.e., Rule 1 takes precedence over Rule 2, Rule 2 over Rule 3, etc. *The General Interpretative Rules are explained at the beginning of Volume 1 of theExplanatory Notes to the Harmonized System.*

General Interpretative Rule 1 provides that, for legal purposes, classification is determined by the terms of the headings and of the Section or Chapter Notes. There are, however, cases where the texts of the readings and of these Notes cannot, of themselves, determine the appropriate heading with certainty. Classification is then effected by application of the other Interpretative Rules.

The first part of Rule 2 (a) extends the scope of any heading which refers to a particulararticle to cover not only the complete article but also that article incomplete or unfinished, providedthat, as presented, it has the essential character of the complete or finished article. The secondpart of Rule 2 (a) provides that complete or finished articles presented unassembled ordisassembled, usually for reasons such as the requirements or convenience of packing, handlingor transport, are to be classified in the same heading as the assembled article.

Rule 2 (b) extends the scope of any heading referring to a material or substance or articles made therefrom. Under this Rule, goods consisting of more than one material or substance must, unless another heading refers to them in their mixed or composite state, be classified according to the principles of Rule 3.

Rule 3 provides classification principles for goods which, prima facie, fall under two or moreheadings.

Rule 3 (a) stipulates that goods should be classified in the heading giving the most specific description. However, there is a provision that if two or more headings each refer to only one of the materials or substances contained in mixed or composite goods, or to only some of the articles included in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete description than the other.

Rule 3 (b) deals with mixed or composite goods, goods consisting of an assembly of different articles and goods put up in sets. By application of this Rule, goods are classified in the heading applicable to the material or component which gives them their essential character.

Rule 3 (c) applies only where goods cannot be classified by application of Rule 3 (a) orRule 3 (b); it provides that goods should be classified in the heading which occurs last innumerical order amongst those which equally merit consideration in determining theirclassification.

Rule 4 provides that goods which (for example because they have newly appeared on the world market) are not specifically covered by any heading of the Harmonized System shall be classified in the heading appropriate to the goods to which they are most akin.

Rule 5 (a) governs the classification of cases, boxes and similar containers presented with the articles for which they are intended, while Rule 5 (b) applies more generally to packing containers presented with the goods they hold. It should be noted that the classification of packingmaterials and containers not covered by Rule 5 (a) or 5 (b) is left to the discretion of countries, which may take whatever measures they consider appropriate in this area.

Finally, Rule 6 provides that classification in the subheadings of a heading must be determined, mutatis mutandis, with reference to the principles applicable to classification in the 4- digit headings; in any event, the terms of the subheadings or Subheadings Notes must be given precedence. This Rule also specifies that, for classification purposes, only subheadings of the same level are comparable; this means that, within a single heading, the choice of a l-dash subheading may be made only on the basis of the texts of the competing 1-dash subheadings; similarly, selection of the appropriate 2-dash subheading, where necessary, may be made only on the basis of the texts of the subdivisions within the applicable 1-dash subheading.

The Interpretative Rules thus establish classification principles which are applicable throughout the Harmonized System Nomenclature.

Moreover, the Interpretative Rules clearly provide a step-by- step basis for the classification of goods within the Harmonized System so that, in every case, a product must first be classified in its appropriate 4-digit heading, then to its appropriate 1-dash subdivision within that heading and only thereafter to its appropriate 2-dash subheading within the predetermined 1- dash subdivision. It should be emphasized that at each step in the process, no account is taken of the terms of any lower-level subdivisions. This principle applies without exception throughout the Harmonized System.

*(**Emphasis supplied)***

(b) Section and Chapter Notes, including subheading Notes

Certain Sections and Chapters are preceded by Notes which, like the Interpretative Rules form an integral part of the Harmonized System and have the same legal force. Some of these Notes, grouped under the title "Subheading Notes", refer solely to the Interpretation of subheadings.

The function of the Notes is to define the precise scope and limits of each subheading. heading (or group of headings). Chapter or Section. This has been achieved, depending on the circumstances, by means of:

- *Either general definitions delineating the scope of a subheading or heading or the meaning of particular terms; for example sparkling wine is defined by Subheading Note 1 to Chapter 22, while Legal Note 5 to Section XI gives a general definition of the sewing thread of headings 52.04, 54.01 and 55.08 in terms of its appearance and texture; or*
- *Non-exhaustive list of typical examples: thus, Note 3 to Chapter 86 specifies the railway and tramway track fixtures and fittings covered by heading 86.08; or*
- *An exhaustive list of the goods covered by a heading or group of headings. Thus, Notes 2, 3 and 4 to Chapter 31 list the products that fall to be classified as fertilisers in headings 31.02. 31.03 and 31.04; or*
- *Exclusions, which list certain articles that must not be included in a particular subheading, heading (or group of headings), Chapters or Section. For example. Note 2 to Chapter 64 lists the articles which must not be regarded as parts of footwear within the meaning of heading 64.06.*

Certain Notes employ several of these drafting formulae. The definition of "synthetic rubber" in Note 4 to Chapter 40 provides an example of a definition in general terms, in accordance withscientific criteria, followed by an enumeration of products which, within the context of thisdefinition, are to be taken as covered by the definition.

Under Interpretative Rule 6, the Section and Chapter Notes also apply to the classification of goods in the subheadings unless, of course, the context otherwise requires. This is the case, for example, with Note 4 (b) to Chapter 71 (definition of the term "platinum"), which cannot apply to subheadings 7110.11 and 7110.19, for which the term "platinum" is more restrictively defined by Subheading Note 2 to Chapter 71.

It would no doubt have been possible, at least in certain cases, to incorporate the substance of these Notes in the text of the headings or subheadings themselves. But this would have greatly lengthened these texts, making them difficult to understand, and would have involved a great deal of repetition. The Notes thus made it possible to draft the headings in concise form while at the same time safeguarding the precision and exactness of interpretation that are essential to avoid doubts and disputes in classification.

To distinguish these Section, Chapter or Subheading Notes from the Explanatory Notes, which are not legally binding under the Convention, they are normally referred to as "Legal Notes".

Additional Notes (or supplementary Notes) may be included at the national level by an administration for its own national use and are national in scope. They may be binding at the national level only.

To complement the legal core, there are Explanatory Notes to the HS published separately by the WCO. While these notes do not form part of the legal provisions of the HS, it is important that they be consulted during the classification process."

(Emphasis supplied)

Whatever the obligations and expectations from the Member States while implementing HSN has been brought out in Chapter 4 titled „**The Harmonized System and National Customs Tariffs**‟ at page II/27 of the above hand Book:

"Contracting Parties to the Harmonized System Convention have to apply the Harmonized System Nomenclature for Customs purposes (Article 3 of the Convention, which deals with obligations of Contracting Parties- see Annex B). This means that they have to introduce the structure of the Harmonized System into their national Customs tariff. In a simple situation, the goods or categories of goods referred to in the national Customs tariff relate to the Harmonized System categories on a one-to-one basis, i.e., the categories in the Harmonized System are the same as those in the national Customs tariff. However, very often they do not coincide with the Harmonized System categories and, consequently, further subdivisions of the Harmonized System nomenclature have to be introduced at the national level. Furthermore, if other Customs measures are to be implemented, further subdivisions of Harmonized System categories may be required.

It is thus clear that the HSN itself acknowledges and rather accepts the need for various member companies to make structural changes into their National Customs Tariff subject to guidance that Rule 1 to 5 of General Interpretative Rules (G.I.‟s)of the HSN shall applied *mutatis mutandis* to national sub-heading by virtue of General Interpretative Rule 6, thus clearly providing the leverage for the Member Nations to make suitable changes in their custom tariffs. This respects the sovereignty of member nations as well as their fiscal and statistical needs. The concept of providing need based suitable changes in HSN is therefore, in tandem with Indian Constitution as well as he structural provisions of HSN.

65. This has been aptly pointed out by learned brother in course of the decision on chapter 21

of India Custom Tarff Act,1975 (specially the heading 2106) with related supplementary notes. These supplementary notes have been in existence since inception ofHSN based Custom Tariff of India. Similar changes have also been made by not only India but various other Countries beyond Chapter 97 which were originally not part of the HSN. Chapter 98 is again outcome of India‟s need, as is manifested in its own Custom Tariff.

66. As observed above, the Custom Cooperation Council while permitting member countries to de-align from HSN to serve their own needs has mandated a particular requirement that the same should not be made in a manner the General Interpreted Rules cannot be pressed into service for interpretation.

67. In short, heading 2106 under Chapter 21 as well as supplementary notes to chapter 21 have been specifically carved out in the Indian Custom Tariff. The relative chapter notes including supplementary notes as well as headings and sub-headings, therefore, will have to be construed differently from HSN, albeit, with the help of general interpretive notes is the requirement of Customs Cooperation Council. Learned Brother has dealt at length and correctly so, to indicate that chapter note 5 of supplementary notes which reads as follows "Heading 2106 (except tariff item 2106 9020 and 2106 9030), interalia, includes: "(a) Protein Concentrates and Textured Protein Substances" which is found that in sub-heading Protein Concentrates and Textured Protein Substances are mentioned as 2106 1000.

68. It is to be noted that the supplementary note 5 specifically provided in Chapter 21 of the Indian Customs Tariff,is not sub-heading note but the supplementary Chapter Note to TH 2106, therefore it seeks enlarge the scope of Tariff heading, specifically. Note3, 4 and 6 of the same Chapter, despite being supplementary notes deal with scope of specific sub-headings and particularly expend the scope of sub-heading. But Chapter note 5 expands the scope of heading 2106, as distinguished from supplementary notes –3, 4 and 6 which describe the inclusions and exclusions even from 8 -digit sub heading. And therefore expend/ contract the scope of such sub-headings following mandate of above Handbook on HSN as above.

69. From the structure of HSN, section notes and chapter notes including sub-heading notes cited supra it is clear that chapter notes like the interpretative rules form an integral part of the harmonized system and have the same legal force being legal notes. It is also a prescription that sub heading notes refer solely to the interpretation of sub-heading. It is thus clear that since the function of the notes is to define the precise scope and limits of heading or group of headings, chapter or section or even for that matter the sub heading. Therefore, chapter note, which is by way of supplementary note 5 seeks to define the scope and limits of heading 2106. It is thus clear that the expression "Food preparation not elsewhere specified or included" figuring in tariff heading 2106 when expanded by virtue of chapter note 5 (supplementary note) makes heading 2106 to specifically include "Protein Concentrates and Textured Protein Substances" therefore the legislature has clearly expanded the scope of tariff heading 2106 by virtue of supplementary notes 5 as brought out above. All this exercise makes even Heading 2106 also as specific in relation to Protein Concentrates and textured proteins, and other items mentioned in Chapter note 5. This is in consonance with HSN Handbook narrative, a portion of which is therefore worthy of re-production, even at the cost of little repetition:

"It would no doubt have been possible, at least in certain cases, to incorporate the substance of these Notes in the text of the headings or subheadings themselves. But this would have greatly lengthened these texts, making them difficult to understand, and would have involved a great deal of repetition. The Notes thus made it possible to draft the headings in concise form while at the same time safeguarding the precision and exactness of interpretation that are essential to avoid doubts and disputes in classification."

Above interpretation also gets fortified from the directive of the Customs Cooperation Council which requires minimal disturbances to be done by the Member States so as to maintain the statistical and data collection similarity between Member States. Learned brother is thus correct in pointing out that in view of the special circumstances of Chapter 21 and heading 2106 in Indian Custom Tariff, the inclusion of „Protein Concentrates and Textured Protein Substances" is clearly specific and that too in tariff heading 2106. The net effect of supplementary note 5 in TH 2106 in Indian Custom Tariff Act is that the heading description 2106 i.e. "Food preparation not elsewhere specified or included" ceases to be a residuary head, in relation to those products which are included in heading

2106, specifically (even if by virtue of any supplementary note). Given above, it is clear that till the product has dominance of Protein Concentrates and Textured Protein Substances (sold as whey protein in the present instance) ,which is undisputed in this case as other similar Whey Protein with different flavours, have been included by the party itself in this head.

70. From the foregoing it is also clear that Chapter 21 of India Custom Tariff Act read with supplementary notes not having been cast in accordance with HSN, the Explanatory Notes as well as other rulings of other countries including of WCO, till it does not contain realities of Chapter 21 and supplementary of Chapter 21 which are peculiar to India, cease to have even persuasive value and become incomparable as they seek to compare the incomparable. Indian Chapter 21 being exclusive and peculiar has to be interpreted with all its peculiarities.

80. Coming to Chapter 18, it is to be noted that Chapter 1806 is applicable to Chocolate and other food preparations containing COCOA. It is to be noted that chapter 18 has two chapter notes relevant for the purpose of this discussion which are reproduced below:

"This Chapter does not cover: (a)…….

(b) Preparations of headings 0403, 1901, 1902, 1904,

1905, 2105, 2202, 2208, 3003 or 3004.

2. Heading 1806 includes sugar confectionery containing cocoa and, subject to Note 1 to this Chapter, other food preparations containing cocoa."

Since we are confining ourselves only to the tariff headings and chapter notes for the purpose of our discussion, therefore, the only GI Rules which remains relevant is General Interpretative Rule – I, as has been correctly pointed out by the learned brother. Both of these have statutory force and therefore prevail over other legal aids like HSN Explanatory Notes or decisions in other territories as well as of WCO which in certain conditions of tariff being aligned,certainly command persuasive value. Same are therefore, correctly discarded in the factual matrix of the matter.

81. Coming to chapter note of heading 1806, chapter note-2 only mentions sugar confectionery containing cocoa and other food preparations containing cocoa shall be classified under Chapter 1806. Clearly chapter note 1806 does not do away with the requirements of predominance of cocoa in the food preparations in relation to heading 1806. In such a situation, heading 2106 read with Supplementary Note-

5 having become more specific for "Protein Concentrates and Textured Protein Substances"(known to market as „whey protein") clearly becomes the preferred head as the product has the predominance of Protein. Again we find that Chapter 18 only excludes preparations of heading 0403, 1901, 1902, 1904, 1905, 2106, 2202, 2208, 3003 or3004. In

chapter note 3 to heading 1904, it has been mentioned that heading 1904 does not cover preparations containing more than 6% by weight of cocoa calculated on a totally defatted basis or completely quoted with chocolate or other food preparation containing cocoa of heading 1806.

82. Above chapter note has been pointed out by way of example that wherever weight percentage other than the pre-dominance is to be considered, the chapter notes have gone on to specifically mention the percentage of weight. Similar is the situation with heading 1901.

HS Code	Item Description
1901	Malt extract; food preparations of flour, groats, meal starch or malt extract, not containing cocoa or containing < 40% by weight of cocoa calculated on a totally defatted basis. Not elsewhere specified or included; food preparations of goods of headings 04.01 to 04.04, not Containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted Basis, not elsewhere specified or included.

Even Chapter note 5 to Chapter 71 dealing with alloys of precious metals has specifically given prescription of 2% or more by weight of gold, platinum and even silver to be treated as alloy of gold, platinum and silver respectively.

83. Thus, it is clear that wherever a particular (lower) percentage is required to be read into any preparation the same has been provided either by way of chapter note or in the heading itself. This not being the case with tariff item 1806, the expression „Food Preparations containing Cocoa" has to be decided by the pre-dominance of ingredients in admixture which in this case is of Protein. While doing so no resort to explanatory notes is being taken in view of impugned contesting entries and their difference from HSN.

84. Thus, it is clear that in instant case classification in favor of 2106 can be decided without resort to Explanatory Notes which in any case do not part of the legal provisions of the harmonized system. Matter can be decided with the help of statutory provisions of Indian Customs Tariff Act, 1975. There is then no need to go further. The advocate for the appellant was at length that the resort should be taken to GI-3 specially Rule 3(a) and while so asserting it has been argued that specific description shall be preferred to general description. The fallacy of the notion has already been brought out in relation to TH to indicate that how the matter can be decided by section or chapter notes.

85. While not agreeing with the proposition of resort being required to be taken to G.I Note 3 (even if for the sake of argument), it has to be considered as to which head provides more specific description for a product which has dominance of Protein Concentrates and Textured Protein Substances, from the discussion above, it is clear that under Indian Tariff 2106 of Indian Customs Tariff above.Learned brother has gone at length with heading 2106 having been extended to include Protein Concentrates and Textured Protein Substances, the same becomes in any case, more specific in description to 1806, in which other food preparations containing Cocoa have been included. It is to be kept in mind that unlike other tariff headings, where the percentage of cocoa has been mentioned the heading 1806 does not speak of percentage of cocoa. Therefore, it is clear that even GI Rule – 3 would have made TH 2106only as more specific heading for the impugned product.

86. Learned advocate during arguments had taken resort to HSN explanatory notes to justify lower percentage of Cocoa to term products still as `preparation of Cocoa". But in doing so, the argument has sidetracked the reality of Indian tariff being different and capable of providing answer through its own existing statutory clauses by way of supplementary notes, as discussed above.

87. While arriving at the above conclusion, support is also drawn from the decision in the matter of Collector of Central Excise vs. Frozen Food

P.L. reported in 1992 (59) ELT 279 (Tri.) which was the decision under HSN based Central Excise Tariff(which also had similar head and supplementary notes de-aligned from HSN- though numbered differently) in relation to the additive supplement "surje", following observations are relevant:

"42. *As for the argument that protein concentrates mentioned in HSN Chapter Note 5(a) of Chapter 21 would refer to protein concentrated from sources other than milk like Soya protein, groundnut, etc., there is no warrant for such a claim. The items which are covered under Chapter IV find specific mention in headings and sub-headings, of that Chapter.* ***We do not find any mention of the expression "protein concentrates" in this Chapter and for this reason alone, protein concentrates would be covered under Chapter 21 by virtue of Note 5(a).***

43. *We agree with the contention of Shri Chakrabarty that because of interpretative Rule 1, classification of a product is to be determined according to the terms of the headings and relative Section of Chapter Notes. By application of this principle, the indication in Note 1(a) of Chapter 30 that dietitic, diabetic or fortified foods and food supplements are covered by Section IV is a clear indication of the classification of these products. This note has therefore, legal force and is not merely an indication of the possible classification as contended by Shri Lakshmi Kumaran."*

(Emphasis supplied)

The above decision has been approved by the Hon"ble Supreme Court as reported in 1998 (98) ELT 295 (SC). Therefore, it is clear that addition of any additive of flavoring content will not alter the characteristic of protein concentrate etc. and will not take it out from the entry 2106 in the present instance.

88. In view of the foregoing, I agree with the views of learned brother and accordingly uphold the classification of the department for the impugned product. Appeal dismissed.

(Pronounced in the open court on 01.09.2023)

(SOMESH ARORA) MEMBER (JUDICIAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD REGIONAL BENCH - COURT NO. 3 **CUSTOMS Appeal No. 10317 of 2019-DB**

[Arising out of Order-in-Original/Appeal No JMN-CUSTM-000-APP-019-18-19 dated 11.07.2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD]

Reliance Industries Limited …. Appellant
Exim Clearance Cell Central Administration Building (cab) East-wing B Block, Ground Floor, Meghpar- Padana, JAMNAGAR, GUJARAT-361280

VERSUS

Commissioner of Customs, Jamnagar (Prev.) Respondent
Sharda House, Bedi Bandar Road, Opp. Panchavati, Jamnagar, Gujarat

APPEARANCE :

Shri JC Patel, Shri Rahul Gajera, Advocates and Ms. Shilpa Paloni, CA for the Appellant

Shri Anoop Kumar Mudvel, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL) HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 18.09.2023
DATE OF DECISION: 31.10.2023

FINAL ORDER NO. 12380/2023

C.L. MAHAR :

The brief facts of the matter are that during the period May 2011 to June 2011, the appellant had imported consignment of crude petroleum oil at Sikka Port. The appellant have filed 12 bills of entry for clearance of the Crude Petroleum Oil which were initially assessed provisionally and goods were cleared on payment of provisionally assessed customs duty. The proper officer finalized the provisional assessment of the relevant bills of entry in the month of April 2016 on the basis of transaction value of the said goods i.e. price actually paid by the appellant. The price which was indicated on the import invoice of the goods and the quantity of the Crude Petroleum Oil mentioned on the bills of lading. On finalization of the bills of entry, the proper officer found that customs duty payable was less than the duty which was provisionally assessed and deposited by the appellant and as a result the appellant become eligible for refund of customs duty which was paid at the time of provisional clearance of subject goods.

2. The Deputy Commissioner of Customs vide its order-in-original dated 13.05.2016 has sanctioned an amount of Rs. 4,47,90,661/- of the basic customs duty and NCCD amounting to Rs. 33,710/- on the basis of the quantities taken for assessment as mentioned in the original invoices and the bill of lading for the imported goods. The department has gone in appeal against the above order-in-original which sanctioned refund to the appellant. The appellate authority, vide its order order-in-appeal No. JMN-CUSTM-000- APP-001-17-18 dated 03.04.2017 set-aside the impugned order of refund with directions to the Adjudicating Authority to examine all facts, documents, provisions of law and facts including the case laws of Hon'ble Supreme Court in the case of Mangalore Refinery and Petrochemicals Limited and subsequent circular dated 26.07.2017 issued by the Board.

3. In denovo proceedings, the matter has been adjudicated by the Deputy Commissioner of Customs vide its order-in-original No. 04/DC/CHS/REF/2017 dated 14.09.2017 wherein the Deputy Commissioner, after examining the matter in detail has passed the following

order:-

> **"**I hereby sanction refund claim of Rs. 4,19,38,972/- (Rupees Four Crore Nineteen Lakh Thirty Eight Thousand Nine Hundred Seventy Two only) to M/s. Reliance Industries Limited in terms of Section 27 of the Customs Act 1962. As M/s. Reliance Industries Ltd have already received Rs. 4,48,24,371/- through Cheque No. A-120824 dated 17.05.2016, therefore, 1, hereby order to appropriate the legitimate refund amount to the account of the claimant in terms of Section 27 of the Customs Act, 1962 read with Section 18(3) of Customs Act, 1962.
>
> As regards the differential amount Rs. 28,85,399/- of erroneously refunded & short payment of duty of Rs. 5,16,232/- in respect of bills of entry no. F-38/03.05.2011, SCN No. VIII/10-334/JC/O&A/2016 dated 23.08.2016 has already been issued to the claimant by the Joint Commissioner, CCP, Jamnagar. Therefore, I refrain to pass any order, in this regard.
>
> 35. This order has been issued under the Customs Act, 1962 and the Regulation framed there-under without prejudice to any other action that may be taken against the claimant or upon any other person, under the Customs Act, 1962 or, the Rules & Regulations framed there under or under any other law for the time being in force."

4. Aggrieved with the above mentioned order-in-original, the appellant have gone in appeal before Commissioner (Appeals) who vide his order dated 11.07.2018 has held that the impugned order-in-original is as per law and he refrained from interfering in the findings of the order-in-original. The relevant portion of Commissioner (Appeals) order is as follows:-

> **"11.** I have carefully gone through the appeal memorandum, as well as record of the case. In this regard, I find that adjudicating authority came to conclusion that final assessment of Bills of entry was erroneously finalised by taking into consideration bills of lading quantity of the load port for calculating of BCD instead of taking unity in second in the Ship's Ullage Survey Report at the discharge port in India. This resulted in part, short payment of Customs duty of Rs. 5,16,232/- in the bills of entry No. F- 38/03.05.2011 and also erroneous refund amounting to Rs. 28,60,198/- in 05 Bills of Entry bearing Nos. F-38/03/05.2011, F-40/04.05.2011, F-79/31.05.2011, F-97/14.06.2011 and F-104/18.06.2011 out of 12 Bills of Entry covered in the refund order. The adjudicating authority came to above mentioned conclusion on the basis of facts that the assessments were finalized in April 2016 by taking into consideration the invoice value and Bill of Lading quantities in pursuance of the erstwhile Circular of the Board dated 12.11.2006, however, at that time Apex Court had decided the matter in MRPL judgment dated 02.09.2015 that the quantities received at the discharge port only was to be considered for levy of duty and not the BL quantity and that the hither-to far relied upon by the department having been held *non-est*, that decision prevailed over the Circular. Hence, the Ullage quantities at discharge port were the quantities received in India and the actual quantity for assessment of imported cargo discharged through pipeline without being stored at Shore Tanks in port area was only the quantity ascertained by the independent surveyors in Ship's Ullage Survey reports. which was signed by the surveyors as well as the Boarding Officer the subsequent Circular No. 34/2016 dated 20.07.2016 of the board had further strengthened this view in line with the decision of the apex Court in the MRPL judgment.
>
> **12.** Further, the adjudicating authority has held that the correct and legitimate way to assess duty in the present case is to consider quantity of Petroleum Crude oil actually received in India. The quantity of imported goods as mentioned in the Ship's Ullage Survey report of the discharge port should be the basis of assessing duty. In this regard, the adjudicating authority has correctly placed reliance on the decision of the Hon'ble Supreme Court in the case of M/s. Mangalore Refinery and Petrochemicals Limited - 2015 (23) ELT 435 (SC).

13. Further, the Board while clarifying the matter vide Circular No. 14/201 26.07.2017 has instructed that in case of bulk liquid cargo imports, the shore tank quantity should be taken into consideration for levy of Customs duty irrespective of whether Customs duty is leviable at a specific rate or ad-valorem basis. Where bulk liquid cargo is directly cleared without being pumped into shore tank, assessment is to be done as per Ship's Ullage Survey spent at the port of discharge. In view of the stove, I do not find any reason to interfere in the impugned order and I agree with the findings of the lower authority. The contentions raised by the appellant are not tenable."

5. The appellant is before us against the above mentioned impugned order-in-appeal.

6. We have heard both the sides. We find that matter is no longer *res- integra* as the Hon'ble Supreme Court in the case of *M/s. Mangalore Refinery and Petrochemicals Limited - 2015 (23) ELT 435 (SC)* has already decided the matter. The relevant portion of the Hon'ble Apex Court decision is reproduced below:-

"17. The Tribunal's reasoning that somehow when customs duty is *ad valorem* the basis for arriving at the quantity of goods imported changes, is wholly unsustainable. Whether customs duty is at a specific rate or is *ad-valorem* makes not the least difference to the above statutory scheme. Customs duty whether at a specific rate or *ad valorem* is not leviable on goods that are pilfered, lost or destroyed until a bill of entry for home consumption is made or an order to warehouse the goods is made. This, as has been stated above, is for the reason that the import is not complete until what has been stated above has happened. The circular dated 12th January, 2006 on which strong reliance is placed by the revenue is contrary to law. When the Tribunal has held that a demand or duty on transaction value would be leviable in spite of "ocean loss", it flies in the face of Section 23 of the Customs Act in particular, the general statutory scheme and Rules 4 and 9 of the Customs Valuation Rules.

18. We therefore, set aside the Tribunal's judgment and declare that the quantity of crude oil actually received into a shore tank in a port in India should be the basis for payment of customs duty. Consequential action, in accordance with this declaration of law, be carried out by the customs authorities in accordance with law. All the aforesaid appeals are disposed of in accordance with this judgment.**"**

7. In view of the above decision of the Hon'ble Supreme Court, we find that the impugned order-in-appeal is legally tenable and we hold that the same is correct and legal. Accordingly, we find that the appeal is without merit and deserve to be dismissed.

8. Thus, we dismiss the appeal.

(Pronounced in the open court on 31.10.2023*)*

(Somesh Arora)
Member (Judicial)

(C L Mahar) Member (Technical)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

CUSTOM Appeal No. 13282 of 2013-DB

[Arising Out Of OIO-RJT-EXCUS-000-APP-300-13-14 Dated 21/06/2013 Passed By Commissioner of Customs –Jamnagar (Prev)]

Amardeep Exports .....Appellant

Plot No. 414 & 417, Gidc,
Phase-Ii, Dared,
JAMNAGAR

GUJARAT

VERSUS

C.C.-Jamnagar(prev) ...Respondent

Sharda House...Bedi Bandar Road, Opp.
Panchavati,

Jamnagar, Gujarat

WITH

i. **Custom Appeal No. 13283 of 2013 (Amardeep Exports)**
ii. **Custom Appeal No. 13284 of 2013 (Amardeep Exports)**
iii. **Custom Appeal No. 13613 of 2013 (Amardeep Exports)**
iv. **Excise Appeal No. 11294 of 2014 (Amardeep Exports)**
v. **Excise Appeal No. 11295 of 2014 (Amardeep Exports)**

APPEARANCE :

Shri R Subramanya, Advocate for the Appellant

Shri Anoop Kumar Mudvel, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. 10267-10272/2024

DATE OF HEARING : 16.10.2023 DATE OF DECISION :30.01.2024

RAJU

These appeals have been filed by M/s. Amardip Exports and Ors. against the demand of Custom Duty, interest, imposition of penalty and confiscation of imported material and imposition of redemption fine.

2. Learned counsel for the appellant pointed out that the appellants were importing mix Brass scarp for manufacture for their final products in terms of Notification 52/2003 –CUSTOM dated 31.03.2003. The imported mix Brass scrap was first subjected to segregation and as a result

non foundry scrap and foundry scrap were obtained. Non foundry scrap was cleared by the appellant as such on payment of appropriate duties. In respect of Non foundry scrap demand was raised by classifying the goods under heads 74040022.The foundry scrap was utilized in the manufacture of finish goods went for export. The dispute in the instant case is if the appellant has utilized raw material in excess of that prescribed – in the input/ out put norms. It was alleged that appellants have utilized has excess imported raw material for the purpose as compare to the quantity eligible for manufacture of the finished goods. He placed reliance on the following Board Circular and Judgments:-

- 2019(368) ELT (GUJ)-CC (Prev) Vs Monarch Overseas & Others
- 2019(1)TMI 925 Gujarat High Court- CC (Prev) Vs Pooja Metal Ltd
- Final Order No. A/11068-11093/2018-Hon'ble Cestat, Ahmedabad
- Circular No. 1029/17/2016 dated 10.05.2016

3. Learned AR relies on the impugned order.

4. We have considered the rival submissions. We find that there are 4 customs and 2 excise appeals.

In the Appeal No. E/11294-11295/2014-DB the Commissioner appeal has held that the non -foundry scrap is not classifiable under Custom Tariff header, 7404 0022 and therefore, the demand of duty and order of confiscation of non- foundry scrap cannot be upheld.

The Commissioner (Appeal) has however, also observed as follows.

"However, before implementing the decision it would require to be seen as to whether the said quantity of non-foundry scrap was generated as per provision of Notification No. 52 /2003-Custom read with the final norms/ ratio fixed by the norms committee by the jurisdictional Excise Authority. However, if the appellants fails to prove that non foundry scrap was generated within the prescribed norms as per the said notification read with the final norms as fixed by the norms committee , as would be applicable depending upon a mix Brass scrap as discussed in para 14 infra there the duty implication in the order stand upheld.

These appeals are also against this specific restriction placed by the Commissioner Appeals in this impugned order.

4.1. It is noticed that the Adjudicating Authority confirmed an order classification of goods under heading No. 7404 0022 of Custom Tariff Act 1975. The show cause notice also sought to classify the said goods under Custom Tariff Act 7404 0022. In the circumstances we find that the order of the Commissioner Appeal seeking to confirm demand while simultaneously holding the goods not classifiable under heading No. 7404 0022 cannot be sustained. Moreover CBIC has classified as follows vide Circular No. 1029/17/2016 dated 10.05.2016.

> *"2. However, there is another category of waste viz. foreign materials segregated initially and not fed in furnace. The issue is when such segregated foreign material is cleared by the brass manufacturers, can it be treated as clearance of "inputs as such" and accordingly are manufacturers required to pay an amount equal to the credit availed in respect of such inputs in terms of Rule 3(5) of CENVAT Credit Rules, 2004.*
>
> *3. The issue has been examined. Segregation from honey grade brass scrap in order to weed out other foreign materials before the process of melting in the furnace is an essential process relating to manufacture of brass articles. The foreign materials, emerging during the process of segregation have to be treated as process waste and cannot be treated like removal of inputs as such. The segregated foreign material has an altogether different character and use vis-a-vis brass scrap. Value per unit and classification of the segregated foreign material is also different from that of imported brass scrap. Accordingly, clearance of foreign material such as iron, steel, rubber, plastic, dust etc. cannot be treated as clearance of inputs as such. It may be noted that circular no. 62/2001-Cus dated 12.11.2001 does not apply to the issue at hand as the facts at hand are different.*
>
> *4. In view of above, it is clarified that the clearance of segregated foreign materials namely iron, steel, rubber, plastic, dust etc. from honey grade brass scrap before feeding in the furnace cannot be treated as removal of "inputs as such" as envisaged under Rule 3 (5) of CENVAT Credit Rules, 2004. The segregated foreign material in such situation, as has been explained above, shall be cleared on payment of Central Excise duty on transaction value as per its appropriate classification and rate of duty determined on merits.*

P

5. Difficulty faced, if any, in implementing the circular should be brought to the notice of the Board. Hindi version will follow."

Thus even according to the CBIC the goods cannot be classified under chapter 74 as foundry scrap. The Appeals E/11294-11295/2014 –DB are therefore allowed.

5. In appeal Nos. C/13282-13284/2013 and C/13613/2013 the issue relates to determination of permissible input output ratio.

The benefit of Notification 52/2003-Custom is subject to the following conditions, namely:-

(1) The importer has been authorized by the Development Commissioner, to establish the unit for the purposes (specified in clauses (a) to (e) of the opening paragraph of this notification;

2) The unit carries out the manufacture, production, packaging or job-work or service in Customs bond and subject to such other condition as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs or Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, (hereinafter referred as the said officer) in this behalf;

(3) The unit executes a bond in such form and for such sum and with such authority, as may be specified by the said officer, binding himself, -

(a) to bring the said goods into the unit or and use them for the specified purpose mentioned in clauses (a) to (e) in the opening paragraph of this notification;
(b) to maintain proper account of the receipt, storage and utilization of the goods;

(c) to dispose of the goods or services, the articles produced, manufactured, processed and packaged in the unit, or the waste, scrap and remnants arising out of such production, manufacture, processing or packaging in the manner as provided in the 2[Foreign Trade Policy] and in this notification;

(d) to pay on demand -

(1) an amount equal to duty leviable on the goods and interest at a rate as specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) issued un- der section 28AB of the said Customs Act on the said duty from the date of duty free import of the said goods till the date of payment of such duty, if-

(i) in the case of capital goods, such goods are not proved to the satisfaction of the said officer to have been installed or otherwise used within the unit, within a period of one year from the date of import or procurement thereof or within such extended period not exceeding five years as the said officer may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow;

(ii) in the case of goods other than capital goods, such goods as are not proved to the satisfaction of the said officer to have been used in connection with the production or packaging of goods in accordance with SION for export out of India or cleared for home consumption within a period of three years from the date of import or procurement thereof or within such extended period as the said officer may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow:

Provided that -

(a) where no SION have been notified, the generation of waste, scrap and remnants upto 2% of input quantity shall be allowed;

(b) where additional items other than those given in SION are required as input or where generation of waste, scrap and remnants is

beyond 2% of the input quantity, use of such goods shall be allowed on the basis of self-declared norms till such norms are fixed on ad hoc basis by the jurisdictional Development Commissioner within a period of three months from the date of self declared norms and the unit shall undertake to adjust the self-declared/ad hoc norms in accordance with norms as finally fixed by the Norms Committee for the unit. The ad hoc norms will continue till such time the final norms are fixed by the Norms Committee;

(c) in case of utilization of a large number of inputs, wide variation in quantum of consumption of inputs or such other factors which render such fixation of SION difficult in the case of a particular unit, the Norms Committee may refer the case to the Board of Approval for a decision];

(iii) in the case of, -

(a) goods produced or packaged, such goods have not been exported out of India, and

(b) unused goods (including empty cones, bobbins or containers, if any, suitable for repeated use) as have not been exported or cleared for home consumption, within a period of one year from the date of import or procurement of such goods or within such extended period as the said officer, as the case may be, on being satisfied that there is sufficient cause for not using them as above within the said period, allow;

(II) in case of failure to achieve the said positive Net Foreign Exchange Earning, the duty equal in amount to the portion of the duty leviable on the said goods but for the exemption contained in this notification and the duty so payable shall bear the same proportion as the unachieved portion of Net Foreign Exchange Earning bears to the positive Net Foreign Exchange Earning to be achieved along with interest at the rate as specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) issued under section 28AB of the said Customs Act, on the said duty to be paid on demand from the date of importation or procurement the said goods till the payment of such duty.

6. In terms of clause 3 (d) (ii) is required to establish to the satisfaction of the officer that the goods used in production or packaging of finished goods are in accordance with the SION for export out of India.

In the case of appellant themselves vide order F No. 01/81/162/313/AM - 10/DES-II/219 dated 04.05.2011 wastage norms are determined in terms of para 6.8 (e) of the Foreign Trade Policy, 2009-2014, as follows.

" I am directed to refer to your letter No.KAZEZ/100%EOU/I/04/2005-06 dated 14.07.2009,13.08.2009 &8.9.2009 on the above mentioned subject and to inform that based on the recommendations of a team of Norms Committee which visited EOUs manufacturing brass items from mixed metal brass scrap in Jamnagar area, the following wastage norms are fixed in terms of Para 6.8(e) of Foreign Trade Policy 2009-14 for the manufacture of brass items by ***M/s Amardeep Export, Jamnagar.***

A. Wastage norms during segregation:

The input raw material namely mixed metal brass scrap is not normal brass scrap as it contains brass scrap with high impurities like iron & Steel, Plastic/rubber etc. The process of segregation for physical removal of impurities form mixed metal brass scrap to produce segregated mixed brass scrap is first operation in the manufacturing process to manufacture brass items from mixed metal brass scrap. Wastage norms during the process of segregation would vary from consignment to consignment depending upon the

percentage of impurities in the mixed metal brass scrap and for the process of segregation the following wastage norms are fixed:

Description (after segregation)	**Quantity**	**Description of Import Item**	**Quantity**
Segregated/processed Mixed brass scrap	1 MT	Mixed metal brass scrap with impurities like iron & steel, plastic/ rubber, etc.	As per actual verified by Central Excise subject to a maximum of 1.50 MT

B. Wastage norms for the manufacture of brass items from Segregated/ processed mixed brass scrap:

For the next stages of manufacturing operations for the manufacture of brass items from segregated/processed mixed brass scrap following wastage norms are fixed:

Export Item		**Input Item**	
Description	**Quantity**	**Description**	**Quantity**
Machined articles components parts accessories made out of brass rods bars solid sections solid profiles	1 MT	Segregated/processed mixed brass scrap	1.26 MT

It is also clarified that the above wastage norms are applicable for the manufacture of brass items from mixed metal brass scrap with impurities like iron & Steel, Plastic/rubber etc and not applicable for the manufacture of brass items from normal brass scrap."

7. It is seen from the order-in-original that the Additional Commissioner has given following calculation for the purpose of ascertaining the quantity required for manufacture of goods actually produced by the appellant.

Annexure- B and Annexure B-1

Calculation as per final norms for segregation of raw material and non-foundry/ foundry scrap obtained during segregation AND finished goods manufactured from the foundry scrap/ cleaned brass scrap during the period 01.02.2009 to 31.03.2010

		Submitted at time of issue of SCN	Submitted at the time of verification
S.No.	Details	Qty. In MT	Qty. In MT (Revised)
1.	Opening stock of R.M.(Mixed brass scrap) as on 1.02.2009	100.964	83.889
2.	Total R.M. procured duty free (From 1.02.2009 to 31.03.2010)	215.920	215.920
3.	Total (1+2)	316.884	299.909
4.	Closing stock as on 31.03.2010.	6.679	1.294
5.	Total R.M. consumed (3-4)	310.205	298.615
6.	Finished goods manufactured / Non-foundry scrap generated	127.872	226.201(Foundry scrap segregated)
			72.414 (Non foundry scrap segregated)
7.	Input/out put norms	1 : 1.10 kg	1 : 1.50kg (at Ist stage)
8.	Raw material permissible as per final norms	140.659	339.302
9.	Excess of R.M. consumed	169.546	0.00 MT
IInd stage Calculation : (Annexure-B-1)			
Opening tock of cleaned brass scrap/ foundry scrap as on 1.02.2009			16.975
Received cleaned brass scrap			226.201
Total			243.176
Closing stock as on 31.03.2010			5.385
Brass scrap consumed for manufacturing of finished brass parts			237.791
Finished goods manufactured			127.872
Maximum input quantity available at 2nd stage, as per Wastage norms 1: 1.26 MT(Brass parts)			161.119
Excess quantity of cleaned brass scrap used			76.672

From the above table it is noticed that the Additional Commissioner has given the benefit of the wasted as prescribed in the letter of Ministry of Commerce and Industry DGFT dated 04.05.2011 prescribe in wastage norms. Row 1 to 9 of the above table calculate the norm at the stage of segregation of non-foundry scrap from foundry scrap. The Annexure -B1 appearing after row 9 of the above table calculates the amount of segregated foundry scrap needed for manufacture of finished goods actually manufactured by the appellant. It is apparent that the said calculation is in accordance with the norms prescribed vide letter dated 04.05.2011. It is seen that by applying those norms the demand has been revised from Rs. 43,69,813/- to Rs. 19,76,115/-.

8. The appellant in the appeal papers have argued that the correct method of calculating excess consumption would be as follows.

> "The appellants again reproduce the calculation. As per the new norms the ratio of 'segregated brass scrap' from 'mixed brass scrap' is fixed as 1MT: 1.50 MT and the ratio for finished goods and Segregated brass scrap, for brass components/articles/bars etc. the same has been fixed as 1 MT: 1.26 MT. **(Exhibit-25). Taking this ratio the calculation for finished product is as under;**
>
> -1.50 MT of 'mix brass scrap' is for 1 MT of 'segregated brass scrap';
>
> -Therefore out of 298.615 MT of raw material consumed i.e. 'mix brass scrap' the quantity of 'segregated brass scrap' would be manufactured is -298.615/1.50=199.076 MT
>
> -Therefore permissible quantity of 'non-foundry' material is - 298.615-199.076=**99.539 MT.**
>
> Now out of 1.26 MT of 'segregated brass scrap' 1 MT of finished product can be manufactured

-therefore out of 199.076 MT of 'segregated brass scrap' the quantity of finished product to be manufactured is = 199.076/1.26 = 157.997MT But the actual quantity of finished goods i.e. brass parts manufactured = 127.872 MT **(Annexure-C to the SCN).**

127.872 MT of Brass parts manufactured and therefore quantity of processed brass scrap required is 127.872^ * 1.06 = 161.118MT . and therefore quantity of raw material required s=161.118^ * 1.5 = **241.677 MT.**

Now quantity of raw material consumed in generation of slag, a by product as per the LOP, is required to be added-

Quantity of slag generated during the period is (11.475MT + closing balance as on 31.03.10 MT + 24.350MT quantity destroyed-35.826MT minus 7.327 MT = 28.498 MT.

(Exhibit-24)

Therefore quantity of raw material consumed, taking 2% of permissible limit (since no norms fixed for slag) the quantity of raw material required = 102% of 28.498 MT= **29.067 MT.**

-Therefore total permissible quantity of raw material comes to= (241.677+29.067)= 270.744 MT whereas the quantity of raw material consumed was 298.615 MT (Annexure B to the SCN). Thus excess quantity of raw material consumed could be said to be 298.615-270.744 = **27.871 MT. Therefore, alternatively the demand should be restricted to 27.871 MT of raw material only, involving duty amount to Rs. 7,18,337/-only.**

8.1. It is seen from the above calculation presented by the appellant that they have taken of fixed ratio of 1.5 for the purpose of calculating ratio at the time of segregation of processed mix brass scrap. It is seen that the letter of DGFT dated 04.05.2011 does not give permission to avail benefit of the ratio of 1.5 but the language is as follows:-

"as per the actual verified by the Central Excise Officer **subject to maximum of 1.5 MT."**

From the table above it is seen that the Additional Commissioner in the order-In-original has given the benefit of actual amount recovered on account of segregation. The calculation in the appeal is made by adoption of a fix ratio 1.5 which is not ratio of prescribed in DGFT letter. It cannot be accepted as the real ratio verified by the authorities is less than 1.5 and as per DGFT letter the ratio is a map of 1.5 but limited to the actual verified by Central Excise.

8.2. The second point raised by the appellant in their calculation relates to the loss on account of slag. From the letter DGFT dated 04.05.2011, it is apparent that the wastage norm for the stage of manufacturing brass items from segregated process mix brass scraped is 1.26 and is obviously inclusive of all kind of losses including slag. Thus, the calculation given by the appellant in their appeal cannot be adopted for the purpose of calculating unexplained consumption of scrap.

8.3. The Next argument raised by the appellant relates to the period of limitation. It is seen that the demand has been raised in terms of clause-3 of the Notification 52/2003-CUS. The said clause prescribes required the appellant to execute bond in terms of which they are required to explain actual consumption of raw material finished goods product and on failure to do so they are required to pay duty. It is seen that the demand has been raised not only invoking provisions of Section 28 but also Section 72 of the Customs Act. In terms B17 bond executed by the in terms of Notification 52/2003-Customs dated 31.03.2003. Therefore, since the demand has been raised invoking the condition of the bond the period of limitation would not be applicable to the instant case.

9. We find that all the customs appeals the facts are practicably identical. We do not find any merit in appeals filed by the appellant the same are dismissed.

(Pronounced in the open court on 30.01.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU) MEMBER (TECHNICAL)

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 01

CUSTOM Appeal No. 12023 of 2018

[Arising Out Of OIA-AHD-CUSTM-000-APP-028-18-19 Dated-25/04/2018Passed By Commissioner of CUSTOMS-AHMEDABAD]

Isgec Heavy Engineering Ltd .....Appellant
Plot -Z/89, Sez-Ii, DAHEJ,
GUJARAT

VERSUS

C.C.-Ahmedabad .....Respondent
Custom House, Near All India Radio Navrangpura, Ahmedabad,
Gujarat

APPEARANCE:

Shri. Vishwanathan, Shri. Manish Jain & Ms. Shruti Khanna, Advocates for the Appellant

Shri. Rajesh Nathan, Assistant Commissioner (AR) for the respondent

CORAM: HON'BLE MEMBER (TECHNICAL), MR. RAJU HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

FINAL ORDER NO.A / 11897 /2023

DATE OF HEARING:17.08.2023
DATE OF DECISION: 11.09.2023

SOMESH ARORA

Brief facts of the case are that the appellant is engaged in manufacturing heavy machinery falling under Chapter 84 of Customs Tariff Act, 1985. It filed a bill of entry No.485 dated 30.7.2012 for import / procurement of imported capital goods viz. Plate Bending machine Model HDR-HY-3500-5000 consisting of three rollers, mobile control panel, air cooler. CNC control unit and all related complete items and accessories falling under Chapter heading 84622990 of CTA, 1985, to its sister concern unit viz. M/s ISGEC Heavy Engineering Ltd Plot No. 13-B, GIDC, Dahej (DTA buyer) in terms of Rule 48(1) of the Special Economic Zone Rules, 2006, read with Section 30 of the SEZ Act, 2005 against Release Advice No.4 dated 6.7.2012 issued by Assistant Commissioner of Customs, New Customs House (EPCG Section) Mumbai against EPCG licence no.0530158560 dated 15.6.2012 issued in the name of M ISGEC Heavy Engg. Ltd., Plot No.13-B, GIDC, Dahej (DTA Buyer). The said bill of entry was provisionally assessed under which the subject capital goods/ machineries were removed to EPCG licensee (license no.0530158560/2/11/00 dated 15.6.2011 holder in DTA to their sister concern M/s ISGEC Hitachi Ltd, Dahej Unit. The subject capital goods were imported vide Bill of entry No.DSEZ/013/2011-12 dated 20.6.2011 in the SEZ unit from Switzerland by M/s Saraswati Industries Syndicate Ltd, Plot No.Z-89, SEZ, Dahej. The assessable value of said capital goods was taken as Rs.218083271/- and total duty forgone was amounting to Rs.52140999/- and Bill of entry was assessed on 20.6.2011.

2. The clearance of the said capital goods under EPCG scheme was allowed under provisional assessment as per provisions of SEZ Act/Rules. The department‟s case was that appellant has not exited from Special Economic Zone and they were not eligible for clearing the capital goods under the prevailing Export Promotion Capital Goods Scheme, as removal of capital goods from SEZ unit under EPCG is only available as per the Rule 74(4) of the SEZ Rules, 2006. Therefore, it is clear that there is no absolute bar on clearance of Capital goods from SEZ to DTA under EPCG, but following the condition that a Unit can opt for EPCG scheme only at the time of exit, as per SEZ Rules 2006 with one time permission from the Development Commissioner. Since the unit had not exited from the SEZ nor any such permission from the Development Commissioner was taken. Therefore, the capital goods cleared is in contravention to the provisions of SEZ Act/Rules and hence liable to re-workout the value as per the provisions of the Section 30 of the Special Economic Zone Act, 2005 read with Rules 30, 34, 47(4) and 49(l) of the SEZ Rules, 2006. While finalizing the assessment of said provisionally assessed Bills if Entry the unit was asked to discharge the duty liabilities accordingly. Therefore, the appellant was required to pay full applicable Customs duty on the assessable value of Rs.218083271/- amounting to Rs.56379934/- in respect of the Capital goods cleared vide the said provisionally assessed BoE no.00485 dated 30.7.2012.

3. After due process of law, the lower authority ordered finalization of assessment and reassessed the duty vide BoE No.00485 dated 30.7.2012 and ordered to levy the duties amounting to Rs. 56379934 /-, in respect of the clearance of Capital goods from SEZ unit to DTA unit as per the provisions of SEZ Act/Rules along with applicable interest as per Section 18 of the Customs Act, 1962. The amount of Rs.6328957/- already paid against the BOE was appropriated and adjusted accordingly. On appeal the order of specified officer was upheld by Commissioner (Appeals). On appeal the order of specified officer was upheld by Commissioner (appeals)

4. Being aggrieved with the impugned order of Commissioner (Appeals) the appellant has filed the instant appeal on the below mentioned grounds and has contended, inter alia, that:

i. the order passed by the Commissioner (Appeals) is violative of the principles of natural justice as it is non-speaking order,

ii. the order has to set out reasons, and without reason the order is bad in eyes of law and relied on case laws:

a. ACCT, Kota vs Shukla Bros-2010(4)SC 785

b. Mangalore Ganesh Bedi Works vs CIT-2005(2)SC 329

C. Kranti Associates (P) Ltd vs Masood Ahmed Khan-2010(9)SC496

iii. the application of the Rules specifically to the facts of the case has been omitted in the impugned order and there is no finding against the submissions advanced by the appellant so violation of principles of natural justice and is liable to set aside;

iv the appellant is legally permitted to sell capital goods to a DTA buyer under an EPCG scheme;

v. there is agreement to the fact that the appellant had validly imported the Plate Bending machine for its authorized operations, however, there is no provisions under the SEZ Act, 2005 or SEZ Rules, 2006, which prohibits the sale of a capital goods held by an SEZ unit either to a buyer in the DTA or outside India:

vi that the department is incorrect in interpreting that the removal of capital goods under EPCG is only available as per Rule 74(4) of the SEZ Rules, 2004 i.e. only at the time of exit of a unit from SEZ and that there is a bar on otherwise claiming benefits under the EPCG scheme at the

time of clearance of goods into the DTA; as none is specifically mentioned.

vii. `Sale of plate bending machine into the DTA is to be considered as an import of capital goods into India; Import of capital goods into India can avail the benefits of EPCG scheme provided at Chapter 5 of the FTP:

viii. liability to pay duty upon removal of such goods is on the DTA buyer as the Bill of Entry for Home consumption is to be filed by the buyer of the goods;

ix. bond cannot be enforced against the appellant SEZ unit as under the law it is not liable to pay any duty for clearance of goods to the DTA; appellant being seller of goods is not liable to pay duty as it is not the importer on record; it is DTA unit which has procured the EPCG authorization; so DTA unit has to pay duty and interest;

x. SEZ authorities erred in issuing SCN to the appellant, the impugned order confirmed the recovery of customs duty after denial of benefit to the DTA buyer under the EPCG authorization; the EPCG authorization issued to the appellant is perfectly valid and neither withdrawn nor cancelled by DGFT, there cannot be a demand of duty from the SEZ authorities:

xi. the EPCG authorization is valid and not cancelled by the appropriate authority, the customs authority cannot challenge the validity of the same under proceedings initiated under Section 28 of the Customs Act, therefore, the impugned order is liable to be set aside on this ground also.

5. During the course of hearing, Appellants emphasized the following grounds:-

THE SEZ UNIT OF THE APPELLANT IS LEGALLY PERMITTED TO SELL THE IMPUGNED GOODS TO THE DTA BUYER UNDER EPCG AUTHORIZATION.

A.1. SEZ law itself envisages the sale of capital goods from a SEZ Unit to DTA- Section 30 of SEZ Act read with Rules 47, 48 and 49 of SEZ Rules deals with provisions relating to domestic clearance of goods by SEZ units. The said provisions mention that any goods (including capital goods) can be removed from an SEZ to DTA, subject to the conditions specified in SEZ Rules and upon payment of applicable duties which were otherwise payable at the time of import. Thus, the statute, specifically the aforementioned Section and Rules, itself envisages sale of capital goods from a SEZ Unit to DTA. Hence, the Appellant is legally permitted to sell the impugned goods from its SEZ Unit to its DTA unit.

A.2. It is further noted that multiple judicial decisions have already held that Section 30 creates a deeming fiction whereby goods cleared into the DTA from an SEZ shall be chargeable to the same duty as in the situation of actual imports. This means that any clearance into the DTA shall be at the same effective rate of duty as in the situation of import, meaning thereby that exemptions available at the time of import shall also be available to a DTA buyer. Reference is made to the following judicial decisions:

- ***Adinath Trade Link Vs. Commissioner of Customs, Kandla, [2013***

  (293) E.L.T. 746 (Tri. - Ahmd.)] Maintained by the Hon‟ble Gujarat High Court in ***[2015 (315) ELT 359 (Gujarat High Court)]***

Adani Power Ltd. vs Union of India 2015 (330) ELT 883 (Guj) Maintained by

- the Hon‟ble Supreme Court in ***[2016 (331) E.L.T. A129 (S.C.)].***

A.3. It is submitted that identical propositions relating to the payment of effective duty have also been discussed in the following judicial decisions and circulars:

- ***CBEC Circular issued vide F. No. 81/65/87-CX.3 dated 02.11.1989;***
- ***Plastics Processors Vs. Union of India, [2002 (143) E.L.T. 521 (Del.)];***
- ***Jain Irrigation Systems Ltd. Vs. Commissioner of Central Excise, Nasik, [2008 (221) E.L.T. 531 (Tri. - Mumbai)];***
- ***Premier Rubber Factory Vs. CCE, [1990 (47) E.L.T. 125 (Tribunal)].***

A.4. Further, it has been settled by the Hon‟ble Supreme Court in the case of ***Government of Kerala Vs. Mother Superior Adoration Convent, [2021 (376) E.L.T. 242 (S.C.)]*** that beneficial exemptions or policies which have been introduced in order to promote or encourage certain activities should be liberally interpreted. In view of the judgment, it can be inferred that no bar should be read into the beneficial policy in order to restrict the availment of such benefit. Further, in the case of ***K.R. Steel Union Ltd. Vs. Commissioner of Customs, Kandla [2001 (129) E.L.T. 273 (S.C.)],*** the Hon‟ble Supreme Court has held that the language of a beneficial notification (or legislation in the present case) have to be construed keeping in view the said object and purpose of the exemption. Thus, as the SEZ law has been introduced with an aim to boost the country‟s economy and to encourage exports in order to bring in more foreign investment, in such a case, upon application of the above judgment it is clear that the scheme provided in SEZ Act read with SEZ Rules should be construed beneficially and no bar should be read into the language of the law in order to restrict the benefit available to it. Thus, when the SEZ law itself envisages sale of capital goods from SEZ into DTA, the Ld. Commissioner (Appeals) cannot question the same.

6. Rule 74 does not provide that EPCG benefit is only available at

the time of exit from the SEZ Scheme- Rule 74 of SEZ Rules states that a unit exiting SEZ is liable to pay all applicable duties on imported goods. Further, Rule 74 (4) mentions that the Development Commissioner can give an option to the SEZ unit to avail of EPCG Scheme at time of clearance, provided the SEZ unit is otherwise eligible to avail the benefit of EPCG Scheme. Thus, it can be interpreted that the intention of the government for providing Rule 74 (4) was to extend the opportunity to an SEZ unit to avail benefit under EPCG scheme at the time of exiting SEZ scheme.

6.1. Further, nowhere in Rule 74 has it been stated that that the benefit of EPCG scheme is only available at the time of exit of the SEZ Unit from the SEZ scheme. It is a settled law that taxing statutes have to be strictly and literally construed and no condition absent therein can be read into it. Hence, the contention of the Ld. Commissioner (Appeals) at para 9.2 of the impugned order that removal of capital goods under EPCG is only available at the time of exit of a unit from the SEZ is completely incorrect.

DTA buyer can obtain an EPCG Authorization to indigenously procure capital goods- As per Rule 47 of the SEZ Rules, removal of goods (which have not been subjected to any manufacturing process) to DTA is governed by relevant Foreign Trade Policy ("**FTP**"). This rule creates a deeming fiction that such goods are being imported into India. Thus, it is established that the intention of the legislature vide SEZ law was to allow a SEZ unit to sell its goods to DTA, subject to compliance with FTP. Further, under Para 5.5 of Handbook of Procedure ("**HBP**") a DTA buyer can obtain an EPCG Authorization to indigenously procure capital goods. In the present case, the impugned goods have not undergone any manufacturing process, hence, the same can be sold to DTA unit of the Appellant having an EPCG Authorization. Thus, there has been no violation of SEZ law by the Appellant.

DEMAND FOR CUSTOMS DUTY AND INTEREST IS ILLEGAL AND IS

LIABLE TO BE SET ASIDE

Duty and interest cannot be demanded by the SEZ Unit- Rule 48 (1) of SEZ Rules states that it is the duty of a DTA unit to file Bill of Entry for home consumption of goods being cleared from a SEZ unit. In the present case, SEZ Unit and DTA Unit of the Appellant operate as two separate entities in terms of Rule 22 of SEZ Rules. Further, the impugned goods the BoE was filed by the DTA Unit of the Appellant for clearance of the impugned goods. Hence, the importer on record was the DTA Unit and therefore the duty liability was on the DTA Unit. Thus, in such a case, no demand of duty could be made against the SEZ Unit. Therefore, findings of the Ld. Commissioner (Appeals) at para 10 of the impugned order that the SEZ Unit of the Appellant was liable to pay customs duty as it had entered a bond under Rule 22 to pay all duties on DTA clearances in terms of the SEZ Act, is untenable.

7. Without prejudice, duty and interest cannot be demanded from the DTA Buyer- Section 30 of SEZ Act provides that goods which are cleared from SEZ unit to DTA, shall be *inter alia* chargeable to "duties of customs", as leviable on such goods when imported. Thus, Section 30 creates a legal fiction whereby DTA buyer of goods is liable to pay customs duty in a manner as if the goods are being imported into India. In such a case, a DTA Buyer can avail the benefit of all exemptions which would otherwise be available at the time of import.

8. In the present case, the impugned goods have been cleared by the DTA unit under EPCG Authorization, upon payment of concessional 3% customs duty under Customs Notification No. 103/2009 dated 11.09.2009[1] ("**Exemption Notification**"). This Exemption Notification is anyway applicable for import of capital goods by any EPCG Authorization holder. Hence, in such a case, no duty or interest can be demanded from the DTA Unit as it has paid the applicable customs duty under the Exemption Notification. In this regard, reliance is being placed on the following cases wherein benefit of an exemption notification is allowed to a DTA buyer in terms the deeming fiction created by Section 30 of the SEZ Act:

- ***Adinath Trade Link Vs. Commissioner of Customs, Kandla, [2013 (293) E.L.T. 746 (Tri. - Ahmd.)];*** Maintained by the Hon"ble Gujarat High Court in ***[2015 (315) ELT 359 (Gujarat High Court)]****and*;
- ***Precision Polyplast P. Ltd. Vs. Commissioner of Cus. (Port), Kolkata, [2016 (344) E.L.T. 977 (Tri. - Kolkata)].***

8.1 Further, the Supreme Court in the case of ***Commissioner of C.Ex., Daman Vs. Sahajanand Technologies Pvt. Ltd., [2015 (325) E.L.T.625 (S.C.)]*** has held that Section 3 of the Central Excise Act, 1944 creates a legal fiction that clearances from 100% EOUs are to be treated at par with imports and therefore DTA clearance of capital goods to EPCG units by EOUs is permissible by payment of concessional rate of duty under the EPCG exemption notifications. Similar legal fiction is being created by Section 30 of SEZ Act. Similarly, in the case of ***Semco Electric Pvt. Ltd. Vs. CCE, Goa, [2019 (370) E.L.T. 1052 (Tri.-Mumbai)],*** the hon"ble tribunal has held that an EOU unit is authorized to sell capital goods in DTA after payment of applicable duties subject to compliance of Customs Procedures. Now, since EOUs and SEZs work essentially on similar principles, these judgments will be equally applicable in the present case. Hence, in view of the above, no duty can be demanded by the DTA buyer.

9. No duty can be demanded as the DTA buyer has fulfilled its Export Obligation under the EPCG Authorization: Under the EPCG Scheme, capital goods are allowed to be imported at concessional rate of duty. In lieu of the concessional rate of duty, the EPCG Authorization Holder has to fulfil its Export Obligation ("**EO**") fixed by the DGFT Authorities. In case where an EPCG Authorization holder fails to fulfil its EO after expiry of EO period, the Customs Authorities can demand differential duty saved and penalty from the Authorization holder. In the present case, it is pertinent to mention that the DTA Unit has fulfilled 100% of EO and received a Redemption Certificate from the jurisdictional DGFT authority on 12.10.2021. Thus, as the DTA buyer has fulfilled the EO in lieu of concessional duty during import, no differential duty can be demanded

from the DTA Buyer.

MISCELLANEOUS SUBMISSIONS:

10. The impugned order is a non-speaking order – The impugned order does not provide any reasoning against various submissions made by the Appellant and is violative of principles of natural justice and thus the same is liable to be set aside.

Customs authorities cannot sit in judgment over the decision of DGFT to grant benefit under the Foreign Trade Policy- The EPCG Authorization is granted by DGFT authorities after due procedure and verification. The EPCG Authorization granted to the DTA Unit of Appellant has not been cancelled or withdrawn by DGFT Authorities. In such a case, the finding of Ld. Adjudicating authority (as confirmed by the impugned order) that clearance of goods from SEZ Unit to DTA unit of Appellant under EPCG Authorization was per se an illegal act and violative of SEZ law is erroneous and untenable.

11. The following provisions as found relevant were referred by the appellants:-

Section 30.- Subject to the conditions specified in the rules made by the Central Government in this behalf:-

(a) any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported; and
(b) the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shall be at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty.

Section 51. -(1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Rule 25 of SEZ Rules, 2006 (Non-Utilization of Goods): Where an entrepreneur or Developer does not utilize the goods or services on which exemptions, drawbacks, cess and concessions have been availed for the authorized operations or unable to duly account for the same, the entrepreneur or the Developer, as the case may be, shall refund an amount equal to the benefits of exemptions, drawback Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944, the Central Excise cess and concessions availed without prejudice to any other action under the relevant provisions of the Tariff Act, 1985, the Central Sales Tax Act, 1956, the Foreign Trade (Development and Regulate Act, 1992 and the Finance Act, 1994 (in respect of service tax) and the enactments specified in the Fes Schedule to the Act, as the case may be: Provided that if there is a failure to achieve positive net foreign exchange earning, by a Unit, such entrepreneur shall be liable for penal action under the provisions of Foreign Trade (Development and Regulation) Act, 1992 and the rules made there under.

Rule 34 of the SEZ Rules, 2006 (Utilization of goods)- The goods admitted into a Special Economic Zone shall be used by the Unit or the Developer only for carrying out the authorized operations but if the goods admitted are utilized for purposes other than for the authorized operations or if the Unit or Developer fails to account for the goods as provided under these rules, duty shall be chargeable on such goods as if these goods have been cleared for home consumption:

Provided that in case a Unit is unable to utilize the goods imported or procured from Domestic Tariff Area, it may export the goods or sell the

same to other Unit or to an Export Oriented Unit or Election Hardware Technology Park Unit or Software Technology Park Unit or Bio-technology Park Une without payment of duty, or dispose off the same in the Domestic Tariff Area on payment of applicable duties on the basis of an import licence submitted by the Domestic Tariff Area buyer, wherever applicable

Rule 47(4) of SEZ Rule, 2006 (Sales in Domestic Tariff Area) - Valuation and assessment of the goods cleared into Domestic Tariff Area shall be made in accordance with Customs Act and rules made thereunder.

Rule 48 of SEZ Rules, 2006 (Procedure for Sale in Domestic Tariff Area)-

(1) Domestic Tariff Area buyer shall file Bill of Entry for home consumption giving therein complete description of the goods and/or service namely, make and model number and serial number and specification along with invoice and packing list with the Authorised Officers:

Provided that the Bill of Entry for home consumption may also be filed by a Unit on the basis of authorization from a Domestic Tariff Area buyer.

Rule 49(1) of SEZ Rules, 2006. (Domestic Tariff Area removals - abatement of duties in certain cases)

(1) A Unit may remove capital goods to Domestic Tariff Area after use in Special Economic Zone payment of duty as under-

(a) duty shall be levied on such goods on the depreciated value thereof and at the rate in force at the date of removal of the goods;

(b) depreciation in value shall be allowed for the period from the date of commencement of production or where such capital goods have been received in the Unit after such commencement of production from the date such goods have been put to use for production till the date of presentation of Bill of Entry for home consumption;

Rule 74(4) of SEZ Rules, 2006 (Exit of Units)

(4) Development Commissioner may permit a Unit, as one time option, to exit from Special Economic Zone on payment of duty on capital goods under the prevailing Export Promotion Capital Good Scheme under the Foreign Trade Policy subject to the Unit satisfying the eligibility criteria under that Scheme.

12. In response to various submissions by the appellant AR submitted that Commissioner (Appeals) has correctly found that since the appellant has not exited from Special Economic Zone, they were not eligible for clearing the capital goods under the prevailing Export Promotion Capital Goods Scheme, as removal of capital goods from SEZ unit under EPCG is only available as per the Rule 74(4) of the SEZ Rules, 2006. On scrutiny of the relevant Sections and Rules of SEZ, it is explicitly clear that there is no bar on clearance of capital goods from SEZ to DTA under EPCG, but following the condition that a unit can opt for EPCG scheme only at the time of Exit, as per SEZ Rules, 2006 with one time permission from the Development Commissioner. Since the Unit had not exited from the SEZ nor any such permission from the Development Commissioner was taken therefore, the capital goods cleared are in contravention of the provisions of the SEZ Act/Rules and hence liable to re-workout the value as per provisions of Section 30 of SEZ Act, 2005 read with Rules 30, 34, 47 (4) and 49 (1) of SEZ Rules, 2006.

13. The D.R. also argued that Commissioner (Appeals) rightly rejected that bond can be enforced against the appellant if goods including capital goods are cleared for any purpose other than for which they were obtained till the time SEZ has not exited from Special Economic Zone, so they were not eligible for clearing the capital goods under the prevailing Export Promotion Capital Goods Scheme, as removal of capital goods from SEZ unit under EPCG is only available under Rule 74(4) of the SEZ Rules-2006. Learned Commissioner (Appeals) also found that the appellant had submitted a bond- cum- undertaking under Rule 22 of the SEZ. Rules- 2006 and have undertaken to fulfill the

conditions of the bond-cum-undertaking and the condition no.9 of the bond-cum-undertaking is as under:

> *"9 We, the obligors shall pay the duties on the goods and services sold in Domestic Tariff Area In terms of Special Economic Zones Act, 2005 and the rules and orders made there under".*

13.1 In view of the above, it is found that the appellant had violated the conditions of the bond cum-undertaking in as much as they have cleared the capital goods under EPCG scheme, without paying appropriate Customs duty and have violated the provisions of the SEZ Rules, 2006, since the Unit had not exited from the SEZ nor any such permission from the Development Commissioner was taken before clearance, therefore, the capital goods cleared are in contravention to the provisions of the SEZ Act Rules. And that the appellant has bound themselves to pay the duties on the goods and services sold in Domestic Tariff Ares (DTA) in terms of Special Economic Zone Act, 2005 and the rules and order made there so the bond-cum- undertaking is enforceable.

14. As per Rule 34 of the SEZ Rules, 2006, the goods admitted to the SEZ unit or the developer only for carrying out the authorized operations but if the goods admitted are utilized for purposes other than for the authorized operation of the developer fails to account for the goods as provided under these rules, duty shall be charge on such goods as if the goods have been cleared for home consumption. That the appellant had removed the capital goods viz. *" Plate bending machine model HDR-HY-3500-5000" consisting of three rollers, Mobile Control Panel, Air Cooler, CNC Contril WWIL all* related complete items and accessories" under EPCG scheme under licence no.0530158560/2/11/00 dated 15.6.2011, to their sister concern M/s ISGEC Hitachi Ltd which were cleared provisionally on payment of customs duty at concessional rate @ 3% only and appropriate Customs duty was not discharged. That Rule 49(1) of the SEZ Rules, 2006, stipulates that Development Commissioner may permit a Unit, as one time option, to exit from Special Economic Zone on payment of duty on capital goods under the prevailing Export Promotion Capital Goods Scheme under the Foreign Trade policy subject to the Unit satisfying the eligibility criteria under that Scheme. Since the SEZ unit has not exited from Special Economic Zone, they were not eligible for clearing the capital goods under the prevailing Export Promotion Capital Goods Scheme. That there is no bar on clearance of Capital goods from SEZ to DTA under EPCG, but following the condition that a unit can opt from the Development Commissioner. Since the Unit had not exited from the SEZ nor any such permission from the Development Commissioner was taken, therefore, the capital goods cleared are in contravention to the provisions of the SEZ Act/Rules and hence, liable to re- workout the value as per provisions of Section 30 of SEZ Act, 2005 read with Rules 30, 34, 47 (4) and 49 (1) of SEZ Rules, 2006.

15. Considered the rival submissions. In this context, it needs to be appreciated that under the provisions in which SEZ Scheme operates, under Section 30 of the SEZ Act, 2005, terms of removal of goods from SEZ to DTA on payment of Customs duties on the rate of duty and tariff valuation on the date of removal has been provided. Further, under Rules made to carry out the provisions of SEZ Act, 2005 i.e. S.E.Z Rules, 2006, under Rule 34 there is a prescription available that goods admitted in SEZ shall be used only for approved operations i.e. which is permitted through LOP by the Unit Approval Committee under Rule 49(1) of the SEZ Rules, 2006. Capital goods are allowed to be removed in DTA after use in a Special Economic Zone on payment of duty and depreciated value counted from the date commencement of production Rule 74 (4) SEZ rule,2006 . This is a special provision for the exiting units through which Dev. Commissioner has been allowed to permit the unit as one time option to exit from SEZ on payment of duty on capital goods into prevailing EPCG Scheme under the Foreign Trade Policy subject to eligibility criteria under the EPCG Scheme. The process of exiting is commonly known as de-bonding. The appellants are seeking to rely upon this provision relating to de-bonding to plead, that they can at any time on payment of duty under Rule 34 clear the goods under EPCG Scheme and not necessarily at the time of exit or de-bonding. We are unable to agree with such proposition and if the same is accepted, it will render the expression "as one time option, to exit from Special Economic Zone on payment of duty on capital goods under the prevailing export motion capital good scheme" in Rule 74 (4) redundant or otiose, we have therefore to make every word operative rather than making any null, while interpreting the statute. Maxim „ut res magis valeat quam pereat" will apply as aid to interpretation. It is thus, clear that the SEZ rules

have made exiting of capital goods under the EPCG Scheme as one time option. Therefore, during the currency of the operations of an SEZ, while it is allowed to remove goods including capital goods to the DTA area, the same can normally be on applicable customs duty and not under EPCG Scheme. When the legislature has made a special provision by mentioning a particular export promotion Scheme to be availed only at the time of exit, same cannot be allowed to be freely availed at any time under a provision in which there is no prescription of capital goods to be cleared under EPCG Scheme is available. In this context, we are fortified in interpreting the provision of statute by the trite law that when a method has been laid down, , it necessarily prohibits the doing of the act in any other manner than that which has been prescribed, and thus, the prohibition in other provision not being mentioned specifically will not apply. In Taylor v. Taylor ((1875) 1 Ch D 426), as notably followed in Nazir Ahmed v. King Emperor [AIR 1936 PC 523] and a plethora of judgments of the Supreme Court, the most well- known being, perhaps, State of Uttar Pradesh v. Singhara Singh [AIR 1064 SC 358], conclude the issue, in law, in favour of the department. The legal principle, fossilised over a period of time, is thus enunciated, in Singhara Singh [AIR 1964 SC 358]

> *"8. In Nazir Ahmed's case [AIR 1936 PC 523] the Judicial Committee observed that the principle applied in Taylor v. Taylor [(1875) 1 ChD 426) a Court, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that or nor at all and that other methods of performance are necessarily forbidden, applied to judicial officers making records under s. 164 and, therefore, held that magistrate could not give oral evidence of the confession made to him which he had purported to record under s. 164 of the Code. It was said that otherwise all the precautions and safe guards laid down in Sections 164 and 364, both which had to be read together, would become of such trifling value as to be almost idle and that it would be an unnatural construction to hold that any other procedure was permitted than which is laid down with such minute particulanty in the section themselves."*
>
> *9. The rule adopted in Taylor v. Taylor (1875) 1 Ch D 426] is well recognized and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted."*

Therefore in the present instance, stipulation of one time availment of EPCG Scheme at the time of exit cannot be read as permitting availment of EPCG Scheme under Rule 34 of SEZ Rules, 2006. Particularly under expression "on license" appearing in that Rule.

16. Further the Export Promotion schemes since 1994 after existence of

W.T.O are being made by member countries as compliant to the W.T.O provisions requiring no element of subsidy to be allowed even entering through procedural mechanism. Switchover thus from one scheme to another of capital goods needs to be construed strictly through specific mandate of the legislature and not liberally. We find that E.P.C.G. till exit from SEZ unit is not available, nor has appellant produced any such mandate or opinion from administrative authorities like Dev. Commissioners approving such availment by customs. We are, therefore inclined to uphold the order of Commissioner (Appeals), which we find has dealt correctly with the issue.

17. In view of foregoing, we find that no merit in this appeal, accordingly dismissed the same.

(Pronounced in the open Court on 11.09.2023)

(RAJU)
MEMBER (TECHNICAL)

Prachi

(SOMESH ARORA) MEMBER (JUDICIAL)

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Customs, Excise & Service Tax Appellate TribunalWest Zonal Bench
At Ahmedabad

REGIONAL BENCH- COURT NO. 1

CUSTOMS Appeal No. 10036 of 2015-DB
(Arising out of OIA No. KDL-CUSTOMS-000-APP-393-14-15 Dated-09.10.2014 passed by Commissioner of CUSTOMS-AHMEDABAD)

BHATIA SHIPPING PVT LTD .....Appellant
GOLDEN ARCADE, 1ST FLOOR,

OFFICE NO. 113, PLOT NO. 141-142,
SECTOR-08,GANDHIDHAM, GUJARAT

VERSUS

COMMISSIONER OF CUSTOMS-KANDLA.....Respondent
CUSTOM HOUSE,
NEAR BALAJI
TEMPLE,
KANDLA,
GUJARAT

APPEARANCE:

None appeared for the Appellant

Shri Anand Kumar, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MR. RAJU, MEMBER (TECHNICAL)
HON'BLE MR. SOMESH ARORA (JUDICIAL)

Final Order No. A/ 11665 /2023

DATE OF HEARING:04.08.2023
DATE OF DECISION:04.08.2023

RAJU

When the matter was called, it was noticed that the hearing has been fixed number of times i.e. on 20.02.2023, 23.03.2023, 20.04.2023 and 04.07.2023 and no one appeared on behalf of the appellant. The notice was served through the Authorized Representative's office also however no one appeared. The appeal has been taken up for hearing ex-parte.

This appeal has been filed by Bhatia Shipping Private Limited against imposition of penalty for failure to properly perform the duty of CHA. A penalty has been imposed under Section 114(iii) for violation of provisions of Section 34, 40 and 51 of the Customs Act.

The claim of the appellant is that the goods are liable for confiscation under Section 113 and therefore no penalty can be imposed. It is seen that Clause (g) of Section 113 read as under:

"Section 113. Confiscation of goods attempted to be improperly exported, etc. –The following export goods shall be liable to confiscation:--

……..

(g) any goods loaded or attempted to be loaded on any conveyance, or water-borne, or attempted to be water-borne or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India, without the permission of the proper officer;"

In the instant case, the goods were allowed to be loaded without let export order of the Custom Officer. It is duty of the CHA to ensure that properprocedure is followed. In these circumstances, we do not find any merit in the appeal. The same is dismissed.

(Dictated and Pronounced in the open court)

(RAJ U)MEMBER (TECHNICAL)

Neha

(SOMESH ARORA)MEMBER (JUDICIAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 01

CUSTOMS Appeal No. 10800 of 2019-DB

[Arising Out Of Order-In-Original/Appeal No MUN-CUSTM-000-APP-308-18-19 Dated 19.03.2019 Passed By Commissioner (Appeals) Commissioner Of Central Excise, Customs And Service Tax-AHMEDABAD]

M M Trading Company **...Appellant**

Opp. Hanuman Mandir, Mama Khania Road, Bhavnagar,

Gujarat

VERSUS

C.C.-Mundra **...Respondent**

Office Of The Principal Commissionerate Of Customs, Port User Buld.
Custom House Mundra, Mundra

Kutch

Gujarat-370421

APPEARANCE:

Shri N D George, Advocate for the Appellant

Shri. Anand Kumar, Superintendent (Authorized Representative) for the Respondent

CORAM: **HON'BLE MEMBER (TECHNICAL), RAJU HON'BLE MEMBER (JUDICIAL),SOMESH ARORA**

FINAL ORDER NO.A / 11695 /2023

DATE OF HEARING: 31.07.2023
DATE OF DECISION: 14.08.2023

SOMESH ARORA

Facts of the matter in brief are that the appellant filed Bill of Entry No.7032841 dated 02.07.2018 for clearance of 198.32 Mts of "Industrial Composite Mixture" classifying the goods under CTH 27101990, assessable value of which was declared as Rs.82,57,556/- involving duty of Rs.20,22,276/- The goods were given first check with order to draw sample and forward the same to CRCL, Kandla for testing. As per the test report of the Customs Laboratory, Kandla, is concerned, the imported goods were found "Light Oil, and not "Industrial Composite Mixture". The adjudicating authority found that the imported goods are classifiable under tariff heading 27101290 i.e. 'Other of sub heading Light Oils and Preparations'.

The adjudicating authority also found that goods falling under tariff heading 27101290 are allowed to be imported through State Trading Enterprises (STE) only as per Policy condition-5 of Chaptr-27 of ITC (HS), Schedule-1. However, the appellant is neither STE nor they have submitted any documents showing grant of such rights by the DGFT to import or export any of the goods notified for exclusive trading through STEs, therefore, they have violated the policy conditions of Foreign Trade Policy. The appellant had waived show cause notice and personal hearing. The adjudicating authority vide impugned order rejected the classification of the goods under CTH read with ITC (HS) Schedule-1's heading 27101990 and ordered to classify the same under CTH 27101290 and ordered to charge appropriate duty; confiscated the goods valued at Rs.82,57,557/- under Section 111(d) and 111(m) of the Customs Act, 1962 and gave an opportunity to the appellant to redeem the confiscated goods on payment of redemption fine of Rs.13,00,000/- under Section 125 of the Customs Act, 1962; imposed penalty of Rs.2,00,000/- on the appellant under Section 112(a)(i) of the Customs Act, 1962; also ordered that the goods to be released on payment of appropriate duty, redemption fine and penalty. The order of the adjudicating authority was upheld by the Commissioner (Appeals) as well in totality. Being aggrieved, appellant has filed the appeal contending, inter alia, that:

2 The department failed to appreciate that on examination it was found that the goods were declared as "Industrial Composite Mixture", however, on the basis of test report, the goods was found to be light oil. There is no change in rate of duty in case the goods are light oil. Therefore, there is no case for confiscation under Section 111 (d) and 111(m) of the Customs Act, 1962 as the goods are freely importable under CTH 27101290.

2.1 The department erred in holding that the goods merited classification under CTH 27101290 as light oil, which is without any basis and/or evidence as the density at 15 degree Celsius * 0.783g/ml. flash point-41 degree Celsius, aniline point-44 degree Celsius, initial boiling point M/s.M.M. Trading Company

2.2 (IBP) 158 degree Celsius, and final boiling point (FBP) = 212 degree Celsius can vary due to climate conditions prevailing at the relevant time. Therefore, there is no case for confiscation under Section 111 (d) and 111(m) of the Customs Act, 1962, nor for any penalties.

2.3 The findings of the department are unsustainable and unjustifiable in law and on facts especially as regards claim of classification not been approved resulting in mis-declaration and a false declaration to call for confiscation under the provisions of Section 111(d) and (m) of the Act. Relied on the judgment in case of Northern Plastic Ltd. Vs Collector of Customs & Central Excise reported in 1998 (101) ELR 549 (S.C.)

2.4 The department failed to appreciate that the test report of the supplier clearly shows the goods as "Industrial Composite Mixture" and it has been rightly classified under CTH 27101990 in international trade. Therefore, there was no intent or knowledge on the part of the appellant to mis-declare and claim incorrect classification.

2.5 It is also settled law that fine and penalty cannot be imposed in case of classification of goods even when there is no duty difference.

3. The Learned, advocate for the appellant submitted that the Respondent-Department, as per note 4 of Chapter 27 seeks to classify the

impugned goods under Customs Tariff Heading 27101290, as against Heading claimed by them under CTH 27101990. For the sake of convenience Sub-heading Note - 4 is reproduced here in below:

> *"4. For the purpose of sub heading 2710 12," light oils and preparations" are those of which 90% or more by volume (including losses) distil at 210 C according to the ISO 3405 method (equivalent to the ASTMD 86 method)."*

As per the test report the distillation has not been done in the present case. Therefore, the goods cannot be classified under CTH 2710 1290 as the goods do not confirm to the light oil.

3.1 The samples drawn have been tested for only 4 parameters on the basis of which it cannot be determined as light oil. The appellant has furnished a Certificate of Analysis along with the Bill of Entry which clearly goes to show that the goods are "Industrial Composite Mixture". The goods as per test report of the department bearing No. 1671 dated 12.07.2018, are composed of Mixture of Mineral Hydrocarbon oil having the following compositions:

i. Initial boiling 158°C
ii. Final boiling point 212°C
iii. Flash Point 41°C
iv. Density at 15°C 0.7830 gm/ml and is therefore light oil/SBPS

3.2 The appellant further say and submit that the order in original clearly records as follows: [para 05.]

> 'From the test report it is seen that the goods in question do not confirm the parameters of Motor Spirit.'

Further, the goods have not been tested for having anti-knock preparations, hence the respondent seeks to classify the goods under CTH 2710 1290 i.e **'Other'**. However, there is no duty difference even if the goods had confirmed the test of anti-knock preparations.

3.3 The appellant say and submit that the said goods are used in paint and similar industries. To qualify as light oil the product needs to be tested in ad mixture with anything other than 'Mineral oil'. The respondent has not produced any evidence to classify the product as 'light oil falling under CTH 2710 1290. However, due to paucity of time and the detention charges the appellant waived the SCN and personal hearing and did not get the goods re-tested.

3.4 Further, the appellant had submitted the certificate of analysis at the time of filling of the Bill of Entry. Further, to classify the goods as light oil the following ingredients were required to be satisfied i.e.

i. Distillation range
ii. Density @ 15°C
iii. Copper strip, 3hrs 100 C
iv. Flash point tag (min)
v. Color, saybolt
vi. Gum existent
vii. Aromatic Content
viii. Doctor test
ix. Sulphur total

3.5 In the instant case only four test were done out of the total nine test as per the certificate of analsis. Therefore, it is out of purview of light oils and preparation. In this Context we rely on the judgment of the Hon'ble Supreme Court of India in the case of Commissioner of C.

Ex. & S.T., Vadodara-II versus Gail (India) Ltd reported in 2023 (383) EL.T. 257 (S.C). Further the Hon'ble Tribunal in the case of Swarna Oil Services, SM Trading Company v/s Commissioner of Customs, Mundra reported in 2020(6) TMI 70-CESTAT Ahmedabad and in the case of Oil Energy verses Commissioner of Customs Jamnagar in Customs Appeal No. 01619 of 2020.

3.6 The policy condition -5 of chapter 27 does not apply in the present case as the said goods is not transportation fuel. It goods are used in paint and varnish industry. Therefore, the Foreign Trade Policy has not been violated. That being so the goods are liable to confiscation under Section 111(d) & (m) of the Customs Act, 1962 nor the appellant liable to redemption fine or penalty under Section 112(a)(i) of the Customs Act, 1962. Further, the appellants made added submissions vide their letter received on 11.08.2023 emphasizing, *inter alia* that only 4 test out of nine were done by the department.

3.7 The appellant therefore submits that the order imposing redemption fine and penalty be set aside with consequential reliefs.

4. As against this, Learned AR relied upon the order of both the lower authorities and the findings to justify the reasoning and the classification upheld by the Department as well as the confiscation and violations has analysed.

5. Considered. We find that the Learned Commissioner (Appeals) has in detail dealt with various submissions of the party as reproduced below:

> *"6. In the instant case, the appellant has declared the imported goods as "Industrial Composite Mixture" and classified the same under CTH 27101990. As mentioned in the impugned order, sample was drawn and forwarded to CRCL, Kandla for testing. The test report No.1671 dated 12.07.2018 states that the imported goods is composed of mixture of mineral Hydrocarbon having initial boiling point 158 C. Final Boiling Point 212° C, Flash Point 41° C, Density at 15° C - 0.7830 gm/ml; it is light oil. Thus as per the said test report, the imported cargo was other than the declaration and they are other than Industrial Composite Mixture and it is Light Oil. After it is confirmed from the test report that the imported goods are Light Oil, the adjudicating authority has correctly observed at para 05 and 06 of the impugned order that the imported goods are appropriately classifiable under tariff heading 27101290 i.e. 'Other' of sub- heading 'Light Oils and Preparations'. The appellant has contended that even the goods imported are freely importable under CTH 27101290. However, being the goods falling under tariff heading 27101290, the same are allowed to be imported through State Trading Enterprises(STE) as per Policy condition-5 of Chapter-27. The policy condition-5 of chapter 27 is as under:*
>
> *M/s.M.M. Trading Company*
>
> *"5 Import allowed through 10C subject to Para 2.20 of Foreign Trade Policy, except for the companies who have been granted rights for marketing of transportation fuels in terms of Ministry of P&NG's Resolution No. P- 23015/1/2001-MKT dated 8.3.2002 including HPCL BPCL & IBP who have been marketing transportation fuels before this date."*
>
> *As mentioned in para 13 of the impugned order, the appellant is neither an STE nor has submitted any documents showing grant of such rights by the DGFT to import or export any of the goods notified for exclusive trading through STES therefore the appellant has violated the policy conditions of the Foreign Trade Policy.*
>
> *7. Regarding confiscation, I find that as per Section 111(m) of the Customs Act, 1962, if any goods which do not correspond in respect of value or any other particular with the entry made under this Act, are liable to*

confiscation. In the present case, the appellant has declared the goods as "Industrial Composite Mixture" and classified the same under CTH 27101990 which are "Light Oil" as per test report of CRCI. Kandla. Also as per Section 111(d) of the Customs Act, 1962, any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force, are liable for confiscation. In this case, the goods being "Light Oil" falling under tariff heading 27101290, the same are allowed to be imported through State Trading Enterprises(STE) as per Policy condition-5 of Chapter-27. However, the adjudicating authority has found that the appellant is neither an STE nor has submitted any documents showing grant of such rights by the DGFT to import or export any of the goods notified for exclusive trading through STES thus the appellant has violated the policy conditions of the Foreign Trade Policy. The adjudicating authority has discussed in detail the confiscation, fine and penalty in the impugned order and I agree with the same"

5.1 Further in this matter, we find that the party had brought a test report with 9 parameters, which it asserts are relevant and decisive for determination of the nature of product and which was drawn purportedly in the country of exportation i.e Bandar Abbas. Same on analyses of 9 parameters including one Doctor test (which has been stated as negative), is reproduced below:

ANALYSIS	
Distillation range	145-230
Desity@ 15°C	780-790
Copper strip, 3hrs 100°C	1a
Flash point, tag(min)	45
Color, saybolt	25
Doctor test	Neg
Sulphut total(max)	0.1
Gum existent (max)	5
Aromatic content	20(max)

The report at R/P 18 of the appeal memo is undated and bears no name of testing agency and its purpose nor does it correlate with impugned consignment.

5.2 As against this, Department relied upon the test report Bearing No. 1671 dated 12.07.2018, from CRCL Kandla, which indicated the imported goods is composed of mixture of Mineral Hydrocarbon which is reproduced below:

- Initial Boiling Point = 158°C
- Final Boiling Point = 212°C
- Flash Point =41°C
- Destity at 15 C = 0.7830 gm/ml

5.3 On the basis of above and a clear finding that the product was light oil has been arrived at, by the department. The learned Commissioner (Appeals), after detailed discussion upheld the classification proposed by the Department. As can be seen the report sought to be relied upon by the appellant was drawn behind the back of the department and in another country and therefore cannot be given precedence over the report relied upon by the Department, which has much higher credence, in the factual matrix of the matter, as the party's report does not even match on the parameters tested by the department. Further even by relying upon this report, the appellants despite advice of suppliers for second opinion and the sample re-test did not opt for same foregoing their right of SCN or personal hearing or even re-test in the matter and just pleading for minimum fine and penalty.

5.4 After having got the goods cleared by waiving Show Cause Notice or personal hearing and requesting for imposition of minimum fine, which were clearly brought in violation of EXIM policy relating to light oil at the relevant time as the same was a canalised item and was allowed to be imported only through State Trading Enterprises, as per the policy condition 5 of chapter 27. An after thought of the appellants cannot be allowed to help their cause. Reliance in this regard is placed on 1992 (9) T.M.I 111 (S.C) in Fine Chemical Suppliers to emphasize that when violation in relation to goods are accepted, penalties get attracted. Party had all the opportunity to seek re-test or even cross examination of Chemical analyst, if it found it to be erroneous, but it chose not to do the same. Having acquiesced with so termed erroneous report, it cannot now be allowed to resist it. Error, qui non resistitur. (An error not resisted is approved) will therefore, in any case apply in the facts and circumstances of the matter.

5.5 In view of the foregoing, and party having accepted the classification and the nature of goods without seeking any re-test of the sample, we find that the present appeal is devoid of merits both on classification issue as well as violation of ITC policy and penalties imposed. We therefore find no merits in the present appeal and uphold the order of Commissioner (Appeals).

6. Appeal is accordingly dismissed.

(Pronounced in the open Court on 14.08.2023)

(RAJU)
MEMBER (TECHNICAL)

PALAK

(SOMESH ARORA) MEMBER (JUDICIAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03

CUSTOMS Appeal No. 10352 of 2015-DB

[Arising out of Order-in-Original/Appeal No AHM-CUSTM-000-APP-357-14-15 dated10.12.2014 passed by Commissioner of CUSTOMS-AHMEDABAD]

Asia World Exports **...Appellant**
80, Aip Marg Banian Street, Salim Manzil, Phdhonie
Mumbai
Maharashtra-400003

VERSUS

C.C.-Ahmedabad **...Respondent**

Custom House,
Near All India Radio Navrangpura,
Ahmedabad,
Gujarat

APPEARANCE:

Shri Hardik Modh, Advocate for Intervener for the Appellant

Shri Ajay Kumar Samota, Superintendent (Authorized Representative) forthe Respondent

CORAM: **HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR**
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO. 10063/2024

RAJU

DATE OF HEARING:06.11.2023DATE OF DECISION:05.01.2024

This appeal has been filed by M/s. Asia World Exports, against change in classification of goods imported by them.

2. Learned Counsel for the appellant argued that they imported “Glass Beads Chatons” and sought classification under Heading 70181020. The goodswere examined by Government approved valuer on 06.02.2014, and he certified the goods as “Glass Chatons” and described the goods as conical shaped stones resembling artificial diamonds without any piercing/ hole.

This according to the revenue was not confirming the definition of “Beads”, but appeared to be confirming to the “Chatons”. The Learned Counsel pointed outthat revenue sought to classify the goods not as beads but as chatons. The revenue was of the opinion that for anything to be classified as beads it has to be pierced. It was argued that while glass beads classifiable under Heading 70181020, the chatons are classifiable under heading 70181090 in thecategory “others”. Learned Counsel argued that Tribunal in the case of Art Beads Pvt Ltd had classified the said goods as beads. He argued that the saidorder was not changed by revenue and therefore is binding on revenue. He point out that in the said order the Tribunal had preferred to the HSN explanatory notes as well as letter F. No. 390/RTI/14-2011-JC dated 01.02.2011 of CBEC, wherein it was categorically stated that the said order ofthe Tribunal was accepted. Learned Counsel also relied on the decision of Supreme Court (2015) 321 ELT A202 (SC) in the case of M/s. VMB Impex - 2015 (321) ELT 522 (Tri.) was upheld. He pointed out that in the case of VMBImpex (Supra) reliance was placed in the decision of Tribunal in the case of Art Beads Pvt Ltd-2013 (292) ELT 472. In view of above learned Counsel sought relief.

3. Learned AR relied on the impugned order.

4. We have carefully considered the rival submissions. We find that theHeading 7018 of the Custom Tariff reads as follows:

7018	*Glass beads, imitation pearls, imitation precious or semi-precious stones and similar glass smallware, and articles thereof other than imitation jewellery, glass eyes other than prosthetic articles; statuettes and other ornaments oflamp-worked glass, other than imitation jewellery; glass microspheres not exceeding 1 mm in diameter*			
7018 10	• *Glass beads, imitation pearls, imitation precious or semi-precious stones and similar glass smallwares:*	*Kg.*	*10%*	-
7018 10 10	*---*	*Kg.*	*10%*	-
7018 10 20	*Bangles……*	*Kg.*	*10%*	-
7018 10 90	*…….*	*Kg.*	*10%*	-
7018 20 00	*---Beads. . . . . .*			
7018 90	*---Other. . . . . .*			
	-Glass microspheres not exceeding 1 mm in diameter			
7018 90 10	*-Other:*	*Kg.*	*10%*	-
7018 90 90	*---Glass statues. . . . . .*	*Kg.*	*10%*	-
	---Other.			

4.1 It is noticed that the Sub-heading 70181020 covers only “Beads”. TheHSN explanatory notes to Heading 7018 described Glass Beads as follows:

> “(A) Glass beads (e.g., as used for necklaces, rosaries,imitation flowers, ornaments for graves, etc.; for decorating textile articles (trimmings, embroidery, etc.), handbags or the like; or for use as electrical insulators). These beads, whether or not coloured, are in the form of small pierced balls, more or less round in shape; they are obtained from tubes which are cut into sections of approximately equal length and diameter. The resulting small cylinders are then introduced, together with a mixture of powdery materials (charcoal, graphite, plaster, etc), into a metal drum revolvingover a furnace. Heat softens the glass cylinders and friction given them a more or less spherical shape, while the powderymaterial prevents them from adhering to one another.”

4.2 Thus, it is seen that the Harmonised System of Nomenclature (HSN) explanatory notes clearly describes Glass Beads “small pierced balls”. Therefore *prima facie* it is appears that the

HSN explanatory notes clearly limits the definition of Beads only to those items which are pierced.

4.3 On the other hand the learned Counsel has relied on the decision of M/s.

VMB Impex which were upheld by Hon'ble Apex Court. It is noticed that the decision in the case of M/s. VMB Impex primarily relies on the decision of Tribunal in the case of M/s. Art Beads Pvt Ltd (Supra) and on the case of Starlite Corporation (supra). In the said decision there is no discussion whatsoever on the HSN notes. It would appear that the HSN note were not brought to the knowledge of the Tribunal and therefore could not come to theattention of Hon'ble Apex Court. The decision in the case of M/s. Starlite corporation (Bom.) reported under 1989 (39) ELT 538 (Bom.) was for a periodwhich was prior to introduction of the new Custom Tariff based on HSN notes.In the said decision reliance was placed on ISI specification to hold that piercing is not a necessary requirement for an items to be a beads. It would therefore appear that the facts in the case of M/s. Starlite were different in somuch as it was dealing with the different custom tariff, wherein no definition of beads was provided and therefore the definition of beads had to be imported from other sources.

4.4 In the case of M/s. Art Beads Pvt Ltd, the decision was based on the decision of Hon'ble Bombay High Court in the decision of M/s. StarliteCorporation. This decision also fails to take note of HSN explanatory notes.

- Hon'ble Apex Court in the case of M/s. Hewlett Packard India Sales Pvt Ltd-2023 (383) ELT 241 (SC) as observed as follows:

  "12. While it appears well settled that the HSN is to be normally takenas a safe guide for classifying goods under the First Schedule because it is based on an internationally recognized 'harmonized nomenclature [Collector of Central Excise, Shillong v. Wood Craft Products Limited - (1995) 3 SCC 454 = 1995 (77) E.L.T. 23 (S.C.)], a bare reading of theexplanatory note applicable to the sub-heading clearly lays out the factthat there is no mandatory condition for being operable without any external source of power. We are thus unable to agree with the Appellants that only ADPs with a built-in power source is necessarily required to be classified under 'Tariff Item 8471 30 10'. In other words,no element of 'functionality' is contemplated for the purpose of classifying the Concerned Goods as 'portable'."

- In the case of M/s. Theremax Ltd- **2022 (382) ELT 442**

  6. *The definition of a product given in the HSN should be givendue weightage in the classification of a product for the purposeof levying excise duty. This is because in the Statement of Objects and Reasons of the Bill leading to enactment of CentralExcise Tariff Act, 1985, it was clearly stated that the pattern oftariff classification is broadly based on the system of classification derived from the International Convention on the Harmonised Commodity Description and Coding System (Harmonised System) with such contraction or modification thereto as are necessary, to fall within the scope of the levy ofCentral Excise duty. The tariff so suggested for the levy under the Indian Tariff Act is based on an internationally accepted nomenclature, in the formulation of which, all considerations, technical and legal, have been taken into account. This was*

done to reduce avoidable disputes on tariff classification. Besides, the tariff would be on the lines of the harmonized system. It was also borne in mind that the tariff on the lines ofthe harmonized system would bring about considerable alignment, between the Customs and Central Excise Tariffs, which in turn, would facilitate charging of additional customs duty on imports, equivalent of excise duty. It was therefore expressly stated in the Statement of Objects and Reasons thatthe Central Excise Tariff are based on the HSN and the internationally accepted nomenclature was as such taken into account, to reduce tariff classification disputes. Thus, it was suggested that a safe guide for classification is the internationally accepted nomenclature emerging from the HSN and in case of doubt, the HSN should be chosen advisory for ascertaining the true meaning of any expression used in the Tariff Act. In Wood Craft (supra), in the opinion written by Justice J.S. Verma, the following was pertinently opined in thiscontext:

> "12. … .. Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the HSN. Thisbeing the expressly acknowledged basis of the structure of Central Excise Tariff in the Act and the tariff classification made therein, in case of any doubt the HSNis a safe guide for ascertaining the true meaning of any expression used in the Act. The ISI Glossary of Terms hasa different purpose and, therefore, the specific purpose oftariff classification for which the internationally accepted nomenclature in HSN has been adopted, for enacting theCentral Excise Tariff Act, 1985, must be preferred, in caseof any difference between the meaning of the expressiongiven in the HSN and the meaning of that term given in the Glossary of Terms of the ISI.
> xx xx xx
> 18. We are of the view that the Tribunal as well as the High Court fell into the error of overlooking the fact that the structure of the Central Excise Tariff is based on the internationally accepted nomenclature found in the HSN and, therefore, any dispute relating to tariff classificationmust, as far as possible, be resolved with reference to thenomenclature indicated by the HSN unless there be an express different intention indicated by the Central ExciseTariff Act, 1985 itself. The definition of a term in the ISI Glossary, which has a different purpose, cannot, in case of a conflict, override the clear indication of the meaning of an identical expression in the same context in the HSN.In the HSN, block board is included within the meaning ofthe expression "similar laminated wood" in the same context of classification of block board. Since the CentralExcise Tariff Act, 1985 is enacted on the basis and patternof the HSN, the same expression used in the Act must, asfar as practicable, be construed to have the meaning which is expressly given to it in the HSN when there is noindication in the Indian tariff of a different intention."

7. *Commenting on the importance of taking guidance from HSN Classification and how a taxing statute should be construedin consonance with their commonly accepted meanings in the trade and popular sense, Justice Sanjiv Khanna in D.L. Steels (supra) also so correctly observed as follows :-*

> "9. The Harmonised System of Nomenclatur[e9], developed by the World Customs Organisation, has been adopted in India by way of the Customs Tariff Act, 1975,though there are certain entries in the Schedules to this Act which have not been assigned HSN codes. The Harmonised System is governed by the International Convention on Harmonised Commodity Description and Coding System, which was adopted in 1983, and enforcedin January, 1988. This multipurpose international product nomenclature

harmonises description, classification, and coding of goods. While the primary objective of the HSN is to facilitate and aid trade, the Code is also extensively used by governments, international organisations, and the private sector for other diverse purposes like internal taxes, monitoring import tariffs, quota controls, rules of origin, transport statistics, freight tariffs, compilation of national accounts, and economic research and analysis. In the present times, given the widespread adoption of the Harmonised System by over 200 countries, it would be extremely difficult to deal with an international trade issue involving commodities, without adverting to the Harmonised System. The Code is the bedrock of custom controls and procedures. The HSN consists of over 5000 commodities groups, which are structured into 21 Sections and 97 Chapters, which are further divided into four and six digit sub-headings. Many custom administrations, like India, use an eight or more digit commodity coding system, with the first six digits being the HSN code.

10. Classification under the Harmonised System is done by placing the goods under the most apt and fitting sub- heading. This is done by choosing the appropriate Chapter, Heading, and sub-heading respectively. To facilitate interpretation and classification, each of the 97 Chapters in the HSN contain corresponding Chapter Notes, General Notes, and Explanatory Notes applicable to the Headings and sub-headings within that Chapter. In addition, there are six General Rules of Interpretationapplicable to the Harmonised System as a whole.

xx xx xx

12. We would, at this stage, take on record the well- settled principle that words in a taxing statute must be construed in consonance with their commonly accepted meaning in the trade and their popular meaning. When aword is not explicitly defined, or there is ambiguity as to its meaning, it must be interpreted for the purpose of classification in the popular sense, which is the sense attributed to it by those people who are conversant with the subject matter that the statute is dealing with. This principle should commend to the authorities as it is a goodfiscal policy not to put people in doubt or quandary abouttheir tax liability. The common parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law-maker. However, the above rule is subject to certain exceptions, for example, when there is an artificial definition or special meaning attached to the word in a statute, then the ordinary sense approach would not be applicable."

From the above, it is apparent that the custom tariff itself was different whendecision of Tribunal in the case of M/s. Art Beads Pvt Ltd was given and the same was the condition when the decision of Hon'ble High Court of Bombay was given in the case of M/s Starlite Corporation. In both these cases the classification was not being examined under the new custom tariff and in boththese cases the explanatory notes given in HSN were not brought to the knowledge of the Courts. In these circumstances, the decisions given in the context of new custom tariff purely relying on the decision of Tribunal in the case of M/s. Art Beads Pvt ltd and that of Hon'ble High Court of Bombay in thecase of M/s. Starlite Corporation ignoring explanatory notes to the HSN on cannot be relied. In view of clear definition of beads provide in HSN, which isa most reliable guide for the purpose of classification under the custom tariff cannot be ignored. Thus, relying on the definition of the beads given in the HSN notes we hold that piercing is a necessary requirement for anything to be classified as beads. There is no disputes that the product imported byappellant is not pierced. Therefore, the same cannot be classified as beads.

5. In these circumstances, the appeal is dismissed.

(Pronounced in the open Court on 05.01.2024)

RAMESH NAIR
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

PALAK

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 624 of 2009-DB

(Arising out of Order-in-Original No.142/2009 dated 27.10.2009 passed by the Commissioner of Customs, Cochin.)

M/s. Ply Point Appellant
Feroke Calicut – 673
631.

Versus

Commissioner of Customs
Custom House Respondent
Cochin.

Appearance:

Mr. Raghunath, Advocate For the Appellant

Mr. K. A. Jathin, Dy. Com. (AR) For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20869 /2023

Date of Hearing: 17.05.2023
Date of Decision: 23.08.2023

Per : R. BHAGYA DEVI

M/s. Ply Point, hereinafter referred, as the appellant is a proprietorship concern owned by Shri V. Habeeb Rahiman. They are engaged in the business of import and sale of items such as Medium Density Fibre (MDF) Boards and Particle Boards from Malaysia. On 20.04.2006, the office of DRI Cochin received information that the MDF boards that were imported by M/s. Ply Point were highly undervalued and there was large-scale evasion of customs duty. On investigation, the officers noticed that the actual supplier of the goods was M/s. V. R. Marketing SDN BHD from Malaysia and they located the under invoiced documents from the office of VR Marketing (M) SDN BHD at Egmore, Chennai which was operated by Shri Ramachandran, a Malaysiancitizen of India origin.

2. The officers of DRI located the relevant Bill of Entry No.176959 dated 19.04.2006 along with the commercial invoice for MDF boards where the value was shown as USD 10,888.10for the consignment imported in the containers. Accordingly, detailed investigations were conducted at Chennai VR marketing office. 15 consignments of MDF boards imported by M/s. PlyPoint from Green Panel Products (M) SDN BHD, Malaysia were taken up for detailed scrutiny. The godown of the importer at Cochin was searched and the officers seized

2169 numbers of MDF boards. Detailed investigations conducted by DRI; several incriminating documents were found and after recording statements from various individuals, notice was issued rejecting the declared value of the MDF boards in the above 15 consignments and for re-determination of the value at Rs.1,61,16,901/- (CIF) under Rule 4 of the Customs Valuation Rules, 1988 read with the Section 14 of the Customs Act, 1962. Differential duty was demanded along with interest invokingprovisions for confiscation under Section 111(m) of the Customs Act, 1962, and penalty under Section 114A of the Customs Act, 1962.

3. The Commissioner vide impugned order dated 27.10.2009 redetermined the value of goods imported under the 15 bills of entry at Rs.1,61,16,901/- as against the declared value of Rs.61,01,811. Differential duty of Rs.35,49,849/- was confirmed; goods were confiscated; penalty of Rs.25,000/- and Rs.30,44,745/- on the appellant was imposed under Section112(a) and 114A of the Customs Act, 1962, respectively and penalty of and Rs.1,00,000/- was imposed on Shri Habeeb Rahiman under section 112 (a) of the Customs Act.

4. The learned counsel Shri Raghunath on behalf of the appellant submits that as per Invoice dated 10.03.2006, 10containers of Medium Density Fibre (MDF) Board "C" Grade was imported and cleared on 19.04.2006. On 20.04.2006, the officers of DRI, Kochi detained these goods – alleging that the MDF Boards were "highly undervalued" – without any physical verification and analysis. They claim that testing and analysis showed that the goods did not confirm to grade I or grade II. Itis submitted that on 21.04.2006, DRI searched the business place of V.R. Marketing at Chennai. During the course of investigation, statement of one Shri Sathyanarayana, Country Manager of V.R. Marketing was recorded where an Excel Sheet sent along with e-mail dt. 19.04.2006 by Rajeshwar Rao of V.R. Marketing was seized/recovered from the computer under a Mahazar, which according to department, showed name of the appellant with alleged details in respect of goods sent to them which contained details of several other traders also.

4.1 Further, the counsel stated that during investigation, statement of Shri Habeeb Rahiman was recorded on 05.05.2006 where he was questioned with reference to the Mahazar and the e-mail with the details in the attachment and was asked about the entries found in the Excel Statement admitted that the "ACT AMT" as noted in the e-mail dt. 19.04.2006 is the correct price and that he will "try to pay the customs duty on this price". This statement was immediately withdrawn by Shri Habeeb Rahiman on the ground that he wasthreatened, harassed and manhandled by DRI and the statement given was not voluntary.

4.2 The appellant also submits that during the course of adjudication proceedings, officers of DRI were cross-examined while the witnesses to the Mahazar could not be cross-examined since their whereabouts were not known and cross- examination of Shri Jacob Cherian, Appraiser who had conducted investigation could not be completed since he did not appear for further cross-examination nor did he produce certain material documents which he was directed to be produced – stating that he has been transferred to Mumbai. It is stated that the statement of Shri Sathyanarayana as well as an e-mail statement received in his e-mail ID from Principalsat Malaysia are inadmissible as he committed suicide and was unavailable for cross-examination. Referring to Section 32(2) of the Indian Evidence Act, they claim that Shri Sathyanarayana's statement was extracted from his memory. The statements show that all negotiations took place between the Malaysian Party and the Traders to which Shri Sathyanarayana was not a party and he merely stated that "*Shri Rajeshwara Rao will negotiate the price and the terms regarding undervaluation and payments of declared amount and differential amounts with the customers"*.

4.3 With regard to the email recovered on 21.04.2006, they submit that the contents of email cannot be relied upon for thereason that the same does not contain any authentication by the officer who is alleged to have recovered the same but contains only the signature of Shri Sathyanarayana as well as two independent witnesses who could not be traced. Therefore, there is nothing to indicate that what is now used against the appellant was actually the one recovered from the computer as alleged.

4.4 The following are the basic submissions of the appellant:

a. Test report disclosed that the samples do not confirm to Grade I or Grade II and hence 'undervaluation' cannot be alleged;

b. The Statement of Shri Sathyanarayana was inadmissible since he had committed suicide and consequently, he was not available for cross examination.

c. That the Excel Sheet claimed to have been downloaded from the computer and seized under mahazar dated 21.04.2006 is liable to be rejected because all these attachments downloaded contained signature of Shri Sathyanarayana and two witnesses and did not containthe signature of officer who claimed to have downloaded the attachment and neither Shri Sathyanarayana nor the two independent witnesses have been made available for cross-examination,

d. The Statement of Shri Habeeb Rahiman was not to be used unless corroborated by other independent evidence, since the same was retracted and such statement hasbeen recorded without reference to the books of accounts.

5. The learned Authorised Representative of the Department reiterating the findings of the Commissioner stated that only after detailed investigations by the DRI, they could unearth materials evidencing under invoicing. He also submitted that though Shri Sathyanarayana was not cross- examined, his statements and records retrieved from his computer were corroborated with the statements by Mr. Habeeb Rahiman and others. Therefore, under-invoicing has been proved and hence, requested for dismissing the appeal ofthe appellant.

6. The first issue is that since the test report disclosed the samples which do not confirm to Grade I or Grade II, hence undervaluation cannot be alleged. In this regard, it can be clearly seen that the Commissioner in the impugned order has held that the notice did not allege undervaluation based on thequality of the MDF boards instead undervaluation was purely based on the evidences unearthed during the investigations.

7. The second issue is that Shri Sathyanarayana's statement is inadmissible as evidence since he had committed suicide and not available for cross-examination. Section 138B reads as follows:

Relevancy of statements under certain circumstances

(1) A statement made & signed by a person before any gazetted officer of customs during the course of any enquiry or proceeding under this act shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains-

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, is kept out of wayby the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

Section 32 of the Indian Evidence Act states as follows:

Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. —

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in thefollowing cases: —

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(2) **or is made in course of business.**—When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty;or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind;or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

7.1 From the above Sections, it is obvious that statements made and signed by the dead persons or who cannot be found remain valid and admissible as long as these statements are made in the course of business. Therefore, the Commissioner was right in stating that "Customs Officer is not a Police Officer - Statements made before him under Section 108 of Customs Act, 1962 are admissible in evidence and are not hit by Section 25 of Indian Evidence Act" as is held by the apex court in the case of **Romesh Chandra Mehta Versus State of West Bengal - 1999 (110) E.L.T. 324 (S.C.)** [CONSTITUTION BENCH] which is reiterated again by the Supreme Court in the case of **Harbansingh Sardar Lenasingh Versus State of Maharashtra: 2004 (177) E.L.T. 13 (S.C.)**, where it was held that "The matter indeed is concluded by the decision of thisCourt in the case of *Romesh Chandra Mehta* v. *State of West Bengal*, (1969) 2 SCR 461, wherein it has been held that the statements recorded by an officer of Customs under the CustomsAct are admissible in evidence and are not hit by Section 25 of the Indian Evidence Act or Article 20(3) of the Constitution".

8. The next issue is whether these statements made by Shri Sathyanarayana was it done in the course of business and has it been corroborated with other statements and evidences on record. Though, we do not find any definition for the ordinary course of business; it is generally understood as the usual transactions, customs and practices of a business and of a company. It is an undisputed fact the appellant is in the business of import of MDF Boards. It is also a fact that Shri Sathyanarayana, the Country Manager of VR Marketing in India of the Malaysian supplier of the goods. It is also a fact that from the computer of Shri Sathyanarayana, certain documents which were inculpatory of the appellant was found. These documents indicated that the price was higher than the price quoted by the appellant at the time of import. An email was sent to ShriSathyanarayana by Shri Ramachandran (Rajesh), Managing Director of VR Marketing Co., which is corroborated by the statement given by Shri V. Habeeb Rahiman on 15.6.2006. The email and the documents recovered from Shri Sathyanarayana's computer categorically show the prices of the imported goods were different from what was quoted in the Bill of Entry and this fact was corroborated by Shri V. Habeeb Rahiman and these documents were found and seized from the office of M/s. V R Marketing at Chennai on 21.04.2006. Shri Sathyanarayana in hisstatement admitted under-invoicing of the goods supplied by a trading company in the name of Green Panel Products. Shri V. Habeeb Rahiman, Proprietor of Ply Point, his statement wasrecorded on various dates on 25.04.2006 and 5.5.2006. It is alsoseen that at a later date when the proprietor was issued summon and called for recording his statement, he filed ananticipatory Bail Application No.3396 of 2006 in the High Courtof Kerala and only on the direction of the Hon'ble High Court of Kerala dated 13.06.2006, he reported to the DRI officers on 15.6.2006 and here it says that the Hon'ble High Court of Kerala ordered to interrogate him and if found necessary to arrest him. Pursuant to this order, Shri V. Habeeb Rahiman reported before the DRI officers on 15.6.2006 along with his accountant Mr. M. V. Ahammed Nizar. The detailed statement of Shri Sathyanarayana which has been

corroborated by Shri V. Habeeb Rahiman, theProprietor of Ply Point, cannot be held as non-admissible just because Shri Sathyanarayana was not there for cross- examination. In fact, all the records and the documents which were seized from the computer were cross verified with the proprietor which was once again admitted by Shri V. Habeeb Rahiman, hence, the authenticity of the documents cannot be questioned. The statements and the under-invoicing documents were also corroborated by other importers of MDF from Green Panel Products, Malaysia whose names figured in the attachmentof the incriminating email. It is also a fact that the other importers to whom show-cause notices were issued, approached the Settlement Commission Bench at Chennai. They admitted and paid the duty differences based on the incriminating email recovered from V R Marketing at Chennai and recovered under Mahazar dated 21.4.2006 as extracted below. The fact that the other importers accepted the incriminating email and under-invoicing documents, goes to prove the authenticity and correctness of all the documents recovered. In view of these corroborated evidences, it is seen that Shri Sathyanaraya's statement and the documents recovered from his computer (extracted below) are authentic, therefore, the Commissionerwas right in redetermining the value of the goods of 15 Bills of Entry as Rs.1,61,16,901/- [CIF] under Rule 4 of the Customs Valuation Rules, 1988 read with Section 14 of the Customs Act, 1962. Accordingly, the differential duty of Rs.35,49,849/- demanded under proviso to Section 28(1) of the Customs Act, along with interest is also upheld.

(i) Email recovered from Shri Sathyanaraya's computer

ANNEXURE B-2 ANN-IV 59

Gmail

sathya1224@gmail.com | Settings | Help | Report bug | Sign

Search Mail | Search the Web | Show search options | Create a filter

Compose Mail

Inbox
Starred
Chats
Sent Mail
Drafts (1)
All Mail
Spam (48)
Trash

Contacts

Quick Contacts
Search, add, or invite
krishnakumar sathya
Set status here
chandran
deepak_glass2001
dri_czu
gayatri
info
maranco
Pravin Bidwal
rajes

Labels

Invite a friend
Gmail to: Show all
Send Invite | 18 left
Preview invite

Rotten Tomatoes: Movies - 40% Scary Movie 4 - 2½ hours ago

« Back to Inbox | Archive | Report Spam | Delete | More actions

‹ Newer 6 of 58 Older ›

Indian Off Exp06 Inbox

Rajes to me More options Apr 19 (2 days ago)

Dear Mr Sathya,

Pls find hereunder Up-Dated outstanding details for your kind reference.

I have included 2 new coloums has to show the Amount collect from the Customer, from where we can find the un-paid customer.

Kindly up-date this file upon you collect any payment from customer.

K. Sathyanarayanan
21/4/06

Regards

Rajes.R

(1) T. Govindaraj
21/4/2006

(2) A. Kalliappan
21/4/2006

Indian Off Exp06(Sathya19.04).xls
105K Gmail could not scan this file for viruses. View as HTML Download

Reply | Forward | Invite Rajes to Gmail

(ii) Invoice

1	Muniswamy	Venk			[illegible]	[illegible]	64.37	$13,839.55	$9,011.60	10/12/04 TT	$4,827.75		INR 211,000.00	05/05/05
2	[illegible]	KP			05.03 / 03.12	04881 / 0170	41.91	$10,309.66	$6,266.50		$4,023.36		INR 177,000.00	05/05/05
3	Muniswamy	Venk			04.08 / 01.02	04481 / 0211	41.91	$5,156.16	$2,934.40		$895.00		INR 39,350.00	05/05/05
	Muniswamy	Venk			04.08 / 01.02	04481 / 0211	41.91				2039		INR 89,715.00	28/05/05
4	Muniswamy	Venk			04.08 / 09.03	04883 / 0224	41.91	$10,309.66	$5,867.40	11/04/05 TT	$4,442.46		INR 195,400.00	05/06/05
5	Ply Point	PP			04.08 / 20.03	04884 / 0247	62.87	$13,831.40	$4,403.90		$9,430.50		INR 411,000.00	05/06/05
6	Muniswamy	Venk			04.08 / 10.04	04882 / 0251	62.87	$15,151.67	$9,116.15		$6,035.52		INR 265,500.00	28/05/05
7	Khemka	KP			06.04 / 17.04	4882-5003 / 0256	41.80	$10,157.40	$6,270.00	04/05/05 TT	$3,887.40		INR 171,000.00	28/05/05
8	Vil	Vil				0301 / 0263	107.16	$16,395.46	$11,787.60		$4,607.86		INR 198,138.00	28/05/05
9	Vil	Vil			05.05 / 25.05	05003 / 0294	64.58	$15,047.14	$10,332.60		$4,714.34		INR 202,716.00	28/05/05
10	Ply Point	PP			05.05 / 25.04	05003 / 0268	62.87	$15,781.40	$4,404.90	13/08/05 TT	$2,410.55		INR 106,065.00	28/05/05
	Ply Point	PP			05.05 / 25.04	05003 / 0268	62.87				8969.90		INR 394,677.00	07/06/05
11	Muniswamy	Venk			18.05 /	05933 / 0293	64.58	$15,047.14	$9,687.00		$5,360.14		INR 235,840.00	07/06/05
12	Ply Point	PP			18.05 /	05005 / 0292	62.87	$15,717.50	$6,287.00		$8,397.00		INR 369,483.00	07/06/05
	Ply Point	PP			18.05 /	05005 / 0292	62.87				$1,033.50		INR 45,474.00	01/07/05
13	Muniswamy	Venk			18.05 /	05005 / 0298	41.91	$10,184.13	$6,286.50		$3,897.60		INR 171,490.00	01/07/05
14	Muniswamy	Venk			17/05	05003 / 0291	41.68	$10,128.24	$6,252.00		$3,876.24		INR 170,554.00	01/07/05
15	Geetha	GT			27.05 / 03.06	0354 / 0306	107.16	$16,609.80	$8,572.80		$8,037.00		INR 353,628.00	01/07/05
16	Daulat	DB			/ 02.06	0359 / 0314	107.16	$13,930.80	$8,572.80		$5,358.00		INR 230,394.00	01/07/05
17	Ply Point	PP			/ 25.05	05006 / 0309	62.87	$15,717.50	$6,287.00		$9,430.50		INR 34,576.00	01/07/05
													INR 370,935.00	03/04/06
18	Ply Point	PP			/ 23.06	05006 / 0330	41.91	$10,393.68	$4,191.00	13/08/05 TT	$321.30		INR 13,816.00	01/07/05
	Ply Point	PP			/ 23.06	05006 / 0330	41.91	$10,393.68	$4,191.50		$5,881.00		INR 252,883.00	21/07/05
19	Muniswamy	Venk			10/06/05	05960 / 0318	43.06	$10,032.98	$6,459.00		$1,696.00		INR 72,936.00	21/07/05
	Muniswamy	Venk			10/06/05	05960 / 0318	43.06	$10,032.98	$6,459.00		$1,878.00		INR 80,744.00	28/07/05
20	Evershine	PT			27.06 / 02.07	05962 / 0335	193.30	$43,751.30	$28,072.50		$15,678.80		INR 674,188.00	21/07/05
21	Geetha	GT			23.06 / 04.07	06014 / 0338	106.69	$24,218.63	$16,003.50		$8,215.13		INR 353,245.00	28/07/05
22	Deepak	DG			30.06 / 04.07	05195 / 0343	41.92	$10,228.48	$6,285.00		$3,940.48	x	INR 169,440.00	28/07/05
23	Muniswamy	Venk			/ 07.07	05980 / 0352	42.94	$9,683.02	$6,441.00		$3,243.02		INR 139,406.00	28/07/05
24	Daulat	DB			02.06 /	0359 / 0315	214.33	$27,434.24	$17,146.40		$5,981.84		INR 257,185.00	28/07/05
	Daulat	DB			02.06 /	0359 / 0315	214.33	$27,434.24	$17,146.40		$4,306.00		INR 185,190.00	09/08/05
25	Hindustan S A	Hind			23.06 / 04.07	05958 / 0341	64.47	$14,742.43	$9,670.50		$5,071.93		INR 218,092.00	09/08/05
26	Maimuna	PwP			29.06 / 12.07	06090 / 0357	64.37	$14,032.66	$9,655.50		$2,598.00	x	INR 111,718.00	09/08/05
	Maimuna	PwP			29.06 / 12.07	06090 / 0357	64.37	$14,032.66	$9,655.50		$1,779.16	x	INR 76,503.00	23/08/05
27	Muniswamy	Venk			20.10 / 14.07	05195 / 0361	41.92	$10,270.40	$6,228.00		$4,042.40		INR 173,823.00	23/08/05
28	Hindustan S A	Hind			20.06 / 12.07	06058 / 0358	42.91	$9,654.75	$6,436.50	19/07	$3,218.25		INR 138,384.00	23/08/05
29	Maimuna	PwP			10.09 / 27.06	05003 / 0337	21.06	$5,854.66	$3,159.00		$2,695.66	x	INR 115,915.00	23/08/05
30	Evershine	PT			18.05 / 27.07	05963 / 0382	193.34	$43,868.02	$28,400.82		$11,520.35		INR 495,375.00	23/08/05
	Evershine	PT									$3,946.85		INR 169,714.60	10/09/05
31	Hindustan S A	Hind			22.07 / 01.08	06089 / 0375	107.54	$24,842.02	$16,131.00		$8,711.02		INR 374,573.86	10/09/05
32	Hindustan S A	Hind		09.08	20.06 / 04.08	06058 / 0396	41.92	$10,228.48	$6,288.00		$3,940.46		INR 169,440.64	10/09/05
33	Deepak	DG			/ 04.08	06089 / 0391	84.93	$20,185.37	$12,739.50		$7,445.87	x	INR 320,172.40	10/09/05
34	Maimuna	PwP			22.07 / 16.08	06089 / 0377	21.53	$5,016.49	$3,229.50		$1,786.99	x	INR 76,840.60	10/09/05
35	Maimuna	PwP			22.07 / 16.06	06091 / 0377	62.51	$15,002.40	$9,378.50		$5,629.90	x	INR 241,913.70	10/09/05
36	Vil	Vil			20.06 / 11.06	06058 / 0389	64.58	$15,176.30	$9,687.00		$5,489.30		INR 236,039.90	10/09/05
37	Vil	Vil			/ 11.08	06132 / 0374	64.58	$14,853.40	$9,687.00		$5,166.40		INR 222,155.20	10/09/05
38	Hindustan S A	Hind			20.06 / 24.08	06058 / 0376	213.50	$49,473.54	$32,025.00		$17,448.55		INR 204,149.10	10/09/05
	Hindustan S A	Hind											INR 546,138.50	15/09/05
39	Vil	Vil		26.08	/ 24.08	06132 / 0411	150.26	$34,023.30	$22,539.00		$10,554.92		INR 453,861.50	15/09/05
	Vil	Vil		26.08	/ 24.08	06132 / 0411	150.26	$34,023.30	$22,536.00		$929.38		INR 39,963.40	01/10/05
40	Muniswamy	Venk			/ 24.08	06087 / 0412	107.44	$24,797.74	$16,116.00		$8,681.74		INR 373,314.60	01/10/05
41	Deepak	DG		26.08	20.06 / 24.08	06056 / 0413	65.84	$18,713.12	$12,876.00		$5,837.12	x	INR 250,996.20	01/10/05
42	Hindustan S A	Hind	EFB	21.09	/ 21.09	06090 / 0435	107.28	$24,138.00	$16,092.00		$8,046.00		INR 345,978.00	01/10/05
43	Muniswamy	Venk	EFB	21.09	/ 21.09	06095 / 0436	63.40	$15,210.50	$9,510.00	05/10/05 TT	$180.20		INR 7,747.60	01/10/05
	Muniswamy	Venk		21.09	/ 21.09	06053 / 0436	63.40	$15,210.50	$9,510.00		$5,520.60		INR 237,385.80	10/10/05
44	Geetha	GT	DW		/ 21.09	1970 / 0437	213.14	$49,448.50	$31,971.00	15.5/16.5	$17,477.50	460.38	INR 769,266.72	10/10/05
45	Geetha	GT	DW	21.09	/ 21.09	1972 / 0438	101.21	$29,553.32	$15,181.50	hmr	$14,371.82	218.51	INR 641,979.10	10/10/05
46	Geetha	GT	PW/EFB	07.10	/ 30.09	06256n1970 /	107.00	$23,754.60	$16,050.00	15.5/16.5/11	$7,300.00	231.12	INR 331,369.20	10/10/05
	Geetha	GT		07.10	/ 30.09	06256n1970 /	107.00	$23,754.60	$16,050.00		$405.00		INR 17,811.34	14/10/05
47	Geetha	GT	DW	08.10	/ 02.10	1970 / 0467	148.10	$34,591.20	$22,386.00	15.5/16.5	$12,226.20		INR 537,952.80	14/10/05
48	Geetha	GT	EFB	29.09	/ 29.09	06136 / 0444	125.74	$30,177.60	$18,861.00	5.5 - 6	$11,316.60		INR 444,235.86	14/10/05
													INR 53,694.50	16/11/05

(1) T.Govindarai 21/4/2006

(2) D. Kallappa 21/4/2006

K. Sammanarayana 21/4/06

Explained to Habeeb in Malayalam

5/5/06

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												Date	USD	INR	Received from Cust	Balance From Cust	
1	[illegible]	Hind	Sfb	[illegible]	[illegible]	[illegible] / 525	121.72	$27,979.90	$19,158.00	12/01	$8,821.90		xx	INR 55,732.20	INR 55,732.20	INR 0.00	
1	[illegible]	Hind	Sfb	[illegible]	[illegible]	[illegible] / 525	121.72	$27,979.90	$19,158.00	12/01	$8,821.90		xx	INR 329,784.83	INR 329,784.83	INR 0.00	10/03
2	Geetha	GT	Efb	06/01	30/12/05	6672 / 526	83.83	$19,532.39	$12,574.50		$6,957.89		xx	INR 304,059.79	INR 304,059.79	INR 0.00	21/03
3	Ranga	RO	Efb	06/01	30/12/05	6301 / 531	170.18	$37,423.40	$25,527.00		$11,896.40		xx	INR 366,155.38	INR 366,155.38	INR 0.00	21/03
3	Ranga	RO	Efb	06/01	30/12/05	6301 / 531	170.18	$37,423.40	$25,527.00		$11,896.40		xx	INR 153,717.30	INR 153,717.30	INR 0.00	21/03
4	Maimuna	PWP	Efb	06/01	30/12/05	6716 / 533	62.51	$14,377.30	$9,376.50	31/03	$5,000.80		xx	INR 218,534.96	INR 218,534.96	INR 0.00	30/03
5	Geetha	GT	Efb/Dw	06/01	30/12/05	6718n102171 / 534	212.17	$46,748.21	$31,825.50		$14,922.71		xx	INR 652,122.43	INR 652,122.43	INR 0.00	30/03
6	Geetha	GT	Dw	06/01	30/12/05	102169 / 535	106.09	$22,809.35	$15,913.50		$6,895.85		xx	INR 301,348.65	INR 301,348.65	INR 0.01	30/03
7	Indian	IF	Efb	06/01	30/12/05	6717 / VR2457	62.87	$15,088.80	$15,088.80		$0.00			INR 0.00		INR 0.00	30/03
8	Ranga	RO	Efb	12/01	31/12/05	6301 / 0532	148.65	$32,686.80	$22,297.50		$10,389.30		xx	INR 454,012.41	INR 454,012.41	INR 0.00	30/03
9	Hindustan	Hind	Efb	12/01	31/12/05	6301 / 0537	106.35	$23,387.00	$15,962.50		$7,434.50		xx	INR 220,264.26	INR 220,264.26	INR 0.00	30/03
9	Hindustan	Hind	Efb	12/01	31/12/05	6301 / 0537	106.35	$23,387.00	$15,962.50		$7,434.50		xx	INR 104,623.39	INR 104,623.39	INR 0.00	30/03
10	Maimuna	PWP	Efb	12/01	31/12/05	6716 / 0538	41.68	$9,586.40	$6,252.00	31/03	$3,334.40		xx	INR 145,713.28		INR 145,713.28	03/04/06
11	Daulat	DB	Sfb	12/01	31/12/05	1190 / 0540	223.52	$43,586.40	$33,528.00		$10,058.40		xx	INR 207,777.69	INR 207,777.69	INR 0.00	03/04/06
11	Daulat	DB	Sfb	12/01	31/12/05	1190 / 0540	223.52	$43,586.40	$33,528.00		$10,058.40		xx	INR 231,774.39	INR 45,185.11	INR 186,589.28	03/04/06
12	Ply Point	PP	Efb	20/01	16/01/06	6499.6718 / 0546	148.94	$30,307.30	$8,819.85		$21,487.45		xx	INR 159,030.42	INR 159,030.42	INR 0.00	12/04/06
12	Ply Point	PP	Efb	20/01	16/01/06	6499.6718 / 0546	148.94	$30,307.30	$8,819.85		$21,487.45		xx	INR 768,225.61	INR 768,225.61	INR 0.00	23/02/06
12	Ply Point	PP	Efb	20/01	16/01/06	6499.6718 / 0546	148.94	$30,307.30	$8,819.85		$21,487.45		xx	INR 11,745.54	INR 11,745.54	INR 0.00	12/04/06
13	Deepak	DG	Efb	23/01	04/01/06	6499 / 0541	64.39	$13,822.47	$9,658.50		$4,163.97		xx	INR 181,965.49	INR 181,965.49	INR 0.00	18/04/06
14	Hindustan	Hind	Efb	23/01	16/01/06	6499 / 0547	105.93	$23,933.30	$15,889.50		$8,043.80		xx	INR 351,514.06	INR 351,514.06	INR 0.00	18/04/06
15	Daulat	DB	Ag	23/01	24/01/06	0446 / 0549	171.46	$20,918.12	$13,716.80		$7,201.32		xx	INR 314,697.68		INR 0.00	18/04/06
16	Sivasakthi	SSW	Jk	16/01	16/01/06	0525 / VR2481	321.6	$43,416.00	$43,416.00	07/04/06	$0.00			INR 0.00		INR 314,697.68	
17	Indian	IF	Efb	23/01	04/01/06	6718 / VR2482	62.87	$15,088.80	$15,088.80		$0.00			INR 0.00		INR 0.00	
18	Sivasakthi	SSW	Efb	23/01	16/01/06	6716 / VR2483	63.11	$16,201.30	$16,201.30		$0.00			INR 0.00		INR 0.00	
19	Daulat	DB	Ag	26/01	23/01/06	0523 / 0553	278.63	$33,992.86	$22,290.40		$11,702.46		xx	INR 511,397.50		INR 0.00	
20	Hindustan	Hind	Sfb	23/01	20/01/06	0773 / 0554	21.43	$4,714.60	$3,214.50		$1,500.10		xx	INR 65,554.37		INR 511,397.50	
21	Geetha	GT	Efb	09/02	02/02/06	06884 / 0563	20.96	$4,883.68	$3,144.00	10/4/06	$1,739.68		xx	INR 76,024.02	INR 65,554.37	INR 0.00	18/04/06
21	Geetha	GT	Dw	09/02	02/02/06	L102190 / 0563	106.1	$22,811.60	$15,915.00	10/4/06	$6,896.50		x	INR 301,377.06	INR 76,024.02	INR 0.00	18/04/06
22	Hindustan	Hind	Efb	09/02	02/02/06	06885 / 0564	215.30	$46,289.50	$32,295.00	16/02	$13,994.50		xx	INR 313,196.52		INR 301,377.06	
22	Hindustan	Hind	Efb	09/02	02/02/06	06885 / 0564	215.30	$46,289.50	$32,295.00					INR 298,363.13	INR 313,196.52	INR 0.00	18/04/06
23	Hindustan	Hind	Efb	13/02	08/02/06	06499.6888 / 0565	106.43	$23,619.10	$15,964.50		$7,654.60		xx	INR 334,506.02	INR 298,363.13	INR 0.00	
24	Ranga	RO	Efb	13/02	08/02/06	6499.6885.6888 / 0567	106.09	$23,849.90	$15,973.50		$7,876.40		xx	INR 344,198.68	INR 334,506.02	INR 0.00	
25	Sivasakthi	SSW	Efb	23/02	16/02/06	06887 / VR2531	21.46	$4,613.90	$4,613.90	07/04/06	$0.00			INR 0.00	INR 344,198.68	INR 0.00	
26	Sivasakthi	SSW	Dw	23/02	16/02/06	L102171 / VR2531	21.41	$4,710.20	$4,710.20	07/04/06	$0.00			INR 0.00		INR 0.00	
27	Ply Point	PP	Efb	24/02	20/02/06	6885/6887.6888 / 0578	148.91	$29,130.56	$8,389.55		$20,741.01		xx	INR 906,382.14		INR 0.00	
28	Daulat	DB	Ag	13/02	08/02/06	0524 / 0566	107.16	$13,395.00	$8,572.80		$4,822.20		xxx	INR 210,730.14	INR 906,382.14	INR 0.00	
29	Sivasakthi	SSW	Ag	23/02	22/02/06	0548 / VR2538	107.16	$15,538.20	$15,538.20	07/04/06	$0.00			INR 0.00		INR 210,730.14	
30	Sivasakthi	SSW	Jk	03/02	23/01/06	0526 / VR2494	321.62	$43,416.00	$43,416.00		$0.00			INR 0.00		INR 0.00	
31	Mica Rushil	MR	Jk	23/02	10/02/06	05000 / 0571	214.33	$34,292.80	$34,292.80		$0.00			INR 0.00		INR 0.00	
32	Ply Point	PP	Efb	08/03	02/03/06	6499.6884.6887 / 0586	85.35	$16,102.22	$4,045.65		$12,056.57		xxx	INR 526,872.11		INR 0.00	
33	Ranga	RO	Efb	09/03	02/03/06	6884.6985.6889 / UP0001	191.76	$42,172.40	$28,764.00		$13,408.40		xx	INR 585,947.08	INR 526,872.11	INR 0.00	
34	Hindustan	Hind	Efb	13/03	03/03/06	6716.6884.6886 / 0588	148.60	$32,568.40	$22,290.00	29/03	$10,278.40		xx	INR 449,166.08	INR 455,203.34	INR 130,743.74	
35	Geetha	GT	Efb	13/03	03/03/06	06265 / 0589	21.02	$5,780.50	$3,153.00		$2,627.50		x	INR 114,821.75	INR 149,166.08	INR 300,000.00	
36	Maimuna	PWP	Efb	13/03	10/03/06	6884.6886.6887 / 0591	63.98	$14,910.80	$9,597.00		$5,313.80		xx	INR 232,213.06		INR 114,821.76	
37	Geetha	GT	Efb	13/03	11/03/06	06884 / 0594	62.87	$14,586.84	$9,430.50		$6,155.34		x	INR 225,288.36		INR 232,213.06	
38	Ranga	RO	Efb	13/03	07/03/06	6265.6884.6887 / UP002	105.84	$24,325.80	$15,876.00		$8,449.80		xx	INR 369,256.26		INR 225,288.36	
39	Indian	IF	Efb	13/03	03/03/06	06884 / VR2562	62.87	$15,088.80	$15,088.80		$0.00			INR 0.00		INR 369,256.26	
40	Deepak	DG	Efb	20/03	07/03/06	06886.6887 / 0595	64.39	$13,629.30	$9,658.50		$3,970.80		xx	INR 173,523.96		INR 0.00	
41	Geetha	GT	Efb	13/03	03/03/06	L102171 / 0589	84.87	$18,247.05	$12,730.50		$5,516.55		x	INR 241,073.24		INR 173,523.96	
42	Geetha	GT	Efb	13/03	11/03/06	L102171 / 0594	64.23	$13,809.45	$9,634.50		$4,174.95		x	INR 182,446.32		INR 241,073.24	
43	Ranga	RO	Efb	10/12/05	05/12/05	06499 / 0607	64.44	$14,499.40	$9,666.26		$4,833.14		x	INR 210,241.59		INR 182,445.32	
44	Daulat	DB	GPP	16/12/2005	05/12/05	GPP064 / 0514	42.86	$10,780.00	$8,000.00		$2,780.00		x	INR 120,930.00		INR 210,241.59	03/04/06
45	Daulat	DB	Ag	16/12/2005	07/12/05	0446 / 0520 A	214.30	$25,716.00	$17,144.00		$8,572.00		x	INR 372,882.00		INR 120,930.00	03/04/06
46	Daulat	DB	Ag	16/12/2005	07/12/05	0446 / 0520 B	150.01	$18,537.00	$12,000.80		$6,536.20		x	INR 284,324.70		INR 372,882.00	03/04/06
47	Daulat	DB	Ag	15/09/05	24/08/05	0395.0396 / 385	150.02	$18,859.70	$12,001.60		$6,858.10		x	INR 298,327.35		INR 284,324.70	03/04/06
48	Hindustan	Hind	Sfb	02/03	20/01/06	1313 / 0550	236.01	$46,020.00	$35,400.00		$10,620.00		x	INR 464,094.00		INR 298,327.35	03/04/06
																INR 464,094.00	

(1) T-Govindarai 21/4/2006

(2) D. Kallappa 21/4/2006

K. Sammanarayana 21/4/06

Explained to Habeeb in Malayalam

9. Finally, it is claimed that statement made by Shri V. Habeeb Rahiman, statement recorded on 5.5.2006 was retracted on 11.5.2006. However, from the statement dated 15.6.2006 given by Shri V. Habeeb Rahiman after the retraction has categorically mentioned about the Chennai office of V R Marketing and their dealings with them as below:

"….. I have again, now seen all these documents signed by me and the Mahazar prepared on 21.4.06 at Chennai V. R. Marketing Office in the presence of witnesses and print-out copies of e-mails recovered as also the statement recorded from Sathyanarayana, Manager of Chennai Office of V. R. Marketing recorded on 21.4.06 under Sec. 108 of the Customs Act and once again these were read over and explained to me by my Accountant Ahamed Nizar. I have seen all the above documents and I am convinced."

10. Accordingly, it is very clear that these under invoiced documents were unearthed only after detailed investigation. Retraction is an "after thought" only to avoid and evade payment of duty.

Section 114A, which reads as under :-

"**114A. Penalty for short-levy or non-levy of duty in certain cases.**- Where the duty has not been levied or has not been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis- statement or suppression of facts, the person who is liable to pay the duty of interest, as the case may be, as determined under sub-section (8) of section 28 shall, also be liable to pay a penalty equal to the duty or interest so determined:

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

The above penalty provisions clearly indicate that anywhere the duty has not been levied or has been short levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded **by reason of collusion or any wilful misstatement or suppression of facts,** the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of Section 28 shall, also be liable to pay penalty equal to the duty or interest so determined. Emphasis supplied.

In the present case the evidences unearthed and placed on record by the investigating officers clearly prove that the goods imported were under invoiced. The original invoices which were discovered during the search have shown that the price of the goods was much more than what was declared thus suppressing the actual value goods by colluding with the suppliers. Therefore as per the above penalty provisions when there is proof of suppression of facts which resulted in short levy they are liable for equal amount of penalty under section 114A. Moreover, the High Court of Karnataka in the Case of **Commissioner of Customs, Mangalore Versus Tata Power**

Company Ltd. 2014 (306) E.L.T. 529 (Kar.) dated 29.1.2014 has held that**:**

"5. The Apex Court has held that imposition of penalty under the Act is not automatic. However, once the conditions which give rise to imposition of penalty exists then the penalty has to be imposed as prescribed under law. At that stage, no discretion is left to the Authorities in the matter of imposing penalty. The law provides that the penalty payable would be not less than equal to the duty payable. Further, the law provides, if the assessee pays the duty with interest within 30 days from the date of the order, then the penalty payable would be 25% of what is imposed. Therefore, the statute provides for the penalty payable and also reduced penalty payable. There is no discretion left either with the authorities or with the Tribunal or with this Court to reduce the penalty. However, the Tribunal, which had no jurisdiction, had proceeded to reduce the penalty from Rs. 59,77,432/- to Rs. 5,00,000/-. Whatever is the reason given by the Tribunal, it is not necessary for us to go into the said question because the question is, whether there is any jurisdiction left with the Tribunal to reduce the penalty. The law on the point is now well settled. Once the authorities decide to impose penalty, no discretion is left in the matter of imposing of penalty except as provided under law. Even the Tribunal also has not been vested with any power to reduce the penalty, which is imposed by the authority as prescribed under law, and therefore, the order passed by the Tribunal reducing the penalty is one without jurisdiction and, accordingly, it is hereby set aside. The substantial question of law is answered in favour of the Revenue Authorities and against the assessee". Therefore, penalty under Section 114A is upheld."

11. Based on the facts and circumstances discussed above, the goods are liable for confiscation and accordingly, the confiscation is upheld in all the 15 Bills of Entry. The High court of Kerala in the case **Commissioner of Customs, Cochin vs. Office Devices: 2009 (240) E.L.T. 336 (Ker.)** has held that 10% of the value as RF is reasonable and upheld the same, hence the redemption fine of Rs.2,00,000/- which is only 10% of the value is upheld. As per proviso to Section 114A of the Customs Act, 1962, "provided also that where any penalty has been levied under this Section, no penalty shall be levied under Section 112 or Section 114." Accordingly, since penalty imposed under 114A is upheld, the penalty of Rs. 25,000/- on M/s. Ply Point under Section 112(a) of the Customs Act, 1962 is set aside.

12. In view of the above discussions, the appeal is disposed of in above terms.

*(Order pronounced in Open Court on **23.08.2023**.)*

(D.M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL

1st Floor, WTC Building, FKCCI Complex, K. G. Road,
BANGLORE-560009

COURT - 2

Customs Appeal No. 2913 of 2011

[Arising out of the Order-in-Appeal No. 93/2011 dated 09.09.2011 passed by the Commissioner of Customs (Appeals), Bangalore.]

M/s. American Power Conversion India Pvt. Ltd. **....Applicant**
No.188/3, Jigani,
Bangalore – 562 106.

Vs.

The Commissioner of Customs **....Respondent**
Queens Road Bangalore
– 560 001.

Appearance:

Ms. Neetu James and
Ms. Shraddha Pandey, Advocates **....For Applicant**

Mr. H. Jayathirtha,
Superintendent (AR) **... For respondent**

CORAM:

HON'BLE DR. D. M. MISRA, MEMBER (JUDICIAL) HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing : 13.06.2023Date of Decision : 23.08.2023

FINAL ORDER NO. 20828 /2023

Per: R. BHAGYA DEVI

The appellant M/s. American Power Conversion India Private Ltd. (the importer) are engaged in the manufacture of uninterrupted power supply and inverters within the electronics hardware technology Park. The appellant imported used Enviro-tuff Liner (ETL) packing material classifying the product under 39232990. They claimed the benefit of Notification No. 52/2003 dated 01.03.2003. The Commissioner (A) in the impugned order held that the Enviro-tuff Liner (ETL) was neither used in the process of manufacture of the articles of exported goods nor it was used in connection with production or packing of exported goods.He observed that merely because the item is used for facilitating safe transportation of the export goods, it did not entitle the goods for the exemption as

packing material as stipulated in the exemption Notification. The Commissioner (A) accordingly confirmed the demand of duty, redemption fine and penalty.

2. The Learned counsels Ms. Neetu James Ms. Shraddha Pandey,on behalf of the appellant submitted that the items to be exported are sophisticated electronic items containing circuitry which are highly susceptible to meet damage due to moisture and rainwater heat etc, hence, they had to ensure that the goods were transported with extra packing so that the goods are not damaged in transit. It is also submitted that Enviro-tuff Liner (ETL) is a fully woven liner which is hung into a general purposes ISO shipping container and allows for forklift loading and hand loading and slip sheet. Once loaded, it is completely sealed providing a closed off temperature and humidity-controlled environment for the goods inside, therefore, it is claimed that this being a packaging material the benefit of Notification should be extended.

3. On the other hand, the Authorised Representative on behalfof the Revenue submitted that the imported goods have nothing to do with the goods being exported and they are second-hand goods which necessarily have to be imported with necessary license as they are restricted items. He also relied on the judgement in the case of **International Creative Foods Ltd. versus Commissioner of Customs (APPL.), Cochin: 1999 (105) E.L.T.92 (Tribunal)** where under similar set of facts, the Tribunal held that the benefit of the Notification No.13/81-C.E. cannot be extended.

4. Heard both sides and perused the records. It is an admitted fact that the goods imported were used Enviro-tuff Liner (ETL) and on examination, it was found that it is a packing material to beused inside the 40 FT container to cover the goods inside the container. The question is whether these imported goods wereeligible for benefit of Notification No.52/2003 dated 31.03.2003. The relevant notification is reproduced below:

Notification No. 52/2003 – Customs

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as thesaid Customs Act), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts,-

(a) all goods as specified in the Annexure -I to this notification, when imported or procured from a Public Warehouse or a Private Warehouse appointed or licensed, as the case may be, under section
57 or section 58 of the said Customs Act or from international exhibition held in India for the purposes of –

(i) manufacture of articles for export or for being used in connection with the production or packaging or job work for export of goods or services by export oriented undertaking (hereinafter referred to as the unit) other than those referred to in clauses (b), (c) and (e), or

ANNEXURE-I

1. Capital goods and spares and accessories thereof.

9. Consumables
10.Packaging
materials

5. From the above Notification, it is amply clear that the items specified therein are meant for manufacture of articles for export orfor being used in connection with the production or packing of these goods for export by the EOUs. Admittedly, in this case, the imported goods are used as liners inside the container to ensure that the goods are safely transported. In similar circumstances, in the case of **International Creative Foods Ltd. versus Commissioner of Customs, Cochin** cited supra, the appellanthad imported refrigeration units to be mounted on trucks used for transport of raw materials. The Commissioner had held that the refrigeration trucks were mainly used for transportation and not for production or packing; therefore, the benefit of Notification No. 13/81-C.E. which was meant for material handling equipment was denied. The Tribunal observing that the refrigerated trucks were used for the transport of goods which was essential for transportingthe raw materials but that itself cannot be the reason to hold that the trucks have been used for production of the goods as envisagedin the Notification and accordingly, the benefit of the Notification was denied. In the case on hand, it is an admitted fact that theitem imported is used inside the container only for safetransportation and not for the production of exported goods. Moreover, the Notification does not allow any used items to be imported and therefore, the question of extending the benefit does not arise at all.

6. The items imported were also found to be used ETL Liners which are categorised as second-hand goods fall under the category of restricted items. As per Para 2.17 of the Foreign Trade Policy, all second-hand goods are restricted for import and byimporting used ETL liners, the importer had violated the provisions of Foreign Trade Policy thereby rendering the goods liable forconfiscation. In view of the above, the Commissioner (A) hadrightly confiscated the goods and imposed redemption fine and penalty. We, therefore, find no reasons to interfere with the order of the Commissioner (Appeals) and accordingly, we uphold the demand of duty of Rs.7,02,981/- along with interest.

7. In view of the various decisions of the High Courts observing that 10% redemption fine and 5% penalty are reasonable, wereduce the redemption fine from Rs.1,00,000/- to Rs.75,000/- (Rupees Seventy-five Thousand Only) under Section 125 of the Customs Act, 1962 and penalty from Rs.50,000/- to Rs.35,000/- (Rupees Thirty-five Thousand Only) under Section 112(a) of the Customs Act, 1962.

8. In the result, the duty demand along with interest is confirmed and redemption fine is reduced to Rs.75,000/- and penalty is reduced to Rs.35,000/-. The appeal is disposed of on above terms.

(Order pronounced in Open Court on 23.08.2023.)

(DR. D. M. MISRA)
MEMBER
(JUDICIAL)

(R. BHAGYA
DEVI)MEMBER
(TECHNICAL)

rv

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALBANGALORE

REGIONAL BENCH – COURT NO. 3

Customs Appeal No. 20603 of 2019

[Arising out of Order-in-Appeal No. COC-CUSTM-000-APP- 90/2018-19 dated 05.02.2019 passed by the Commissioner ofCustoms (Appeals) Cochin]

Elite Green Pvt. Ltd.

Building No. 9/433, 9/434Kuttanellur
P.O, Ollur Trissur-680 014 **……..Appellant**

VERSUS

Commissioner of Custom .....Respondant
Cochin

Custom House, Willingdon IslandCochin-682 009

APPEARANCE:

None for the Appellant
Mr. Rajesh Shastry, Authorized Representative for theRespondent
CORAM:

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 20971/ 2023

Date of Hearing: 08/09/2023Date of Decision:08/09/2023

Per: Pullela Nageswara Rao

M/s Elite Green Pvt. Ltd., the appellant filed this appeal aggrieved by the impugned order of Commissioner (Appeals).

2. The facts in brief are that the appellant has imported high quality oats and cleared the goods against 25(twenty five) Billsof Entry, on payment *inter alia* of 4% Special Additional Duty (SAD) and filed 5(five) refund claims as per Notification No. 102/2007-Cus. dated 14.09.2007. The adjudicating authority sanctioned refund in respect of those bills of entry, where the 4% SAD was paid in cash and rejected the refund claims in case of other Bills of Entry, where the 4% SAD was paid through DEPB/Reward Scheme Scrips. The rejection of refund claim was based on the Circular 18/2013-Cus. dated 29.04.2013, wherein CBEC has extended the time limit for using the re-credited DEPB/Reward Scheme Scrips in case of 4% SAD up to 30.09.2013. The rejected refund claims in the said case are pertaining to the period after 30.09.2013.

3. The appellant in the grounds of appeal have submittedthat they have filed a representation to the Ministry of Finance and Directorate General of Foreign Trade (DGFT) and since therewas no response, they have filed a Writ Petition No. 7262/2016 before the Hon'ble High Court of Kerala with a prayer to stay theproceedings. They further submitted that Department ought to have awaited the outcome of the Writ proceedings before issuingthe impugned order. They further submitted that the adjudicating authority and the appellate authority failed to appreciate that as per Notification No. 102/2007-Cus. dated14.09.2007, 4% duty is collected as additional duty on import of goods and such amount collected from the importers has to be returned to the importer subject to production of evidence regarding payment of sales tax to the Customs authorities and there is no reason or justification to deny the benefit even after showing evidence regarding payment of sales tax. Further they have submitted that the adjudicating authority and the appellate authority have failed to appreciate the facts and that the office ofthe Commissioner of Customs is bound to issue public notice andstanding order for the guidance of trade and the Department andalso to inform the importers that they are not eligible to claim refund of duty paid through scrips. Further they have submitted that the original Bills of Entry, TR-6 challan, certificate from Chartered Accountant and sufficient documents to provepayment of sales tax and endorsement on each invoice to the effect that Special Additional Duty liability has not been passedto the ultimate buyer. In view of the above, the rejection of 4% SAD is unsustainable.

4. None appeared for the appellant despite the case having been adjourned on the last three occasions. Heard Shri Rajesh Sastry, Authorised Representative (AR) for the Revenue and he has submitted the copy of the judgement of the Hon'ble High Court of Kerela dated 25th July 2023 in Writ Petition(C) No.7262 of 2016, filed by the appellant.

5. I have considered the submissions of the appellant and thesubmissions of the learned AR and perused the records. In this case, I find that the adjudicating authority has rejected therefund claim of 4% SAD paid by the appellants on import of goods for the reason that the payment of 4% SAD was made through debit in the DEPB/Reward Scheme scrips. Board vide Circular No. 18/2013-Cus. dated 29.04.2013 have extended the time limit for using the re-credited DEPB scrips/Reward Scheme Scrips in case of payment of 4% SAD only up to 30.09.2013. TheCircular is a third Circular in the series of Circulars issued by CBEC on the same subject and Circular No. 18/2013-Cus. dated 29.04.2013 has clearly stated that the extension given for using the re-credited scrips is applicable only upto 30.09.2013. Furtherthe Circular was uploaded on the website of Ministry of Finance and DGFT. Hence the contention of the appellant that they are not aware of the Circular is untenable. In this case the Writ Petition No. 7262/2016, filed by the appellant before the Hon'bleHigh Court of Kerala was dismissed vide judgement dated 25th July 2023, which held as under:

"7. I find substance in the submissions of the learned Counsel for the respondents. Admittedly, when the petitioner has not paid the4% SAD in cash but in scrips despite CircularNo. 18/2013-Cus. dated 29/04/2013, he wasnot entitled to refund of 4% of SAD. I do notfind substance in the submission of the learned Counsel for the petitioner that the public notice was not issued regarding Circular No. 18/2013- Cus. dated 29/04/2013. If the said Circular was published on the official website of the DGFT, it amounts that the public notice was given about the Circular.

8. In view thereof, I find no merit and substance in the present writ petition, which is hereby dismissed. Interim order, if any, stands vacated."

6. In view of the above, the appeal is not maintainable and hence, dismissed.

(Operative portion of the order was pronouncedin open court on 08.09.2023)

(Pullela Nageswara Rao)
Member (Technical)

…iss

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 22153 of 2015

[Arising out of Order-in-Original No. BLR-CUSTOM-CITY-03-15-16 dated17.07.2015 passed by the Commissioner of Customs, Bangalore City]

Hikoki Power Tools India Pvt Ltd (Formerly known as Hitachi Koki India Pvt Ltd)Plot No. 9A, 1st Phase,
Peenya Industrial Area,Bangalore 560 058 **……Appellant**

VERSUS

Commissioner of Customs, Bangalore
City Commissionerate, C R Buildings,Queens Road,
Bangalore 560 001 **……Respondent**

with

Customs Appeal No. 22154 of 2015

[Arising out of Order-in-Original No. BLR-CUSTOM-CITY-03-15-16 dated17.07.2015 passed by the Commissioner of Customs, Bangalore City]

Shri Dattatreya Joshi Vice President &Company Secretary **……Appellant**
HiKoki Power Tools India Pvt LtdPlot No. 9A, 1st Phase,
Peenya Industrial Area,Bangalore 560 058

VERSUS

Commissioner of Customs, Bangalore
City Commissionerate, C R Buildings,Queens Road,
Bangalore 560 001 **……Respondent**

APPEARANCE:

Present for the Appellants: Ms. Neethu James & Mr. Rohan, AdvocatesPresent for the Respondent: Mrs. D. S. Sangeetha, Addl. Com. (A.R.)

CORAM:
HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)
HON'BLE Mrs. R. BHAGYA DEVI, MEMBER (TECHNICAL)

FINAL ORDER NO. 20945-20946/2023

DATE OF HEARING: 19.05.2023DATE OF DECISION: 18.09.2023

PER: D. M. MISRA

These two appeals are filed against the Order-in-Original No. BLR-CUSTM-CITY-03-15-16 dated 17.07.2015 passed by the Commissioner of Customs, Bangalore City.

2. Briefly stated the facts of the case are that the appellant M/s Hikoki Power Tools India Pvt Ltd (formerly known as Hitachi KokiIndia Pvt Ltd) are the importer of brush cutters, grass cutters, grass trimmers etc. They have filed Bill of Entry No. 4388114 dated 18.01.2014 for clearance of 120 nos. of 'Brush Cutters' classifying thesame under CTH 8432 2990 claiming 'nil' rate of CVD. The goodswere later examined by the officers of SIIB in the presence of the Customs Broker and found that motors were packed in one box and the shafts were packed in another box separately. The 'user manual' retrieved from the box described the goods as 'grass trimmer/brush cutter'. Investigation was initiated on the classification of said products. After recording the statements, analyzing the catalogues etc., and on completion of said investigation, a show cause notice was issued to the appellants on 14.11.2014 alleging that the productsimported namely 'brush cutters' are classifiable under CTH 8467 8990 and not under CTH 8432 2990 as claimed in the respective Bill of Entry. The appellants accepted the said classification and discharged duty with interest amounting to Rs.49,72,134/- for the period from 18.01.2014 to 30.09.2014 under protest classifying the productsunder CTH 8467 8990. Further investigation revealed that similar goods were imported in the past by the appellants and consequently, demand notice was issued for the period from 18.11.2009 to 28.11.2013 demanding differential duty of Rs.93,37,120/- with interest and penalty with proposal for confiscation. Hence the preset appeals.

3.1 The Ld. Advocate for the Appellant submits that the goods imported were classifiable under CTH 8432 2990. She has submitted that CTH 8432 covers the products meant for the agricultural purposes. It is her contention that the imported goods are solely used for agricultural purposes and the same is evidenced by the approval/ test certificate issue by the Department of Agricultural Engineering, GKVK. She has submitted that essential character and functionality ofthe products are essential in order to determine the classification of the products. Further, she has submitted that the goods were sold tothe dealers on the product catalogue clearly state that the same are agricultural machinery. Hence, correct classification for the said products is under 8432 2990. At advanced alternative argument, the ld. Advocate submitted that the imported goods also be considered classifiable under CTH 8433 of the Customs Tariff Act, 1975 particularly, under CTH 8433 1190 of the CTA. She has submitted that CTH 8433 covers grass mowers, hay mowers and other machinery for cleaning and sorting. The entry for 8433 1190 specifically coves 'mowers powered with the cutting device rotating ina horizontal plane'. The imported goods being grass cutters/brush cutters have a rotating device at the end of the apparatus which is used for cutting the grass. She also submitted that the imported goods cannot be classified under CTH 8467 of CTA. It is here contention that the same tariff heading 8467 covers tools for working in hand which have self-contained electric or non-electric motor.Some of the goods covered under CTH 8467 are drills, hammers, saws etc. These products are tools used for general purposes and not specifically for agricultural purposes. She also submitted that the relevant HSN Explanatory Note to CTH 8467 refers to goods ormachinery in general used for trimming lawns and are not meant for agricultural purposes. Further, with regard to the manner of usage

(worn on shoulder) and weight of the impugned goods, the same are not potable hand tools classifiable under CTH 8467, she has contended that CTH 8432 is more specific than CTH 8467 as the said entry refers to the machinery meant for agricultural purposes andthus the imported goods are not classifiable under CTH 8467. She further submitted that the appellants have paid the total amount of Rs.49,72,134/- prior to issuance of show cause notice and the sameis not disputed by the Department and in cases where the duty is paid with interest, then show cause notice should have not issued;also, in such cases, penalty is not imposable on the assessee.

3.2 She has further submitted that the show cause notice invoking extended period of limitation and confirmed by the Commissioner is not sustainable in-as-much-as the appellants have neither indulged inany suppression nor mis-declared the description of the imported goods with an intent to evade payment of duty. She has submitted that the appellants are importing the goods from November 2009 onwards classifying the same under CTH 84322990 of CTA,1975. Theappellants have been filing all the required documents such as bills ofentry, supplier invoices, packing lists etc. and they have not mis- declared the description of the imported goods in all the documents including bills of entry, which are correctly described as 'brush cutters' and the same have not been disputed by the Department.The imported goods have been duly examined and assessed by the Customs Officers and assessment orders have been passed accordingly. She has further submitted that extended period oflimitation cannot be invoked in cases wherein the goods have been assessed and the assessees have provided all the relevant documentsand materials during such assessment proceedings. In support, she referred the decisions in the cases of *M/s Signet Chemical Pvt Ltd vs. CC, Mumbai – 2020 (10) TMI 289 – CESTAT MUMBAI* and *CCE & ST, Hyderabad vs. Sandor Medicaids Pvt Ltd – 2019 (367) ELT 486 (Tri. Hyd.).* Further she has submitted that for claiming a wrong classification, extended period of limitation cannot be invoked. In thisregard, she placed the reliance on the decision of Hon'ble Apex Court in the case of *Densons Pultretaknik vs. CCE – 2003 (155) ELT 211 (S.C.).*

3.3 It is her contention that since the demand itself is not sustainable, imposition of penalty and interest also not sustainable. Further, she has submitted that personal penalty imposed on the co- Appellant is also not sustainable.

4. Per contra, the Learned A.R. for the Revenue reiterated the findings of the learned Commissioner. She submitted that as per the Explanatory Notes in CTH 8432 and 8433, one thing is clear that these two sub-headings cover 'machines' used in place of 'hand tools'for the mechanical purposes for the operations mentioned under the said Note. She also submitted that in the present case, the imported goods are not used as machinery but used as a hand tool, correctly classified under CTH 8467. Further, she submitted that on many occasions, the appellants have classified these grass cutters/ brush cutters under CTH 8467 and invoice of the overseas supplier also mentions the item 'brush cutters' under CTH 8467 8990. She has further submitted that the appellants without any valid reason changed the classification of brush cutters from CTH 8467 to CTH 8432 knowing fully well that the overseas supplier classified the sameunder CTH 8467. It is her contention that the change of classification was an act of mis-declaration with the intention to evade applicable CVD payable on such imports; therefore, the ld. Commissioner has rightly confirmed the demand for extended period of limitation. She has further submitted that the appellants on one hand, admit re- classification of the goods from January, 2014 to September, 2014 under CTH 8467 and claim that since they have discharged thedifferential duty, applicable duty under CTH 8467, they are now disputing the correct classification of the goods under CTH 8467.

5. Heard both sides and perused records.

6. The issues involved in the present appeals for determination are, whether: (i) the

imported goods namely 'brush cutters' classifiable under CTH 8432 2990 or under CTH 8467 8990 of the Customs Tarriff Act, 1975; (ii) demand could be confirmed invoking extended period of limitation for the past period 18.11.2009 to 28.11.2013 and (iii) penalty imposable on the appellants.

7. The appellant in their reply dated 14/5/2015 before the Commissioner submitted that they are not contesting the classification of the product, brush cutter, on merit, but contested theinvoking of extended period of limitation. In the finding, the Commissioner recorded that the appellant has accepted the re- classification of the goods under CTH 8467 and the dispute is only for the demand invoking extended period. However, the Commissioner proceeded to discuss the classification on merit and also the demand for extended period. In the grounds of appeal, the appellant agitated the classification and during the course of argument the Advocate for the appellant also raised the issue on merit as well as on limitation.

8. Before analyzing the relevant entries in ascertaining the correctclassification of the imported goods viz. brush cutters, it is necessary to reproduce the competing entries of the Customs Tariff Act,1975 which is as under:

8432	**AGRICULTURAL, HORTICULTURAL OR FORESTRY MACHINERY FOR SOIL PREPARATION OR CULTIVATION; LAWN OR SPORTS-GROUND ROLLERS**			
8432 10	- Ploughs:	U U	7.5%	-
8432 10 10	--- Disc ploughs	U	7.5%	-
8432 10 20	--- Other tractor ploughs		7.5%	-
8432 10 90	--- Other	U		
	-Harrows, scarifiers, cultivators, weeders and		7.5%	-
8432 21 00	hoes	U U		
8432 29	-- Disc harrows	U U	7.5%	-
8432 29 10	-- Other		7.5%	-
8432 29 90	--- Rotary hoes	kg	7.5%	-
8432 30 00	--- Other	kg	7.5%	-
8432 40 00	- seeders, planters and transplanters	kg		
8432 80	- Manure spreaders and fertiliser distributors		7.5%	-
8432 80 10	- Other machinery	kg	7.5%	-
8432 80 20	--- Lawn or sports ground rollers		7.5%	-
8432 80 90	--- Rotary tiller	kg		
8432 90	---- Others		7.5%	-
8432 90 10	- Parts			
	--- Parts of agricultural machinery falling		7.5%	-
8432 90 90	within headings 843210, 843221, 843229, 843230 and 843240 ---Others			

8433	**HARVESTING OR THRESHING MACHINERY, INCLUDING STRAW OR FODDER BALERS; GRASS OR HAY MOWERS; MACHINES FOR CLEANING, SORTING OR GRADING EGGS, FRUIT OR OTHER AGRICULTURAL PRODUCE, OTHER THAN MACHINERY OF HEADING 8437**			
8433 11		U U	7.5%	-
8433 11 10	- Mowers for lawns, parks or sports-grounds:		10%	-
8433 11 90	-- Powered with the cutting device rotating in a horizontal plane --- Powered with 3 HP or more			

8433 19	---Other			
8433 19 10	--Other	U U	7.5%	-
8433 19 90	---Non-powered mowers, having width of 75	U U	10%	-
8433 20 00	cm or more	U	7.5%	-
8433 30 00	---Other		7.5%	-
8433 40 00	- Other mowers, including cutter bars for	U U	7.5%	-
	tractor mounting	U U		
8433 51 00	- Other haymaking machinery		7.5%	-
8433 52 00	- Straw or fodder balers, including pick-up		7.5%	-
8433 53 00	balers	U U	7.5%	-
8433 59 00	- Other harvesting machinery; threshing	Kg	7.5%	-
8433 60	machinery			
	-- Combine harvester-threshers			
8433 60 10	-- Other threshing machinery		7.5%	-
8433 60 20	-- Root or tuber harvesting machines		7.5%	-
8433 90 00	-- Other		7.5%	-
	- Machines for cleaning, sorting or grading eggs, fruit or other agricultural produce :			
	--- Machines for cleaning			
	--- Machines for sorting or grading			
	- Parts			

8467	**TOOLS FOR WORKING IN THE HAND, PNEUMATIC, HYDRAULIC OR WITH SELF- CONTAINED ELECTRIC OR NON-ELECTRIC MOTOR**			
8467 11	- Pneumatic :			
8467 11 10	-- Rotary type (including combined rotary	U U	7.5%	-
8467 11 20	percussion)	U U	7.5%	-
8467 11 90	--- Drills		7.5%	-
8467 19 00	--- Hammers	U U	7.5%	-
	--- Other	U		
8467 21 00	-- - -- Other		7.5%	-
8467 22 00	-With self-contained electric motor:	U	7.5%	-
8467 29 00	--Drills of all kinds		7.5%	-
	--Saws	U U		
8467 81 00	--Other	U	7.5%	-
8467 89	-Other Tools			
8467 89 10	--Chain saws	Kg	7.5%	-
8467 89 20	--Other	Kg	7.5%	-
8467 89 90	--Compressed air grease guns,	Kg	7.5%	-
	lubricators and similar appliances			
8467 91 00	--Vibrators		7.5%	-
8467 92 00	--Other		7.5%	-
8467 99 00	-Parts:		7.5%	-
	-Of Chain saws			
	-Of pneumatic tools			
	--Other			

9. The claim of the appellants in the respective bills of entry isthat the declared product namely 'brush cutters' is classifiable under CTH 8432 2990 since this product is meant for agricultural purposes and cleared to the farmers. Its use for agricultural purposes has been supported by certificates issued by the University of AgricultralSciences, Bangalore.

10. In the alternative, the contention of the appellants is that if the said 'brush cutters' is not accepted to be classifiable under CTH 8432,the same could be classifiable under CTH 8433 relating to harvesting or threshing machinery etc.

11. Revenue's argument, on the other hand, is that CTH 8432 and 8433 cover only 'machinery' and not hand tools. The hand tools specifically covered under the scope of

CTH 8467. In support, ld.
A.R. for the Revenue referred to the relevant HSN Explanatory Notes,which is reproduced as under:
"8.1 The Explanatory Notes to Harmonized Commodity Description and Coding System (Fifth Edition, 2013) for CTH 8432 read as follows:

"The heading covers ***machines,*** *whatever their modeof traction,* ***used in place of hand tools****, for one or more of the following classes of agricultural, horticultural and forestry work, viz.:*

The ***machines*** *of the heading may be hauled by an animal or by a vehicle (e.g. a tractor), or may bemounted on a vehicle (e.g. on a tractor or horse-drawn chassis). (In this context "tractor" includes "pedestrian controlled tractor") (emphasis supplied)*

8.2 ---

8.3 *As per Explanatory Notes, the goods covered underChapter 8433 are described as follows:*

"The heading covers machines used in place of hand tools, for mechanical performance of the following operations:

The provisions of Explanatory Heading 84.32 apply,mutatis mutandis, to this heading, e.g., in respect of tractors fitted with harvesting, threshing, mowing or other interchangeable attachments, and in respect of motor rakes. (emphasis supplied)

The heading includes

(1) Lawn Mowers, whether worked by hand or motor driven. They may have a cutter bar like agriculture mower, rotary blades which cut the grass against a fixed horizontal blade, or rotating disc with knives on outer edge.
(2) Mowers (including Motor mowers) for cutting hay etc. They usually consist of a horizontal cutter bar and sections which cut by oscillating action of teeth between the fingers of cutter bar, or they may consistof rotating discs or drums with knives on outer edge.
---

(21) Machines for removing leaves from maize (corn) cabs; maize (corn) threshers.

However, this heading excludes portable machines for trimming lawns, cutting grass along walls, borders or under bushes, for example. Thes machines, which are composed of a self-contained internal combustion engine in a light frame or of an electric motor mounted on a metal handle and cutting device usually consisting of one or more thin nylon threads are classified in heading 8467. (emphasis supplied).

8.4.1 The Explanatory Notes to CTH 8467 are follows:

"This heading covers tools which incorporate an electricmotor, a compressed Air Motor (or compressed air operated piston), on internal combustion motor or any other motor (e.g. small hydraulic turbine)….

The heading covers such tools only if for working in hand. The expression 'tools for working in hand' means tools designed to be held in the hand during use, and also heavier tools (such as earth rammers) which are portable, that is, which can be lifted and moved byhand by the user, in particular while work is in progress, and which are also designed to be controlled and directed by hand during the operation. To obviate the fatigue of taking their full weight during operation they may be used with auxiliary supporting devices (e.g.

Tripods, Jacklegs, Overhead Lifting Tackle).However, certain tools for working in the hand of this heading have fittings permitting them to temporarily fixed to a support. They remained classified here, together with support if it is presented therewith, provided the tools are essentially "for working in hand" as defined above. Some of the tools covered by this heading may be fitted with auxiliary devices (e.g. ; a Fan Wheel and its dust bag to remove and collect dust during working)"

8.4.2 *Further, the Explanatory Notes to CTH 8467 also specify the Tools covered under this heading and Sl.No. 18 & 19 of the list are reproduced below:-*
"(18) Portable machine for trimming lawns, cutting grass in corners, along walls, borders or under bushes, for example. Such machine have a self-contained motorin light metal frame and a cutting device usually consisting of this nylon thread.

(19) Portable brush-cutters with a self-contained motor, a drive shaft (rigid or flexible) and a tool holder,presented together with various interchangeable cuttingtools for mounting in tool holder."

12. On a plain reading of the relevant Tariff Entry and said explanatory notes under CTH 8432/8433 and 8467, it is clear that theproducts mentioned under CTH 8432/8433 are referring to 'machineries'; 'hand tools' fall outside the scope of said entries;whereas hand tools explained in the explanatory note under CTH8467 at sr. no 18 & 19 includes 'brush cutters', hence the product in dispute would fall under CTH 8467. The use of the product for Agricultural purpose cannot be the criterion for determination of the appropriate classification. It is held by the Hon'ble Supreme Court in the case of *M/s O.K. Play (India) Ltd vs CCE – 2005 (180) ELT 300 (SC)* that use of an article as 'Toys' by children would not place in classification under 'Toys'. It has been held in a series of cases that the explanations for classification of particular product mentioned in the HSN cannot be brushed aside in determining the correct classification of a product. The Hon'ble Apex Court in *CC, Bombay Vs.Business Forms Ltd. - 2002-TIOL-277-SC-CUS-LB* held as below:
"These civil appeals arise on orders of the Customs, Excise and Gold (Control) Appellate Tribunal and they have to be allowed and the matters remanded for re-consideration by that Tribunal because, principally, the Tribunal has declined to place reliance upon the Explanatory Notes in the H.S.N. stating that, at best, these have onlypersuasive value.

2. *This Court in Collector of Central Excise, Shillong v. Wood Craft Products Limited [1995 (77) E.L.T. 23] has said :*

"We are of the view that the Tribunal as well as the High Court fellinto the error of overlooking the fact that the structure of the CentralExcise Tariff is based on the internationally accepted nomenclaturefound in the HSN and, therefore, be resolved with reference to thenomenclature indicated by the HSN unless there be an expressdifferent intention indicated by the Central Excise Tariff Act, 1985itself. The definition of a term in the ISI Glossary, which has adifferent purpose, cannot, in case of a conflict, override the clearindication of the meaning of an identical expression in the same context in the HSN. In the HSN, block board is included within themeaning of the expression 'similar laminated wood' in the samecontext of classification of block board. Since the Central Excise TariffAct, 1985 is enacted on the basis and pattern of the HSN, the same expression used in the Act must, as far as practicable, be construedto have the meaning which is expressly given to it in the HSN whenthere is no indication in the Indian Tariff of a different intention." Clearly, therefore, the HSN Explanatory Notes are entitled to far greater consideration than the Tribunal has given there.

3. *The Tribunal has also said that the Collector (Appeals) had not relied upon the HSN Explanatory Notes. That was clearly an oversight of the Tribunal because its order says, earlier, thus: "The Collector (Appeals) held that the photographic apparatus, as has been imported, for making printing blocks were excluded from Chapter Heading 84.38 vide*

Explanatory Notes to CCOM at Page 1288."

4. *The civil appeals are, therefore, allowed. The orders under appealare set aside. The appeals before the Tribunal are restored to it for being heard and disposed of afresh. All contentions shall be available to the parties thereto."*

Thus, the impugned goods in question i.e. 'brush cutters' is correctly classifiable under CTH 8467 8990 of CTA,1975.

13. The next issue for consideration is whether the extended periodof limitation can be invoked for demanding duty pertaining to past clearance of the imported 'brush cutters' for the period 18.11.2009 to28.11.2013. Resisting the confirmation of duty invoking extended period of limitation, the appellants have submitted that all the facts have been disclosed to the Department and the goods have been examined and assessed and thereafter, cleared by the Customs Department; they have enclosed examination report by the Customs Department in the appeal paper book (page 121 to 126). Hence, the allegation of suppression cannot be sustained. In their reply to the show cause notice, explaining the facts declaring classification of the similar goods in past under CTH 8467 8990, it has been submitted that since it was imported along with other products, therefore, the mistake could have occurred on their part in declaring the product brush cutter under CTH 8467. Further, they have stated that it is only in the case of imports from Singapore supplier, the classification of 'brush cutter' was mentioned in the invoice as CTH 84678900, which is nominal, whereas bulk quantity imported from Japan under CTH 84322990; hence, for uniformity they declared classificationunder CTH 84322990 and there was no intention to claim any wrong classification.

14. The Ld. Commissioner in the impugned order confirming the demand for extended period has observed that the description of the product in the relevant Bills of entry is declared as 'Engine Brush Cutter', or Brush Cutter, or Brush cutter (Engine). Further, he has held that from the explanatory notes, it is clear that these goods are portable tools or for working in hand, but nowhere in any of the documents, the appellant declared this vital information that theimported goods are portable tools for working in hand. Non disclosureof this vital fact during the self-assessment era, post 2011, resulted into suppression of fact. Further, he has observed that nondisclosure of these facts do not support the defence of the appellant that the goods were examined and examination reports produced.

15. We find that the differential duty of Rs.93,37,120/- has been demanded, as per annexure-1 to the show cause notice for the period18.11.2009 to 28.11.2013 for clearance of 6765 numbers of 'Engine Brush cutters' cleared against 116 Bills of Entry. The contention ofthe appellant is that they have placed all the necessary materials, including the catalogue of the said machines at the time of assessment. The goods were physically examined by the assessing officer and thereafter allowed to be cleared on payment of applicable duty. Since the goods were meant to be used for agricultural purposes, they classified it according to their understanding under CTH 84322990. We find that the appellant declared the description of the goods correctly all along during the said period. Also, the goods were examined and assessed by the Department. Once the catalogue has been submitted by the appellant during the course of assessment, therefore, it is the responsibility of the Department to ascertain from the catalogue and description its classification under the appropriate heading. This Tribunal has consistently held that oncethe description of the goods is correctly disclosed, wrong classificationof the said goods on the basis of description cannot be the basis for invoking extended period of limitation. Also, it has been held in a series of cases that merely because the goods are not classified correctly under the appropriate heading by an assessee even though all facts are disclosed to the Department, the allegation of misdeclaration or suppression of fact cannot be invoked for recovery of duty for the past period. In our view, it is not necessary for the appellant to disclose on the relevant bills of entry that the goods are meant to be used

as portable hand tools; the basis of classification asper explanatory notes of HSN. The stray cases of classification of the imported goods in five bills of entry under CTH 84678900 by the appellant, in our view, cannot lead to the conclusion that in other billsof entry, the goods were declared under wrong heading knowinglyand to suppress the correct classification. The explanation furnished by the appellant that the mistake occurred when other goods of the same heading were imported along with the Brush cutters seems to be reasonable. Thus, invoking of extended period cannot be sustainedand hence the demand is barred by limitation. Consequently, the penalties on the Appellants not sustainable.

16. In the result, the impugned Order is modified to the extent of confirming classification of the impugned goods under CTH 84678990; confirming the demand and interest for the normal period and setting aside demand and interest for the extended period; also the penalty imposed on the Appellants is set aside.

17. Appeals are disposed off accordingly.

(Pronounced in the court on 18.09.2023)

(D. M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

RA_Saifi

Back

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,BANGLORE-560009

COURT-2

Customs Appeal No. 2535 OF 2011

[Arising out of the Order-in-Appeal No.44/2011 Cus. (B) dated 25.05.2011 passed by the Commissioner of Customs (Appeals), Bangalore.]

M/s. IBM India (P) Ltd. **....Appellant**
Subramanya Arcade,

No.12, Bannerghatta Main Road,
Bangalore – 560 029.

Vs.

The Commissioner of Customs (Appeals) **....Respondent**
C. R. Building, P. B. No.5400,Queens Road,

Bangalore – 560 001.

Appearance: **....For** Appellant

Mr. B. V. Kumar, Advocate

Mr. Rajesh Shastry, AR..... **For Respondent**

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 05/07/2023Date of Decision: 08/09/2023

FINAL ORDER No. 20920 of 2023

Per R. BHAGYA DEVI:

Brief facts of the case are that the appellant, M/s. IBM India Pvt. Ltd., imported software "SPO" for 5691 XXX CATIA Hybrid Design vide Bill of Entry No. 276457 dated 27.11.2009 indicating the value of the software as US$ 21,49,953.610 as indicated in

the overseas supplier's invoice No. CUM97711A dated 26.11.2009.This product was assessed by the group concerned on the basis of the declared value and the duty amounting to Rs. 84,64,975 was paid on 27.11.2009 and thereafter, the goods were cleared for home consumption. Later, the said imported software was sold to M/s. Tata Technologies Ltd. Pune vide invoice No. PCS020 dated 30.11.2009 in terms of the purchase order dated 25.11.2009. Theappellant then realised that they had erroneously declared value of imported software to be ₹10,27,30,275/- as against ₹1,91,24,415/- and filed an appeal to reassess their goods and seek refund of the excess duty paid by them. The Commissioner (Appeals) noted that the appellant being registered as an Accredited Client Programme (ACP) and the imports made by suchimporters are normally facilitated through Risk Management System (RMS); in other words, the goods were cleared without examination based on the transaction value declared in the Bill of Entry and there is no dispute that there was any irregularity in the assessment made at the time of import. The only defense of the appellant was that there was a clerical error committed by them where higher value was declared which resulted in excess payment of customs duty and hence, they sought to reopen the assessment and rectify a clerical error in terms of provisions of section 149 and 154 of the Customs Act 1962. The Commissioner (A) observed that section 149 allows amendment of a Bill of Entry after the clearance of the goods only on the basis of documentary evidences which were in existence at the time the goods were cleared for home consumption; while Section 154 deals with only clerical mistakes. He held that since, in this case, no such error was committed, Section 154 was ruled out and Section 149 could not be invoked by the appellant. Thus, in the absence of the goods which have already been cleared and specific identity of the goods not being available, the Revenue had no recourse route to read it in mind the intrinsic value of the software at a belated date. The Commissioner (A) also noted that the appellant had produced an amended purchase order dated 10.12.2009 amending the value ofthe imported software as USD 2,34,253.50 which was not inexistence at the time of import and did not indicate that the same is related to the transaction already completed. He also notes thatthough the supplier had indicated to the appellant that they wouldissue a credit note for the differential amount and there were no documents produced to show that the differential amount was credited and whether the transaction was finalised in their booksof accounts of both the supplier and the importer. Therefore, inthe absence of any verifiable means to determine the intrinsic value of the imported goods that were not available for examination, the request for reassessment of goods was rejected.

2. The learned counsel on behalf of the appellant submits that their quotation number dated 23.11.2009 given to M/s. Tata technologies Ltd. Pune quoted the correct price and on the basisof this quotation, they had placed the purchase order dated 25.11.2009 on IBM India and IBM India in turn placed a purchase order on "IBM USA" quoting an incorrect higher value on the basisof which the commercial invoice was issued by the supplier andn accordingly, excess duty was paid by the appellant at the time of import. It is stated that they realised their mistake and the appellant brought the same to the notice of the supplier and accordingly, the overseas supplier amended the purchase order. Since a Bill of Entry is an appealable order, they filed an appealfor reassessing the Bill of Entry. Since Section 149 allows for amendment of a Bill of Entry, they requested this Tribunal to consider the request to allow the amendment to the Bill of Entry so that they can claim refund of the excess duty paid by them. They also relied on following various judgements:

(i) PPN Power Generating Co. Pvt. Ltd. vs. CC, Trichy: 2016 (344) ELT 891 (Tri.-Chennai)

(ii) Steel Authority of India Ltd. vs. CC, Chennai: 2016 (343)ELT 602 (Tri.-Chennai)

(iii) Mohit Overseas vs. Commissioner of Customs: 2016 (335)ELT 18 (Del.)

(iv) UFLEX Ltd. vs. Commissioner of Customs, New Delhi: 2013 (298) ELT 476 (Tri.-Del.)

(v) Oswal Agloimpex Pvt. Ltd. vs. Commissioner of Customs,Kandla: 2012 (283) ELT 300 (Tri.-Ahmd.)

(vi) Commissioner of Central Excise, Nhava Sheva vs. CrestChemicals: 2009 (244) ELT 361 (Tri.-Mum.)

(vii) Chirag Enterprises vs. Commissioner of Customs (EP),Mumbai: 2008 (232) ELT 730 (Tri.-Mumbai)

(viii) Senka Carbon Pvt. Ltd. vs. Commissioner of Customs,Chennai: 2007 (216) ELT 397 (Tri.-Chennai)

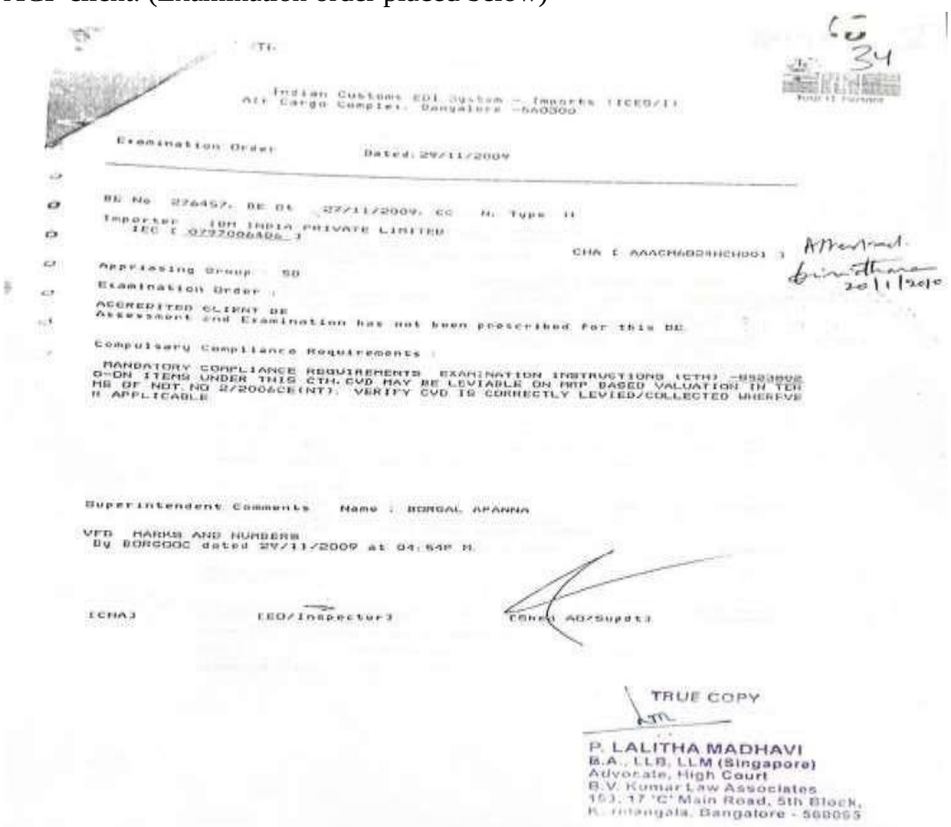
(ix) Union of India vs. Aluminium Industries Ltd.: 1996 (83) ELT41 (Ker.)

3. The learned Authorised Representative on behalf of the Revenue reiterating the findings of the Commissioner (A) submits that since the goods were not examined at the time of import, thevalue was accepted by both the Department and the appellant,the question of reopening of the assessment does not arise. Moreover, the documents that were submitted before the Commissioner (A) were not available at the time of import but they happen to have revised the purchase order and revisedinvoice which was generated at a later period of time which cannotbe accepted as a transaction value for the said goods. Therefore, he submits that the goods that were not examined at the time of import cannot now be examined and hence, the question of revising the value based on the documents that were not availableat the time of import cannot allow either to amend the Bill of Entryor reassessment.

4. We have gone through the records of case carefully and findthat the facts that are undisputed:

a) Bill of Entry No. 276457 dated 27.11.2009 filed where goodswere declared as SPO for 5691 XXX CATIA Hybrid Design.

b) The goods imported by the appellant were not examined at the time of import as they were an ACP client. (Examination order placed below)



Indian Customs EDI System – Imports (ICES/I)
Air Cargo Complex, Bangalore -560300

Examination Order Dated: 29/11/2009

BE No 276457, BE Dt 27/11/2009, CC No, Type II

Importer IBM INDIA PRIVATE LIMITED
IEC (0237006A05)

CHA (AAACH6829HCH001)

Appraising Group SG

Examination Order :

ACCREDITED CLIENT BE
Assessment and Examination has not been prescribed for this BE

Compulsory Compliance Requirements :

MANDATORY COMPLIANCE REQUIREMENTS EXAMINATION INSTRUCTIONS (CTH) -8523802
0-ON ITEMS UNDER THIS CTH, CVD MAY BE LEVIABLE ON MRP BASED VALUATION IN TERM
NS OF NOT NO 2/2006CE(NT). VERIFY CVD IS CORRECTLY LEVIED/COLLECTED WHEREVE
R APPLICABLE

Superintendent Comments Name : BORGAL APARNA

VFD MARKS AND NUMBERS
By BORG00C dated 29/11/2009 at 04:54P M

(CHA) (EO/Inspector) (Chief AO/Supdt)

TRUE COPY

P. LALITHA MADHAVI
B.A., LLB, LLM (Singapore)
Advocate, High Court
B.V. Kumar Law Associates
163, 17 'C' Main Road, 5th Block,
R...ntangala, Bangalore - 560095

c) Invoice No. CUM9711A dated 26.11.2009 declared the valueas USD 21,49,953.61

d) TR6 Challan No.98122006 dated 27.11.2009 evidencingpayment of duty of Rs.84,64,975/-.

e) Amended Purchase Order No. G08659A dated 10.12.2009.

The goods were assessed and payment of duty was made and the goods were cleared for home consumption. Now, after clearance of the goods, the appellant claims that they paid excess duty not because there was an error either in the Bill of Entry or in the invoice but based on a revised purchase order and revised invoice generated at a later dated by the supplier on the request of the appellant. These documents were not in existent at the time of import and the claim of the appellant based on the quotation has no value in as much as a quotation is not a price which has been agreed upon. The purchase order and the commercial invoice for that purchase order are the legal documents in a commercial transaction. Moreover, the goods were not examined at the timeof import nor were made available to be examined at the time of their request to amend the value.

Section 154. Correction of clerical errors, etc. –

Clerical or arithmetical mistakes in any decision or order passed by the Central Government, the Board or any officer of customs under this Act, or errors arising thereinfrom any accidental slip or omission may, at any time, be corrected by the Central Government, the Board or such officer of customs or the successor in office of such officer, as the case may be.

In this case, Section 154 is not applicable in as much asthere is no clerical mistake committed in any of the invoices.

Section 149. Amendment of documents. - Save as otherwise provided in Sections 30 and 41, the proper officer may, **in his discretion**, authorise any document, after it has been presented in the custom house to be amended [1] [in such form and manner, **within such time**, subject to such restrictions and conditions, as may be prescribed]:

Provided that no amendment of a bill of entry or ashipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, **except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be.**

(Emphasis supplied)

From the above provisions, it is abundantly clear that for invoking Section 149, relevant documents should have been in existence atthe time of import but in this case, obviously the invoice was revised based on the request of the appellant and the veracity of the genuineness of this invoice could not be verified since the goods were not examined at the time of import nor were availablefor examination.

5. We find that the Hon'ble High Court of Delhi in the case of

Terra Films Pvt. Ltd. vs. Commissioner of Customs: 2011

(268) E.L.T. 443 (Del.) held that:

"The facts leading to the filing of the present appeal need to be mentioned in brief. The appellant is a manufacturer of c-extruded multilayer film having their factory in specified area of Himachal Pradesh and availing exemption from customs duty. It exported commodities under 7 shipping bills during the period of September 2004 to April 2005. In the shipping bills, they had mentioned about the scheme under which exports were made as "DEPB/DEEC". The goods stood exported to the destination under this scheme. After a lapse of considerable period, the exporter/appellant vide its letter dated 27th January, 2006 followed by some more letters requested for permission to amend their DEEC/DEPB shipping bills into those DEEC/DEPB cum drawback scheme.

6. As per proviso of this Section 149, no amendment of a shipping bill was to be allowed after the export goods have been exported except on the basis of the documentary evidence, which was in existence at the time the goods were exported. The submission of the learned counsel for the appellant/exporter in this regard was that the exporter was in possession of all the documents at the time of export to show that it was entitled to claim under the DEPB/DECC cum drawback scheme. **From the plain reading of Section 149, it may be seen that exporter could not claim amendment in routine and as a matter of right. The discretion vested in the Proper Officer to permit amendment in any document after the same has been presented in the Customs house. Though this discretion was to be exercised judiciously, but it was qualified with the proviso that the amendment could be allowed only if it was based on the documentary evidence in existence at the time the goods were exported.** The Commissioner in the remand case has rightly observed that the present case in fact relates to the request for conversion of shipping bills from one export promotion scheme into another and was not merely of an amendment in the shipping bill. The request was made for conversion from one scheme to another after the lapse of long period of more than one year. It was a case of request for "conversion" and not of "amendment" inasmuch by converting from one scheme to another, it was not only addition of word 'cum' duty drawback, but change of entire status and character of the documents. Even if it was to be taken as a case of amendment, the proper officer may not be in possession of the documents sought to be amended after lapse of such a long period, particularly when the goods already stood exported. **For enabling an exporter to draw the benefits of any scheme, not only physical verification of documents would be required, but as is noted by both the authorities below, the verification of the goods of export as also their examination by the Customs was necessarily required to be done. In the given factual circumstances, that was rightly held to be impossible.** The Commissioner in the remand case rightly distinguished the cases cited on behalf of the exporter from the facts of the present. The finding of fact as arrived at by the Commissioner has been rightly upheld by the CESTAT.

7. We do not see any perversity or illegality in the discretion exercised by the Commissioner in rejecting the request of the exporter of conversion/amendment from one scheme to the other after a lapse of more than

one year. There is no reason to interfere in the findings of the fact arrived at by the CESTAT. Since, there is no question of law involved, the appeal is dismissed. No orders as to costs. Ordered accordingly."

(Emphasis supplied)

6. The Hon'ble High Court of Madras in the case of **Commr. ofCus. (Seaport-Export), Chennai Vs. Suzlon Energy Ltd. 2013 (293) E.L.T. 3 (Mad.)** held that:

"18. A similar issue was considered by the Division Bench of Delhi High Court in the matter of *M/s. Terra Films Pvt. Ltd*. v. *Commissioner of Customs* [2011 (268) E.L.T. 443 (Del.)]. In the above decision, the Delhi High Court has considered the scope of Section 149 of Customs Act and found that the discretion vested in the Proper Officer to permit amendment in any document after the same has been presented in the Customs house has to be though exercised judicially, **it was qualified with the proviso that the amendment could be allowed only if it was based on the documentary evidence in existence at the time the goods were exported. It is further observed therein that the request was made for conversion from one Scheme to another is a case of request for conversion and not of an amendment inasmuch as by converting from one Scheme to another, it was not only addition of certain word, but change of entire status and character of the documents.** Thus, the Delhi High Court observed that the Proper Officer may not be in a possession of the documents sought to be amended particularly, when the goods already stood exported. For enabling an exporter to draw the benefits of any scheme, not only physical verification of documents would be required, but also verification of the goods of export and their examination by the Customs was necessarily required to be done. By observing so, the Delhi High Court upheld the rejection of the request of the exporter seeking for conversion of the Shipping Bill from one Scheme to another.

19. We are in full agreement with the reasonings given by the Delhi High Court in the above said case and by following the said decision [2011 (268) E.L.T. 443 (Del.)], we find that the 1st Respondent's claim seeking conversion is not maintainable and the same has been rightly rejected by the Commissioner of Customs. The Tribunal has not gone into any of these aspect in detail, even though it happens to be a final fact finding authority. It has simply allowed the conversion by resorting to the provision under Section 149 of Customs Act as if, it is a simple request for amendment. Therefore, we find that the order passed by the Tribunal cannot be sustained and accordingly, the same is set aside and the appeal filed by the Department is allowed. The questions of law raised in the appeal are answered in favour of the Department. No costs.

7. The High Court of Gujarat in the case of **Anil Sharma Versus Union of India 2017 (350) E.L.T. 332 (Guj.)** held that:

"6. Heard the learned advocates for the respective parties at length. At the outset, it is required to be noted that it is the case of the petitioner that though they imported the goods under the shipping bill under the Advance Authorization Scheme, through oversight and by mistake it was punched as duty drawback. Therefore, it is the case on behalf of thepetitioner that subsequently when they requested to amend the bill of entry, the case would fall under Section 149 of the Customs Act, which does not provide any limitation to make application to amend the shipping bill and therefore, the authorities are not justified in rejecting the application on the ground that the same is not within the period of three months, relying upon Board Circular No. 36 of 2010. Identical question came to be considered by the Division Bench of the Madras High Court in the case of *Suzlon Energy Ltd.* (supra). Relying upon considering the decision of the Division Bench of theDelhi High Court in the case of *Terra Films Pvt. Ltd.* (supra), Madras High Court has held that such goods would not fall under Section 149 of the Customs Act, but shall be governedby Board Circular No. 36 of 2010. In the case of *Terra Films Pvt. Ltd.* (supra), the Delhi High Court has considered the scope of Section 149 of the Customs Act and found that discretion vested in the proper officer to permit the amendment in any document after same has been presented in the Custom House has to be though exercised judiciouslybut it was qualified with the proviso that the amendment couldbe allowed only if it was based on the documentary evidence inexistence at the time the goods were exported. In the said decision, it is further observed that the request made for conversion from one scheme to another scheme is a case of request for conversion and not of amendment inasmuch as by converting from one scheme to another scheme, it was notonly addition of word "cum" duty drawback but change entire status and character of the document. The Delhi High Court has thereafter observed that proper officer may not be in possession of the documents sought to be amended after lapse of such a long period when the goods already stood exported. **For enabling an exporter to draw the benefits of any scheme, not only physical verification of the documents would be required but also verification of the goods ofexport as also their examination by the Customs was necessarily required to be done.**

6.1 Thus, the request of the petitioner which has been rejected by the respondent cannot be said to be a mere amendment in the shipping bill as contemplated under Section 149 of the Customs Act, but it will be case of conversion of one scheme to another scheme, for which, proper officer is required to verify whether the very manufactured final product which has been manufactured from the raw material has been exported or not.

7. The contention on behalf of the petitioner that as the case would fall under Section 149 of the Customs Act which doesnot prescribe any time limit and therefore, on the basis of material on record, which was available at the time of export, itcould have been verified whether final goods manufactured from the raw material imported has been exported or not, can be verified is concerned, as such, as observed herein above Section 149 of the Customs Act will not be applicable. Even otherwise, it is required to be noted that what is considered at the time of DEEC, the appropriate inquiry would be limited to the extent to satisfy the authority whether raw material which was imported has been used in

manufacturing final product or not. So far as Advance Authorization Scheme is concerned, the appropriate authority is required to consider after holding appropriate inquiry that the raw material which was imported has only been used in the manufacture of final product and that final product has been actually exported.

Based on the above decisions of the Hon'ble High courts it is clearly evident **for any amendment under section 149 the proviso needs to be strictly interpreted and any amendment cannot be claimed in a routine manner and as a matter of right. The discretion vested in the Proper Officer to permit amendment in any document after the same has been presented in the Customs house. Though this discretion was to be exercised judiciously, but it was qualified with the proviso that the amendment could be allowed only if it was based on the documentary evidence in existence at the time the goods were exported. It also held that for enabling the appellant the benefits of any amendment not only physical verification of the documents would be required but also verification of the goods and also their examination by the Customs was necessarily required to be done.** Based on these observations the request for amendment was rejected.

Keeping the above observations of the judiciary let's examine as to how they are relevant for the present case where the issue is in relation to the amendment of value of the imported goods. In the present case the documents produced for amendment of the value were never before the assessing authority at the time of clearance and they were admittedly revised purchase order and revised commercial invoice. Secondly since the appellant is an ACP client the goods were not examined at the time of import. Therefore, the criteria laid down as held by the above decisions evident that it is clear that for any amendment under section 149 the proviso needs to be strictly interpreted and any amendment cannot be claimed in a routine manner and as a matter of right and the discretion is vested in the Proper officer to permit amendment in any document and the discretion was to be exercised judiciously. The proviso to section 149 allowed the amendment only if it was based on the documentary evidence in existence at the time the goods were imported/exported and to enable any benefits of any amendment not only physical verification of the documents would be required but also verification of the goods necessarily required to be done. In the present case these conditions were not satisfied and hence rejected.

(Emphasis supplied)

8. The Supreme Court in the case of **Escorts Limited Versus Union of India, 1998 (97) E.L.T. 211 (S.C.)** observed that "it may be noticed that the Act does not prescribe any particular formin which the order of assessment is to be made. In the verynature of things, no formal order of assessment can be expected when there is no dispute as to the classification or the rate of duty, no formal order can be expected in such a case, it is more like `across-the-counter' affair. …… The bill of entry presented by the appellant was signed, signifying approval by the assessing officer. That itself is an order of assessment in such a situation.We are, therefore, not prepared to agree that there is no order of assessment in this case, and therefore, the limitation prescribed inSection 27 did not begin to run. Section 27 is emphatic in language. It says that an application for refund of duty shall be made before the expiry of six months from the date on which the duty was

paid. In the face of this provision, the authorities under the Act, including the Government of India, had no option but to dismiss the appellant's application."

9. The Hon'ble Supreme Court in the case of **Eicher TractorsLtd. versus Commissioner of Customs, Mumbai, 2000 (122) E.L.T. 321 (S.C.)** dated on 14-11-2000 observed that:

"6. Under the Act customs duty is chargeable on goods. According to Section 14(1) of the Act, the assessment of duty is to be made on the Value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not so fixed the value has to be determined under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which such or like goods are *ordinarily sold*, or offered for sale, for delivery at the *time* and *place of importation* - in the course of international trade. The word 'ordinarily' necessarily implies the exclusion of "extraordinary" or "special" circumstances. This is clarified by the lastphrase in Section 14 which describes an "ordinary" saleas one "where the seller or the buyer have no interest in the business of each other and the price is the sole consideration for the sale.....". Subject to these threeconditions laid down in Section 14(1) of time, place and absence of special circumstances, the price of imported goods is to be determined under Section 14(1A) in accordance with the rules framed in this behalf.

7. The rules which have been framed are the Customs, Valuation (Determination of Price of Imported Goods)Rules, 1988. Under Rule 3(i) "the value of imported goods shall be the transaction value". "Transaction value"' has been defined in Rule 2(f) as meaning the value determined in accordance with Rule 4. Rule 4(1) in turn states "The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules."

8. Reading Rule 3(i) and Rule 4(1) together, it is clear that a mandate has been cast on the authorities to accept the price actually paid or payable for the goods in respect of the goods under assessment as the transaction value. But the mandate is not invariable and is subject to certain exceptions specified in Rule 4(2) namely:

(a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which -
(i) are imposed or required by law or by the publicauthorities in India; or
(ii) limit the geographical area in which the goodsmay be resold; or
(iii) do not substantially affect the value of the goods;

(b) the sale or price is not subject to same conditionor consideration for which a value cannot be determinedin respect of the goods being valued;

(c) no part of the proceeds of any subsequent resale, disposal or use of the goods

by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules; and

(d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3)."

9. These exceptions are in expansion and explicatory of the special circumstances in Section 14(1) quoted earlier. It follows that unless the price actually paid for the particular transaction falls within the exceptions, the Customs authorities are bound to assess the duty on the transaction value.

12. Rule 4(1) speaks of *the* transaction value. Utilisation of the definite article indicates that what should be accepted as the value for the purpose of assessment to customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4(2). "Payable" in the context of the language of Rule 4(1) must, therefore, be read as referring to "*the* particular transaction" and payability in respect of *the* transaction envisages a situation where payment of price may be deferred.

If the phrase 'the transaction value' used in Rule 4 were not limited to the particular transaction then the other Rules which refer to other transactions and data would become redundant.

14. It is only when *the* transaction value under Rule 4 is rejected, then under Rule 3(ii) the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Rules. Conversely if the transaction value can be determined under Rule 4(1) and does not fall under any of the exceptions in Rule 4(2), there is no question of determining the value under the subsequent Rules".

(Emphasis supplied)

10. The Supreme Court in the case of **India Century Metal Recycling Pvt. Ltd. vs. Union of India 2019 (367) E.L.T. 3** dated on 17-5-2019 held that:

"9. As per Section 14(1) of the Act, value of the imported goods shall be the transactional value of such goods, which means the price actually paid or payable for the goods when sold for export to India where the buyers and sellers are not related and the price fixed is the sole consideration for sale. As per the first proviso to Section 14(1) of the Act, the transactional value for the purpose of Customs duty would include amounts paid or payable as costs and services like commission, brokerage, engineering, design work, cost of transportation, etc., as may be specified in the rules made in this behalf. These amounts are to be added to the declared transactional value. Accordingly, in terms of Rule 10 of the 2007 Rules, the value and price of costs and services are added to the price actually paid or payable for the imported goods for determining the transaction value.

15. The requirements of Rule 12, therefore, can besummarised as under:

(a) The proper officer should have reasonable doubt as to thetransactional value on account of truth or accuracy of the value declared in relation to the imported goods.

(b) Proper officer must ask the importer of such goods further information which may include documents or evidence;

(c) On receiving such information or in the absence of response from the importer, the proper officer has to apply his mind and decide whether or not reasonable doubt as to the truth or accuracy of the value so declared persists.

(d) When the proper officer does not have reasonable doubt, the goods are cleared on the declared value.

(e) When the doubt persists, sub-rule (1) to Rule 3 is not applicable and transaction value is determined in termsof Rules 4 to 9 of the 2007 Rules.

(f) The proper officer can raise doubts as to the truth or accuracy of the declared value on 'certain reasons' which could include the grounds specified in clauses (a) to (f) in clause (iii) of the Explanation.

(g) The proper officer, on a request made by the importer, has to furnish and intimate to the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to the imported goods. Thus, the proper officer has to record reasons in writing which haveto be communicated when requested.

(h) The importer has to be given opportunity of hearingbefore the proper officer finally decides the transactional value in terms of Rules 4 to 9 of the 2007 Rules.

11. In view of the above observations of the apex court, the changes to be brought about in valuation of goods is not just a simplicitor amendment, Section 14 of the Customs Act along with the Customs Valuation Rules clearly laid down the procedure for any assessment under this Specialized Act. Once an assessment isdone, only on appeal, reassessment is possible and anydemand/refund on account of reassessment on account of valuation or for any other reason has to be within the frameworkof laws as laid down under Section 28/27 of the Customs Act, 1962. Therefore Section 149 amendments cannot be read in isolation making these sections with regard to classification or valuation redundant. Reassessment of any assessment cannot be equated with an amendment under Section 149. The legislature, in the interest of justice, has not laid down any time limit under Section 149, does not take away the fact that any changes in valuation should not be in tandem with the laws laid down for refund or demand or else there will be no end for amendments which will result in utter chaos and de-stabilize the entire gamut of the Customs Act, 1962.

12. In the present case, first of all, no documents existed at the time of assessment and

the documents produced for amendment were not available at the time of assessment, these surfaced at much later date. The goods were not examined and the invoice produced by the appellant at the time of import had no factual errors and therefore to change the value of the imported goods based on an amended purchase order and revised invoice will not be a simplicitor amendment envisaged under Section 149. Moreover, the Commissioner (A) has clearly observed that there isno evidence to indicate that this revised purchase order and the revised invoice related to the transaction already completed. He also notes that "the amended purchase order dated 10.12.2009, *inter alia* continue to indicate the date required delivery as 10.12.2009, payment to be made within 30 days documents to besent as soon as shipment is sent etc;" which clearly shows thatthe revised documents cannot be related to the imported goods which have already been cleared for home consumption. Further, it is also observed that the supplier had indicated that on 11.01.2010 credit note would be issued for the differential amount and no evidence is produced till date. There are no evidences produced till date with regard to the revised transactions as to how the differential amounts reflect in the books of accounts of the supplier as well as the appellant. In view of the above, the question of considering change in value as mere amendment as per Section 14 read with Section 149 is ruled out. Therefore, the Commissioner (A) was right in rejecting these changes and in disallowing reassessment of the imported goods.

13. In view of our observations above, the appeal is rejected.

(Order pronounced in open court 08/09/2023.)

(P. A. AUGUSTIAN)MEMBER (JUDICIAL)

(R. BHAGYA DEVIMEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 2110 of 2012

(Arising out of Order-in-Appeal No.90/2012 dated 30.05.2012 passed by the Commissioner of Customs(Appeals), Bangalore.)

M/s. ABB Limited
Plot No.5 & 6, II PhasePeenya Industrial Area
P.B. No.5806, Bangalore – 560 058. — Appellant(s)

Versus

Commissioner of Customs
C.R. Building
P.B. No.5400, Queens Road, Bangalore – 560 001. — Respondent(s)

Appearance:

Ms. Shraddha Pandey,Advocate — For the Appellant

Mr. K. A. Jathin, AR — For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21337 /2023

Date of Hearing: 04.12.2023
Date of Decision: 04.12.2023

Per : D.M. MISRA,

This appeal is filed against Order-in-Appeal No.90/2012 dated 30.05.2012 passed by the Commissioner of Customs (Appeals), Bangalore.

2. Briefly stated the facts of the case are that the appellant had filed Bill of Entry No.860886 dated 19.9.2008 declaring goods as inverter unit – frequency converter classifying thesame under CTH 9032 9000 and claiming concessional rate of duty. The Department has reclassified the product under CTH 8504 4010 as 'inverter'. Aggrieved by the said assessment, they filed appeal before the learned Commissioner (A), who in turn upheld the order of the adjudicating authority and rejected their appeals. Hence, the present appeals.

3. At the outset, the learned Authorised Representative forthe Revenue submits that on similar issues for subsequent period, this Tribunal had already decided the appeals filed by the appellant classifying the product under CTH 8504 4010 as against claimed classification of CTH 9032 9000. Therefore, the present appeal be decided accordingly.

4. Learned advocate for the appellant does not dispute the said facts.

5. Heard both sides and perused the records. We find that theissue has already been considered by this Tribunal taking note ofthe various aspects on the issue and precedent. After analysing the submissions from both sides, this Bench vide Final Order No. 21151 – 21152/2023 dated 20.10.2023 has held as follows:

"21. The reliance placed on by the learned counsel on note 1(m) of Section XVI which states this Section does not cover articles of Chapter 90 is totally misplaced as seen from the chapter notes and the explanatory notes supra. The learned counsel has also relied on the explanatory notes where it states "automatic voltage regulators are classified in heading 90.32,conveniently ignoring the HSN explanatory notes under Chapter 8504". As discussed above, the items imported are not automotive regulators but frequencyinverters and going by the Technical Literature provided by the appellant, they are rightly classifiable under Chapter 85.04. The reliance placed on Koneelevators by the appellant does not support the case of the appellant in as much as the product there was being classified under 8504 based on the expert opinions which was not rebutted by the revenue.

6. The learned Authorised Representative has rightly relied on the decision of the Tribunal in the case of **Larsen & Toubro Ltd. V. Commissioner of Central Excise Mumbai 2005 (189) ELT 439 (Tri- Mumbai)** wherein the similar products under dispute,the Tribunal upheld the classification under 8504 as against the classification under 8537 as claimed by the Revenue. The facts of the case are that the static converters manufactured by the appellant where the primary function of the subject goods was to convert electrical energy in order to adopt it for further use namely direct current - alternating current - direct current or alternating current - alternating current.The subject goods technically known as 'frequency inventors, convertors for speed control of D.C. Motors,Chopper Controllers, A.C. Regulators'. The dispute involved in the present case relates to the classification of the said "static convertors" manufactured by the appellants. The appellants claimed the classification ofthe said products under Chapter subheading 85.04 of the Tariff Act and cleared the products at appropriate rate of duty accordingly. By the order impugned in this appeal, the Commissioner (A) classified the said products as "'Panels'' under Chapter Heading 85.37 ofthe Tariff Act. But based on the primary function of the product, the Tribunal found classification under 8504 to be appropriate.

7. In the case of **Pioma Chemicals v.Commissioner of Customs, Nhava Sheva-I: 2019 (370) ELT 301 (Tri-Mumbai)** held that:

"In our view all the published literature support the findings recorded by the Commissioner in the impugned order to the effect that the goods imported are nothing but re-esterified fat/oil. On going through the published literature referred above, and also the fact that as per the rulings relied from US Customs and Kenya Customs we do not find any error in the classification of the goods determined under Chapter 1516 20 91. It is true that the Rulings of the US Customs and Kenya Customs may not be binding but definitely have great persuasive value as the Classification Code followed by all these countries, are based on**,** which the classification system adopted by Indian Customs is also aligned. It is only beyond six-digit level that local jurisdictions have their own expansions."

8. The Hon'ble Supreme Court of India in the caseof **Thermax Ltd. Versus Commissioner of Central Excise, Pune-I: 2022 (382) E.L.T. 442 (S.C.)** datedon 13-10-2022 the Supreme Court held that:

*"**6.** The definition of a product given in the HSN should be given due weightage in the classification of a product for the purpose oflevying excise duty. This is because in the Statement of Objects and Reasons of the Bill leading to enactment of Central Excise TariffAct, 1985, it was clearly stated that the pattern of tariff classification is broadly based on the system of classification derived from the International Convention on the Harmonised Commodity Description and Coding System (Harmonised System) with such contraction or modification thereto as are necessary, to fall within the scope of the levy of Central Excise duty. The tariff so suggested for the levy under the Indian Tariff Act is based on an internationally accepted nomenclature, in the formulation of which, all considerations, technical and legal, have been taken into account. This was done to reduce avoidable disputes on tariff classification. Besides, the tariff would be on the lines of the harmonized system. It was also borne in mind that the tariff on the lines of the harmonized system would bring about considerable alignment, between the Customs and Central Excise Tariffs, whichin turn, would facilitate charging of additional customs duty on imports, equivalent of excise duty. It was therefore expressly stated in theStatement of Objects and Reasons that the Central Excise Tariff are based on the HSN and the internationally accepted nomenclature was as such taken into account, to reduce tariff classification disputes..... ".*

In view of the above, the decision of the WCO cannot be ignored and also the fact that the suppliers invoice classified theproduct under Chapter Heading 8504.

9. Therefore, based on our above observations and the various decisions as discussed above, we find that the goods are rightly classifiable under Chapter Heading 8504 as against the classification under Chapter Heading 9032 as claimed by the appellant.

10. We do not find any reason in not following the said orderof the Tribunal. Consequently, the product in question merits classification under CTH 8504 instead of CTH 9032 as claimed bythe appellant. Consequently, the appeal is dismissed.
(Order dictated and pronounced in Open Court.)

(D.M. MISRA)MEMBER (JUDICIAL) (R. BHAGYA DEVI)MEMBER)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL

1st Floor, WTC Building, FKCCI Complex, K. G. Road, BANGLORE-560009

COURT-2

Customs Appeal No. 558 of 2010

[Arising out of the Order-in-Appeal No.169/2009 dated 23.12.2009 passed by the Commissioner of Customs (Appeals), Bangalore.]

The Commissioner of Customs **....Appellant**
C.R. Building, No.1, Queens Road
Bangalore – 560 001.

Vs.

M/s. Kronos Systems India Pvt. Ltd. **....Respondent**
Regus Millenia, Level-1, Tower-B,
No.1 & 2, Murphy Road, Ulsoor,
Bangalore – 560 008.

Appearance:

Mr. K. Vishwanath, Superintendent (AR) **....For Appellant**

Vs.

None **.... For Respondent**

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 24.07.2023 Date of Decision: 20.10.2023

FINAL ORDER No. 21155 of 2023

Per R. BHAGYA DEVI:

M/s. Kronos System India Private Limited, Bangalore, the respondent had imported '553 series for 4500 Full A/N Prox. Exp Memory'. The importers had claimed that this item was to be part of computer and accordingly classified items under Chapter Heading 8473 3020 as part of the computers. On examining the samples, the operation manual and the catalogue of the goods, it was found that the item imported was described as data collection device. There are known as kronos 4500 Touch ID terminal chips with an integrated badge reader. It has integrated bar code reader, integrated

proximity reader and integrated magnetic reader. When an employee swipes his card in the card reader slot or enters his pin through the alphanumeric keys, the machine identifies the employee and marks his attendance and exit. The data so collected is rooted to a central server which is further processed. Based on the above description and referring to Chapter Note 5(E) to Chapter 84, those in authority states that the data collection device functions like a badge reader which works in conjunction with a central server and such proximity such badge readers are rightly classifiable under chapter heading 8543 7099.

2. The appellate authority in the impugned order after analysing the Chapter Headings of 8543 and 8471 states that 8543 is meant for "Electrical machines and apparatus having individual functions". From the description of the product catalogue submitted by the respondent, the same does not fall in this category. The product under import has a Central Processing Unit (CPU) runtime memory, storage memory, operating system and application software. As is the case with automatic data processing machine unit under import has the ability to accept and process data locally. The installation guides submitted by the respondent confirms the above statement and items under import prescribed to Chapter Note under Chapter Heading 84. He further submits that *"I am of the opinion that this classification is more appropriate as it has functions of an automatic data processing machine and is a standalone function. I accept the contention of the appellants that the 4500 Terminal is not itself a badge reader, but rather includes one as one of the several possible input devices."* Accordingly, he classifies the imported item under Chapter Heading 8471 4190 by setting aside original authority's classification under Chapter Heading 8543. Aggrieved by this impugned order, Revenue is appeal before us.

3. The grounds on which the appeal is filed by the Revenue is that the Commissioner (Appeals) had ignored the findings of the original authority that the item was not a data processing machine or any part or accessory of the same even though the product is a CPU keyboard and display. Since item imported only collect the data as and when the card is swiped and pin is entered but does not process the data, it cannot be construed as an automatic data processing machine and hence, are rightly classifiable under chapter 8543. The authorised representative on behalf of the Revenue reiterating the grounds of appeal submits that the device itself is not able to perform any data processing operations; it only acts upon the program run by the central server; it has the functionality and the characteristic of proximity card reader and hence, are rightly classifiable under Chapter Heading 8543. He further submitted that there was an error in the impugned order classifying the product under a classification which was not pleaded before the original authority and prays for upholding the order of the original authority.

4. None appeared for the respondent.

5. The Original Authority at para 5 of the order has stated that the importers claimed the impugned goods i.e., data collection device as parts of computers falling under Chapter Heading 8473 3020. However, the Commissioner (A) in the impugned order classifies the item under Chapter 8471 41 90 as Automatic Data Processing Machines which was never claimed by the importer. The Apex Court in the case of **Precision Industries Pvt. Ltd. 2016 (334) ELT 577 (SC)** held that no new case could have been set up or decided contrary to the show-cause notices for the classification other than what was part of the notice. In this case, the importer admittedly had requested for classification under Heading 8473 while the Department classified the items under 8543. The Commissioner (A) should have restricted himself to these headings and cannot classify the item entirely under a different heading which was not part of the order of the lower authority. Hence, the Commissioner (A)'s order is bad in law.

6. Now the question arises as to whether the item is classifiable under Chapter 8543 as claimed by the Revenue. From the catalogue, it is noticed that:

"-The item is described as 'Data Collection Device'

-Every Kronos 4500 badge terminal or Kronos 4500 Touch ID Terminal ships with an integrated badge reader. These readers identify users in a consistent and reliable manner, facilitating faster time and labor transactions. The machine also support connection of customer supplied external readers, including contact less MIFARE and iCLASS smart card readers.

-It has integrated Bar code reader, Integrated Proximity reader and integrated Magnetic reader.

-The employ may swipe his card in the card reader slot or enter his PIN through the alphanumeric keys on the machine.

-upon swiping or entering the pin the machine identifies the employee and mark his attendance and exit.

-the data so collected will be routed to the central server through Ethernet cable connection/modem.

-the central server process the data of the employees for further processing and data is archived there."

7. As seen from the above and as noted by the original authority, the device captures the data from the employee's card or the data of the particular employee who key in the PIN into the device. The device does not do anything except for collecting the data at the time of entry or exit and this data is transmitted to a central server for further processing like marking the attendance, preparation of payroll or for other purposes. These facts are not in dispute. Based on the General Rules of Interpretation and the Chapter Notes, the item needs to be classified in the heading akin to it or where the specific description is provided. In this case, the data collection device imported by the respondent is nothing but a card reader working in conjunction with the server. Thus, this device functions such as proximity readers/badge readers, which are specifically classified under Chapter Heading No.8543 and as per Chapter Note 5(E) to Chapter 84.
"Chapter Note 5(E) to Chapter 84 "Machines performing a specific function other than data processing and incorporation or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, falling that in residual headings".

8. Since the specific function of the imported item is to mark attendance or to take note of the persons of the employees for the purpose of attendance or payroll or leave, they cannot be classified under Chapter 84 as it excludes from this Chapter as per the Chapter Note 5(e) discussed above.

9. In the case of **Commissioner of Customs, Bangalore vs.**

Scatia: 2019 (370) ELT 703 (Tri.-Bang.), a similar product viz., fingerprint scanner was classified under Chapter Heading 8543 7099 as per the observations made by the Tribunal at para 5.1, wherein it has held that:

"5.1 The Department contended that CTH 8543 70 99 is more applicable due to the fact that the item imported basically operates on electrical/electric technology. We find that the Head 8543 covers electrical machines and apparatus having individual functions not specified or included elsewhere in the chapter. Therefore, the classification of the Finger Print Reader would be more appropriate under this heading. We also accept the Department's contention that when the item is *prima facie* classifiable under two headings in terms of Rule 3(c) of General Rules of Interpretation of Import Tariff, the goods should be classified under the heading which occurs last in numerical orders among those which equally merits consideration. We accept this contention. Going by merits as well as by the Rules of Interpretation, we hold that the impugned product merits classification under CTH 8543 70 99 as contended by the Department."

10. Hence, based on the discussions above and by following the decision of this Bench, we find that the product is rightly classifiable under chapter 8543.

11. The appeal is allowed.

*(Order pronounced in Open Court on **20.10.2023**.)*

rv

(P. A. AUGUSTIAN)
MEMBER
(JUDICIAL)

(R. BHAGYA DEVI) MEMBER
(TECHNICAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road, BANGLORE-560009

COURT-2

Customs Appeal No. 3156 of 2011

[Arising out of the Order-in-Appeal No.173/2011 to 177/2011 dated 30.10.2011 passed by the Commissioner of Customs (Appeals), Cochin.]

M/s. Glass House **....Appellant**
T.K. Road, Pullad, P.O Pathanamthitta – 689 548.

Vs.

The Commissioner of Customs (Appeals) **....Respondent**
Custom House, Willingdon Island, Cochin – 682 009.

Appearance:

....For Appellant

Mr. M. Balagopal, Advocate
Mr. K. A. Jathin, Dy. Com. (AR) **.. For espondent**

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 27.07.2023 Date of Decision: 20.11.2023

FINAL ORDER No. 21259 of 2023

Per R. BHAGYA DEVI:

The appellant M/s. Glass House filed a Bill of Entry No. 238994 dated 12.01.2009 for the clearance of "Dark Green Reflective Float Glass" which was imported from China. On examination, the officers found that as per the Notification No.4/2009 Cus. dated 06.01.2009, the imported goods were liable for anti-dumping duty, however since the appellant disputed leviability, the goods were cleared with a provisional bond. On finalisation of provisional duty, the original authority confirmed the duty amount of Rs. 1,50,649/- along with interest under Section 18(3) of the Customs Act 1962, in view of the Notification No.4/2009 Cus. dated 6.01.2009.

2. The Commissioner (Appeals) also confirmed the anti- dumping duty on the ground that there was a specific exclusion for Reflective Glass from the purview of the anti-dumping duty under Notification No. 165/2003-Cus. dated 12.11.2003, but Notification No.4/2009

dated 06.01.2009 there was no such exclusion for Reflective Glass. Aggrieved by this order, the appellant is before us only on the limited ground that they are not liable to pay anti-dumping duty in as much as prior and after to the Notification No.4/2009 dated 06.01.2009 as there was admittedly no anti-dumping duty and therefore, for the relevant period there appears to be an omission in the Notification in not excluding the Reflective Glass from the anti-dumping duty.

3. The learned counsel on behalf of the appellant submitted that the facts are not in dispute. The Reflective Glass imported by the appellant was in fact excluded in the Notification No. 165/2003 dated 12.11.2003 and Notification No. 51/2009-Cus. dated 22.05.2009 but by omission the Reflective Glass did not find place in Notification No.4/2009 dated 06.01.2009. According to the appellant, the authority for imposing anti-dumping duty on a product is the Director-General of Anti-dumping and in the final findings of the DGAD referred to subject goods falling under Heading 7005 and the subject goods included the items imported by them. Therefore, the Customs Authorities cannot exclude the item in their Notification in as much as it has not been approved by the DGAD. It is also submitted that as per the sunset final Notification findings issued by DGAD, the product under consideration remains the same as the subject goods and therefore, imposing anti-dumping duty on the items imported by them was illegal and hence, the appeal.

4. On behalf of the Revenue, the Authorised Representative for the Revenue submitted that Notification No. 165/2003-Cus. dated 12.11.2003 excluded Reflective Glass from its scope, however, there is no such exclusion for Reflective Glass in the Notification No.4/2009 dated 06.01.2009. The exemption Notification No. 51/2009 dated 22.05.2009 once again provided exemption to Reflective Glass and therefore, since the relevant Notification during the time of import did not provide any exemption from anti-dumping duty to the appellant. It is also submitted that the Hon'ble High Court of Kerala while deciding Writ Petition (C) No.7563 of 2009 (M) in the case of **K. Kochumon vs. Union of India** as reported at **2011 (273) ELT 187 (Ker.)** wherein it was held that:

"6. Therefore, *prima facie*, I am not satisfied that the reflective glass are excluded from the description of Float Glass in respect of which anti-dumping duty has been levied. In view of this, I am not persuaded to accept the contention of the learned counsel for the petitioner that the levy of anti-dumping duty is without jurisdiction.

7. True, the learned counsel for the petitioner made reference to Exts. P11 & P12. According to him these documents would show that reflective glass, were allowed to be imported in certain other ports in the country without levying anti-dumping duty. This Court can be guided only by the description of the commodity as available in the notification and even if there has been any omission on the part of the Department in levying duty at any place that will not justify interference levy of duty, if it is otherwise legal. Therefore, this court will not be justified in granting any relief in the writ petition and it is accordingly dismissed. However, it is clarified that the findings in the judgment will not stand in the way of the petitioner agitating his liability before the appellate Forum that is available under the statute, which, shall decide the matter untrammelled by any of the observations made above."

In view of the above, the Revenue prayed that the appeal should be dismissed.

5. Heard both sides. The limited issue to be decided is whether the importer is eligible for the benefit of exemption from anti- dumping duty during the relevant period i.e., from 06.01.2009 to 22.05.2009. To understand the issue let's examine the Notifications that are relevant to the issue. Notification No. 165/2003-Cus. dated 12.11.2003 reads as:

Anti-dumping duty on Float Glass of specified quality, originating in, or

exported from, the People's Republic of China and Indonesia

WHEREAS, in the matter of import of Float Glass of thickness 2 mm to 12 mm (both thickness inclusive) of clear as well as tinted variety (other than green glass) but not including processed glass meant for decorative, industrial or automotive purposes (hereinafter referred to as the subject goods), falling under heading 7005 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), originating in, or exported from, the Peoples' Republic of China and Indonesia (hereinafter referred to as the subject countries), and imported into India, the designated authority *vide* its preliminary findings, No. 14/19/2002-DGAD, dated the 20th November, 2002, published in the Gazette of India, Extraordinary, Part I, Section 1, dated the 20th November, 2002, had come to the conclusion that -

(a) the subject goods, had been exported to India from the subject countries below the normal value;

(b) the domestic industry had suffered material injury;

(c) the material injury had been caused by the dumped imports from the subject countries;

and the designated authority had recommended imposition of provisional anti-dumping duty, pending final determination, on all imports of the subject goods, originating in, or exported from, the subject countries;

AND WHEREAS, on the basis of the aforesaid findings of the designated authority, the Central Government had imposed an anti-dumping duty *vide* notification of the Government of India in the erstwhile Ministry of Finance and Company Affairs (Department of Revenue), No. 7/2003-Customs, dated the 7th January, 2003, published in Part II, Section 3, Sub-section (i) of the Gazette of India, Extraordinary, dated the 7th January, 2003 [G.S.R. 14(E), dated the 7th January, 2003];

AND WHEREAS, the designated authority, *vide* its final findings No. 14/19/2002- DGAD, dated the 22nd August, 2003, published in the Gazette of India, Extraordinary, Part I, Section 1, dated the 22nd August, 2003, has come to the conclusion that -

(a) Float Glass of thickness 2 mm to 12 mm (both thickness inclusive) of clear as well as tinted variety (other than green glass) but not including reflective glass, processed glass meant for decorative, industrial or automotive purposes have been exported to India from the subject countries below their normal value;

(b) the domestic industry has suffered material injury;

(c) the material injury has been caused by the dumped imports of the subject goods from the subject countries, and the designated authority has considered it necessary to impose final anti-dumping duty on all imports of Float Glass of thickness 2 mm to 12 mm (both thickness inclusive) of clear as well as tinted variety (other than green glass) but not including reflective glass, processed glass meant for decorative, industrial or automotive purposes, originating in, or exported from the subject countries so as to

remove the injury to the domestic industry;

NOW, THEREFORE, in exercise of the powers conferred by sub-section (1) of section 9A of the said Customs Tariff Act, read with rules 18 and 20 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, the Central Government, on the basis of the aforesaid findings of the designated authority, hereby imposes on the goods, the description of which is specified in column (3) of the Table below, falling under tariff item of the First Schedule to the said Customs Tariff Act as specified in the corresponding entry in column (2), the specification of which is specified in column (4) of the said Table, originating in the countries as specified in the corresponding entry in column (5), and exported from the countries as specified in the corresponding entry in column (6) and produced by the producers as specified in the corresponding entry in column (7) and exported by the exporters as specified in the corresponding entry in column (8), and imported into India, an anti-dumping duty at a rate which is equal to the amount as specified in the corresponding entry in column (9), in the currency as specified in the corresponding entry in column (11) and per unit of measurement as specified in the corresponding entry in column (10), of the said Table.

TABLE

S. No.	Sub-heading	Description of goods	Specification	Country of Origin	Country of Export	Producer	Exporter	Amount	Unit of Measure-ment	Cur-rency
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
1.	70 05	Float Glass	Float Glass of thickness 2 mm to 12 mm (both thickness inclusive) of clear as well as tinted variety (other than green glass) but not including reflective glass, processed	Any country other than China	Indonesia	Any producer	PT Mulia Glass	71.16	Metric tonne	US$

			glass meant for decorative, industrial or automotive purposes							
2.	70 05	Float Glass	Float Glass of thickness 2 mm to 12 mm (both thickness inclusive) of clear as well	Any country other than China	Indonesia	Any producer	PT Tensindo	77.76	Metric tonne	US$
			as tinted variety (other than green glass) but not including reflective glass, processed glass meant for decorative, industrial or automotive purposes							
3.	70 05	Float Glass	Float Glass of thickness 2 mm to 12 mm (both thickness inclusive) of	Any country other than China	Indonesia	Any producer	PT Abdi Rakyat	81.21	Metric tonne	US$

			clear as well as tinted variety (other than green glass) but not including reflective glass, processed glass meant for decorative, industrial or automotive purposes							
4.	70 05	Float Glass	Float Glass of thickness 2 mm to 12 mm (both thickness inclusive) of clear as well as tinted variety (other than green glass) but not including reflective glass, processed glass meant for decorative, industrial or automotive purposes	Any country other than China	Indonesia	Any producer	All exporters except PT Mulia, PT Tensindo and PT Abdi Rakyat	81.21	Metric tonne	US$
5.	70 05	Float Glass	Float Glass of thickness 2 mm to 12 mm	China	Indonesia	Any producer	Any exporter	81.21	Meric tonne	US$

			(both thickness inclusive) of clear as well as tinted variety (other than green glass) but not including reflective glass, processed glass meant							
			for decorative, industrial or automotive purposes							
6.	70 05	Float Glass	Float Glass of thickness 2 mm to 12 mm (both thickness inclusive) of clear as well as tinted variety (other than green glass) but not including reflective glass, processed glass meant for decorative, industrial or automotive purposes	Any country	China	Any producer	Any exporter	72.27	Metric tonne	US$

2. The anti-dumping duty imposed under this notification shall be levied with effect from the date of imposition of the provisional anti-dumping duty, i.e. the

7th January 2003, and shall be paid in Indian currency.

Explanation. - For the purpose of this notification, rate of exchange applicable for the purposes of calculation of the anti-dumping duty under this notification shall be the exchange rate specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) issued from time to time, in exercise of powers conferred under sub-clause (i) of clause (a) of sub-section (3) of section 14 of the Customs Act, 1962 (52 of 1962) and the relevant date for determination of the rate of exchange shall be the date of presentation of the "bill of entry" under section 46 of the said Customs Act.
[Notification No. 165/2003-Cus., dated 12-11-2003]

Anti-dumping duty on Float glass of specified quality, originating in, or exported from, China and Indonesia

Whereas, the Designated Authority, vide its Notification No. 15/1/2007- DGAD, dated the 13th December, 2007, published in the Gazette of India, Extraordinary, Part I, Section 1, dated the 13th December, 2007 had initiated a sunset review in the matter of **continuation of anti-dumping on imports of Float Glass of thickness 2 mm to 12 mm (both inclusive) of clear as well as tinted variety (other than green glass) but not including processed glass meant for decorative, industrial or automotive purposes (hereinafter referred to as the subject goods), falling under heading 7005 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975),** originating in, or exported from, the Peoples' Republic of China (in short 'China PR') and Indonesia (hereinafter referred to as the subject countries), and imported into India, imposed *vide* notification of the Government of India, Ministry of Finance (Department of Revenue), No. 165/2003-Customs, dated the 12th November, 2003 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub- section (i) *vide* G.S.R. No. 887(E) of the same date;

And whereas, the Central Government has extended the anti-dumping duty on the subject goods, originating in, or exported from, the subject countries *vide* notification of the Government of India, Ministry of Finance (Department of Revenue), No. 4/2008-Customs, dated the 4th January, 2008, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) *vide* G.S.R. No. 12(E) of the same date, up to and inclusive of the 6th January, 2009;

And whereas, in the matter of sunset review of anti-dumping on import of the subject goods, originating in, or exported from the subject countries, the Designated Authority *vide* its final findings No. 15/1/2007-DGAD, dated the 2nd December, 2008, published in the Gazette of India, Extraordinary, Part I, Section 1, dated the 2nd December, 2008 has come to the conclusion that -

(i) The subject goods are entering the Indian market at dumped prices and dumping margins of the subject goods imported from China PR are substantial and above *de minimis*;

(ii) The subject goods are likely to enter the Indian market at dumped prices and the likely dumping margins in respect of imports from China PR and Indonesia is substantial and above *de minimis*;

(iii) The subject goods are likely to enter Indian market at dumped prices, should the present measures be withdrawn;

(iv) Even though the domestic industry has improved its performance during the POI, the withdrawal of the existing anti-dumping measure on subject goods from subject countries is going to cause a substantial injury to the domestic industry. Further, should the present anti-dumping duties be revoked, injury to the domestic industry is likely to intensify;

and has recommended continued imposition of the anti-dumping duty on the subject goods originating in, or exported from, the subject countries in order to remove injury to the domestic industry; Now, therefore, in exercise of the powers conferred by sub-sections (1) and (5) of section 9A of the Customs Tariff Act, 1975 (51 of 1975) read with rules 18 and 23 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 165/2003-Customs, dated the 12th November, 2003, except as respects things done or omitted to be done before such supersession, the Central Government, after considering the aforesaid findings of the Designated Authority, hereby imposes an anti-dumping duty on the imports into India of subject goods falling under Heading 7005 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) at an amount, which is equal to, -

(a) US $ 133 per metric tonne in case of imports of subject goods originating in, or exported from, China PR; and

(b) US $ 81.21 per metric tonne in case of imports of subject goods from Indonesia, except that in respect of imports from PT Mulia Glass, Indonesia (exporter), the anti-dumping duty shall be levied at an amount which is equal to US $ 71.16 per metric tonne.

2. The anti-dumping duty imposed under this notification shall be effective for a period of five years (unless revoked, superseded or amended earlier) from the date of publication of this notification in the Official Gazette and shall be paid in Indian currency.

Explanation. - For the purpose of this notification, rate of exchange applicable for the purposes of calculation of the anti-dumping duty under this notification shall be the exchange rate specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) issued from time to time, in exercise of powers conferred under sub-clause (i) of clause (a) of Explanation to section 14 of the Customs Act, 1962 (52 of 1962) and the relevant date for determination of the rate of exchange shall be the date of presentation of the "bill of entry" under section 46 of the said Customs Act.

[Notification No. 4/2009-Cus., dated 6-1-2009]

Anti-dumping duty on Float glass, originating in, or exported from China and Indonesia — Reflective glass excluded — Amendment to Notification No. 4/2009-Cus.

Whereas, in the matter of import of Float Glass of thickness 2 mm to 12 mm (both thickness inclusive) of clear as well as tinted variety (other than green glass) but not including processed glass meant for decorative, industrial or automotive purposes, falling under heading 7005 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), originating in or exported from the Peoples' Republic of China and Indonesia (hereinafter referred to as the subject countries), and imported into India, the designated authority *vide* its final findings No. 14/19/2002-DGAD, dated the 22nd August, 2003, published in the Gazette of India, Extraordinary, Part I, Section 1, dated the 22nd August, 2003, **had recommended to impose final anti-dumping duty on all imports of Float Glass of thickness 2 mm to 12 mm (both thickness inclusive) of clear as well as tinted variety (other than green glass) but not including reflective glass, processed glass meant for decorative, industrial or automotive purposes (hereinafter referred to as the subject goods) originating in or exported from the subject countries so as to remove the injury to the domestic industry;**

And whereas, on the basis of the aforesaid findings of the designated authority, the Central Government, in exercise of the powers conferred by sub-section (1) of section 9A of the said Customs Tariff Act read with rules 18 and 20 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, imposed an anti- dumping duty on the subject goods *vide* notification of the Government of India, Ministry of Finance (Department of Revenue), No. 165/2003-Customs, dated the 12th November, 2003, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) *vide* G.S.R. No. 887(E), dated 12th November, 2003;

And whereas, the designated authority, *vide* its Notification No. 15/1/2007-DGAD, dated the 13th December, 2007, published in the Gazette of India, Extraordinary, Part I, Section 1, dated the 13th December, 2007 had initiated a sunset review in the matter of continuation of anti-dumping on imports of Float Glass of thickness 2 mm to 12 mm (both inclusive) of clear as well as tinted variety (other than green glass) but not including processed glass meant for decorative, industrial or automotive purposes, falling under heading 7005 of the First Schedule to the said Customs Tariff Act, originating in or exported from the subject countries and imported into India;

And whereas, the designated authority vide its final findings No. 15/1/2007-DGAD, dated the 2nd December, 2008, published in the Gazette of India, Extraordinary, Part I, Section 1, dated the 2nd December, 2008 had recommended continued imposition of the anti-dumping duty;

And whereas, in exercise of the powers conferred by sub-sections (1) and (5) of section 9A of said Customs Tariff Act read with rules 18 and 23 of the said Customs Tariff Rules, and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 165/2003-Customs, dated the 12th November, 2003, except as respects things done or omitted to be done before such supersession, the Central Government, after considering the aforesaid findings of the designated authority, has imposed an anti-dumping duty on the imports into India of Float Glass of thickness 2 mm to 12 mm (both inclusive) of clear as well as tinted variety (other than green glass) but not including processed glass meant for decorative, industrial or automotive purposes, falling under Heading 7005 of the First Schedule to the said Customs Tariff Act, vide notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 4/2009-Customs, dated the 6th January, 2009, which was published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) *vide* G.S.R. No. 14(E) of the same date;

And whereas, in terms of rule 4 read with rule 23 of said Customs Tariff Rules, the designated authority is required to investigate as to the existence, degree and effect of any alleged dumping in relation to import of any article, to identify the article liable for anti-dumping duty, to recommend the amount of anti-dumping duty equal to the margin of dumping or less, which if levied, would remove the injury to the domestic industry and to review the need for continuance of anti-dumping duty on such article;

Now, therefore, in exercise of the powers conferred by sub-sections (1) and (5) of section 9A of said Customs Tariff Act read with rules 4, 18 and 23 of the said Customs Tariff Rules, the Central Government hereby makes the following amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 4/2009-Customs, dated the 6th January, 2009, namely :-

In the said notification, in the opening paragraph, after the words, “as well as tinted variety (other than green glass) but not including”, the words “reflective glass,”, shall be inserted.

[Notification No. 51/2009-Cus., dated 22-5-2009]

6. As can be seen from the above Notification No.165/2003- Cus. dated 12.11.2003 read that the *"Float Glass of thickness 2 mm to 12 mm (both thickness inclusive) of clear as well as tinted variety (other than green glass)* ***but not including reflective glass,*** *processed glass meant for decorative, industrial or automotive purposes have been exported to India from the subject countries below their normal value"*. Whereas, the Designated Authority, vide its Notification No. 15/1/2007-DGAD, dated the 13th December, 2007, published in the Gazette of India, Extraordinary, Part I, Section 1, dated the 13th December, 2007 had initiated a sunset review in the matter of continuation of anti- dumping on imports of Float Glass of thickness 2mm to 12mm (both inclusive) of clear as well as tinted variety (other than green glass) but not including processed glass meant for decorative, industrial or automotive purposes (hereinafter referred to as the subject goods), falling under heading 7005 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)."
As can be seen from the above Notifications, it is seen that though the Notification No.165/2003-cus. dated 12.11.2003 and Notification No.51/2009-Cus. dated 22.5.2009 excluded reflective glass from the levy of anti-dumping duty whereas the Notification No.4/2009-Cus. dated 06.01.2009 did not exclude Reflective Glass. As claimed by the appellant, there could be an omission but that omission cannot be set right by the Customs authorities in as much as the Customs Notifications are issued only on the basis of the findings of the DGAD and their notifications.

7. In the case of **Dilip Kumar**, the Supreme Court held that:

"**43.** There is abundant jurisprudential justification for this. In the Governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the Courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualizing different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion".

Finally, the conclusion arrived at by the Apex court was as follows:

(1) *Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*
(2) *When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.*

8. The Supreme Court of India in the case of **State of Gujarat Versus Arcelor Mittal Nippon Steel India Ltd. 2022 (379) E.L.T. 418 (S.C.)** held that:

"**20.3** In taxing matters, the doctrine of promissory estoppel as such is not applicable and the Revenue can take a position different from its earlier stand in a case with established distinguishing features. [See *Commissioner of Central Excise, Bangalore-1* v. *Bal Pharma Limited, Bangalore and Ors.*, (2011) 2 SSC 620 = 2010 (259) E.L.T. 10 (S.C.)].

20.4 The rules of promissory estoppel and estoppel by conduct may not be applied to alter or amend the specific terms and against statutory provisions. All the terms and conditions contained in the exemption notification shall prevail and the person claiming the exemption has to fulfil and satisfy all the eligibility criteria/conditions mentioned in the exemption notification.

21. Now, so far as the submission on behalf of the respondent that prior to 14-11-2000, there was no demand of the purchase tax and/or the exemption from payment of purchase tax was made available in the earlier assessment years and, therefore, in the subsequent assessment years also, the respondent-assessee shall be entitled to the exemption is concerned, the aforesaid has no substance. In the taxation matters, every assessment year/period is a different year/period".

9. In view of above observations of the Supreme Court, the question of interpreting the exemption Notification has to be done in the manner specified in the Notification. In the present case, since Reflective Glass is not found in the Notification No.4/2009- Cus. dated 06.01.2009 for exempting them from anti-dumping duty, question of extending the benefit does not arise. The Commissioner (Appeals) has rightly held that no attempt can be made to infer the motive or meaning of the Notification other than what is emanating from the plain language of the Notification.
Therefore, we uphold the order of the Commissioner (Appeals) and dismiss the Appeal.

10. The Appeal is dismissed.

*(Order pronounced in open court **20/11/2023**.)*

(P. A. AUGUSTIAN) MEMBER (JUDICIAL)

(R. BHAGYA DEVI MEMBER (TECHNICAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road, BANGLORE-560009
COURT-2

Customs Appeal No. 1714 of 2010

[Arising out of the Order-in-Appeal No.90/2010 dated 30.04.2010 passed by the Commissioner of Customs (Appeals), Bangalore.]

The Commissioner of Customs (Appeals) **....Appellant**
C.R. Buildings,
No.1, Queen's Road,
Bangalore – 560 001.
Vs.

M/s. Larsen & Toubro Ltd. **....Respondent**
KIADB Indl. Area, Hebbal, Hootagalli,
Mysore – 570 018.

Appearance:

Mr. K. A. Jathin, AR **....For Appellant**

Mr. Mohit Raval, Advocate **.... For Respondent**

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 04.08.2023 Date of Decision: 30.11.2023

FINAL ORDER No. 21316 of 2023

Per R. BHAGYA DEVI:

The respondent M/s. Larsen and Toubro Ltd. imported G-24 PL 001 GSM Chipset Wavecom (modem) vide Bill of Entry No.2120004 dated 02.09.2009, classifying them under chapter Heading 8517 6230. The supplier invoices described the imported goods as "electronic components for metering production system", and on examination, officers found that the goods imported were a chipset mounted on printed circuit board and as per the Technical Write-up, the circuit boards were wireless CPU-a powerful programmable processor. Based on the above description and with reference to HSN Explanatory Notes, the items were classified under Chapter Heading 8537 1000 by the Original Authority as against the classification claimed by the respondent under Chapter Heading 8517 6230. On an appeal before the Commissioner (A), the Commissioner (Appeals) based on the catalogue produced before him found that the wireless CPU wavecom includes ARM microprocessors

that can process data, listen to more than 50 peripheral devices, address complex display driver interfaces, etc; thus describes the modem to be a powerful programmable processor which can also connect to cellular networks anywhere in the world. Thus, classified the same under Chapter Heading 8517 as claimed by the respondent. The Department is in appeal against the above impugned order.

2. The matter came up for hearing today and the learned Authorised Representative on behalf of the Revenue submitted that the item imported is a programmable processor mounted on a printed circuit board and based on this description, the goods were rightly classified under Chapter Heading 8537 by the Original Authority. It is submitted that the classification should be based on the description and function of an item as it is imported and not based on the end-use of the same. The Commissioner (Appeals) classified the items based on the end-use that they were used in the manufacture of modem which is inappropriate; hence, the impugned order needs to be set aside.

3. The learned counsel on behalf of the respondent submits that Chapter Heading 8537 merely consists of Boards, panels for electric control and distribution of electricity and items imported by them is nowhere connected to this description. It is their claim that the goods are rightly classifiable under Chapter Heading 8517 as the goods are used for transferring the data from the electric metre to the control unit and to be treated as networking equipment and these items are used in the manufacture of modems which are classifiable under Chapter Heading 8517. Thus, requests to dismiss the revenue appeal.

4. Heard both sides. There is no dispute that the items imported are a programmable processor mounted on a printed circuit board. The Commissioner (Appeals)'s classification under Chapter Heading 8517 is misplaced in as much as this Chapter includes *Telephone sets, smartphones and other telephones for cellular networks or for other wireless networks; other apparatus or for the transmission or reception of voice, Images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of Heading 8443, 8525, 8527 or 8528*. He further observed that based on the flowchart produced by the respondent, the imported item is a component to be used in the manufacturing of a modem and any part which goes into the manufacture of the same, needs to be classified under Chapter Heading 8517. It is a settled fact that the principles of classification endorses that any classification should be based on the description and function of an item as it is imported and not based on its end-use as held by the Supreme Court in number of cases. In the case of **Commissioner of Central Excise, Delhi Versus Carrier Aircon Ltd. 2006 (199) E.L.T. 577 (S.C.)** decided on 5-7-2006 the Hon'ble Supreme Court held that:

"15. End use to which the product is put to by itself cannot be determinative of the classification of the product. See *Indian Aluminium Cables Ltd.* v. *Union of India and Others,* 1985 (3)

S.C.C. 284. There are a number of factors which have to be taken into consideration for determining the classification of a product. For the purposes of classification the relevant factors *inter alia* are statutory fiscal entry, the basic character, function and use of the goods. When a commodity falls within a tariff entry by virtue of the purpose for which it is put to, the end use to which the product is put to, cannot determine the classification of that product".

5. Now let's examine the rival tariff entries which read as under:

8517: Telephone sets, smartphones and other telephones for cellular networks or for other wireless networks; other apparatus or for the transmission or reception of voice, Images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of Heading 8443, 8525, 8527 or
8528 –

8537: Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of Heading 8535 or 8536, for electric control or the distribution of 8537 10 00 electricity, including those incorporating instruments or apparatus Of chapter 90, and numerical control apparatus, other than switching apparatus of Heading 8517.

6. The HSN Explanatory Notes to Chapter Heading 8537 states that this heading covers 'programmable controllers which are digital apparatus using a programmable memory for the storage of instructions for implementing specific function such as logic sequencing, timing, counting and arithmetic to control through digital or analogue input/output modules, various types of machines'. It is also a fact that the appellant are manufacturers of electric metre and their products are classifiable under chapter heading 90283010 and it is also an admitted fact that these impugned goods are used in automatic metering system. Therefore, Commissioner (Appeals) justification for classification under Chapter Heading 8517 as part of modem is inappropriate. Since programmable controllers are specifically covered under Chapter Heading 8537, they are rightly classifiable under this Heading and not under Chapter Heading 8517 as part of modem. The Board vide Circular No.49/3/97-CX dated May 9, 1997 has classified the programmable logic controller under Chapter Heading 8537, which is reproduced herein below:

ORDER NO. 49/3/97-CX, Dated: May 9, 1997

Classification of Programmable Logic Controllers and Programmable Process Controllers-order under Section 37B of CEA, 1944

Attention is drawn to the Board's Section 37B Order No.45/3/96-CX dated 06.08.1996 clarifying that Programmable logic controllers and other forms in variations such as DCS (distributed Control System), PCE (Process Control Equipment), TDC (Total Distributed Control System), LCS (Logic Control System) and PM (Process Manager) etc. shall be classifiable under heading 85.37 of the Central Excise Tariff.

2. Representations have been received from trade pointing out that programmable logic controller and Programmable process controllers such as process control equipment/distributed control system are two different types of controls classifiable under different headings of Central Excise Tariff i.e., heading 85.37 and heading 90.32 respectively. The following specific differences have been pointed out between two types of controllers:-

grammable Logic Controller	**rammable Process Controller**
1. These are controlling various types of machines.	These are for controlling various types of processes
2. Operation depends on set of pre-determined operations	Operations depend on factor to be controlled
Programmable Logic Controller	**rammable Process Controller**
3. Operation based on desired sequence of operations.	Operation operates basically by continuously monitoring and maintaining the variable to be controlled such as pressure, flow, temperature, level etc. with/at pre- determined level.
4. No regulatory function.	Regulatory function by continuously monitoring the desired value with actual value and bringing variable to be controlled to the desirable value.
5. Conventionally it is relay- based panel for electric control with timer and switches.	Regulating apparatus for process control for continuous process governing.
6. Relay-based panel has been upgraded to programmable controller commonly known as programmable logic controller by using microprocessor for storing and doing sequence of operations.	Microprocessors are used for doing complex storing and algorithms primarily for controlling. These are commonly known as controllers e.g., digital distributed control system, distributed control system.

3. the matter has been re-examined by the Board in consultation with the department of electronics. Their opinion is reproduced below:-

i) The programmable controllers covered under heading 85.37:- They perform specific functions such as logic instruments timing etc. to control various types of machines in a plant.

ii) The automatic regulating or controlling instruments and apparatus under the heading No.90.32:-

They may be considered as industrial process control systems satisfying criteria mentioned in No.90.32. These are primarily used for controlling/maintaining the

flow, level pressure or other variables of liquids or gases, or for automatically controlling temperature of a process (may be refinery, steel, chemical industry) at the present level. They can perform functions both sequence logic and different control strategies like Proportional - Integral - Differential (PID) control and other forms of control.

4. It is observed that opinion of the Department to Electronics is also in conformity with the Explanatory Notes of HSN.

5. Now, therefore, in exercise of the powers conferred under Section 37B of the Central Excise Act, 1944 and in supersession of Board's Order dated 6.8.96 referred to above, and for the
purpose of ensuring uniformity in the classification of the goods in question, Board hereby orders that **programmable logic controller** as describe in para 2 and other similar forms **will be classifiable under heading 85.37** of the Central Excise Tariff and programmable process controller as described in para 2 and other similar forms will be classifiable under heading 90.32 of the Central Excise Tariff.

[F.No.154/8/94-CX.4]

7. In view of the above observations, we hold that imported item viz., G-24 PL 001 GSM Chipset Wavecom (modem) are rightly classifiable under Chapter Heading 8537. Consequently, the impugned order is set aside and the appeal filed by the Revenue is allowed.

(Order pronounced in Open Court on **30.11.2023**.*)*

(P. A. AUGUSTIAN) MEMBER (JUDICIAL)

(R. BHAGYA DEVI MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 226 of 2010

(Arising out of Order-in-Original No.26/2009-Commr. dated 3.11.2009 passed by the Commissioner of Customs, Bangalore.)

M/s. Woodtech ConsultantsPrivate Limited Appellant(s)
No.618, 18th Main 25th Cross,
Rajarajeswarinagar, Bangalore – 560 098.

Versus

Commissioner of Customs(Appeals)
S.P. Complex, Lalbagh Road, Bangalore – 560 027. Respondent(s)

WITH

Customs Appeal No. 227 of 2010

(Arising out of Order-in-Original No.26/2009-Commr. dated3.11.2009 passed by the Commissioner of Customs, Bangalore.)

Shri T. Gopi, Managing Director
M/s. Woodtech ConsultantsPrivate Limited
No.618, 18th Main 25th Cross, Appellant(s)
Rajarajeswarinagar, Bangalore – 560 098.

Versus

Commissioner of Customs(Appeals)
S.P. Complex, Lalbagh Road, Bangalore – 560 027. Respondent(s)

AND

Customs Appeal No. 228 of 2010

(Arising out of Order-in-Original No.26/2009-Commr. dated 3.11.2009 passed by the Commissioner of Customs,Bangalore.)

Shri D. Madan Raj,Marketing Director
M/s. Woodtech ConsultantsPrivate Limited Appellant(s)
No.618, 18th Main 25th Cross,
Rajarajeswarinagar, Bangalore – 560 098.

Versus

Commissioner of Customs(Appeals)
S.P. Complex, Lalbagh Road, Bangalore – 560 027. Respondent(s)

Appearance:

None For the Appellant

Mr. K. Vishwanath, Superintendent (AR) For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

Final Order No. 21348 to 21350 /2023

Date of Hearing: 11/12/2023
Date of Decision: 13/12/2023

Per : DR. D.M. MISRA

None present for the appellants.

2. The matter had been adjourned on all these occasions i.e. on 30.05.2023, 20.06.2023, 30.06.2023, 01.08.2023, 29.08.2023, 18.09.2023 and 03.11.2023. Accordingly, the matter is taken up for hearing after hearing learned Authorised Representative for the Revenue and records.

3. Briefly stated the facts of the case are that the appellant had imported wood working machines falling under CustomsTariff Heading 8465 9990. On the basis of intelligence that the appellant was involved in import of wood working machines from various suppliers at Taiwan, Spain and Italy by under invoicing the imported goods to the extent of 40% and later, the amount was transferred to the suppliers by means of non-banking channels; investigations were initiated against the appellant by recording statements of Shri Madan Raj, Marketing Director and others. On completion of the investigation, a show-cause notice dated 5.11.2008 proposing enhancement of value and demanding differential duty of Rs.14,97,179/- under the proviso to Section 28 of the Customs Act, 1962 along with interest and penalty under various provisions of Customs Act, 1962; also, it isproposed to appropriate an amount of Rs.17,53,595/- paid by them during the course of investigation. On adjudication, the demand was confirmed by enhancing the assessable value to

Rs.1,56,71,221/- with interest; imposed penalty ofRs.14,97,179/- and equal interest under Section 114A of the Customs Act, 1962; also, he has imposed penalty of Rs.3,00,000/- on Shri T. Gopi, Managing Director and Rs.2,00,000/- on Shri D. Madan Raj under Section 112(b) of the Customs Act, 1962.

4. In the present appeal, the appellant had not challenged the payment of differential duty along with interest but vehemently contested imposition of penalty on the appellants. They have argued that since the amount has been paid with interest before issuance of show-cause notice, therefore,imposition of penalty under Section 114A of the Customs Act, 1962 cannot be sustained. It is their contention that their case is squarely covered under provisions of Section 28(2B) of the Customs Act, 1962. Also, they have submitted that personalpenalty on other appellants cannot be imposed.

5. The learned Authorised Representative for the Revenue has submitted that in the present appeal, the appellants have challenged imposition of penalty of Rs.14,97,179/- under Section114A of the Customs Act, 1962. It is his contention that appellant had knowingly mis-declared the value and fraudulentlytransferred the excess amount of the value to the overseassellers by non-banking channels. In their statements furnished, the Managing Director Shri T. Gopi as well as other persons conceded to the said undervaluation and transferring the under invoiced amount to the overseas sellers. It is his contention that during the period, they had accepted that they had imported totally 14 consignments and suppressed the value, hence imposition of penalty on the appellant under Section 114A of the Customs Act, 1962; as also imposition of penalty on other appellants under Section 112(b) of the Customs Act, 1962 is justified.

6. I have carefully gone through the records of the case and submissions advanced by the learned Authorised Representative by the Revenue. The short issue involved in the present appealis whether the penalty on the appellant-company is rightly imposed under Section 114A equivalent to the duty short-paid and personal penalty of other appellants under Section 112(b) of the Customs Act, 1962. The undisputed facts are that the appellants are engaged in the business of import of wood working machines falling under Customs Tariff Heading 8465 9990 from countries like Taiwan, Spain, Italy, etc. During the relevant period, they have suppressed/mis-declared the correct value of the imported goods, hence, investigation was initiated against them for ascertaining the correct assessable value. After recording the statements and analysing the evidences, later a show-cause notice was issued to the appellant for enhancement of the value to Rs.1,56,71,221/- and differential duty of Rs.14,97,179/- payable on the enhanced value was demanded under proviso to Section 28 of the Customs Act, 1962. The learned Commissioner while confirming the allegations of the department observed as follows:

"23. The main issue for decision before me is whether the value of the woodworking machines and parts imported by M/s WCPL vide 14 Bills of Entry shouldbe revised to include the extra consideration paid to the suppliers in cash, in terms of Section 14 of theCustoms Act, 1962 and whether the differential duty has to be demanded from them. It is evident that M/s. WCPL imported a total of fourteen consignments ofwood working machines and parts through ICD, Bangalore as detailed in the worksheet and filed Bills of Entry at Inland Container Depot, Bangalore, seeking customs clearance of the said goods after declaring thevalue which was approximately about 40% less than the actual value of the goods paid by them to their suppliers. The differential value of the imported goods was transferred to the suppliers abroad

by means of non banking channels. They have, made payments through Bank for only 60% of the total value of the machinery and the balance 40% was paid to the supplier in cash through an agent by name M/s. Shivam Forex. They have also accepted that they had imported machineries or an agreed consideration and in reality not declared the actual consideration paid to the suppliers but undervalued the machineries for thepurpose of assessment under various statutes including the provisions of Customs Act, 1962and thus failed to discharge full duty and levies payable on such imports and evaded payment of appropriate duties by suppression of facts. It is also seen that when the party was confronted with all documentary evidences of their fraud and wilful mis-statement andsuppression of facts, they agreed to pay the duty on the value of the extra consideration i.e. 40% of the value which was paid to the supplier through other than banking channels. It is also seen that the party after clearance of the goods had added the above said 40% of the value so under-invoiced in the importdocuments, to their sales invoices along with other costs and had charged the total amount to their customers. The noticees have not challenged the revaluation of the goods at any time during the proceedings and have accepted the duty liability. M/s.WCPL have contravened the provisions of Section 14 of the Customs Act, 1962 in not declaring the correct value of goods for the purpose of payment of duty. They are liable to pay the differential duty. The actual price of the goods was wilfully mis-stated and payment towards imported goods was effected through non-banking channels, which was suppressed with an intention to defraud the Revenue. Since M/s WCPL had mis-declared the value of the said goods, the sameare liable to confiscation in terms of Section 111(m) of the Customs Act, 1962.

24. The next issue which has to be decided is whether M/s WCPL are liable to penalty under Section 112 (a) and Section 114A of the Customs Act, 1962. As discussed above since M/s WCPL have rendered the goods liable to confiscation in terms of Section 111(m) of the Customs Act, 1962 they are liable to penaltyunder Section 112 (a) of the Customs Act, 1962. Since the short levy/levy of the duty/interest has arisen due to the wilful misstatement and suppression of the facts, M/s WCPL are liable to pay penalty equal to the duty and interest under Section 114A of the Customs Act, 1962.

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31. From the facts of the case as it emerges, it is amply clear that the party had wilfully committed thefraud by deliberately suppressing the value of the goods with an intention to evade duty. The party hadfurther made its fraudulent intentions clear by making conscious efforts to suppress the invoice value by 40%which was subsequently paid to the suppliers through non banking channels by misrepresenting thefacts to the Forex Dealer. Further, the party after getting the goods cleared from Customs added back the said undervalued amount into their sales invoices along with their other charges, sold the goods to their buyers. This goes to prove that the party had only one intention, and that was to defraud the Revenue. The case laws cited above squarely answers to the schemings and machinations utilized by the party to evade duty."

7. From the aforesaid findings of the learned Commissioner,it is clear that the mis-declaration of the assessable value by the appellant resulted into short-payment of

Rs.14,97,179/-, hence imposition of penalty equivalent to the said differential duty of Rs.14,97,179/- under Section 114A of the Customs Act, 1962 on the appellant is justified. I do not find any error of facts or in application of law in arriving at the said conclusion by the learned Commissioner when the allegation of gross undervaluation of the product and transferring the suppressed amount later through non-banking channels have been accepted in the statements of the Managing Director and other persons of the appellant-company; consequently, the penalty imposed on the appellant-company is hereby upheld. Also, I do not find any reason to interfere with the findings of the learned Commissioneron the personal penalties imposed on each of other appellants who were actively involved in the gross undervaluation.However, considering the gravity of offence committed and the facts and circumstances of the case, the penalty imposed on Shri T. Gopi, Managing Director is reduced to Rs.2,00,000/- (Rupees Two Lakhs Only) and the penalty imposed on Shri D. Madan Raj, Marketing Director is reduced to Rs.1,00,000/- (Rupees OneLakh Only) under Section 112(b) of the Customs Act, 1962 to meet the ends of justice.

8. In the result, the appeal filed by the appellant-company is dismissed and the appeals of other appellants are partially allowed to the extent mentioned as above

9. All the appeals are disposed of accordingly.

(Order pronounced in Open Court on 13.12.2023.)

(D.M. MISRA)MEMBER (JUDICIAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 1666 of 2011

(Arising out of Order-in-Appeal No.15/2011 dated29.3.2011 passed by the Commissioner of Customs (Appeals), Bangalore.)

M/s. ABB Limited
Plot No.5 & 6, II Phase, Appellant(s)
Peenya Industrial Area,
P.B. No.5806,
Bangalore – 560 058.

Versus

The Commissioner of Customs
P.B. No.5400, Queens Road, Respondent(s)
Bangalore – 560 001.

WITH

Customs Appeal No.1775 of 2011

(Arising out of Order-in-Appeal No.13/2011 dated05.04.2011 passed by the Commissioner of Customs(Appeals), Bangalore.)

M/s. ABB Limited Plot
No.5 & 6, II Phase, Appellant(s)
Peenya Industrial Area,
P.B. No.5806,
Bangalore – 560 058.

Vs.

The Commissioner of Customs
P.B. No.5400, Queens Road, Respondent(s)
Bangalore – 560 001.

AND

Customs Appeal No.1836 of 2011

(Arising out of Order-in-Appeal No.17/2011 dated06.04.2011 passed by the Commissioner of Customs(Appeals), Bangalore.)

M/s. ABB Limited Plot
No.5 & 6, II Phase, Appellant(s)
Peenya Industrial Area,
P.B. No.5806,
Bangalore – 560 058.

Vs.

The Commissioner of Customs
P.B. No.5400, Queens Road, Respondent(s)
Bangalore – 560 001.

Appearance:
Ms. Shraddha Pandey, Advocate — For the Appellant
Mr. K. A. Jathin, AR — For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21275 to 21277 / 2023

Date of Hearing: 17.11.2023
Date of Decision: 17.11.2023

Per : R. BHAGYA DEVI

Customs Appeal No.1666 and 1775 of 2011

M/s. ABB Limited, the appellants have filed these twoappeals against the respective impugned orders as shown below.

Appeal No.	how-cause Notice	Period	Order-in-Original	Order-in-Appeal
C/1666/2011	14.10.2009	15th April 2009 toSeptember 2009	No.418/2009(AC (SIIB) dt.26.12.2009	No.15/2011 dt.05.04.2011
C/1775/2011		September 2009	No.261/2009(AC (SIIB) dt.30.09.2009	No.13/2011 dt.05.04.2011

Since the issue involved in these two appeals is with regard to the classification of the product 'Frequency Converter' (variable speed drive), they are taken up together for disposal.

2. The Appellants, M/s ABB Limited, are engaged in the manufacture of Automation Products, Distribution Control Systems, Control and Relay Panels, Air Circuit Breakers (ACBs), Low Voltage Products etc. They imported 'Frequency Converter' (variable speed drive) from M/s. ABB Finland classifying them under Chapter Heading 9032 89 90. The original and the appellate authorities rejected the classification of the imported goods under Chapter Heading 9032 8990 as claimed by the Appellants and re-classified the same under Chapter Heading 8504 4010. Aggrieved by these orders, the appellant is in appeal.

3. Today, when the matter was being heard both sides fairly submit that the issue has

already attained finality vide this Tribunal's Final Order No. 21151-21152 /2023 dated 20.10.2023.

4. The issue before us is whether the imported goods "Frequency Converter (Variable Speed Drive)" is classifiable under Chapter Heading 9032 89 90 or under 8504 40 10 of the Customs Tariff Act, 1975. The classification of the said goodshas already been decided by this Tribunal's vide Final order No.21151-21152 /2023 dated 20.10.2023 which has fairly been admitted by both sides. Accordingly, following the above decision for the earlier appeals, we hold that the goods are rightly classifiable under Chapter Heading 8504 as against the classification under Chapter Heading 9032 claimed by the appellant.

Customs Appeal No.1836 of 2011

5. This appeal is filed by the appellant against Order-in- Appeal No.17/2011 dated 06.04.2011 passed by theCommissioner of Customs (Appeals), Bangalore. During the period from April 2009 to September 2009, the appellants imported of plugs and sockets wherein the Commissioner (Appeals) in the impugned order had classified the said products under Chapter Heading 8536 69 10/90. The Commissioner (Appeals) had observed that the plugs and sockets are claimedas parts of frequency converter by the appellant, but however, the said items are known and used in the industry for thepurpose of making connections to or in any electrical circuits.The invoices are the testimony for the facts that these itemshave independent existence. It is further submitted that the appellant has not furnished any technical write-up to disprovethe above proposition. These items are not only used in frequency converter but are also sold in units for retail sale. The subject items being of general in nature and manufactured to technical parameters has been classified under Chapter heading 8536 in terms of Rule 3(a) of General Rules of Interpretation as against the classification 9032 as claimed by the appellant.

6. The learned counsel on behalf of the appellant submits that since the frequency converter are classifiable under ChapterTariff Heading 9032, the above said items which are used in manufacture of the frequency converter should also be classified under 9032.

7. The Authorized Representative on behalf of the Revenue referring to the impugned order submits that the goods are presented in the form of plugs and sockets which are rightly classifiable under 8536 in terms of Note 2(a) of Section XVI of the Customs Tariff Act, 1985. As seen above at para 4, this Tribunal has classified the frequency converter under Chapter Heading 8504 as against 9032 as claimed by the appellant. Therefore, the question of classifying the plugs and sockets as parts of frequency converter under chapter heading 9032 does not arise. Since the fact that plugs and sockets are general in nature and having cleared them for retail sale and having not being produced any evidence to prove that these items can only be used in frequency converter, the classification by the Commissioner (Appeals) under Chapter Heading 8536 69 10/90is to be upheld. Moreover, Chapter 8536 includes lamp holders, plugs and sockets and therefore, as per the Interpretative Rules when there is a specific description, the item has to be classified accordingly. The only contention of the appellant is that the itemto be classified under Chapter Heading 9032 as parts of frequency converter, since 9032 is ruled-out, we uphold theclassification under 8536 as per Rule 3(a) of the General Interpretative Rules. As per Note 2(a), parts which are included in any of the Headings of Chapter 84 or 85 or in all cases are to be classified in their respective headings. Since, frequency converter is already classified under Chapter 8504, based on Section 2(a) of Section XVI the goods are rightly classifiableunder Chapter Heading 8536 69 10/90.

8. In view of above observations, all the appealsaredismissed.

(Operative portion of the Order was pronounced in Open Court.)

(D.M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,BANGLORE-560009

COURT-2

Customs Appeal No. 1774 of 2010

[Arising out of the Order-in-Appeal No.83/2010 dated 23.04.2010 passed by the Commissioner of Customs (Appeals), Bangalore.]

The Commissioner of Customs **....Appellant**
CR Building, Queen's Road,
Bangalore – 560 001.

Vs.

M/s. Bosch Limited **....Respondent**
Hosur Road,Adugodi
Bangalore – 560 030.

Appearance:

Mr. K. A. Jathin, AR **....For Appellant**

Ms. Neetu James, Advocate **.... For Respondent**

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 04.08.2023Date of Decision: 06.12.2023

FINAL ORDER No._21336 of 2023

Per R. BHAGYA DEVI:

The respondent, M/s. Bosch Limited imported Smartra Immobilisers classifying the same under Chapter Heading 8536 5090 as automatic regulating and controlling instrument and apparatus. From the catalogue submitted by the respondent, the imported item vehicle immobiliser system consisted of key head with transponder, antenna, Smartra, and engine managementsystem. From the various features of the imported items, it was found that it was an optional item to be fitted to vehicle engine forbetter security. The engine of the vehicle would not start if any improper starting of the vehicle was attempted and thus, prevented theft. It was an antitheft device and accordingly, the item was classified under chapter heading 8708 9900 as accessories of vehicles by the original authority. However, onappeal, the Commissioner (Appeals) observed that smartra components are made up of digital circuit with the characterinterface and the device directs electronic signals between the engine management system and the transponder and once the car engine is stopped the EMS

immobilizes the vehicle by disabling control of the spark ignition circuit and fuel supply. Going by the Australian Customs Authority's classification, the Commissioner(Appeals) classified the said item under 8536 5090. The department is in appeal against this impugned order.

2. On behalf of the Revenue, the Authorised Representative submitted that as per the catalogue provided by the supplier, "electronic control unit (Smartra)" is a part of a vehicle engine immobiliser system. Vehicle immobiliser greatly reduces the chance of a vehicle being stolen by preventing engine start if a previously electronically registered key is not presented. Smartra is one key component in vehicle immobiliser system. Immobiliser functionality: after engine stops, vehicle is immobilised after a short period of time, authentication must be repeated to mobilise the vehicle and that the immobilisation of the vehicle occurs bythe EMS disabling the control of the spark ignition and fuel supply.The Smartra unit acts as an electronic translator between the engine management system and the key with the transponder.The Smartra unit is made up of digital circuits with one connector interface and mounting bracket". Therefore, the Smartra immobiliser does not work as a switch to start and stop the engineso it cannot be classified under chapter heading 8536 as 'other switches'. The Authorised Representative further submitted that it is nothing but an antitheft device which prevents engine to start if the previously registered key is not presented and therefore, it is an accessory of the vehicle rightly classifiable under Chapter Heading 8708 9900 which covers other parts and accessories of motor vehicles of heading 8701 to 8705.

3. On the other hand, the learned advocate for the respondent submits that the HSN Explanatory Notes to Chapter Heading 8536 reads as apparatus for switching electrical circuits. The imported goods are nothing but an electronic chip consisting of transistor and logic chip for a voltage not exceeding 1000 volts. It is submitted that the device switches on the EMS, when the appropriate signal is received from the transponder, i.e., the impugned goods make it circuit. If the appropriate signal is not received from the transponder, then the engine itself cannot be turned on by the user of the vehicle and therefore, it is rightly classifiable under Chapter Heading 8536. Relying on HSN Explanatory Notes under the heading 'parts and accessories' it is submitted that if any of the three conditions are not satisfied, the goods cannot be classified under Section XVII as part of an accessory of the goods. It is further stated that Note 2(f) excludesgoods of Chapter 85 to be classified as parts or accessory of goodsof Section XVII. The learned Counsel further relied on decision in the case of **Intel Design Systems (India) Pvt. Ltd. vs. Commr. of Cus. & C. Cx: 2008 (223) ELT 135 (SC)** and **PerfetElectric Concern Pvt. Ltd. vs. Collector of C. Ex., Patna:1997 (93) ELT 622 (Tribunal)** wherein it was held that switch isdesigned for goods of Chapter 8710 merits classification under Chapter Heading 8536. The respondent also relied on the decision of **Pioma Chemicals vs. Commissioner of Customs, Nhava Sheva-I: 2019 (370) ELT 301 (Tri.-Mumbai)** to state that Rulings of the U.S. Customs had great persuasive value on the classification and hence, the Australian Tariff Advice issued for theimported item was relevant in deciding the classification which has been rightly done by the Commissioner (Appeals) in the impugnedorder.

4. Heard both sides and perused the records. There is nodispute on the technical aspects of the item imported and the function of the said item that it is being used in the vehicles as an antitheft device and for security purpose. The question now arises whether it is classifiable under Chapter Heading 8701 as 'part/accessory of a motor vehicle' or as a 'switch' under Chapter Heading 8536.

5. The rival entries reads as under:

8536			**Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders and other connectors, junction boxes), for a voltage not exceeding 1,000 volts : connectors for optical fibres, optical fiber bundles or cables.**
8536	10		- Fuses :
8536	20		- Automatic circuit breakers :
8536	41	00	Other apparatus for protecting electrical circuits
			Relays:
8536	50		- Other switches :
8536	50	100	--- Control and switch gears u 10% -
8536	50	200	--- Other switches of plastic u 10% -
8536 50 90			**--- Other**
8708 10			**-Parts and Accessories of the Motor Vehiclesof Headings 8701 TO 8705**
Other parts and accessories:			
8708	91	00	-- Radiators and parts thereof
8708	92	00	-- Silencer sparts (mufflers) and exhaust pipes;
8708	93	00	--Clutches and parts thereof
8708	94	00	-- Steering wheels, steering columns and steering boxes; parts thereof
8708	95	00	--Safety airbags with inflater system; parts thereof
8708 99 00			**-- Other**

Section XVI Note 2 reads as

2. Subject to Note 1 to this Section, note 1 to Chapter 84 and to note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules:

(a) parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are in all cases tobe classified in their respective headings;

Section XVII: Vehicles, Aircraft, Vessels and Associated TransportEquipment

Notes:

1. This Section does not cover articles of heading 9503 or 9508 orbobsleighs, toboggans and the like of heading 9506.

2. The expressions "parts" and "parts and accessories" do not apply to the following articles, whether or not they are identifiable as for the goods of this Section:

(a) joints, washers or the like of any material (classified according to their constituent material or
in heading 8484) or other articles of vulcanised rubber other than hard rubber (heading 4016);

(b) parts of general use, as defined in Note 2 to Section XV, ofbase metal (Section XV), or similar
goods of plastics (Chapter 39);

(c) articles of Chapter 82 (tools);

(d) articles of heading 8306;

(e) machines and apparatus of headings 8401 to 8479, or parts thereof, other than the radiators
for the articles of this Section, articles of heading 8481 or 8482or, provided they constitute integral parts of engines and motors, articles of heading 8483;

(f) electrical machinery or equipment (Chapter 85);

(l) brushes of a kind used as parts of vehicles (heading 9603).

The above Clause (f) refers to 'electrical machinery or equipment' falling under Chapter 85, the goods imported are neither a machinery nor an equipment but an accessory to be used in a vehicle for security purpose.

6. The HSN Explanatory Notes in respect of Tariff Item 8708 are reproduced below:-
"This heading covers parts and accessories of the motor vehicles of headings 87.01 to 87.05, provided the parts and accessories fulfil both the following conditions :

(i) They must be identifiable as being suitable for usesolely or principally with the above-mentioned vehicles; and

(ii) They must not be excluded by the provisions of the Notes to Section XVII (see the corresponding General Explanatory Note)."

7. As per above Explanatory Notes, both the conditions prescribed under Clauses (i)

and (ii) needs to be fulfilled forclassifying parts and accessories of motor vehicle. As per clause (ii), parts and accessories must not be excluded by the provisions of Notes of Section XVII. The Smartra Immobilser undoubtedly is used only in the vehicles for antitheft purpose and it is not excluded by the provisions of the Notes to Section XVII, thus, satisfying both the conditions as discussed supra.

8. As per the HSN Notes to Chapter Heading 8536 coverselectrical apparatus for a ztage not exceeding 1000 volts generally used for dwellings or industrial equipment. This heading also covers connectors for optical fibres, optical fibre bundles or cables. As seen from the Technical Literature of the item imported, it is nothing but an electronic security device fitted to a motor vehicle that prevents engine from being started unless the correct key is present and thus, prevents the vehicle from being stolen. Under no circumstances, this can be considered as switch to be classified under Chapter Heading 8536.

9. Moreover, the HSN Notes under 'parts and accessories' of Clause A, B and C reads as:

(A) Parts and Accessories excluded by Note 2 to SectionXVII

(B)

This note excludes the following parts and accessories, whether or not there are identifiable as for the articles of this section:

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7. Electrical machinery or equipment of Chapter 85for example:

--

(k) Pantographs and other current collectors for electric traction vehicles, and refuses, switchers and other electrical apparatus of heading 8535 or 8536.

(B) Criterion of sole or [principal] use. (1) Parts andaccessories classifiable both in Section XVII and in another Section.

Under Section Note 3, parts and accessories which are not suitable for use **solely or principally** with the articles of Chapters 86 to 88 are **excluded** from those Chapters.

The effect of Note 3 is therefore that when a part oraccessory can fall in one or more other Sections as well as in Section XVII, its final classification is determined but its *principal use.* Thus the steering gear, braking systems, road wheels, mudguards, etc., used on many of the mobile machines falling in Chapter 84, are virtually identical with those used on the lorries of Chapter 87, and since their principal use is with lorries, such parts and accessories are classified in this Section.

(2) Parts and accessories classifiable in two or moreheadings of the Section.

Certain parts and accessories are suitable for use on more than one type of vehicle (motor cars, aircraft, motorcycles, etc.); examples of such goods include

brakes, steering systems, wheels, axles, etc. Such parts and accessories are to be classified in the heading relating to the parts and accessories of the vehicles with which they are *principally used.*

(C) **Parts and accessories covered more specifically elsewhere in the Nomenclature - Parts and accessories, even if identifiable as for the articles of this Section, are excluded if they are covered more specifically by another heading elsewhere in the Nomenclature,**

10. As seen above the exclusions under Part A (k) as claimed bythe respondent is not applicable and Part C excludes parts and accessories even if identifiable as for the articles of this Section are excluded if they are covered more specifically by another heading elsewhere in the nomenclature and this headingspecifically excludes vehicle seats of heading 9401 but not asecurity device or an antitheft device. Therefore, it is seen that Part A and Part C are not applicable to the relevant items and Part B clearly establishes that it is rightly classifiable under CTH 8708 based on its principal use. Hence the reliance placed on thedecision of ***Intel Design Systems (India) Pvt. Ltd.*** (supra) by the respondent is of no help since it does not satisfy the criteria laid down for classifying the item under 8536.

11. The Hon'ble Supreme Court of India in the case of **C. EX, Delhi Versus Insulation Electrical (P) Ltd.: 2008 (224) E.L.T. 512 (S.C.)** dated 27-3-2008 while dealing with the classification of Rail Assembly Front Seat (Omni), Adjuster Assembly slider seat, YF-2, Rear Back Lock Assembly and 1000 CCRear Back Lock Assembly observed that:

"Tribunal, by the impugned order, has set aside the orders of the authorities below holding that the products manufactured by the assessee are classifiable under chapter heading 8708.00 as claimed by the assessee and not under chapter heading 9401.00 as put forth by the revenue. Tribunal cameto the conclusion that the items manufactured by the assessee are only adjuncts, additions to the seats for the betterutilization of the seats for comfort and convenience of the passengers and they are not essential components or parts of seats. That the seats are complete in themselves without these mechanisms and therefore do not merit classification as parts of seats under Chapter 9401.00. Tribunal relying upon a judgment of this Court in the case of *Mehra Brothers* v. *Joint Commercial Officer* reported in 1991 (51) E.L.T. 173 (S.C.) held that products manufactured by the assessee merited classification under chapter heading 8708.00 as "parts and accessories of motor vehicles".

21. Chapter heading 8708 covers both the 'parts' as well as 'accessories'. The items manufactured by the assessee are onlyadjuncts. These are to be affixed on the floor of motor vehicles.When seats are affixed on these rails, seats can slide back and forth with the operation of a lever forming part of other rail assembly front seat adjuster. This enables the driver or the passenger, to adjust the position of the seat to suit his comfort and convenience. These are merely to improve the efficiency and convenience of the seat and does not form part of the seat. The seats are complete in themselves without these mechanisms and therefore it

cannot be held that the partsmanufactured by the assessee merit classification under chapter 9401. Rather the same would be accessories to the motor vehicle as claimed by the assessee and would meritclassification under chapter heading 8708, because they are fitted in the motor car for adjustment of the seats for the convenience and comfort of the passengers. The Rail Assembly front seat (Omni), Adjuster/assembly slider seat, YE-2 rearback lock assembly and 1000 cc rear back lock assembly being manufactured by the assessee can at best be termed as accessories to the motor vehicle for better convenience of the passengers/drivers travelling in the car."

12. The Hon'ble Supreme Court of India in the case of **Westinghouse Saxby Farmer Ltd. Versus Commissioner of C. EX., Calcutta: 2021 (376) E.L.T. 14 (S.C.)** dated 08-03- 2021 was dealing with the question Whether the "Relays" manufactured by the appellant used only as Railway signaling equipment would fall under Chapter 86, Tariff Item 8608 as claimed by the appellant or under Chapter 85 Tariff Item No. 8536.90 as claimed by the Department. In the regard the Hon'ble apex court observed that :

"--- it is necessary first to see the description of the goodsthat fall under Chapter 85 and Chapter 86 with particularreference to the relevant Tariff Items thereunder. Chapter
85 covers goods, described as *"Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles."* Chapter Heading 8536 covers *"Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs sockets, lamp-holders and other connectors, junction boxes), for a voltage not exceeding 1,000 volts; connectors for optical fibres, optical fibre bundles or cables."* Sub-heading 8536.90 covers *"other apparatus"*. This includes (i) Motor starters for AC motors under sub-heading 8536.90.10; (ii) Motor starters for DC motors under sub-heading 8536.90.20; (iii) Junction boxes under sub-heading 8536.90.30; and (iv) others under sub- heading 8536.90.90.

Chapter 86 covers *"Railway or tramway locomotives, rolling-stock and parts thereof; railway or tramway track fixtures and fittings and parts thereof; mechanical (includingelectro-mechanical) traffic signalling equipment of all kinds."*

Chapter Heading 8608 covers *"Railway or tramway track fixtures and fittings; mechanical (including electro-mechanical) signalling safety or traffic control equipment for railway, tramways, roads, inland waterways, parking facilities, port installation or air-fields; parts of the foregoing".*

--the answer to question revolves around thedescription of goods found in Chapters 85 and 86, as well as the Notes in Section XVII and the General Rules for Interpretation of the First Schedule. We have already extracted the description of goods in Chapters 85 and 86. Therefore, let us now take note of the relevant Notes in Section XVII and the relevant Rule of the General Rules for Interpretation of the First Schedule.

Section 2 of the Central Excise Tariff Act, 1985 provides that the rates at which duties of excise shall be levied underthe Central Excise Act, 1944 are specified in the First Schedule and the Second Schedule. The First Schedule contains a set of Rules known as *"General Rules for the Interpretation of this Schedule".* These Rules begin with a mandate that the *"classification of goods in this Schedule shall be governed by the principles laid thereunder."* Rule 1 of these Rules makes it clear that *"the titles of Sections, Chapters and Sub-Chapters are provided for ease of reference only and that for legal purposes, classification shallbe determined according to the terms of the Headings and any relative Section or Chapter Notes and provided suchheadings or Notes do not otherwise require, according to the provisions of the rules that follow".* Rule 2 deals with (i) incomplete or unfinished articles; and (ii) mixtures or combinations of material or substance. While Rule 2(a) deals with incomplete or unfinished Articles, Rule 2(b) deals with mixtures or combinations of a material or substance. Rule 3 deals with cases where goods are classifiable undertwo or more sub-headings. But Rule 3 begins with a reference to Rule 2(b). Therefore, it is necessary to extractRule 2(b) and Rule 3 together. They read as follows :

"2.(a) xxxx

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

3. When by application of rule 2(b) or for any other reason, goods are, *prima facie,* classifiable under two or more headings, classification shall be effected as follows :

(a) the heading which provides the most specific descriptionshall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) mixtures, composite goods consisting of different materials ormade up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) when goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs lastin numerical order among those which equally merit consideration."

In the case on hand, the claim of the assessee was that the relays manufactured by them were part of the railway signalling equipment. But all the Authorities were of theunanimous view that this product is referable to goods of a specific description in Chapter sub-heading 8536.90 and that, therefore, General Rule 3(a) will apply. But in invoking General Rule 3(a), the Authorities have omitted to take note of 2 things. They are : (i) that as laid down by this Court in *Commissioner of Central Excise* v. *Simplex Mills Co. Ltd.* [(2005) 3 SCC 51 = 2005 (181) E.L.T. 345 (S.C.)] the General
Rules of Interpretation will come into play, as mandated inRule 1 itself, only when no clear picture emerges from theterms of the Headings and the relevant section or chapter notes; and (ii) that in any case, Rule 3 of the General Rulescan be invoked only when a particular goods is classifiable under two or more Headings, either by application of Rule 2(b) or for any other reason. Once the authorities have concluded that by virtue of Note 2(f) of Section XVII, 'relays' manufactured by the appellant are not even classifiable under Chapter Heading 8608, we do not know how the Authorities could fall back upon Rule 3(a) of the General Rules. There is a fundamental fallacy in the reasoning of the Authorities, that Rule 3(a) of the General Rules will apply, especially after they had found that 'relays' are not classifiable under Chapter Heading 8608, on account of Note 2(f) of Section XVII. Coming to Section XVII, which precedes Chapter 86, the same contains a few notes, one of which is Note 2, which lists out certain articles to which the expressions *"parts"* and *"parts and accessories"* mentionedin Chapter 86 do not apply. Note 2(f) reads as follows :-

"(1) xxxx

(2) xxx
(a) xxxx
(b) xxxx
(c) xxxx
(d) xxxx
(e) xxxx
(f) electrical machinery or equipment (Chapter 85)".

Note 2(f) is relied upon by the Revenue, in view of the fact that Chapter Heading 8608 uses the words *"parts of the foregoing"* after the words *"Railway or tramway track fixtures and fittings"* etc. Chapter Heading 8608 does not specifically mention *"electrical relays"*. The assessee's contention is that *"it is part of the railway signalling safetyor traffic control equipment"* and that, therefore, Relays manufactured by them would fall under Chapter Heading 8608 due to the usage of the word *"parts"*. It is this contention that is sought to be repelled by the Authoritiesby relying upon Note 2(f) of Section XVII.

Though at first blush, Note 2(f) seems to apply to the caseon hand, it may not, upon a deeper scrutiny.

Note 3 of Section XVII reads as follows :

"References in Chapters 86 to 88 to "parts" or "accessories" do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those Chapters. A part or accessory which answers to a

description in two or more of the headings of those Chapters is to be classified under that heading which corresponds to the principal use of that part or accessory."

What is recognized in Note 3 can be called the *"suitabilityfor use test"* or *'the user test'*. While the exclusion underNote 2(f) may be of goods which are capable of being marketed independently as electrical machinery or equipment, for use otherwise than in or as Railway signalling equipment, *those parts which are suitable for use solely or principally with an article in Chapter 86* cannot be taken to a different Chapter as the same would negate the very object of group classification. This is made clear byNote 3. It is conceded by the Revenue that the relays manufactured by the appellant are used solely as part of the railway signalling/traffic control equipment. Therefore, the invocation of Note 2(f) in Section XVII, overlooking the *"sole or principal user test"* indicated in Note 3, is not justified.

On the question as to what test would be appropriate in a given case, this court pointed out in *A. Nagaraju Bros*. v. *State of A.P*. [1994 Supp (3) SCC 122 = 1994 (72) E.L.T. 801
(S.C.)], as follows :
".....there is no one single universal test in thesematters. The several decided cases drive home this truth quite eloquently. It is for this reason probably that the common parlance test or commercial usage test, as it is called, is treated as the more appropriate test, though not the only one. There may be cases, particularly in the case of new products, where this test may not be appropriate. In such cases, other tests like the test of predominance, either by weight of value or on some other basis may have to be applied. It is indeed not possible, nor desirable, to lay down any hard and fast rules of universal application."

Therefore, the respondents ought not to have overlooked the *'predominant use'* or *'sole/principal use'* test acknowledged by the General Rules for the Interpretation of the Schedule.

Accordingly, the Hon'ble Supreme Court allowed the appeal classifying the product under Chapter Heading 8608 and not under8536 as claimed by the Revenue.

13. In the present case, the facts are similar to the above case and therefore, since admittedly the sole and principal use ofsmartra immobiliser is only as an accessory to the vehicle as an antitheft device, adding value to the vehicle in terms of security, the question of classifying the same under Chapter Heading 8536 does not arise. Moreover, it is to be classified as part of motor vehicle unless excluded by the Section or Chapter Notes or if there is a specific entry in the Tariff as per the General Explanatory Notes. As already discussed, it is rightly classifiable under ChapterHeading 8708 as there is no specific entry elsewhere. Therefore, since the smartra immobiliser is only a security device to preventa vehicle from being stolen it is rightly classifiable under Chapter Heading 8708 as parts of motor vehicle. When the primary evidences and criteria for classification as discussed supra do not allow classifying the items under Chapter Heading 8536, the question of following the Tariff Advice which is only a persuasive value does not arise.

14. In view of the above observations, the impugned order is setaside and the appeal is allowed.

(Order pronounced in open court on 06/12/2023.)

(P. A. AUGUSTIAN)MEMBER (JUDICIAL)

(R. BHAGYA DEVIMEMBER (TECHNICAL)

RV

Back

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,BANGLORE-560009

COURT-2

Customs Appeal No. 255 of 2012

[Arising out of the Order-in-Appeal No.187/2011 dated 24.11.2011 passed by the Commissioner of Customs (Appeals), Bangalore.]

M/s. Enterprise Software Solutions Lab **....Appellant**
No.24, 23rd Main,
Marenahalli,
J.P. Nagar II Phase,
Bangalore – 560 078.

Vs.

The Commissioner of Customs **....Respondent**
C.R. Building, Queens
Road, Bangalore – 560
001.

Appearance:

Mr. B. Venugopal, Advocate **....For Appellant**

Mr. K. Vishwanath, **.... For Respondent**
Superintendent (AR)

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 23/08/2023Date of Decision: 22/12/2023

FINAL ORDER No. 21438 of 2023

Per R. BHAGYA DEVI:

The appellant M/s. Enterprise Software Solutions Lab Ltd., Bangalore, had imported T4 Fingerprint Time & Attendance System and K200 Proximity Time & Attendance System under Customs Tariff Heading 8471 4190. The assessing authority classified them under 8543 and aggrieved by this order the appellant filed an appeal before commissioner appeals who classified them under 8471. The revenue filed a appeal before thisTribunal and the Tribunal vide Final Order dated 11.8.2010 had remanded the matter to re-examine the issue with the following observations:
"10. The issue to be decided in this appeal is whether the device imported by the appellant

is more properly classified under tariff item No. 8435 7099(correct CTH 8543) as electrical instruments not specified elsewhere as sought in the appeal of the revenue or under CSH 8471 4190 of the Customs tariff as ADPM, as claimedby the respondents. The goods in issue work in conjunction with a server and process data in digital format. The device has the facility to scan thefingerprint of any person seeking access to an area which the user desires to restrict. The finger print of arson seeking entry to the premises is scanned and digitised8 compared with data of such finger prints already stored in the memory of the device. If the current image is found in the database, the person is allowed access and his attendance is marked. There is also an additional check of the identity of the person by comparing the Personal Identification Number (PIN) required to be entered with such PINs stored in the memory of the device. The data of authorized persons received are transferred to a separate server which maintains particulars of the staff such as salary and leave important for the employer.

10.1 There is no dispute that the subject goods are correctly under 8435 7309 (8543) if excluded from CH8471. Appeal seeks classification of the goods as electrical machinery not elsewhere specified.

2. We find that the capability to be freely programmed in accordance with the needs of the buyerappears to include the writing of a new or modified program by programmer or the purchase and use of software containing an existing program. The object is to introduce or alter the instructions that tell the computer what to do with the data. According to revenue a machine is freely programmable, if the user is able to modify the existing program. We find thatthis facility could be availed if several fixed programs are available in the machine and the user can switchto the desired program; i.e., he can choose between a number of fixed programs. Argument of the Counsel for the respondents appears to be that the device is freely programmable in this sense.

3. We observe that the original authority noted that the item is freely programmable as per the submissions of the assessee. He found that the goods did not satisfy the conditions to classify it as ADPM and the entry under CH 8437 more specifically covered the goods. He found the equipment to be not a computer as the device worked in conjunction with a server which only processed the data inputted.

4. The impugned order finds the device to be 'freely programmable' without discussing any evidence. It is only before us that both the parties have canvassed their rival claims on classification of the device underCSH 8471 4190 based on this decisive attribute of the device. Both the lower authorities have not examined this important aspect. In the circumstances we remand the matter to the Commissioner (Appeals) to examine this issue and decide the dispute after hearing the parties. He will not be hindered in the exercise by our views on the issue appearing the order. The appeal is thus allowed by way of remand."

2. Based on this, in the *de novo* proceedings, theCommissioner (Appeals) has held that:

"4.3 The Hon'ble CESTAT while remanding the issue has stated that the "impugned order finds the device tobe freely programmable without discussing anyevidence" and have remanded the matter to examine this issue. In this regard, it would be pertinent to statethat the appellants have not produced any evidence toprove the freely programmable nature of the impugned goods, except for stating on a letterhead of the manufacturer that all

the impugned goods use Linux as their operating system. This by itself does not prove that the impugned goods are freely programmable since Linux operating system is used mostly for its stability. Also, these devices being designed for specific usage do not require to be freely programmable. The data regarding time and attendance, contained in these devices are sensitive in nature and could be tamperedwith, if they are capable of being freely programmed in accordance with the requirements of the user. However, it appears that the impugned goods could be customized by the manufacturers according to the requirement of the user and **are not freely programmable by the user themselves to suit their requirements**."

3. The learned counsel for the appellant submits that thisis the second round of litigation before Tribunal. He further submits that the Learned Commissioner (Appeals) has completely misread the remand directions wherein the Tribunal had directed whether the impugned machine is capable of being freely programmed in accordance with the requirements of the user and proceeds to examine the issue once again afresh based on the technical and functional nature of the impugned machine. He submits that the *de novo* order has traversed beyond the remand directions of the Tribunal. He submits that machines are capableof being freely programmed according to the requirement of the user and it satisfied all attributes of Automatic Data Processing Machines and is rightly classifiable under CTH 8471. He submits that the limited issue in the remand proceedings is to examine whether the impugned machine is capable of freely programmedas per the requirement of the user Note 5(A) (ii) of Chapter 84. He further submits that considering the configuration of the machines, the impugned goods cannot be classified as 'electrical apparatus or instrument' as the heading covers only electrical appliances and apparatus with individual functions. Act, 1962. To substantiate his contentions, relied on the following case laws:

- STJ Electronics Pvt. Ltd. vs. CC, New Delhi: 2016 (337) ELT 140 (Tri.-Del.)
- Jaya Diagnostic & Research Centre Ltd. vs. CC, Hyderabad: 2020 (374) ELT 273 (Tri.-Hyd.)

4. The learned Authorised Representative for the Revenue reiterated the findings of the lower authorities and relied on the following judgments to claim classification of the impugned goods under CTH 8543 7099:

- CC, Bangalore vs. N.I. Systems (India) P. Ltd.: 2010 (256) E.L.T. 173 (SC).

- CC, Bangalore vs. Shakya Technologies Ltd.: 2019 (370)ELT 703 (Tri.-Bang.)

- Commissioner of Customs, Bangalore vs. Scatia: 2019 (370)ELT 703 (Tri.-Bang.)

5. Heard both sides and perused the records. The short issue to be decided is whether the impugned imported goods are classifiable under CTH 8543 7099 or under CTH 8471 4190. The claim of the appellant that the authorities have gone beyond the remand directions is baseless in as much as from the orders it is seen that the authorities have limited themselves to the directionsin deciding the classification. The Tribunal while remanding the case also observed that "He will not be hindered in the exercise by our views on the issue appearing in the order". Therefore the authorities have only restricted themselves in analysing the impugned item as per its features to arrive at the correct classification.

5.1 The Original Authority on examination of the imported goods have found that they are

nothing but Fingerprint Time and Attendance System which reads finger prints of the user andhence it is a biometric reader; similarly, the Proximity Time and Attendance Systems reads the data from the proximity cards/smart card of the user when it is flashed near the device and hence it is a proximity card reader. Hence, rejects the classification claimed by the appellants under CTH 8471 4190 as Automatic Data Processing Machines and classifies the impugned goods under CTH 8543 7099.

6. Now the question arises as to whether the item isclassifiable under Chapter 8543 7099 as claimed by the Revenueor under Chapter 8471 4190 as claimed by the appellant. Both therelevant Chapter Tariff Headings reproduced herein below: **Chapter 8543:**

Heading No.	scription ofArticle	Uni t	Rate of duty	
			Standard	eferential Areas
85.43	**Electrical machines and apparatus having individual functions, not specified or included elsewhere in Chapter 85.**			
8543 70 99	---Other	u	7.5%	-

Chapter 8471:

Heading No.	scription ofArticle	Uni t	Rate of duty	
			Standard	eferential Areas
8471	**Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data on to data media in coded form andmachines for processing such data, not elsewhere specified orincluded**			
8471 41 90	---Other	u	Free	-

6.1 As per the Chapter Notes of Chapter 84, an item to beclassified under 8471 should satisfy the following conditions

"6.(A) For the purposes of heading 8471, the expression —automatic data processing machine‖ means machine capable of :

(i) storing the processing programme or programmes and at least the data immediately necessary for the execution of the programme;

(ii) being freely programmed in accordance with the requirements of the user;

(iii) performing arithmetical computations specified by the user; and

(iv) executing, without human intervention, a processing programme which requires them to modify their execution, by logical decision during the processing run.

The Commissioner (A) has clearly observed in the impugned orderthat (as reproduced in paragraph 2 above) they are not freely programmable and hence, they get excluded from Chapter 8471.

7. From the catalogue, it is noticed that:

"The Item 'Fingerprint Time & Attendance System'

T4 is a standalone finger print T & A system, low price with good performance, specially designed in the purpose of popularizing the fingerprint products. The system has got inbuilt processing capabilities and works independently without connecting to computer or server for data processing operations.

Product Features:

i. This device is standalone device it can register/manage user finger fingerprint/RFID card.
ii. It can verify user's finger print/RFID card and store respective Attendance Log Data into its internal memory.
iii. Also if required this device can be connected to computer using RS232/TCP/IP network for downloading same attendance Log data.
iv. It has capability to change internal logic/parameters using Telnet/FTP options.
v. This device can be used for various other applications such as canteen management,production count management as per users requirements. Development and programming tools are available.

7.1 As seen from the above and as noted by the Original Authority, the device captures the data from the employee's card or the data of the particular employee who key in the PIN into the device. The device does not do anything except for collecting the data at the time of entry or exit and this data is transmitted to a central server for further processing like marking the attendance, preparation of payroll or for other purposes. These facts are not indispute. Based on

the General Rules of Interpretation and the Chapter Notes, the item needs to be classified in the heading akin to it or where the specific description is provided. In this case, the data collection device imported by the appellant is nothing but a card reader working in conjunction with the server. Thus, this device functions as proximity readers/badge readers, which are specifically classified under Chapter Heading No.8543 and therelevant Chapter Note 5(E) reads as:

Chapter Note 5(E) to Chapter 84 reads:

"Chapter Note 5(E) to Chapter 84 "Machines performing a specific function other than data processing and incorporation or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, falling thatin residual headings".

8. Since the specific function of the imported item is to mark attendance or to take note of the persons of the employees for the purpose of attendance or payroll or leave, they cannot be classified under Chapter 84 as it excludes from this Chapter as perthe Chapter Note 5(E) discussed above.

9. In the case of **Commissioner of Customs, Bangalore vs. Scatia** (supra) a similar product viz., fingerprint scanner was classified under Chapter Heading 8543 7099 as per the observations made by the Tribunal at para 5.1, wherein it has held that:

"5.1 The Department contended that CTH 8543 70 99 is more applicable due to the fact that the item imported basically operates on electrical/electrictechnology. We find that the Head 8543 coverselectrical machines and apparatus having individualfunctions not specified or included elsewhere in the chapter. Therefore, the classification of the Finger Print Reader would be more appropriate under this heading. We also accept the Department's contention that when the item is *prima facie* classifiable under two headings in terms of Rule 3(c) of General Rules of Interpretation of Import Tariff, the goods should be classified under the heading which occurs last in numerical orders among those which equally merits consideration. We accept this contention. Going by merits as well as by the Rules of Interpretation, we hold that the impugned product merits classification under CTH 8543 70 99 as contended by the Department."

10. Similarly in the same set facts in the case of **CC vs. ShakyaTechnologies Ltd.** (supra), this Tribunal at para 5.1 has held that:

> **"5.1** The Department contended that CTH 8543 70 99 is more applicable due to the fact that the item imported basically operates on electrical/electric technology. We find that the Head 8543 covers electrical machines and apparatus having individualfunctions not specified or included elsewhere in the chapter. Therefore, the classification of the Finger Print Reader would be more appropriate under this heading. We also accept the Department's contention that when the item is *prima facie* classifiable under two headings in terms of Rule 3(c) of General Rules of Interpretation of Import Tariff, the goods should be classified under the heading which occurs last in numerical orders among those which equally merits consideration. We accept this contention. Going by merits as well as by the Rules of Interpretation, we hold that the impugned product merits classification under CTH 8543 70 99 as contended by the Department."

11. This Tribunal, recently, in the case of **Commissioner of Customs, Bangalore vs. M/s. Kronos Systems India Pvt. Ltd. vide Final Order No.21155 of 2023 dated 20.10.2023**,in an identical issue held the product to be rightly classifiable under Chapter 8543.

12. Hence, based on the above discussions and by following the decisions of this Bench, we find that the product is rightly classifiable under Chapter 8543.

13. In view of the above, the impugned order is upheld and the appeal is dismissed.
*(Order pronounced in open court on **22/12/2023**.)*

(P. A. AUGUSTIAN)MEMBER (JUDICIAL)

(R. BHAGYA DEVIMEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 1727 of 2012

(Arising out of Order-in-Appeal No.66/2012 dated27.03.2012 passed by the Commissioner of Customs(Appeals), Bangalore.)

M/s. Forbin Poly Glass
No.26, MM Industrial Estate — Appellant(s)
K.R. Road,
West of Jayanagar, Bangalore – 560 082.

Versus

The Commissioner of Custom
P.B. No.5400, CR Building,Queens Road, — Respondent(s)
Bangalore – 560 001.

Appearance:

Shri T. Krishna, Advocate — For the Appellant

Shri Maneesh Akhoury, AR — For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21423 /2023

Date of Hearing: 19.12.2023
Date of Decision: 19.12.2023

Per : R. BHAGYA DEVI

This appeal is filed against the impugned Order-in-Appeal No.66/2012 dated 27.3.2012. This is a case of mis-declaration and undervaluation of the goods imported. The authorities belowfound that the imported item was A-15 Tender Rigid Inflatable Boat of APEX making which was mis-declared as A-15 Open Rigid Inflatable Boat vide Bill of Entry No.2825505 dated 22.2.2011. Shri Harish J Padmanabh, Proprietor of M/s. Forbin Poly Glass (the Appellant) in his statement had clearly admitted that he was not aware of the model as there was no purchase order and hence, accepting the misdeclaration requested vide

letter dated 26.3.2011 to adjudicate the case without issuance ofshow-cause notice and also requested the authorities to take a lenient view. Similarly, Shri Desikan K.S, partner of M/s. Supreme Freight Services, CHA, for this consignment, in hisstatement dated 17.3.2011 submitted that he was aware thatthe goods were mis-declared and undervalued. M/s. IMCO Services InC New York vide their letter dated 28.3.2011 who specializes in exports of boats and marine equipment submitted that their associate company mentioned the boat model wrongly and regretting the error provided the corrected invoice for A-15 Tender Rigid Boat as USD 8247.50. However, the Revenue after ascertaining the value of imported goods as USD 15,495 from the website of the manufacturer, when questioned the importer, it was stated that they had purchased it at 50% discount. The veracity of this claim could not be ascertained and there was no evidence to this effect produced by the importer. Accordingly,the goods A-15 Tender Rigid Boat was reclassified and valued at UDS 15,495 and the importer was allowed to redeem the goods on redemption fine of Rs.1,00,000/- under Section 125 of the Customs Act, 1962 while imposing penalty of Rs.25,000/- under Section 112(a) of the Customs Act, 1962. Aggrieved by this order, appellant is before us.

2. When the matter came up for hearing today, the learned counsel accepts that it was clearly admitted by the proprietor of the appellant-company and the CHA that this was a case of mis- declaration and undervaluation. There is nothing placed on record to disprove either the mis-declaration or undervaluationof the goods that were imported. In view of the admitted facts on misdeclaration and undervaluation, we find that the redemption fine is only Rs.1,00,000 and penalty imposed is only Rs.25,000/- which is 10% of the duty liability, which is reasonable. Therefore, we find no reason to interfere with the impugned order. Consequently, the impugned order is upheldand the appeal is dismissed.

(Operative portion of the Order was pronounced in Open Court.)

(D.M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL

1st Floor, WTC Building, FKCCI Complex, K. G. Road,BANGLORE-560009

REGIONAL BENCH COURT-2

Customs Appeal No 1294/2012

[Arising out of Order-in-Original SI. No. 20/2011 dated 16.02.2012Passed by the Commissioner of Customs, COCHIN.]

M/s. SREE RAYALASEEMA HI-STRENGTHHYPO LTD.
No.216 K.J. ComplexBhagya Nagar Kurnool – 518 004

……..Appellant

Versus

Commissioner of Customs,
Custom House, Cochin – 682 009.

.....Respondent

Appearance:

Mr. Sh. Gokulraj L., Advocate For Appellant

Mr. K. Vishwanath Authorized Representative (AR) FOR Respondent

CORAM:

HON'BLE Mr. P. A. AUGUSTIAN, MEMBER (JUDICIAL)

HON'BLE Mrs. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 04.08.2023Date of Decision: 07.12.2023

FINAL ORDER No. 21338 of 2023

P. A. AUGUSTIAN

Issue in the present appeal is regarding amendment of Shipping Bill. The appellant use to export "**Calcium Hypocloride Chlorine content more than 60"** and as per International MaritimeDangerous Goods Code, It was difficult to export the goods under same heading. Thus goods were exported as "**Calcium Hypocloride Hydrated**". Due to change of description as stated above, the benefitof DEPB denied to be appellant. Thereafter appellant approached DGFT and DGFT issued Public Notice No.96 dated 05.04.2006 for amending description of the product as "**Calcium Hypochlorite Hydrated**". After issuing amendment, appellant made a request before the respondent to amend the shipping bill for converting free shipping billto DEPB shipping bill. To support the claim, appellant also produced certificate

from "Indian Institute of Chemical Technology" to prove thatboth the description are one and the same. However adjudicating authority denied the request by this impugned order. Aggrieved by thesame, present appeal is filed before this Tribunal.

2. When the appeal was taken up for hearing, Learned Counsel submits that amendment of Shipping Bill as per section 149 of CustomsAct 1962 is permissible and there is no time limit prescribed under thesection for seeking amendment. Only condition prescribed under theseprovisions is that the document based on which amendment is soughtshould be available at the time of export. Regarding the delay, LearnedCounsel for the Appellant submits that the delay was due to the reasonthat the appellant had taken up the issue with DGFT for amending thePublic notice and only there after, request made for amending the Shipping Bills. Learned Counsel further submits that in the matter of **M/s.Sologuard Medical Devices Pvt. Ltd. Vs. CC, Chennai [2007**

(216) ELT 62 (Tri-Chennai), Tribunal has considered the issue andheld that circular No.4/2004 Cus dated 16.01.2004 debarring such conversion is not an adequate ground to deny the export incentives given by Government.

3. The Learned Counsel also draw our attention to the findings ofthe Tribunal in the matter of **Areva T&D India Ltd. Vs. CC, Mumbai,2009 (242) ELT 442 (Tri-Chennai)** and the finding given by the Tribunal in the matter of **CARBOLINE INDIA PVT. LTD**. Versus **COMMISSIONER OF CUSTOMS, CHENNAI-IV 2022 (381) E.L.T. 397 (Tri. – Chennai).**

4. The Learned Counsel also draw our attention to the communications and also the judgement of the Hon'ble High Court of Kerala in the matter of **PARAYIL FOOD PRODUCTS PVT. LTD. Versus UNION OF INDIA 2021(375) E.L.T. 486 (Ker.).**

5. Learned Authorised Representative (AR) reiterated the finding ofthe adjudicating authority and submits that though there is no time limit prescribed for amendment of the shipping bill, such request cannot be considered without examination of the records. In appellant's case, goods were exported against 20 Shipping bills from 26.06.2005 to 01.10.2005 and amendment was sought only on 18.08.2011. Even if it is assumed that the appellant was waiting for the outcome of the request made by them before the DGFT to submitrequest for amendment shipping bill, Goods were exported on 20.06.2005 onwards and as per the request of the appellant, Public notice was issued on 05.04.2006. But request for amendment in the shipping bill were made only on 18.08.2011 and no reasonable grounds urged by the appellant for the delay of more than 5 years after receiving amendment by DGFT. The issue regarding conversion of shipping bill in similar case was considered by the Hon'ble High Courtof Delhi in the matter of **E.S.LIGHTING TECHNOLOGIES PVT. LTD**.**2020(371) E.L.T.369(Del.)** and held that *Having perused the impugned order and the decisions relied upon by Mr. Bansal and havingconsidered the facts of the case, we are of the*

view that the Tribunal was not justified in adopting the approach that it did. Merely because no time limitation is prescribed under Section 149 for the purpose of seeking amendment/conversion, it does not follow that a request in that regard could be made after passage of any length of time. The same could be made within a reasonable period. The conversion sought by the respondent was from free shipping bill to advance license shipping bill. The petitioner could not have entertained the applicationfor such conversion without examination of the records. It was not fairto expect the Department to maintain, and be possessed of, the records after passage of five long years - when the respondent made its application for such conversion. Learned AR also relied the judgement of Hon'ble High court of Gujarat in the matter of **ANIL SHARMA Versus UNION OF INDIA 2017(350) E.L.T. 332(Guj.),** and **MAIZE PRODUCTS Versus COMMISSIONER OF CUSTOMS, KANDLA 2018(360) E.L.T. 560(Tri. – Ahmd.)** in this regard.

6. Heard both sides. While considering the issue the Tribunal in the matter of **CARBOLINE INDIA PVT. LTD**. Versus **COMMISSIONER OF CUSTOMS, CHENNAI-IV (supra)**, observed that the exporter realise the mistake in two shipping bills dated 18.04.2018 and 02.05.2018 and request was made for amendment vide letter dated 19.08.2020. In the above circumstances the Tribunal held that " *When the statute does not prescribe any time limit for filing an application for conversion of a shipping bill, the department cannot relyupon a circular to frustrate the provisions contained in the statute. When there is a conflict, the statute will definitely prevail over the Board circular. The issue whether the time limit prescribed as per the Board circular will apply was considered by this Tribunal in the case ofAutotech Industries (India) Pvt. Ltd. reported in 2021 (11) TMI 518-CESTAT Chennai = 2022 (380) E.L.T. 364 (Tri. - Chennai) and held*
that time limit of three months prescribed in the above Board circularcannot be applied to reject the request of conversion/amendment of shipping bills. The Tribunal in the case of Contemporary Leather Pvt. Ltd. v. CC, Chennai reported in 2021 (12) TMI 393-CESTAT Chennai followed the decision of the Hon'ble jurisdictional High Court to hold that the Board circular cannot be pressed into application to deny therequest for conversion of shipping bills. We have also considered the judgement of the Hon'ble High Court of Kerala PARAYIL FOOD PRODUCTS PVT. LTD. (Supra).

7. Though it is admitted that the circular No.36/2010 dated23.09.2010 fixing time limit of 3 Months is not proper, as held by Hon'ble High Court of Delhi in the matter of **E.S.LIGHTING TECHNOLOGIES PVT. LTD**. (**Supra),** merely because no time limitation is prescribed under Section 149 for the purpose of seeking amendment/conversion, it does not follow that a request in that regardcould be made after passage of any length of time. The request by the appellant was to convert shipping bill from free to advance license shipping bill. The Respondent cannot entertain such request for conversion without examination of the records. It is not fair to expectthe department to consider the request for

such amendment after 5 long years. Thus there is no infirmity in the impugned order rejecting the request for amending shipping bill for converting free shipping billto DEPB shipping bill 6 years after export of goods.

8. Considering the above facts, appeal is rejected.

(Order pronounced in open court on……07.12.2023..)

(P.A.AUGUSTIAN) MEMBER (JUDICIAL)

(R. BHAGYA DEVI) MEMBER (TECHNICAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road, BANGLORE-560009
COURT-2

Customs Appeal No. 1481 of 2012

[Arising out of the Order-in-Appeal No.34/2012 dated 09.03.2012 passed by the Commissioner of Customs (Appeals), Cochin.]

M/s. Cochin Shipyard Ltd **....Appellant**
PO Bag No.1653,
Perumanoor P.O Cochin – 682 015.

Vs.

Commissioner of Customs **....Respondent**
Customs House Willingdon Island
Cochin – 682 009.

Appearance:

Mr. Kuryan Thomas, Advocate **....For Appellant**

Mr. K. A. Jathin, AR **.... For Respondent**

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 21/09/2023 Date of Decision: 24/01/2024

FINAL ORDER No. 20055 of 2024

Per R. BHAGYA DEVI:

The appellant, M/s. Cochin Shipyard Ltd., filed five ex-bond bill of entry No.515 dated14.05.2004 for clearance of dredger manufactured under bond in the warehouse in terms of Section 65 of the Customs Act, 1962 by availing the benefit of Notification No.21/2002 dated 01.03.2002 by which the raw materials and components imported for manufacture of vessel falling under CTH 8905 are exempted from customs duty. The dredger was to be sold to Chennai Port Trust as per the sale agreement. The goods were assessed as per the value declared in the sale agreement and duty was remitted by the appellant. Later, the appellant preferred an appeal before the Commissioner (Appeals) and the Commissioner (A) vide Order-in-Appeal No. 141/04 dated 19.08.2004 allowed the appeal observing that the benefit of Notification was also available to the imported raw materials and parts that were utilised in the manufacture of dredgers. Based on this, a refund application was filed for refund of duty amount of Rs.2,61,21,513/-. Meanwhile, the said order was appealed by the Revenue before this Tribunal and the Tribunal vide its Final Order No.1733/06 dated

13.10.2006 dismissed the appeal for want of COD clearance and the CBEC had directed the authorities to decide the refund claim on merits. The Commissioner (A) rejected the refund claim on the ground that the documents filed along with the refund claim clearly establish that the incidence of duty was passed on to the buyer i.e., Chennai Port Trust who had informed the reimbursement of duty to the appellant. Accordingly, the amount rejected was credited to the consumer welfare fund and the claim was hit by the doctrine of unjust enrichment. The present appeal is against this impugned order rejecting the refund claim.

2. The learned counsel on behalf of the appellant submitted that they had entered into an agreement dated 24.04.2002 with Chennai Port trust for design, construction and supply of Trailing Suction Hopper Dredger. While clearing the dredger, the appellant had claimed benefit of the Notification No.21/2002 dated 01.03.2002 which granted exemption from basic duty of customs and additional duty in respect of raw materials and parts used in the manufacture of dredger. The appellant remitted the duty on 14.05.2004 challenged the assessment. On appeal, the Commissioner (Appeals) had extended the benefit of the Notification and accordingly, they filed a refund claim. It is submitted that when Revenue demanded duty on the clearance of the dredger, the Chennai Port Trust advanced the said duty amount to the appellant. At the time of payment of duty, the Account Head "Other Direct Expenses" having Account No. E-DE- SB-2160-00 was debited on 14.05,2004. After the Commissioner (Appeals) extending the benefit of the Notification on 13.10.2004 under Account Head "Other Direct Expenses" Account was credited and corresponding debit was given to "Customs Cochin - Advance Account" bearing Account No. A-LA-CP-4507-00 by the amount of duty of Rs.2,61,21,513/-. It is further submitted that the amount equivalent to customs duty advanced by Chennai Port Trust was debited from the customer ledger of Chennai Port Trust and credited to the account "Credit Balance of Sundry Debtors" bearing Account No. L-CL-OL-3525-00. In the financial statements, amount of the customs duty is shown as deposits with Customs Department under the heading "Other Non-current Assets". It is also stated that it has been declared as payable to Chennai Port Trust under the heading "Other Financial Liabilities Non-current". Therefore, it is claimed that when the amount equivalent to duty which was advanced by Chennai Port Trust to enable the appellant to pay the duty and clear the dredger and it is stated as payable to Chennai Port Trust in the books of account; hence, the authorities cannot hold that the appellant had passed on the duty liability to Chennai Port Trust. As long as the appellant shows the amount as payable to Chennai Port Trust and as a deposit with the Customs Department, it cannot be treated as passed on to Chennai Port Trust. In support, he relied upon the following decisions:

- Jindal Drugs Ltd vs. CC: 2017 (357) ELT 259
- CC vs. Jinal Drugs Ltd.: 2018 (360) ELT 988 (Bom.)
- Cadbury India Ltd. vs. UOI: 2015 (315) ELT 488 (Ker.)
- CCE vs. Addison & Co. Ltd.: 2016 (339) ELT 177 (SC)
- Pfizer Ltd vs CCE: 2022 (66) GSTL 122 (Tri.-Mum.)
- PMP Components Ltd vs. CCE: 2001 (135) ELT 914 (Tri.-Mum.)

3. The Authorised Representative on behalf of the Revenue submits that from the records, it is very clear that the duty burden was borne by the buyer i.e., Chennai Port Trust and this fact is not under dispute. The only reasoning placed by the appellant is that it was an advance and the documents in the financial statements of the appellant shows as payable to Chennai Port Trust. The provisions of unjust enrichment are very clear and very categorical that unless and until the appellant produces evidences to show that it is not passed on to the buyer, refund cannot be sanctioned. In this case, the duty has been borne by the buyer is not under dispute and therefore, any amount of clarifications on records placed before the authorities will not entitled the appellant refund amount.

Section 27. Claim for refund of duty. –

(1) Any person claiming refund of any duty or interest,-
(a) paid by him; or
(b) borne by him,
may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest:

Provided that where an application for refund has been made before the date on which the Finance Bill, 2011 receives the assent of the President, such application shall be deemed to have been made under sub-section (1), as it stood before the date on which the Finance Bill, 2011 receives the assent of the President and the same shall be dealt with in accordance with the provisions of sub-section (2)
Provided further that the limitation of one year shall not apply where any duty or interest has been paid under protest.

Provided also that where the amount of refund claimed is less than rupees one hundred, the same shall not be refunded.

Explanation. - For the purposes of this sub-section, "the date of payment of duty or interest" in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person. (1A) The application under sub-section (1) shall be 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 or interest, in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty or interest, has not been passed on by him to any other person.

(2) If, on receipt of any such application, the 4 [Assistant Commissioner of Customs or Deputy Commissioner of Customs] is satisfied that the whole or any part of the 5 [duty and interest, if any, paid on such duty] paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of 5 [(duty and interest, if any, paid on such duty] as determined by the 4 [Assistant Commissioner of Customs or Deputy Commissioner of Customs] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to –

(a) the 5 [duty and interest, if any, paid on such duty paid] by the importer, 6 [or the exporter, as the case may be] if he had not passed on the incidence of such 7 [duty and interest, if any, paid on such duty] to any other person;

(b) the 5 [duty and interest, if any, paid on such duty] on imports made by an individual for his personal use;

(c) the 5 [duty and interest, if any, paid on such duty] borne by the buyer, if

he had not passed on the incidence of such 5 [duty and interest, if any, paid on such duty] to any other person;

4. The appellant is eligible for the refund claim is not in dispute. The limited issue to be decided is whether the appellant as per the above Refund provisions has passed on the duty burden to his buyer and therefore, the Commissioner (A) was right in rejecting the refund claim on the question of unjust enrichment. The appellant himself admits to the fact that the Chennai Port Trust, their buyer had advanced the customs duty amount of Rs.2,61,21,513/- to the appellant for discharging their duties on the dredger imported by them. The Chartered Accountant has also certified that customs duty was paid by Chennai Port Trust. The Chief Engineer of M/s. Chennai Port Trust vide his letter dated 19.12.2007 to the Assistant Commissioner (Refunds) informed that the sum of Rs.2,61,21,513/- has been reimbursed by the Chennai Port Trust to M/s. Cochin Shipyard (appellant) towards customs duty on construction and supply of 1 no. Trailing Suction Hopper Dredger Cauvery by M/s. Cochin Shipyard to Chennai Port Trust. This letter and the contents of the letter is not disputed. Their only claim is that the amount received from the buyer is an advance which will be paid to them after the receipt of the refund claim from the authorities. As per Section 27 (2) (a) the appellant will be eligible for **duty and interest, if any, paid by the importer, if he had not passed on the incidence of such duty and interest, to any other person;** and in the present case it is obvious and admitted fact that duty burden was passed on to the buyer. All the decisions relied upon by the appellant are those wherein the appellants in those cases had produced sufficient evidence to prove that duties paid by them were not passed on to their buyers. As the law, on unjust enrichment, it is a settled that unless and until the importer proves that incidence of duty has not been passed on to the buyer, the question of refund does not arise. The Hon'ble Supreme Court in the case of **Union of India Versus Pesticide Pvt. Ltd. 2000 (116) E.L.T. 401 (S.C.)** dated 4-2-2000 observed that:

"17. The use of the words "incidence of such duty….." is significant. The words "incidence of such duty" mean the burden of duty. Section 27(1) of the Act talks of the incidence of duty being passed on and not the duty as such being passed on to another person. To put it differently the expression "incidence of such duty" in relation to its being passed on to another person would take it within its ambit not only the passing of the duty directly to another person but also cases where it is passed on indirectly. This would be a case where the duty paid on raw material is added to the price of the finished goods which are sold in which case the burden or the incidence of the duty on the raw material would stand passed on to the purchaser of the finished product. It would follow from the above that when the whole or part of the duty which is incurred on the import of the raw material is passed on to another person then an application for refund of such duty would not be allowed under Section 27(1) of the Act.

18. Section 27(2) of the Act, as already noticed, deals with the cases where application for refund had been made prior to the amendment of the Act in 1991. Sub- section (a) of the proviso is similar to the provisions contained in Section 27(1) of the Act i.e. refund of duty paid by the importer will be allowed if he had not passed on the incidence of such duty to any other person. Section 28C of the Act would have reference to those goods which are cleared and would undoubtedly have no application to the cases of the captive consumption. It is in respect of those goods, which are cleared that Section 28C requires a person clearing the goods to indicate the amount of duty paid thereon which will form part of the price at which such goods are to be sold. It is not possible to accept the contention that because Section 28C of the Act cannot be applied in the cases

of goods imported for captive consumption, therefore, the principle of unjust enrichment would not be applicable in such cases. As we have already indicated, Section 27 of the Act has been re-cast with the amendments made in 1991 and the said section does not necessarily have to be read in conjunction with Sections 27C and D of the Act. If the incidence of duty paid on the imported raw material has not been passed on to any other person, then by virtue of proviso to Section 27 (2) of the Act in the case where application for refund had been made prior to 1991, refund due on the duty paid would be given to the applicant.

5. In view of the above, we do not find any reason to interfere with the impugned order and accordingly, the appeal is dismissed.

(Order pronounced in open court on 24.01.2024.)

(P. A. AUGUSTIAN) MEMBER (JUDICIAL)

(R. BHAGYA DEVI MEMBER (TECHNICAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,BANGLORE-560009

COURT-2

Customs Appeal No.245 of 2012

[Arising out of the Order-in-Appeal No.235/2011 dated 26.12.2011 passed by the Commissioner of Customs (Appeals), Bangalore.]

M/s. Lovable Lingerie Ltd.
No.46/2, Guru Prasanna IDL Area Kanakapura Road, **....Appellant**
Daddakalandra Post, Bangalore – 560 062.

Vs.

The Commissioner of Customs (Appeals)
C.R. Building, Queens RoadBangalore – 560 001. **....Respondent**

Appearance:

Mr. B. V. Kumar, Advocate **....For Appellant**

Mr. Neeraj Kumar, Superintendent (AR) **.... For Respondent**

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 19/07/2023Date of Decision: 10/01/2024

FINAL ORDER No. 20041 of 2024

Per R. BHAGYA DEVI:

The present appeal is regarding the classification of thegoods 'Bra Cups' imported by the appellant during the period from25.02.2010 to 14.07.2010. The appellant claimed classification under CTH 3926 of the Customs Tariff Act, 1975 as against the classification by the Revenue in the impugned order under CTH6212.

2. The learned counsel placed his arguments as follows:

(i) The goods were examined and finally assessed and therefore, the question of reopening the classification does not arise.

(ii) Regarding Classification, it is submitted that the burden of proof lies on the Revenue to prove that the goods are rightly classifiable under 6212 and not under the 3926. It is further claimed that the composition of the imported item as per the Regional Laboratory, Textiles Committee, Bangalore reads as :

"The bra cup consists of Layer I (knitted polyester) 100%, Layer II (knitted polyester) 100%, and Layer III-(foam) polyurethane 100%. The weight of thesample is 10.27 grams out of

which the weight of polyester is 4.94 grams and the weight of polyurethane +adhesive is 5.33 grams."

(iii) The learned counsel also submits that the Central Silk Technological Research Institute, Central Silk Board, Bangalore, test report showed that it composed of three layers of materials i.e., 100% polyester fabric both sides and middle layer composed of sponge. In view of the above test reports, the goods are rightly classifiable under 'Textiles and Textile articles' which covers woven, knitted or crocheted fabrics, felt or non-woven, impregnated, coated, covered or laminated with plastics or articlesthereof of chapter 39.

(iv) It is further claimed that at the time of importation, the goods were in raw form and cannot be considered as 'parts of brassieres' since they had to be further processed to become part of brassier. Therefore the goods are rightly classifiable underChapter 3926 and not under 6212.

(v) The final argument is that the goods are from Sri Lanka and hence they are liable to 'nil' rate of duty in terms of Notification No. 26/2000 Cus. dated 1.3.2000.

3. The learned AR on behalf of the Revenue reiterating the findings of the Commissioner (Appeals) in the impugned order submits that there is no bar in issuing show-cause notice for reclassification of the goods even though earlier the goods were assessed and already cleared. Relying on various decisions, emphasises that Revenue was right in reclassifying the goods as 'parts of Brassier' under CTH 6212.

4. The issue is 3-fold whether after goods being cleared, the Revenue can issue notice to the appellant for reclassifying the goods and demand differential duty. Secondly, whether the goods are classifiable under CTH 3926 or 6212. Thirdly, whether they areeligible for the benefit of the Notification No. 26/2000 Cus. dated 1.3.2000.

5. In the case of **Union of India vs. Jain Shudh Vanaspati Ltd. in Civil Appeal No. 2360 of 1980, 1996 (86) E.L.T. 460 (S.C.)** dated 8-8-1996 the Hon'ble supreme court held that "

"5. It is patent that a show cause notice under the provisions of Section 28 for payment of Customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance under Section 47 of the concerned goods. Further, Section 28 provides time limits for the issuance of the show cause notice thereunder commencing from the "relevantdate"; "relevant date" is defined by sub-section (3) of Section 28 for the purpose of Section 28 to be the date on which the order for clearance of the goods has been made in a case where duty has not been levied; whichis to say that the date upon which the permissible period begins to run is the date of the order under Section 47. The High Court was, therefore, in error in coming to the conclusion that no show cause noticeunder Section 28 could have been issued until and unless the order under Section 47 had been first revised under Section 130."

5.1 Similarly in the case of **Signode India Ltd. Versus Collector of Central Excise 2003 (158) E.L.T. 403 (S.C.)**dated 19-11-2003 the Supreme Court observed as follows:

"51. The procedure laid down under Rule 173B of the Rules has specifically been included in the Act. Furthermore, by reason of the amended Act a provisionhas been made for reopening the approved classification lists. It is a procedural provision in terms whereof statutory authorities are required to determineas to whether the earlier classification was correctlydone or not. The

said authority upon giving an opportunity of hearing the parties may come to the conclusion that decision on the approval granted need not be reopened and even if the same is reopened, the reasons therefor are to be stated. As the provision of Section 11A is a recovery provision as regards non-levyor non-paid or short-levy or short-paid or erroneously refunded duties by reason of the said amendment the Parliament had merely provided that an approval onthe basis of a classification list *inter alia* in case of a short-levy can be recovered if a finding is arrived atthat the goods had undergone a short-levy."

Therefore, it is a settled issue that the Revenue can reopen their own assessments within the time limits prescribed in the Act for the reasons mentioned therein as long as the aggrieved partiesare put to notice and a reasonable opportunity is provided tothem.

6. The second issue is regarding classification of the imported goods. Let's examine the relevant entries which reads as:

CHAPTER 39 Plastics and articles thereof

3926	- Other Articles of Plastics and Articles of Other Materials of Headings 3901-3914
	--- Collar stays, patties, butterfly,shoulder-pads and other stays :
3926 20 41	---- Of polyurethane foam
3926 20 49	---- Other
3926 20 91	---- Of polyurethane foam

The HSN Notes reads as

This heading covers articles, Note 1 to the Chapter) or elsewhere specified or included, of plastics (as definedin of other materials of headings 39.01 to 39.14

They include:

(1) Articles of apparel and clothing accessories (other than toys) made by sewing or sealing sheets of plastics, e.g., aprons, belts, babies bibs, raincoats, dress-shields, etc. Detachable plastic hoods remain classified in this heading if presented with the plastic raincoats to which they belong.

(2) Fittings for furniture, coachwork or the like

(3) Statuettes and other ornamental articles.

(4) Dust-sheets, protective bags, awnings, file-covers, document-jackets, book covers and reading jackets, and similar protective goods made by sewing orgluing together sheets of plastics.

(5) Paperweights, paper-knives, blotting-pads, pen- rests, bookmarks, etc.

(6) Screws, bolts, washers and similar fittings ofgeneral use.

(7) Transmission, conveyor or elevator belts, endless, or cut to length and joined end to end, or fitted with fasteners. belts or belting of any kind, presented with the machines or Transmission, conveyor or elevator belts apparatus for which they are designed, whether or not actually mounted, are classified with thatmachine or or apparatus (eg. conveyor belts Section XVI). In addition, this heading does not cover transmission or or belting, of textile material, impregnated, coated, covered or laminated with plastics (Section XI, cg, heading 59.10).

(8) Ion-exchange columns filled with polymers ofheading 39.14.

(9) Plastic containers filled withcarboxymethylcellulose (used as ice-bags).

(10) Tool boxes or cases, not specially shaped or internally fitted to contain particular tools with or without their accessories (see the Explanatory Note to heading 42.02)

(11) Pacifiers (or "baby's dummies"); ice-bags; douche bags, enema bags, and fittings therefore, invalid and similar nursing cushions; pessaries, sheath contraceptives (prophylactics), bulbs for syringes.

(12) Various other articles such as fasteners for handbags, corners for suit-cases, suspension hooks, protective cups and glides for placing under furniture, handles (of tools, knives, forks, etc.,) beads, watch “glasses”, figures and letters, luggage label-holders.

(13) Artificial fingernails.

The heading excludes household articles such as dustbins and mobile garbage bins (including those for outside use).

As seen from the above description of the articles the question of classifying the bra cups under Chapter 39 is ruled-out.Moreover, the appellant themselves are not clear as to where to classify them and accordingly claim classification under 3 different Headings 39262041 or 39262049 or 39262099.

CHAPTER 62 Articles of apparel and clothing accessories, not knitted or crocheted

1. This Chapter applies only to made up articles of any textile fabric other than wadding, excluding knitted or crocheted (other than those of heading 6212).

2.This Chapter does not cover :

(a)worn clothing or other worn articles of heading6309; or

(b) orthopaedic appliances, surgical belts, trusses orthe like (heading 9021).

15. Subject to Note 1 of Section XI, textiles, garments and other textile articles, incorporating chemical, mechanical or electronic components for additional functionality, whether incorporated as built-in components or within the fibre or fabric, are classifiedin their respective headings in Section XI provided that they retain the essential character of the goods of thissection.

(h) woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated,

62.12- Brassières, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted.

6212.10 Bras

6212.20 Girdles and panty-girdles6212.30 Corsets
6212.90 Other

This heading covers articles of a kind designed for wearas body-supporting garments or as supports for certain other articles of apparel, and parts thereof These articles may be made of any textile material including knitted or crocheted fabrics (whether or not elastic).

The heading includes, inter alia:

(1) Brassières of all kinds.
(2) Girdles and panty-girdles.
(3) Corselettes (combinations of girdles or panty-girdles and brassières).
(4) Corsets and corset-belts. These are usually reinforced with flexible metallic or plastic stays, and aregenerally fastened by lacing or by hooks.
(5) Suspender-belts, hygienic belts, suspensory bandages, suspender jock-straps, braces, suspenders, garters, shirt-sleeve supporting arm-bands and armlets.
(6) Body belts for men (including those combined with underpants).
(7) Maternity, post-pregnancy or similar supporting or corrective belts, not being orthopedic appliances of heading 90.21 (see Explanatory Note to that heading).

All the above articles may be furnished with trimmings of various kinds (ribbons, lace, etc.), and mayincorporate fittings and accessories of non-textile materials (e.g., metal, rubber, plastics or leather).
The heading also includes knitted or crocheted articles and parts thereof obtained by manufacture directly to shape by increasing or decreasing the number or size of the stitches and designed to be used for the manufacture of articles of this heading, even when presented in the form of a number of items in the length. The heading does not include corsets and beltsmade wholly of rubber (heading 40.15).

As seen above from the HSN notes, it is absolutely clear that the bra cups are to be classified under 6212. The only contention of the appellant is that since the chapter notes excludes woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, as per clause (h) it should be classified under Chapter 39. This exclusion cannot be read in isolation without all other factors that describe the article. As seen from the General Interpretative Rules (reproduced below), the goods are to be classified as perthe terms of the section notes and the Chapter notes. In this case,the Chapter 6212 clearly includes Brassier and when there is a specific description, the goods cannot be classified based on the content of the material used to manufacture the same. The Interpretative Rules reproduced below as seen under clause 2(a) the essential character of the product decides the classification and here the bra cups undoubtedly are used as

part of a Brassier and the impugned products are more akin to the description given under 6212 and therefore rightly classifiable under 6212 90 as perclause 4 of the Interpretative Rules.
The General Rules for the Interpretation of ImportTariff

Classification of goods in this Schedule shall be governed by the following principles:

1. The titles of Sections, Chapters and sub-chaptersare provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

7. Regarding the benefit of the Notification, since it was not claimed at the time of import and the conditions therein were not satisfied the question of extending the benefit does not arise.

8. On the question of duty proposed to be charged, it is submitted that duty is to be charged on the value of the pair and not on single piece. The packing list placed before us clearlyshows the items were imported in pairs and it is also a fact that a pair of bra cups are used for one brassier. The invoice also shows that the unit price shown is per pair and accordingly the total value is calculated. Therefore, the unit price for the pair should be taken as per unit price (set of 2 pieces) rather than artificially splitting the price for per piece. Section 19 of the Customs Act takes cognisance of articles imported in sets and therefore we findthe said goods which are in pairs should be considered as a unit and the rate of duty to be calculated accordingly.
9. In view of the above, we uphold the classification of the imported goods under CTH 6212 and consequently, impugned order is upheld as far as classification is concerned and appeal is remanded to the adjudicating authority to recalculate the duty taking into consideration the unit price for pairs as a single unit price.

10. The appeal is disposed of by way of remand.

(Order pronounced in open court on 10.01.2024.)

(P. A. AUGUSTIAN)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,BANGLORE-560009

COURT-2
Customs Appeal No. 1123 of 2010

[Arising out of the Order-in-Appeal No.28/2010-Cus. dated 22.02.2010 passed by the Commissioner of Customs (Appeals), Bangalore.]

The Commissioner of Customs
New Customs House,Panambur, **....Appellant**
Mangalore – 575 010.

Vs.

M/s. R.M.K.S Minerals Exports P. Ltd.
No.21/1, 5th Cross Street,CIT Colony, Mylapore, **....Respondent**
Chennai – 600 004.

Appearance:

Mr. K. A. Jathin, AR **....For Appellant**

None **.... For Respondent**

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 07.08.2023Date of Decision: 04.01.2024

FINAL ORDER No. 20025 of 2024

Per R. BHAGYA DEVI:

The respondent filed a shipping bill No.93/07 which was assessed on 23.04.2007 at the applicable rate and based on the assessment, duty was paid on 24.04.2007. Thereafter 'Let export order' and 'allowed for shipment' order was issued on 28.04.2007.Consequent to this, Notification No.62/2007-Cus. Dated 03.05.2007 was issued reducing the rate of duty and on accountof this reduction in duty, the respondent filed a refund claim on 4.08.2007 under Section 27 of the Customs Act, 1962. This claim was rejected by the original authority on the ground that as per Section 16(1)(a) of the Customs Act 1962, the rate of duty applicable to any export goods shall be the leading force on the date on which the proper officer makes an order permitting clearance and loading the goods for exportation under Section 51 of the Customs Act, 1962. Since the duty was paid as per the rate prevalent on the date the 'Let export order' was issued, thebenefit of reduction in the rate of duty cannot be extended to the goods and accordingly, the refund was rejected. However, the Commissioner (Appeals) in the impugned order taking into consideration the date of loading of the goods into the vessel as the relevant date, allowed the refund claim. Aggrieved by this, Revenue is in appeal against this impugned order.

2. The Authorised Representative on behalf of the Revenue submitted that the Commissioner was wrong in considering the date of sailing of the vessel as the relevant date while the laws prescribed the date of 'Let export order' as the relevant date and accordingly, requested for setting aside impugned order allowing their appeal.

3. The question before us is what is the relevant date for payment of duty in the case of goods being exported. Section 16 which is the relevant Section reads as:

(18) "export", with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

(19) "export goods" means any goods which are to be taken out of India to a place outside India;

Section 16. Date for determination of rate of duty and tariff valuation of export goods.-

1[(1) The rate of duty and tariff valuation, if any, applicable to any export goods, shall be the rate and valuation in force,-

(a) in the case of goods entered for export under section 50, on the date on which the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51;

(b) in the case of any other goods, on the date of payment of duty.]

(2) The provisions of this section shall not apply to baggage and goods exported by post.

Clearance of export goods:

Section 50: Entry of goods for exportation. -

(1) The exporter of any goods shall make entry thereof by presenting 1 [electronically] 2 [on the customs automated system] to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export 3 [in such form and manner as maybe prescribed]:

4 [**Provided** that the 5 [Principal Commissioner of Customs or Commissioner of Customs] may, in cases where it is not feasible to make entry by presenting electronically 6 [on the customs automated system], allow an entry to be presented in any other manner.]

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall 7 [* * *] make and subscribe to a declaration as to the truth of its contents.

8 [(3) The exporter who presents a shipping bill or bill of export under this Section shall ensure the following, namely:-

(a) the accuracy and completeness of the information given therein;

(b) the authenticity and validity of any document supporting it; and

(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.]

The relevant Sections to determine the rate of duty is Section 16 read with Section 50 of the Customs Act ,1962. The reliance placed on Section 18 and 19 of the Customs Act, 1962 by the Commissioner (Appeals) is irrelevant as far as determination of rate of duty is concerned. As per Section 16, the date of 'let export order' is the date for determining the rate of duty. Thisview is also upheld by the Hon'ble High court of Bombay in the case of **Narayan Bandekar & Sons Pvt. Ltd. Versus Commr. of Cus. & C. EX, Goa 2010 (259) E.L.T. 362 (Bom.)** dated 18-

8-2010 observed that:

"6. We are concerned with clause (a) of sub-section (1) of Section 16 which provides that in case of goods entered for export under Section 50, the date of determination of rate of duty and tariff valuation of export goods will be the date on which the proper officer makes an order permitting clearance and loading of the goods for exportation under Section 51 of the said Act. Sections 50 and 51 of the said Act read thus :

*"**50. Entry of goods for exportation.-** (1) The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.*

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.

***51. Clearance of goods for exportation.-** Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation."*

7. Sub-section (1) of Section 50 contemplates that the exporter of the goods should make entry thereof to the proper officer by presenting a shipping bill. After satisfying that the exporter has paid the duty assessed on the goods, the proper officer can exercise power under Section 51 and make an order permitting clearance and loading of the goods for exportation. In the case of *Prime Mineral Exports Private Ltd.* v. *Union of India and another*, (W.P. No. 374/2010, decided by this Court on 5th July, 2010 [2010 (257) E.L.T. 414 (Bom.)], in paragraph 7, this Court has observed thus :

As per paragraph 40 of the CBEC's Customs Manual of Instructions, on passing of a shipping bill by the Export Department, the exporter has to present the goods to the shed appraiser (export) in docks for examination. The shed appraiser may mark the document to a Custom Officer for examining the goods. If the description and other particulars of the goods are found to be as declared, the shed appraiser gives a "let export order" after which the exporter may contact the preventive superintendent for supervising the loading of the goods on the vessel. The order passed in the nature of "let export order" is an order permitting the clearance and loading of the goods for exportation in accordance with Section 51 of the said Act.

The Shipping Bills show that Let Export Order was signed on 28th February, 2007 by the Superintendent Central Excise and on the same day an order "allowed for shipment in full" was passed by the said officer. Admittedly, as of 28th February, 2007, only cess was payable on export of iron ore. There is no dispute that cess of Rs. 25,000/- and Rs. 17,000/- respectively was paid against the shipping bills on 28th February, 2007. Admittedly, on 28th February, 2007 no export duty was payable and what was payable was the export cess which was admittedly paid on the same day. The remarks made by the Superintendent of Central Excise show that he was satisfied that the goods were not prohibited goods and, therefore, he passed an order ''allowed for shipment" on 28th February, 2007 and signed "Let Export Order" on the same day. Thus, the order permitting clearance and loading of goods for exportation under Section 51 of the said Act was made on 28th February, 2007. Thus, 28th February, 2007 is the date for determination of the rate of duty. Admittedly, on that day, the export duty was not payable. It became payable with effect from 1st March, 2007. The Commissioner of Customs (Appeals) held that the Let Export Order was issued on 28th February, 2007 and, therefore, both the requirements of filing of the shipping bill and issue of the Let Export Order were completed on 28th February, 2007 and, therefore, the relevant date under Section 16(1)(a) is 28th February, 2007. This aspect has been completely overlooked by the CESTAT. The CESTAT committed an error by holding that the relevant date as per Section 16(1)(a) of the said Act will have to be treated as 1st March,

2007 when loading was actually started. On a plain reading of Section 51 read with clause (a) of sub-section (1) of Section 16 of the said Act, the date of determination of the duty is the date on which an order was passed under Section 51 by the proper officer which in this case is 28th February, 2007. The date on which actual loading of iron ore was started is totally irrelevant."

3.1 The Tribunal in the case of **Commissioner of C. EX., CUS.& S.T., BBSR-I Versus Kashvi Power & Steel (P) Ltd. 2018**

(364) E.L.T. 332 (Tri. - Kolkata) dated 11-7-2017 Held that:

"5. Regarding the relevant date for applying the rate of export duty, we note that the let export order was duly issued by the competent officer on 25-2-2011. As per records, there is no other let export order issued for this consignment and neither any such order was asserted by the Revenue. In this connection, we refer to the decisions of Hon'ble Bombay High Court in the case of *Prime Mineral Exports Pvt. Ltd.* v. *Union of India* reported in [2010 (257)
E.L.T. 414 (Bom.)] and in the case of *Narayan Bandekar & Sons Pvt. Ltd.* v. *Commr. of Customs & Central Excise, Goa* reported in [2010 (259) E.L.T. 362 (Bom.)]. The High Court examined the relevant date for export of applicable in identical situation and held that the date of "let export order" permitting loading of goods was relevant to decide the correct rate of duty. The High Court also held that the date on which the actual loading of iron ore was started is totally irrelevant. Following the ratio of these decisions and in terms of clear legal provisions of Section 16 read with Sections 50 and 51 of the Customs Act, 1962, we find that the impugned order has been passed in line with the said legal provisions. We find no force in the present appeal by the Revenue to persuade as to interfere with the findings of the Commissioner (Appeals). Accordingly, the appeal is dismissed."

4. In view of the above, the impugned order is set aside and the appeal filed by the Revenue is allowed.

*(Order pronounced in open court on **04.01.2024.**)*

(P. A. AUGUSTIAN)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 1773 of 2010
(Arising out of Order-in-Appeal No.80/2009-Cus. (B) dated 9.4.2010 passed by the Commissioner of Customs (Appeals), Bangalore.)

The Commissioner of Customs Appellant(s)
Queen's Road, Bangalore – 560 001.

Versus

M/s. Snom Technology India Pvt. Ltd.
No.1, 5th Cross, Respondent(s)
BTM Layout, II Stage, Bangalore – 560 076.

Appearance:

For the Appellant
Mr. K. A. Jathin, AR
None For the Respondent

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)

HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20026 /2024

Date of Hearing: 06/07/2023 Date of Decision: 04/01/2024
Per : R. BHAGYA DEVI

M/s. Snom Technology India Pvt. Ltd., Bangalore, the respondent had imported 'Crossmatch L Scan Guardian F LSE' of 160 Nos. The importers had claimed that this item to be parts of Automatic Data Processing Machines and accordingly classified items under Chapter Heading 8471 6050 as part of the computers. On examining the samples, the operation manual and the catalogue of the goods, it was found that the item imported functions as a fingerprint reader and not as a part or accessory of the computer; challenging the assessment order, the respondent filed an appeal before Commissioner (A). The learned Commissioner (A) held that:

5. ……..From the records presented and the catalogue, I find that the same works as a unit which identifies the individual via his/her fingerprints. The scanner is also compact in as much as it can accommodate only four fingers to scan at a time. Thus, it is very clear that this cannot be used for scanning any other object less be used as a multipurpose scanner. Further, the CTH 8471 seems to be the most suitable heading for the goods under import as it identifies the person, sends the signals to the Automatic Data Processing Machine, which in turn recalls all the data available about the person whose fingers were scanned. This is nothing but an instrument which is used to identify the person/employee."

Aggrieved by the above classification, Revenue is in appeal before us.

2. The grounds on which the appeal is filed by the Revenue is that the Commissioner (Appeals) had ignored the fact that the item was not a data processing machine or any part or accessory of the same. The Fingerprint reader is a device which only reads the Fingerprint of the user and hence t is biometric reader. Scanner covered

under CTH 8471 6050 is a document scanner which is used for scanning the documents which are data and the Finger Print reader is not the one that is covered under the above CTH. A little consideration of the literature available on the web will show that the item is a machine having individual function and sold as finger print reader and not as part or an accessory of the computer. It may be seen that the scanners under the heading are covered under the broad category of input/input devices of a computer. The finger print reader imported by importer can by no stretch of imagination be considered as input/out unit of a computer.

3. The Authorised Representative on behalf of the Revenue reiterating the grounds of appeal submits that Fingerprint scanner is an equipment having individual function. It reads the fingerprint of the user and hence, it is a biometric reader. By virtue of Chapter Note 5(E) to Chapter 84, such devices do not fall under CTH 8471 but are classifiable under residual heading 8543 7099 as they are not specifically covered under any other heading. The item is a machine having individual function and sold as fingerprint reader and not as part or accessory of the computer. Scanner covered under CTH 8471 6050 is a document scanner which is used for scanning documents.

4. None appeared for the respondent.

5. We find that the issue has already been considered by this Tribunal taking note of the various aspects on the issue. This Bench vide **Final Order No. 21155/2023 dated 20.10.2023** in the case of **CC vs. Kronos Systems India Pvt. Ltd.** has held as follows:
"6. Now the question arises as to whether the item is classifiable under Chapter 8543 as claimed by the Revenue. .....
7. As seen from the above and as noted by the original authority, the device captures the data from the employee's card or the data of the particular employee who key in the PIN into the device. The device does not do anything except for collecting the data at the time of entry or exit and this data is transmitted to a central server for further processing like marking the attendance, preparation of payroll or for other purposes. These facts are not in dispute. Based on the General Rules of Interpretation and the Chapter Notes, the item needs to be classified in the heading akin to it or where the specific description is provided. In this case, the data collection device imported by the respondent is nothing but a card reader working in conjunction with the server. Thus, this device functions such as proximity readers/badge readers, which are specifically classified under Chapter Heading No.8543 and as per Chapter Note 5(E) to Chapter 84.
"Chapter Note 5(E) to Chapter 84 "Machines performing a specific function other than data processing and incorporation or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, falling that in residual headings".

8. Since the specific function of the imported item is to mark attendance or to take note of the persons of the employees for the purpose of attendance or payroll or leave, they cannot be classified under Chapter 84 as it excludes from this Chapter as per the Chapter Note 5(e) discussed above.

9. In the case of **Commissioner of Customs, Bangalore vs. Scatia: 2019 (370) ELT 703 (Tri.- Bang.)**, a similar product viz., fingerprint scanner was classified under Chapter Heading 8543 7099 as per the observations made by the Tribunal at para 5.1, wherein it has held that:
"5.1 The Department contended that CTH 8543 70 99 is more applicable due to the fact that the item imported basically operates on electrical/electric technology. We find that the Head 8543 covers electrical machines and

apparatus having individual functions not specified or included elsewhere in the chapter. Therefore, the classification of the Finger Print Reader would be more appropriate under this heading. We also accept the Department's contention that when the item is *prima facie* classifiable under two headings in terms of Rule 3(c) of General Rules of Interpretation of Import Tariff, the goods should be classified under the heading which occurs last in numerical orders among those which equally merits consideration. We accept this contention. Going by merits as well as by the Rules of Interpretation, we hold that the impugned product merits classification under CTH 8543 70 99 as contended by the Department." Hence, based on the discussions above and by following the decision of this Bench, we find that the product is rightly classifiable under chapter 8543."

6. Subsequently, following the above order, in a similar set of facts in the case of **Enterprise Software Solutions Lab vs. CC vide Final Order No.21438/2023 dated 22.12.2023**, the products were classified under CTH 8543. Hence, we do not find any reason in not following the said orders of the Tribunal. Consequently, the product in question merits classification under CTH 8543 instead of CTH 8471 as claimed by the respondent.

7. In view of the above discussions, the impugned order is set aside and the appeal filed by the Revenue is allowed.
(Order pronounced in Open Court on 04.01.2024.)

(P. A. AUGUSTIAN) MEMBER (JUDICIAL)

(R. BHAGYA DEVI) MEMBER (TECHNICAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,BANGLORE-560009

COURT-2

Customs Appeal No. 2998 of 2011

[Arising out of the Order-in-Appeal No.38/2011 dated 23.05.2011 passed by the Commissioner of Customs (Appeals), Bangalore.]

M/s. Nuance Group (India) Pvt. Ltd. **....Appellant**
Bengaluru International Airport Alpha 3, Airline Building, 1st Floor,Devanahalli,
Bangalore – 560 300.

Vs.

The Commissioner of Customs **....Respondent**
Bengaluru International Airport,Bangalore – 560 001.

Appearance:

Shri K. S. Naveen Kumar and Ms. M. Mahalakshmi, Advocates **....For Appellant**

Mr. K. Vishwanath, AR **.... For Respondent**

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 08.09.2023Date of Decision: 10.01.2024

FINAL ORDER No. 20042 of 2024

Per R. BHAGYA DEVI:

The appellant M/s. Nuance Group (India) Private Limitedwas operating Private Bonded Warehouse and duty-free shop at Bangalore International Airport under Section 58 of the Customs Act, 1962 and they had to comply with the procedures specified in Trade Facility No.50/2005 dated 5.4.2005. As per this Trade Facility Procedure, the appellant for every sale made from the duty-free shop should be covered by a voucher which shows the name of the passenger to whom the sale was affected, passport number, flight number of the aircraft of arrival and departure. These sale vouchers are to be countersigned by the customs officer. However, the officers investigated, it was noticed that between 17.9.2008 to 17.11.2008 the appellant had launched a promotional offer for sale of Johnnie Walker and Smirnoff brand liquor in terms of "buy JW centurion 3 for 2, buy JW Black 3 for 2 and buy Smirnoff 3 for 2". The said promotional offer was not informed to Customs Authorities. Therefore, the appellant had violated the provisions of Section 72 of the Customs Act, 1962 andTrade Facility No.50/2005; admittedly, accepting their lapse, the appellant paid an amount of Rs.14,21,751/-. Accordingly, theOriginal Authority confirmed the demand along with interest and imposed penalty of Rs. 50,000/-. On an appeal, the Commissioner(Appeals) upheld the order of the original authority. Aggrieved by this order, the appellant is in appeal against this impugned order.

2. The learned counsel on behalf of the appellant submits that the promotional offer, in essence, give the customer's discount of 33% on the total value of three bottles of liquor purchased by them. The liquor cleared by the international passengers in excessof the baggage allowance should have been subjected to duty in their hands under Section 28 of the Customs Act 1962 and not demanded from the appellant under Section 72. He further submits that in terms of Section 71 of the Customs Act, 1962 warehoused goods could be taken out of the warehouse for home consumption or as otherwise provided in the Customs Act, 1962.In terms of Chapter XI of the Customs Act, import of goods as baggage from outside India including the goods purchased from duty-free shops located beyond the customs frontier is a recognised procedure. Under Section 77, the owner has to file a declaration of the contents of the baggage and as per the BaggageRules, the passenger could carry 2 Litres of liquor as free allowance and if anything, in excess, needs to be declared and paythe duty. Therefore, the duty should have been demanded from the passenger under Section 28 and not from the appellant under Section 72. To substantiate his claim, he has relied upon the decision in the case of Aarish Altaf Tinwala Vs. Commissioner of Customs (Airport) Mumbai in Order No. 634/2018- CUS(WZ)/ASRA/Mumbai dated 31.08.2008. Also relied on the following decisions:

- **Flemingo Travel Retail Ltd. vs. CCGST & CE: 2022 (64)GSTL 564 (T)**
- **Hotel Ashoka vs. ACCT: 2012 (276) ELT 433 (SC)**
- **Sandeep Patil & Flemingo Travel Retail P. Ltd. vs. UOI &Ors.: 2019-TIOL-2348-HC-MUM-GST.**
- **A-1 Cuisines P. Ltd. vs. UOI: 2019 (22) GSTL 326 (Bom.)**
- **Atin Krishna vs. UOI: 2019 (25) GSTL 390 (All.)**

It is also submitted that the adjudicating authority observed that 'the appellant had not done it intentionally to evade customsduty,' therefore, imposition of penalty does not arise as there isno *mens-rea* and no specific provision has been invoked in the present case for imposition of penalty.

3. The learned Authorised Representative has reiterated the findings of the Commissioner (Appeals) and submitted that in the case of **Alpha Future Airport Retail P. Ltd. Vs. CCE New Delhi(Air Cargo Export): 2018 (364) ELT 193 (Tri.-Del.)**, the Tribunal has observed that:

"The appellant has been issued private bonded warehouse license under Section 58. The appellant has also executed the bond under Section 59 ibid. The investigation into the affairs of the appellant has categorically showed that the appellant has violated with impunity, the conditions of the issue of PBWL and Public Notice No. 5/2006 which he is required to comply in the operation of DFS. The appellant was permitted to import liquor and other goods without payment of duty and store the same in the private bonded warehouses. They were allowed to sell such goods to international passengers subject to strict conditions as per the Public Notice above. It stands established that goods have been cleared by way of sale in contravention of the conditions imposed on the appellant. The demand for customs duty in respect ofsuch goods cleared in violation of the conditions have been raised in terms of Section 72(1)(a) of the Act which provides for payment of customs duty chargeable on such goods removed in contravention of the conditions of the warehousing bond, along with interest and penalties. The provisions of Section 72 are different from Section 11A of the Central Excise Act. Section 72 pertains to the warehousing goods for which the bond is executed under Section 79 and there is no time limit for the recovery of such dues".

In view of the above, it is submitted that since they are bound by the bond conditions, they are liable to duty along with interest andtherefore, the impugned order needs to be upheld.

4. Heard both sides. Let's examine the relevant sections.

Section 71 of the Customs Act, 1962 which reads as:

Goods not to be taken out of warehouse except as provided by this Act. –

No warehoused goods shall be taken out of a warehouse except on clearance for home consumptionor [1] [export], or for removal to another warehouse, or as otherwise provided by this Act.

Section 72 reads as: Goods improperly removed fromwarehouse, etc. –

(1) In any of the following cases, that is to say, -

(a) where any warehoused goods are removed from a warehouse in contravention of section 71;

(b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under section 61 to remain in a warehouse;

[1] [(c) * * *]

(d) where any goods in respect of which a bond has been executed under [2] [section 59 [3] [***]] and which have not been cleared for home consumption or [4] [export] are not duly accounted for to the satisfaction of the proper officer, the proper officer maydemand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with [5][interest, fine and penalties]payable in respect of such goods.

(2) If any owner fails to pay any amount demanded under sub-section (1), the proper officer may, withoutprejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may [6][deem fit].

4.1 The Trade Facility No.50/2005 issued by the Commissionerof Customs, Bangalore with regard to the sale of goods from Duty-Free Shop reads as follows:
"(V) the imported or indigenous nonduty paid goods permitted to be received and stocked in the Duty-Free Shop shall be sold by the licensee only to the international passengers and on obtaining from them payment in approved foreign currencies. On arrival/ departure side every sale made by duty free shop shall be covered by sale voucher which shall be deemed to be the bill of entry/shipping will bill for the purpose of Section 68 or 69 of the Customs Act 1962 in the form prescribed at Annexure G, which inter alia shall show the name of the passenger to whom the sale was affected, the passport number, flight number of aircraft arrival or departure as the case may be. The passenger shall append his full signature on thebill/sale voucher. The sale voucher/bill should be serial number and as far as possible sale voucher books should be used in the duty-free shop in a chronological order. The licensee should intimate the Deputy/Asst Commissioner of Customs airportregarding the sale voucher/cash memo books that are in use from time to time. All such information is should be kept in a separate file and a customs officer in charge of the duty-free shop should ensure that only those cash memo books for each intimations have been received are in use.

It shall be the responsibility of the person in charge ofthe duty-free shop to from every incoming passenger who purchases goods from duty free shop that

all such purchases will be regarded as import in the country and all the provisions of the Customs act, the Exim policy would be applicable to these goods as they applyto regular accompanied baggage of the passenger."

4.2 The fact that the appellant is bound by the above Sections and the procedures laid down by the Trade Facility orders is not indispute. The fact that the warehoused goods are obliged to be removed in accordance with provisions of Section 71 of the Customs Act, 1962 and goods improperly removed from the warehouse are liable to be dealt in terms of Section 72 of the Customs Act, 1962 and they are statutorily obliged to duly account for the goods which are bonded, to the satisfaction of the proper officer, is also not disputed. The Assistant Manager Logistics, Shri Ramesh Poojari of the appellant-company in his statement dated 3.4.2009 admitted that the promotional scheme launched by them provided for one imported liquor extra forpurchase of two bottles as free allowance and he agrees that therehas been a failure in complying the statutory requirements in preparation of Annexure-G which did not give details of signature of passengers/customs officers etc. Similarly, Shri Pradeep Lalchandani, Manager Operations in his statement dated 6.4.2009 stated that he admits the omissions and commissions in notgetting signatures of the passengers and the officers with regard to various sales transactions. Shri Cherian George, Head of buyingand merchandising of the appellant in his statement 16.4.2009 stated that the said promotional offer was not informed to the Customs Authorities at the airport and having realised their mistake in not properly justifying the transactions, necessary payments were made involving sale of liquor sold under discountin excess of duty-free allowances. Even during reply to show- cause notice, it was admitted that liability is accepted in case of 1716 bottles and have paid entire duty at the time of investigation.

4.3 The appellant before us has challenged these orders on the ground that that they are not liable to pay duty under Section 72 but the duty needs to be collected from the passengers andhence, demand against them is liable to be set aside. From the records, we note that the appellants were issued with Customs Bonded Warehouse License and permitted to operate the duty-freeshop (DFS) at Bangalore and on investigation into the facts in terms of the bond executed by them as well as the conditions for grant of permission of running the DFS, which has been made withthe strict condition that import of goods such as liquor wereallowed duty-free only for the purpose of selling the same to international passengers. They were also required to maintaindetailed documentation by which the Customs Authorities could verify and ascertain whether the strict conditions prescribed have been complied. The statements from the various persons in- charge of the duty-free shop and the scrutiny of the documents relating to DFS have revealed that the appellant have completely violated the conditions under which licenses were granted to them.

4.4 Therefore, from the above Sections, it is very clear that the licensee of the Duty-Free Shop is liable to pay duty, if the provisions of Sections and the Procedures laid down therein, are violated and therefore, the question of passengers paying duty does not arise. This has also been affirmed by the Tribunal in the case of **Alpha Future Airport Retail P. Ltd.** (supra) which has been upheld by the Supreme Court as reported at **2021 (378) ELT 4 (SC)**. The Tribunal as discussed supra has clearly held that the provisions of Section 72 are applicable to the appellant and they are liable for duty along with interest. In view of the above, the duty along with interest is upheld. With regard to penalty as rightly observed by the Original Authority, there is no intention to evade payment of duty and the fact that the officers are also to verify the vouchers and countersign the sale vouchers, the fact of
awareness by the officers cannot be ignored and hence, we setaside the penalty.

5. In view of the above, the duty demanded along with interestis upheld and the penalty is set aside.

(Order pronounced in open court on 10.01.2024.)

(P. A. AUGUSTIAN)MEMBER (JUDICIAL)

(R. BHAGYA DEVIMEMBER (TECHNICAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road, BANGLORE-560009
COURT-2

Customs Appeal No. 20295 of 2023

[Arising out of the Order-in-Original No.BLR-CUSTM-COMM- 05-2023 dated 21.3.2023 passed by the Commissioner of Customs, Bangalore.]

M/s. UDL Logistics Pvt. Ltd.
Survey No.136/9, Site No. 4 & 5, Sneha Nagar, Kashi Nagar Main Road, Opposite Iyengar Bakery, Amruthahalli, Bangalore – 560 092. **....Appellant**

Vs.

The Commissioner of Customs
City Customs Commissionerate
P.B. No.5400, C.R. Building, Queen's Road, Bangalore – 560 001. **....Respondent**

Appearance:

Mr. Sundaranathan, Advocate **....For Appellant**

Mr. Neeraj Kumar, AR **.... For Respondent**

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 14/07/2023 Date of Decision: 09/01/2024

FINAL ORDER No. 20036 of 2024

Per R. BHAGYA DEVI:

The appellant is in Customs Broker holder of Customs Broker License No.CUS/BLR/CB/03/2020 valid up to 27.02.2030.

2. The DRI officersintercepted export consignments pertaining to M/s. TEAC Engineers where the products were declared as "Ductile Industrial Pipes" but on examination the consignment, it contained red sanders logs which are prohibited items for export. Since the appellant had filed these shipping bills and had violated the Customs Brokers Licensing Regulations (CBLR) 2018 and therefore, they were issued with show-cause notice which culminated into impugned order wherein the Commissioner revoked the license and ordered for forfeiture of entire security deposit and imposed penalty of ₹50,000/-. The appellant is in appeal against this impugned order.

3. On behalf of the appellant, the learned counsel submits that one Mr. Satishkumar claiming to be representative of the exporter sought the services of the appellant to export 'Industrial Ductile Pipes'. Mr. Satishkumar submitted all the export documents along with the KYC documents attested by the exporter in original. With these documents, the genuineness of the exporter was verified online from the

webpages of the Government Authorities and also that of the exporter and all the documents were found to be genuine. Hence, the appellant filed the shipping bills for export of 'Industrial Ductile Pipes'. It is further claimed that several others including the Department Officials were issued with show-cause notice and the notice is still pending, but based on the offence report, the authorities proceeded to proceed against the appellant by issuing notice and adjudicating the case against the appellant alleging violation of Regulation 10 (e) and 10 (n) of CBLR 2018. It is claimed that the offence report dated 22.7.2022 was issued by the principal Commissioner of Customs, Bengaluru while the enquiry report stated referred to the investigation report dated 20.2.2022. Therefore, the show-cause notice dated 10.10.2022 is barred by limitation in terms of Regulation 17(1) CBLR 2018. To support his claim, he placed reliance on **Shri Pradeep Kumar Seth vs. CC, New Delhi: Final Order dated 27.2.2023 (Tri.-Del.)**.

3.1 On merits, it is submitted that Regulation 10(e) is about exercising diligence while imparting instructions to the client and admittedly there is no finding on this aspect but the only allegation was that authorisation was not obtained from the exporter which is incorrect since the appellant had verified the genuineness of the exporter from the online webpages. To substantiate their claim on merits, the following decisions were relied on to claim that online verification was sufficient to verify the genuineness of the exporter.

- K. S. Sawant & Co vs. CC, Mumbai: 2012 (284) ELT 363 (Tri.-Mum.)
- Shri Pradeep Seth vs. CC, New Delhi: Final Order dated 27.2.2023 (Tri.-Del.)
- Trans Asia Shipping Services vs. CC, Bangalore: Final Order dated 5.6.2023 (Tri.-Bang.)
- M/s. Sadagati Clearing Services Pvt. Ltd. vs. CC (Air), New Delhi: Final Order dated 29.5.2023 (Tri.-Del.)
- M/s. Ashok Malhotra vs. CC (Airport), New Delhi: Final Order dated 30.05.2023 (Tri.-Del.)
- E. Maj Shipping Pvt. Ltd. vs. CC (Airport) New Delhi: Final Order dated 24.05.2023 (Tri.-Del.)

4. The Authorised representative reiterated the findings of the Commissioner in the impugned order.

5. Heard both sides.

6. On perusal of records, it is observed that a show- cause notice No.155/2021-22 dated 24.1.2022 was issued to the exporter and also the appellant for the same offence for which they are in appeal against the impugned order. Simultaneously, another show-cause notice No.5/2022/Commr. dated 10.10.2022 was issued to the appellant under Regulation 17(1) of CBLR, 2018. In the above show-cause notice dated 24.1.2022, it is alleged that Mr. Najeeb Zainudeen was the kingpin involved in the export of the red sander logs and there were many others involved including Mr. Satishkumar who had used IEC details of the exporter for export of prohibited goods. The only allegation against the appellant in this show-cause notice that he had violated the conditions under Regulation 10(e) and 10 (m) of CBLR 2018 and thus, was made them liable for penalty under Section 114, 114(AA) of the Customs Act, 1962. Before completion of the adjudication proceedings of the above show- cause notice, another show-cause notice No.5/22 dated 10.10.2022 was adjudicated which is now before us. The Commissioner in the impugned order observed that *"I agree with the Customs Broker's submission that they are not supposed to physically verify the address of the importer/exporter as the same is not a legal obligation on the part of the CB to fulfil. Further, I also agree with the CB that as per the provisions of the Regulations of CBLR 2018, their job is to verify the genuineness of the exporter/importer, their GSTIN and not the goods. I am also of the opinion that they are not expected to check the genuineness of the goods as the verification or examination of the goods is the statutory function of the Customs.*

They may not have the knowledge of any mis-declaration of the quality, quantity, nature and value of the goods by the importer/ exporter." After recording the above observations, the Commissioner finds that the appellant had not received any authorisation from the exporter for the said consignment as per the Regulation 10(a) of the CBLR 2018. Accepting the fact that the shipping bill was filed based on the KYC documents, invoices and packing list made by Mr. Satishkumar, Commissioner alleges that the appellant should have received authorisation and all other documents directly from the exporters which resulted in fraudulent export. The act of negligence on the part of the appellant was only to the extent of not verifying the authenticity of the documents and to check whether the orders have been placed by the exporters. The appellant has placed before us documents to show that the KYC documents were authorised by the exporter and also placed before us the mahazar which shows that the department had seized certain documents which included original attested copy of KYC documents of the exporter including certificate of IEC, GST registration certificate, PAN card and Aadhar Card. Since based on these documents, they had verified online and filed the shipping bill in good faith; they cannot be penalised for the illegal attempt to export prohibited goods. Moreover, the main show-cause noticed dated 24.1.2022 which deals with the main culprits should have been adjudicated along with the present notice. In view of the above, we find no reason for revoking the license of the appellant and for forfeiture of the security deposit. Therefore, we set aside the revocation of license and forfeiture of the security deposit.

7. However, the fact remains that the goods that were declared as 'Industrial Ductile Pipes' were found to be 'red sander logs' and the shipping bills were filed by the appellant. For having violated the Regulations of CBLR in not verifying the genuineness of Mr. Satishkumar who claims to the authorised representative of the exporter will warrant penalty under CBLR 2018. Accordingly, we uphold the penalty of Rs.50,000/- (Rupees Fifty Thousand Ony). The appeal is allowed partly.
(Order pronounced in open court on 09/01/2024.)

(P. A. AUGUSTIAN) MEMBER (JUDICIAL)

(R. BHAGYA DEVI) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 60442 Of 2022

[Arising out of OIA No. 10-14/Appl/Cus(D)CampChd/13 dated 21.02.2013 passed by the Commissioner (Appeals) of Customs, Delhi (Camp Chandigarh)]

M/s Saraswati Knitwear Pvt. Ltd. **: Appellant (s)**
Plot No. 1200, Kashmir Nagar, Gaushala Road, Ludhiana

Vs

Commissioner of Customs, Ludhiana **: Respondent (s)**
ICD GRFL, G.T. Road, Sahnewal, Ludhiana

APPEARANCE:

Shri N. K. Sharma, Advocate for the Appellant

Shri Amandeep Kumar, Authorised Representative for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

ORDER No. A/60376/2023

Date of Hearing:18.05.2023
Date of Decision:13.09.2023

Per : S. S. GARG

The present appeal is directed against the impugned order dated 21.02.2013 passed by the Commissioner (Appeals) of Customs, Ludhiana whereby the Ld. Commissioner (Appeals) has rejected the appeal of the appellant by holding that the appellant is not entitled to interest on refund.

2. Brief facts of the case are that the appellant had filed 05 Bills of Entry on 09.06.2011 for clearance of 100% PCT Polyester Spun NE 30/1, Yarn Raw White on Cones falling under CTH 55094190. The value declared by the Appellant @ USD 1.25 per Kg appeared on lower side and thus B/Es were provisionally assessed @ USD 2.60 per Kg.

- The duty so assessed was paid by the Appellant vide various challans dated 29.11.2011 & 30.11.2011.
- Being aggrieved with the provisional assessment of the Bills of Entry @ USD 2.60 per Kg, the appellant filed an appeal before the Commissioner (Appeals) protesting against the excess duty charged.
- The Commissioner (Appeals) vide OIA No 10-14/Appl/Cus(D) Comp Chd/13 dated 21.02.2013 directed the assessing officer to finalize the assessment at the earliest and opined that question of refund of excess duty paid, if any, will arise only after the adjustment of provisionally assessed duty under clause(a) of sub-section (2) of Section 18 of Customs Act, 1962.
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- In pursuance to the Order-in-Appeal dated 21.02.2013, Assessing Officer finalized the assessment of Bills of Entry on 29.12.2021 @ 1.40 USD/Kg, which was accepted by the appellant. Thereafter, the appellant filed the refund application on 12.01.2022 of excess duty paid over $1.40 per kg. On refund application, some deficiencies were raised and after meeting out the queries Adjudicating Authority vide order-in-original dated 14.03.2022 sanctioned the refund claim of Rs 13,22,041/- Rs. 1237420/- excess duty paid + excess Interest Paid of Rs.84621/-).
- Hence, the present Appeal.

3. Heard the parties and perused the records.

4. Ld. Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the appellant is entitled to interest on the refund amount which was paid during investigation or during adjudication proceedings. He further submitted that the department took undue long period of more than 8 years in finalizing the assessment which has caused delay in granting of refund. He further cited number of decisions holding that the amount deposited during investigation, if ultimately found not sustainable, is to be treated as revenue deposit and the same is to be refunded with interest. In support of this submission, he relied upon by the following decisions:-

- Calcutta Iron & Steel Company vs. CESTAT Chennai
- JK Cement vs. CCE & CGST
- Sandvik Asia Ltd. vs. Commr. Of Income Tax
- Parle Agro Pvt. Ltd. vs. CCE, Noida
- Supertron Electronics Pvt. Ltd. vs. UOI

5. On the other hand, the Ld. DR reiterated the findings in the impugned order and submitted that the provisional assessment and final assessment are common phenomena in Customs and are governed under Section 18 of the Customs Act, 1962. He further submitted that Section 18 prescribes all the provisions w.r.t. provisional assessment and final assessment and grant of refund and interest thereon as the case may be. He also submits that Sub-section 4 of Section 18 clearly specifies that interest is payable only if refund is not granted within 3 months from the final assessment. He further submits that the interest rate has also been prescribed in this sub- section at the rate specified in Section 27A of the Act. He further submitted that there is no delay in granting the refund.

- He further submitted that the assessment in this case was finalized on 29.12.2021 @1.40/kg which were accepted by the appellant. In pursuance to this final assessment, the appellant filed refund claim dated 12.01.2022 seeking refund of differential excess duty and the said amount was refunded to the appellant vide OIO dated 14.03.2022 i.e. within 3 months from the final assessment. He further submitted that once the refund has been granted as per Section 18 and 27A of the Act within 3 months from the date of final assessment then the appellant cannot claim any interest. For this Submission, the Ld. DR relied upon the following decisions:-

- Ajay Exports Vs CC Import Nhava Sheva [2015 (330) ELT 225 (Tr. Mum)]
- CC Vs IOCL [2012 (282) E.L.T368 (Del)]
- Bochasanwasi Shri Aksharpurushottam Swaminarayan Sanstha Vs CC Ahmedabad [2022 (380) E.L.T82 (Tri. -Ahmd.)
- Ajay Exports Vs CC Import Mumbai [2016 (335) ELT 150 (Tr. Mum)
- Pride Foramer Vs CC Import Mumbai [Order dated 14.06.2010 in WP No. 2629/2006
- CC (Export) Chennai Vs Sayonara Exports Pvt Ltd. [2015 (321) ELT 583 (Mad.)
- M/s.. Nirma Ltd. Vs. CC Jamnagar (Prev.) [MANU/CS/0008/2022
- Veer Overseas Ltd. Versus CCE, Panchkula [2018 (15) G.S.T.L. 59 (Tri. - Lb)

- UOI vs. Cosmo Films Limited vide order dated 28.04.2023 (SC) Ld. DR submits on the question of delay in finalizing the assessment which could not be done due to alert Circular No. 09/2011-CI dated 26.07.2011 issued by the DRI on such import consignment, due to which this provisional assessment was kept pending.

Ld. DR further submitted that the decision relied upon by the appellant are not applicable in the facts and circumstances of the case because none of the judgements relied upon by the appellant are under provisional assessment as provided under Section 18 of the Customs Act, 1962.

6. After considering the submissions of both the parties and perusal of material on record, I find that in the present case, the assessment was finalized on 29.12.2021 and in pursuance to the final assessment refund was sanctioned to the appellant vide OIO dated 14.03.2022 which is within the time limit of 3 months from the date of final assessment. The original authorities rejected the request of interest and vide impugned order; the Commissioner has also rejected the appeal seeking grant of interest on delayed refund. Further, I find that the appellant was provisionally assessed under Section 18 of the Customs Act. The relevant provisions of the Customs Act are reproduced herein below:-

Section 18. Provisional assessment of duty

[(1) Notwithstanding anything contained in this Act but without prejudice

to the provisions of section 46 [2] [and section 50],--

(a) where the importer or exporter is unable to make self-assessment under sub-section (1) of section 17 and makes a request in writing to the proper officer for assessment; or

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

(c) where the importer or exporter has produced all the necessary documents and furnished full information but the proper officer deems it necessary to make further enquiry; or

(d) where necessary documents have not been produced or information has not been furnished and the proper officer deems it necessary to make further enquiry,

the proper officer may direct that the duty leviable on such goods 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 as may be finally assessed or re-assessed as the case may be, and the duty provisionally assessed.]

[(1A) Where, pursuant to the provisional assessment under sub-section (1), if any document or information is required by the proper officer for final assessment, the importer or exporter, as the case may be, shall submit such document or information within such time, ***and the proper officer shall finalise the provisional assessment within such time and in such manner, as may be prescribed.]***

(2) When the duty leviable on such goods is assessed finally [3] [or re- assessed by the proper officer] in accordance with the provisions of this Act, then--

(a)..... ,

(b)..... ,

[(3) The importer or exporter shall be liable to pay interest, ……..

(4) Subject the 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 or re-assessment of duty, as the case may be, there shall be paid an interest on such un-refunded amount at such rate fixed by
the Central Government under section 27A till the date of refund of such amount.]

7. Further, I find that the decisions relied upon by the Ld. Counsel for the appellant are not applicable to the present case because they were not decided under the provisions of Section 18 read with Section 27(A) of the Customs Act, 1962.

8. Further, I find that the decisions relied upon by the Ld. DR are applicable in the present case.

In this regard, I may refer to the decision of CCE vs. IOCL 2012 (282) E.L.T368 (Del) wherein it has been held by the Hon'ble Delhi High Court that in the case of provisional and final assessment, the refund is payable in terms of Section 18 of the Customs Act, 1962. The relevant portion of Para 20 of the judgement is reproduced herein below:-

"20.. In the first situation the assessee has paid provisional duty which gets reduced on final assessment. The assessee, therefore,

becomes entitled to refund which is payable in terms of Rule 9B of the Excise Act [(sic) Rules], 1944 or Section 18 of the Act."

9. Further, I find that the appellant is entitled to interest if the refund is payable after the expiry of 3 months from the date of final assessment as per Section 18 (4) of the Customs Act whereas in the present case the refund was granted within 3 months as prescribed under Section 18 (4) of the Act. Therefore, in my considered view, the appellant is not entitled to any interest in view of the statutory provisions and the case laws cited (supra)

10. In view of above, I do not find any infirmity in the impugned order which is upheld by dismissing the appeal of the appellant.

(Pronounced on 13.09.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
REGIONAL BENCH - COURT NO. I

Customs Appeal No. 60304 of 2022

[Arising out of Order-in-Original No. Commr/VG/LDH/CUSTOM/05/2022 dated 28.06.2022passed by the Commissioner, Ludhiana]

M/s Safe Cargo Clearing Services **……Appellant**
52, Rasila Nagar, Opp, BBMB Power House,
Chandigarh Road, Ludhiana 141010
VERSUS

C.C. Ludhiana **……Respondent**
Customs House, Sahnewal, Ludhiana 141120

APPEARANCE:

Present for the Appellant: Shri Sudhir Malhotra & Shri Kanika Malhotra, Advocates

Present for the Respondent:Shri Rajeev Gupta, Ms. Swati Chopra and Shri Ravinder Jangu, Authorized Representatives

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL) FINAL ORDER NO. 60462/2023

DATE OF HEARING:09.06.2023 DATE OF DECISION: 03.10.2023

PER S. S. GARG

The present appeal is directed against the Order-in-Original dated 28.06.2022 vide which the Ld. Commissioner has revoked Custom Broker Licence of the appellant under Regulation 17 of CBLR 2018 and imposed penalty of Rs. 50,000/- under Regulation 18 read with Regulation 14 of CBLR, 2018.

2. The Ld. Commissioner also forfeited the security deposit made by the Custom Broker at the time of taking licence in terms of Regulation 14 of CBLR, 2018.

3. Briefly the facts of the present case are that the appellant holds Custom broker licence and was permitted to work as custom broker at various customs stations.

3.1 A communication from. Additional Commissioner, Ludhiana Customs Commissionerate, vide letter Cus/SIIB/MISC/451/2021-SIIB-0/0-Commr-Cus-Ludhiana dated 07.09.2021 was received wherein it has been reported that Custom Broker has been found involved in a case of fraudulent import pertaining to M/s PS Traders Shop. No. 20/100, Turi Bazar, Near AnardanaChowk, Patiala. Details of case is as under:

a In a Bill of Entry No. 3479461 dated 08.04.2021 filed by M/s. Safe Cargo Clearing Services on behalf of M/s P. S. Traders, Shop No. 20/100, Turi Bazar, Near AnardanaChowk, Patiala, Punjab holding IEC No. GAUPS9998M, for import of 14836 Kg of Aluminium Scrap under CTH 76020010 having assessable value of Rs. 12,51,524/- After issuance of Customs Out of Charge (COC), during transit, the consignment was intercepted by the Preventive Wing, CGST Commisssionerate, Ludhiana and apart from 10.300 MT Iron Scrap, 3960000 Cigarette Sticks of 100 mm length with Filters & four Alloy Wheels recovered. A case was booked and later, goods have been seized under section 110 of Customs Act, 1962.

b. Certain documents such as examination reports, detention memo, statements of Customs Officers namely ShriSandeep Kumar, Inspector &ShriRambir Singh, Supdt. statements of Customs Brcker ShriAbdesh Kumar of M/s Safe Cargo Clearing Services, Ludhiana and Shri Sunil Dutt, G-Card holder working with M/s Safe Cargo Clearing Services, Ludhiana have been provided to this office by the CGST Commisssionerate, Ludhiana. Further, during investigation by this office statements of ShriPrabhjot Singh, proprietor of M/s P. S. Traders, Patiala, Custom Broker ShriParamjit Singh, G-Card holder of M/s DAS Logistics Pvt. Limited, Ludhiana, representative of Shipping Line and others have been recorded under Section 108 of the Customs Act, 1962,

(d) In this case, it has been seen that the said consignment was marked for 50% examination, however was cleared from the Customs Area without conducting examination, without depositing of Customs duty & other levies and also on the basis of manual COC. Even Customs seal was not broken. Further, Cigarettes imported in the said consignment in the guise of Aluminum Scrap / by concealing in Scrap are under prohibition The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 provides that "No person shall import cigarettes or any other tobacco products for distribution or supply for a valuable consideration or for sale in India unless every package of cigarettes or any other Tobacco products so imported by him bears thereon, or on its label, the specified warning". In the instant case, cigarettes have been found without statutory pictorial & textual warning As per Regulation 10 (n) of the Customs Broker Licensing Regulations, 2018 (Notified under Notification No. 41/2018-Customs (NT) dated 14.05.2018. The Customs Broker has an Obligation to verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information. But Sh. Sunil Dutt, G-card of M/s Safe Cargo Clearing Services in his statement dated 12.04.2021 recorded under CGST Act, 2017 himself admitted his fault. Sh. Sunil Dutt, G-card of M/s Safe Cargo Clearing Services has mentioned that he never met the proprietor of M/s P. S. Traders. Patiala on whose behalf he had filed the import documents. Further Sh Sunil Dutt is not appearing before Customs despite Summon being sent on 12.08.2021, 28.08.2021, 31.08.2021 & 11.09.2021 In this regard a complaint under Section 174-175 of Indian Penal Code. 1860 has been lodged before Chief Judicial Magistrate. Ludhiana,

(e) He was duty bound to confirm the KYC of importer before filing the import documents and examination of consignment and payment of Customs duty before clearance of the consignment. The said consignment was managed to clear from Customs without examination on 09.04 202 whereas the M/s Safe Cargo Clearing Services was responsible to get the consignment examined for which documents were filed by him. M/s Safe Cargo Clearing Services has failed in his duties by submitting. signing false declaration or documents to Customs in the transaction of his business as a Customs broker &authorized representative of the importer.

(f) It is pertinent to mention here that Sh. Sunil Dutt, G-card of M/s Safe Cargo Clearing Services in his statement dated 15.04.2021 tendered by him before the CGST official, has stated that he had already deleted the communication of whatsapp chat which was crucial evidence in the case and hence, cannot be trusted in any manner. It appears that he in connivance with other accused managed to illegally clear the consignment having Cigarettes and later on deleted all the whatsapp chat/ call records with their crime partners.

(g) In the instant case, Sunil Dutt did not persuade the importer to deposit Customs duty and examination of consignment. Also, warehouse file for issuance of Gate pass was. prepared by him, however he did not come forward to get issuance of gate pass. Though, he was responsible to get the consignment examined, examination of the said import consignment was not conducted. Hence, M/s Safe Cargo Clearing Services has not performed his duty with due diligence and with utmost efficiency and has not fulfilled the obligations of Custom Broker as envisaged in Regulation 10 of CBLR, 2018 and have not discharged his duties as a Customs Broker.

3.2 As mandated by Regulation 10(n) the CBLR, 2018, the Customs Broker was duty bound to confirm the KYC of the importer before filing the import documents, which the Customs Broker and his employee G-Card holder Sh. Sunil Dutt failed to do. The Customs Broker consciously owned the deeds and acts done by his employee G card Holder Sh. Sunil Dutt by way of furnishing a bond dated 14.05.2018

3.3 Moreover, the Board vide Circular No. 09/2010-Customs dated 08.04.2010 has specifically prescribed "Know Your Customer (KYC) guidelines to the CBS/CHAS so that the CBS/CHAS are not (mis)used Intentionally or unintentionally by importers/exporters indulging in fraudulent activities and with a view to control offences involving various modus operandi such as misuse of export promotion schemes, fraudulent availment of export incentives and duty evasion by bogus

IEC holders, etc. In this regard, a detailed guideline on the list of documents to be verified and obtained from the client/customer was also provided. Here, it appears that the CB failed to exercise due diligence and grossly violated the KYC guidelines of the said Circu ar dated 08.04.2010 read with the provisions of the CBLR, 2018. As per the mandate of the Regulation 10(n) of the CBLR, 2018 read with the Circular No. 09/2010-Customs dated 08.04.2010, it was incumbent upon the CB to verify identity and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information which apparently the CB have failed to do.

3.4 M/s Safe Cargo Clearing Services holding CB License number 12/CB/REG/LDH/2015 have failed to comply with the provisions of Regulation 10 of CBLR 2018 and are therefore liable for action under Regulation 14 read with Regulation 17 and 18 of CBLR, 2018, including revocation of license, forfeiture of part or whole of security & imposition of penalty Accordingly, the Commissioner of Customs, in exercise of powers conferred upon him under Regulations 16 (1) of CBLR, 2018, suspended the Customs Broker License No. 12/CB/REG/LDH/2015 vide Order issued under F.No. VIII- 13(15) Tech/ CHA/SCCS/HQRS/LDH/2015 dated 08.09.2021 (DIN 20210975NK000000C3B9) issued to Safe Cargo Clearing Services, and ordered to submit the License along with F/G/H Cards (in original) to the Deputy Commissioner (TECH), Customs Commissionerate, Ludhiana immediately. The suspension of CHA licence was continued vide order in original dated 15.11.2021 by the Commissioner, Customs, Ludhiana and later the license of the Custom Broker M/s. Safe Cargo Clearing Services 52, Rasila Nagar, opposite BBMB Power House, Chandigarh Road, Ludhiana was revoked and penalty of Rs. 50000/- has been imposed vide Order-In- Original number Comm/VG/LDH/CUSTOMS/05/2022 dated 28.06.2022. Aggrieved by the said order, the appellant has filed the present appeal.

4. Heard both the parties and perused the record.

5. Ld. Counsel appearing for the appellant submitted that the impugned order revoking the CHA licence and forfeiting security amount and imposing the penalty of Rs. 50,000/- are not sustainable in law as the same has been passed without properly appreciating the facts and the law and custom broker regulation, 2018. He further submitted that the inquiry conducted by the Deputy Commissioner Sandeep Kamboj is in violation of regulation 17(4) of CBLR, 2018 as the appellant has not been given the opportunity to cross examine certain persons whose statements was relied upon by the department. He further submitted that the reasons for denial of cross examination is also not legally sustainable.

6. He further submits that the documents relied upon by the inquiry officer were not supplied to the appellant in spite of their request thereby entire inquiry is vitiated and cannot be relied upon for inflicting any punishment on them. He further submits that the custom broker filed bill of entry no. 347461 dated 08.04.2021 on the basis of documents supplied by the importer Ms. P.S. Traders after complying with KYC norms. He also submits that the impugned goods were not presented for examination because the custom duty was not paid and the goods were clandestinely removed without issuing custom out of charge order. He further submits that the custom broker was not involved in clandestine removal of the goods from the port with the connivance of custom officers.

7. He further submits that prima facie facts of the case shows that impugned goods were removed clandestinely with the connivance of custom officers for which custom broker cannot be punished.

8. Ld. Counsel took us through to the report of the inquiry officer and pointed out that there are contradictions in the same. He further submits that the show cause notice issued to the appellant is defective one, as it has been issued without bringing on records, statement of custom officers, custodian, CGST officers etc. Hence, the same is bad in law. He further submits that the inquiry officer has not given any finding regarding issuance of notice beyond the period of limitation.

9. In support of his submissions, he relied upon the following decisions:

* ***Trade Wings Logistics India Pvt. Ltd. Vs. Commissioner of Customs 2019 (370) ELT 510 (T).***
* ***Anax Air Services Pvt. Ltd. Vs. Commissioner of Customs, New Delhi.***

10. On the other hand, Ld. DR supported the findings in the impugned order and submitted that the custom broker has failed to comply with the regulations as prescribed in regulation 10 of CBLR. He further submitted that Sunil Dutt, G-card holder of the appellant was responsible to get the consignment examined, but examination of the consignment was not conducted and he was aware that consignment was cleared without examination and payment of custom duties but he did not inform the custom department of the same. Hence, he has not performed his duty with due diligence

and utmost efficiency and has not fulfilled the obligations of custom broker as envisaged in regulation 10 of CBLR, 2018. He further submits that the inquiry officer recorded the statement of Abdesh Kumar F-card holder of the custom broker and Sunil Dutt G-card holder of custom broker dated 12.04.2021 wherein they have admitted that they had not obtained any KYC documents from the actual importer i.e. PS traders. Further, Sunil Dutt admitted all the documents including the KYC were provided to him by Sandeep Kumar, inspector customs and he never contacted the actual importer during and after the clearance of the consignment which is in violation of regulation 10(n) of CBLR, 2018.

11. Ld. DR further submits that the custom broker consciously owned deeds and acts done by his employees i.e.
G-card holder, Sunil Dutt by way of furnishing a bond dated 14.05.2018.

12. Ld. DR further submits that cross examination was denied because no cogent reasons were given for seeking cross examination at the belated stage. She further submitted that revocation of licence and imposition of penalty has been imposed by the adjudicating authority after following the procedure laid down under regulation 17 of CBLR, 2018.

13. Ld. DR in support of her submission has relied upon the following decisions:-

- ***Swastic Cargo Agency Vs. Commissioner of Customs, New Delhi of CESTAT 2023(2) TMI 677 dated 16.02.2023.***
- ***Commissioner of Customs Vs. K.M Ganatra & Co. reported in 2016 (332) ELT 15 (SC) dated 14.01.2016.***
- ***M/s Meenu Rathore Vs. CCE, Ludhiana in Final Order no. 60126/2023 dated 11.05.2023.***
- ***M/s Falcon India (Customs Broker) Vs. Commissioner of Customs, New Delhi vide order dated 21.03.2023.***

14. We have considered the submissions made by both the parties and perused the material on record and the judgments relied upon by both the parties. Here it will be relevant to reproduce the provisions of the regulations CBLR 18 which are as under:
"Obligations of Customs Broker.- A Customs Broker shall-

(a) obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be.

(b) transact business in the Customs Station either personally or through an authorized employee duly approved by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be

(c) not represent a client in any matter to which the Customs Broker, as a former employee of the Central Board of Indirect Taxes and Customs gave personal consideration, or as to the facts of which he gained knowledge while in Government service;

(d) advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non- compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;

(e) exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage.

(f) not withhold information contained in any order, instruction or public notice relating to clearance of cargo or baggage issued by the Customs authorities, as the case may be, from a client who is entitled to such information

(g) promptly pay over to the Government, when due sums received for payment of any duty, tax or other debt or obligations owing to the Government and promptly account to his client for funds received for him from the Government or received from him in excess of Governmental or other charges payable in respect of cargo baggage on behalf of the client;

(h) not procure or attempt to procure directly or indirectly, information from the Government records or other Government sources of any kind to which access is not granted by the proper officer

(i) not attempt to influence the conduct of any official of the Customs Station in any matter pending before such official or his subordinates by the use of threat, false accusation, duress or the offer of any special inducement or promise of advantage or by the bestowing of any gift or favour or other thing of value.

(j) not refuse access to, conceal, remove or destroy the whole or any part of any book, paper or

other record, relating to his transactions as a Customs Broker which is sought or may be sought by the Prinopal Commissioner of Customs or Commissioner of Customs, as the case may be;

(k) maintain up to date records such as bill of entry, shipping bill, transhipment application etc all correspondence, other papers relating to his business as Customs Broker and accounts including financial transactions in an orderly and itemised manner as may be specified by the Principal Commissioner of Customs or Commissioner of Customs or the Deputy Commissioner of Customs or Assistant Commissioner of Customs as the case may be.

(l) immediately report the loss of license granted to him to the Principal Commissioner of Customs Commissioner of Customs, as the case may be.

(m) discharge his duties as a Customs Broker with utmost speed and efficiency and without any delay

(n) verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable independent, authentic documents data or information,

(0) inform any change of postal address, telephone number, e-mail etc to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, of all Customs Stations including the concerned Deputy Commissioner or Assistant Commissioner of the Commissionerate who has granted the license immediately within two days;

(p) maintain all records and accounts that are required to be maintained under these regulations and preserve for at least five years and all such records and accounts shall be made available at any time for the inspection of officers authorized for this purpose; and

(q) co-operate with the Customs authorities and shall join investigation promptly in the event of an inquiry against them or their employees.

14. Further in order to appreciate the role and the position of CHA the Hon'ble Apex Court in the case of ***Commissioner of Customs K.M. Ganatra & Co. reported in 2016 (332) ELT***

15 (SC) and placed on the reliance of ***Noble Agency Vs. Commissioner of Customs, Mumbai [2002 (142) ELT 84 (Tri.- Mumbai]*** wherein a Division Bench of the CESTAT, West Zonal Bench, Mumbai has observed :

"The CHA occupies a very important position in the Customs House. The Customs procedures are complicated. The importers have to deal with a multiplicity of agencies viz. carriers, custodians like BPT as well as the Customs. The Importer would find it impossible to clear his goods through these agencies without wasting valuable energy and time. The CHA is supposed to safeguard the interests of both the importers and the Customs. A lot of trust is kept in CHA by the importers/ exporters as well as by the Government Agencies. To ensure appropriate discharge of such trust, the relevant regulations are framed. Regulation 14 of the CHA Licensing Regulations fists out obligations of the CHA. Any contravention of such obligations even without intent would be sufficient to invite upon the CHA the punishment listed in the Regulations...." We approve the aforesaid observations of the CEGAT, West Zonal Bench, Mumbai and unhesitatingly hold that this misconduct has to be seriously viewed."

"29. Similarly, the view taken by the High Court of Madras, in Sri Kamakshi Agency Vs Commissioner of Customs, Madras -2001 (129)
ELT 29 it has been held that:

"the grant of licence to act as a Custom House Agent has got a definite purpose and intent. On a reading of the Regulations relating to the grant of licence to act as Custom House Agent, it is seen that while Custom House Agent should be in a position to act as agent for the transaction of any business relating to the entry or departure of conveyance or the import or export of goods at any customs station, he should also ensure that he does not act as an agent for carrying on certain illegal activities of any of the persons, who avail his services as Custom House Agent. In such circumstances, the person playing the role of Custom House Agent has got greater responsibility. The very prescription that one should be conversant with various procedures, including the offences under the Customs Act to act as a Custom House Agent would show that, while acting as Custom House Agent, he should not be a cause for violation of those provisions. A CHA cannot be permitted to misuse his position as a CHA by taking advantage of the access to the department. The grant of licence to a person to act as Custom House Agent is to some extent to assist the department with the various procedures such as scrutinising the various documents to be presented in the course of transaction of business for entry and exit of conveyance or the import or export of the goods. In such circumstances, great confidence is reposed in a Custom House Agent. Any misuse of such position by

the Custom House Agent will have far reaching consequences in the transaction of business by the Custom House officials."

***30**. The recent decision of this Tribunal in the case of M/s Falcon India (Customs Broker) Vs. Commissioner of Customs, (Airport and General) New Delhi in Customs Appeal No. 50934 of 2021 dated 21.03.2022, it has been observed:*

"33. The above decisions lay down that the Customs Broker (or Custom House Agent) is a very important person in the transactions in the Custom House and it is appointed as an accredited broker as per the Regulations and is expected to discharge all its responsibilities under them, Violations even without intent are sufficient to take action against the appellant. While it is true, as has been decided in a number of cases, that the Customs Broker is not expected to do the impossible and is not expected to physically verify the premises of the importer or doubt the documents issued by various Governmental authorities for KYC, it is equally true that the Customs Broker is expected to act with great sense of responsibility and take care of the interests of both the client and the Revenue. It is expected to advise the dient to follow the laws and if the client is not complying, it is obligated under the Regulations to report to the Assistant Commissioner or Deputy Commissioner. Fulfilling such obligations is a necessary condition for the CB licence and it cannot be termed as 'spying for the department' as argued by the appellant before us. It has also been argued that If it sples for the department, it will lose its business. It is evident from the facts of this case, that the appellant was not only aware of the benami Bills of Entry but has actually filed them with the full knowledge that they were benami and they were filed by Anil after a case of undervaluation has been booked by DRI against him. It is afraid of losing business because it has built its business model on violators who, it does not want to upset by reporting to the department. Therefore, we find no reason to show any leniency towards the appellant. At any rate, once violation is noticed, it is not for the Tribunal to Interfere with the punishment meted out by the disciplinary authority, viz., the Commissioner unless it shocks our conscience. In this case, it does not."

15. Further, we find that in the present case Sunil Dutt G- card holder in connivance with other accused managed to illegally cleared the consignment having cigarette and later deleted all the whatsapp chat/call records in connivance with their crime partners.

16. Further, we find that Sunil Dutt has categorically admitted in his statement that he has not obtained any KYC documents from the actual importer and all the documents including the KYC were given to him by Sandeep Kumar inspector and he has never contacted and met the actual importer at any point of time. Thereby, he has violated the regulation 10(n) which prescribed that the custom broker has to verify correctness of the importer exporter code (IEC) number, goods and services tax identification number (GSTIN), identify of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information. The appellant had failed to verify the correctness of IEC, identity and whereabouts of the firms with authentic data and information thereby violating the obligations cast upon it under Regulation 10 (n) of CBLR 2018.

17. Further, we find that the Hon'ble Supreme Court in the case of ***K.M. Ganatra & Co.*** has laid down that CHA is very important person in the transaction in the custom house and he is appointed as an accredited broker as per the Regulation and is expected to discharge all its responsibilities under them. Violations even without intent are sufficient to take action against the appellant. While it is true, as has been decided in a number of cases, that the customs broker is not expected to do the impossible and is not expected to physically verify the premises of the importer or doubt the documents issued by the government authorities for KYC, it is equally true that the customs broker expected to act with great sense of responsibility and take care of the interests of both the client and the Revenue. He is expected to advise the client to follow the laws and if the client is not complying, it is obligated under the Regulations to report to the Assistant Commissioner or the Deputy Commissioner. Fulfilling such obligations is a necessary condition for the custom broker licence and it cannot be termed as spying for the department as argued by the counsel for the appellant.

18. It has been argued that if it spies for the department, it will not lose its business. From the evidence on record, it appears that the custom broker was having the knowledge that container does not contain the scrap but something else. It is also fact that Sunil Dutt informed the CGST team after the goods were cleared and thereafter the CGST department seized the goods when the same was in transit. Therefore, there is no doubt he has helped the Custom Department to confiscate the illegal smuggled items which was cleared without payment of duty and without examination.

19. Further, we find that there is no doubt that the appellant has not performed his duty with due diligence and utmost efficiency and has connived with Sandeep Kumar inspector and Rambir Superintendent in illegally clearing the consignment having cigarette and later on deleted all the whatsapp chats/call records with their crime partners which clearly shows that he has not fulfilled the obligation under regulation 10 of CBLR, 2018 but his act and conduct does not nwarrant the imposition of extreme penalty of revocation of custom broker licence depriving him of his livelihood. But certainly his conduct warrants, the imposition of penalty and forfeiture of security deposit.

20. In view of our discussion above, after considering the entire facts and circumstances of the case, we hold that revocation of custom broker licence of the appellant is not warranted and we set aside the revocation. As far as the imposition of penalty and forfeiture of security deposit are concerned, we are of the opinion that the imposition of penalty of Rs. 50,000/- and forfeiture of security are justified in the facts and circumstances of the case.

21. In result, we set aside the revocation and confirm the imposition of penalty and forfeiture of security deposits.

(Order pronounced in the open court on 03.10.2023)

(S. S. GARG) MEMBER (JUDICIAL)

(P. ANJANI KUMAR) MEMBER (TECHNICAL)

Kailash

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

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REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 60278 Of 2020

[Arising out of 02/CUS/ASR/PRV/2020 dated 03.07.2020 passed by the Commissioner of Customs, Amritsar]

Narayan Sharma **: Appellant (s)**

S/o Santosh Sharma, resident of 283,

Street No. 3, Ambedkar Nagar-2, Gaziabad, UP-201001

Vs

Commissioner of Customs, Amritsar **: Respondent (s)**

Central Revenue Building, The Mall, Amritsar

With

(2) Customs Appeal No. 60357 of 2020-Pardeep Saini
(3) Customs Appeal No. 60387 of 2020 – Sreet Saini
(4) Customs Appeal No. 60003 of 2021-Vaibhav Rai
(5) Customs Appeal No. 60004 of 2021-Rakesh Rai

[Arising out of Common impugned order No. 02/CUS/ASR/PRV/2020 dated 03.07.2020 passed by the Commissioner of Customs, Amritsar]

APPEARANCE:

Shri Naveen Bindal, Advocate for the Appellant

Shri Dilpreet Singh Gandhi, Advocate for the Appellant Ms. Swati Chopra, DR for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

ORDER No. A/60464-60468/2023

Date of Hearing:07.06.2023
Date of Decision:05.10.2023

Per : S. S. GARG

These five (5) Appeals are directed against the common impugned order dated 03.07.2020 passed by the Commissioner of Customs, Amritsar whereby the Ld. Commissioner has passed the following order:-
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"(1) I order absolute confiscation of gold bar weighing 995.5 grams valued at Rs 32,98,350/-, seized under seizure memo dt. 22.03.2019, under section 111(d), 111(1), 111(1) and 111(m) of the Customs Act, 1962.

(2) I confirm duty of Rs 11,80,872 on gold valued at Rs 30,67,200/- under section 28 of the Customs Act, 1962 and order its recovery from Noticee 3, Sh. Narayan Sharma alongwith interest under section 28AA of the Act, ibid.

(3) I confirm duty of Rs 23,44,804/- on gold valued at Rs 60,90,400/- under section 28 of the Customs Act, 1962 and order its recovery from Noticee 4, Sh. Rishab Saini alongwith interest under section 28AA of the Act.

(4) I order absolute confiscation of the Indian currency of Rs 2.20 lacs detained from the premises of the Noticee 2, Sh. Pardeep Saini, on 23.03.2019 under Section 121 of the Customs Act, 1962.

(5) 1 Impose a penalty of Rs. 50,000/- (Rs. Fifty Thousand only) on Sh. Sahib Singh, Noticee 1, under Section 112 of the Customs Act, 1962;

(6) I impose a penalty of Rs. 15,00,000/- (Rs. Fifteen Lakhs only) on Sh. Pardeep Saini, Noticee 2, under Section 112 of the Customs Act, 1962;

(7) I impose a penalty of Rs. 1,00,000/- (Rs. One Lakh only) on Sh. Narayan Sharma, Noticee 3 under Section 112 of the Act read with section 114 of the Act.

(8) I impose a penalty of Rs.5,00,000/- (Rs Five Lakhs only) on Sh. Rishab Saini, Noticee 4, under Section 112 of the Customs Act, 1962.

(9) I impose a penalty of Rs.15,00,000/-(Rs Fifteen Lakhs only) on Sh. Rakesh Rai, Noticee 5, under Section 112 of the Customs Act, 1962.

(10) I impose a penalty of Rs.5,00,000/- (Rs Five Lakhs only) on Sh. Vaibhav Rai, Noticee 6, under Section 112 of the Customs Act, 1962.

(11) I order confiscation of Toyota Innova car bearing Registration No. PB02-BZ-7000 registered in the name of Smt. Sreet Saini, Noticee 7, seized under Section 110 of the Customs Act, 1962 under section 115(2) of the Customs Act, 1962. However I order Noticee 7 may redeem the said vehicle on payment of redemption fine of Rs. 1,00,000/- (Rs. One Lakh only) under section 125 of the Customs Act, 1962

(12) I impose a penalty of Rs. 50,000/- (Rs. Fifty Thousand only) on Smt. Sreet Saini, Noticee 7, under Section 117 of the Act;

(13) I order confiscation of Bus with registration No. PB-02 CR 3991 seized under Section 110 of the Customs Act, 1962 from Noticee 8, (M/s InterGlobe Aviation Limited, SGRDJI Airport, Amritsar) under Section 115(2) of the Customs Act, 1962. However, I order that it may be redeemed on redemption fine of Rs. 50,000/- (Rs. Fifty Thousand only) under section 125 of the Customs Act, 1962.

(14) I impose a penalty of Rs. 5,000/- (Rs Five Thousand only) on M/s InterGlobe Aviation Limited, Noticee 8, under Section 117 of the Act;"

2. Briefly the facts of the present case are that on 22.03.2019, based upon a specific input, Customs officers at SGRDJI Airport, Amritsar found suspicious object wrapped in yellow coloured cloth bag from the cavity near the driver seat in the bus bearing registration number PB-02 CR 3991 operated by M/s Inter Globe Aviation Limited (IndiGo Airlines) to ferry passengers from Aircraft to terminal building and vice versa, the suspicious object was found to be a gold bar with foreign marking "MTM 1 Kg GOLD 995 MELYER ASSAYER B020344" and Customs officers took the possession of the said gold bar.

- Panchnama dated 22.03.2019 was drawn on the spot and the gold was got certified by the Goldsmith M/s Khalsa Jewellers, Raja Sansi, Amritsar, who vide its certificate dated 23.03.2019 certified that the gold bar in question was of 99.5% purity Le. 24 Karat, having gross weight of 999.50 grams (foreign origin) and having market value of Rs. 32,98,350/-. The said Gold bar recovered from the said bus along with its packing material i.e. yellow coloured cloth bag with

bus bearing registration number PB-02 CR 3991, were seized under recovery cum seizure memo dated 22.03.2019 under Section 110 of the Customs Act, 1962 (hereinafter referred to as 'the Act') on the reasonable belief that the same are liable to confiscation under Section 111, 115 & 118 of the Customs Act, 1962.

- As per the Department, the said bus was being driven by Shri Sahib Singh driver of the bus who is not the appellant before me and his statement was recorded under Section 108 of the Customs Act, 1962 on 22.03.2019 by Superintendent of Customs, Amritsar wherein he has admitted 1 Kilo Gram Gold was handed over to him by a passenger who came on board Indigo Flight 6E048 from Dubai; but the name is not known to him because on the earlier occasion also, the same person also handed over Gold to him on 04.03.2019. He also said on three previous occasions, Gold was handed over to Sh. Pardeep Saini by him. He further clarified that on previous two occasions, the Gold was brought by Shri Rishab Saini, son of Shri Pardeep Saini. Though the Rishab Saini has not filed appeal before the Tribunal but Sh. Pardeep Saini and his wife Smt. Sreet Saini have filed appeals before the Tribunal. He has also admitted the modus- operandi of whole smuggling of Gold and also admitted that he get Rs. 10,000/- for each transaction of gold.
- Similarly, the statements of other appellants were recorded under Section 108 of the Customs Act, 1962 wherein they have partly admitted the smuggling of gold.
- After completion of investigation, show cause notices were issued to the appellants, as per impugned order to call upon to show cause as to why:-

"19.3 Sh. Pardeep Saini was called upon to Show Cause as to why:-
(1) Penalty should not be imposed upon him for involvement in the smuggling of seized 999.5 grams of gold valued at Rs. 32,98,350/- on 22.03.2019 and in the smuggling of 3000 grams of gold valued at Rs. 9157600/- on previous multiple occasions
i.e. on 15.02.2019, 04.03.2019 and 09.03.2019 under Section 112(a) & 112(b) of the Act.
(ii) Indian currency of Rs 2.20 lacs which was detained from the premises of the Noticee 2 on 23.03.2019 should not be absolutely confiscated under Section 121 of the Customs Act, 1962
19.4 Sh. Narayan Sharma was called upon to Show Cause as to why:-
(1) Gold bar weighing 999.5 grams valued at Rs. 32,98,350/- smuggled on 22.03.2019 and seized under Seizure Memo dated 22.03.2019, should not be absolutely confiscated under Section 111(d), 111(i), 111(I) and 111(m) of the Customs Act, 1962;

19.6 Shri Rakesh Rai, Noticee 5 was called upon to Show Cause as to why:-
(1) Gold bar weighing 999.5 grams valued at Rs. 32,98,350/- smuggled on 22.03.2019 and seized under Seizure Memo dated 22.03.2019, should not be absolutely confiscated under Section 111(d), 111(1), 111(I) and 111(m) of the Customs Act, 1962;
(ii) Penalty should not be imposed upon him for involvement in the smuggling of seized 999.5 grams of gold on 22.03.2019 and in the smuggling of 3000 grams of gold on previous multiple occasions i.e. on 15.02.2019, 04.03.2019 and 09.03.2019 under Section 112(a) & 112(b) of the Act.
19.7 Sh. Vaibhav Rai, Noticee 6 was called upon to Show Cause as to why:-
(1) Penalty should not be imposed upon him for involvement in the smuggling of seized 999.5 grams of gold on 22.03.2019 and in the smuggling of 3000 grams of gold on previous multiple occasions l.e. on 15.02.2019, 04.03.2019 and 09.03.2019 under Section 112(a) & 112(b) of the Act.
19.8 Smt. Sreet Saini Noticee 7 was called upon to Show Cause to as to why:-
(i) Toyota Innova car bearing Registration No. PB02-B2-7000 used by Sh. Pardeep Saini to commute to and from the Airport and smuggle the gold out of Airport which was seized under Section 110 of the Customs Act, 1962 should not be absolutely confiscated under Section 115(2) of the Customs Act, 1962.
(ii) Penalty should not be imposed upon her under Section 117 of the Act;"

- Out of these five (5) appellants, Shri Rishab Saini did not choose to file the reply to the show cause notice which was issued to him whereas other appellants denied the allegations against them by stating that they have been falsely implicated in the present case and they have no role in the said smuggling of gold.

3. Heard both the parties and perused the records.

4. Ld. Counsel Shri Naveen Bindal appearing for the appellant Shri Narayan Sharma submitted that the demand of duty and penalty on the appellant Shri Narayan Sharma is only based upon his statement given under Section 108 of the Customs Act, 1962 but the said statement has not been read as a whole and relied upon in toto but read in piecemeal. He further submits that the appellant is hardly studied upto 10th class and also does not know English language whereas the customs officer has got his statement typed and the signature was obtained without explaining the same to him. He further submits that the demand of customs duty has been confirmed under Section 28 of the Customs Act, 1962 alongwith interest under Section 28AA whereas as per law before confirming the duty, a show cause notice is required to be served upon the person chargeable with duty. He further submits that as per Section 17 of the Customs Act, 1962 the importer shall assess the duty liability at the time of import and the proper officer shall verify the assessment or may re-assess the goods. He further submits that in the present case, the appellant Shri Narayan Sharma is not the importer and therefore, the duty under Section 28 cannot be confirmed and recovered from him who according to the Counsel was only a carrier and not the importer of the alleged goods. He further submits that the appellant Shri Narayan Sharma is working as a salesman with M/s Ganesh Book Depot and also worked as driver for them. He further submitted that the appellant went to Dubai with Shri Vaibhav Rai s/o Shri Rakesh Rai. He also submits that the Ld. Commissioner has given categorical findings in Para 36 and 39 of the impugned order that Shri Rakesh Rai was mastermind and chief organizer of the alleged smuggling of gold and was also involved in arranging foreign currency. He further submitted that the Ld. Commissioner has given finding against Shri Vaibhav Rai by holding that he purchased 1Kg gold and gave it to Shri Narayan Sharma to hand over the same to Shri Sahib Singh, driver of the bus. He further submitted that Shri Rakesh Rai and Shri Vaibhav Rai had played major role in the entire smuggling of gold and were also the actual beneficiary of the whole smuggling. The foreign currency was also arranged by Shri Rakesh Rai and gold was purchased by Shri Vaibhav Rai in Dubai. Further, the appellant did not bring the gold outside the Airport. He further submits that the appellant was only a carrier who used to be paid Rs. 10,000/- for carrying the gold and handover the same to the driver of the Bus. He further submits that the penalty imposed on the appellant Shri Narayan Sharma is on a higher side.

5. Ld. Counsel Shri Dilpreet Singh Gandhi appearing for the Appellant Shri Rakesh Rai has submitted that the entire allegation against Shri Rakesh Rai is based upon the statement of Shri Narayan Sharma and despite request; cross examination of the said person was denied to him which is in violation of principle of natural justice. He also submits that if the statement of Shri Narayan Sharma is excluded then nothing remains against him and therefore, the cross examination of the said witness was essential before any penalty is imposed on him. He further submits that the allegations that he gave foreign currency USD 33,000 to Shri Narayan Sharma is not proved by any cogent evidence and cannot be believed.

5.1 Ld. Counsel cited some decisions wherein it has been held that the statement against assessee cannot be used without giving them opportunity of cross examination.

5.2 Ld. Counsel submitted on behalf of Shri Pardeep Saini that no recovery was affected from him and he has been falsely implicated only on the statement made by Shri Naryana Sharma under Section 108 of the Customs Act, 1962. He further submits that penalty could not be imposed on him because he had no *mens rea.* He also submits that no cross examination of Shri Narayan Sharma was granted to him and therefore his statement cannot be relied upon to impose penalty and further the penalty imposed on him is on higher side which is not justified.

5.3 Similarly, the ld. Counsel has submitted on behalf of Shri Vaibhav Rai that he has been falsely implicated and his statement was recorded under coercion and pressure and cannot be relied upon for imposing penalty.

5.4 Ld. Counsel appearing on behalf of Smt. Sreet Saini submits that she has no role in the entire smuggling of gold and the Toyota Innova Car bearing Registration No. PB02-BZ-7000 which is allegedly used in the said smuggling was registered in her name.

5.5 Besides, the Indian currency of Rs. 2,20,000/- was also recovered from the residential premises of Shri Pardeep Saini and Smt. Sreet Saini on the basis of search

conducted on 23.03.2019.

6. On the other hand, the Ld. DR reiterated the findings in the impugned order and filed the written submissions controverting the grounds of which the appellants have filed these present appeals. He further submitted that the Ld. Commissioner has considered all the statements made by the appellants and has given detailed findings regarding the alleged smuggling of gold by the appellants. He further submitted that the confessional statement of the appellants clearly indicates the role played by Shri Sahib Singh and Shri Pardeep Saini in all the transactions on various occasions.

7. After considering the submissions of both the parties and perusal of material on record, as far as the appeal of Shri Narayan Sharma is concerned, I find that in his confessional statement, he has admitted that he was a carrier of the gold which was recovered from the cavity near the driver seat in the Bus bearing No. PB-02-CR 3991 operated by M/s Inter Globe Aviation Limited (Indigo Airlines). Further, I find that Shri Narayan Sharma has stated in his confessional statement that he is working as salesman with M/s Ganesh Book Depot and went to Dubai along with Shri Vaibhav Rai son of Shri Rakesh Rai and brought the gold which was handed over to Shri Sahib Singh driver of the bus. Further, I find that in his statement, he admitted that Shri Rakesh Rai and Shri Vaibhav Rai played major role in the entire smuggling of gold and both were the actual beneficiary of the smuggling of gold and he was only getting Rs. 10,000/- as a carrier for carrying the gold and handing over the same to the driver of the bus.

7.1 Further, I find that the demand of customs duty has been wrongly confirmed under Section 28 of the Customs Act along with interest under Section 28AA because no show cause notice which is required to be served upon the person chargeable with duty was issued to Shri Narayan Sharma. Therefore, I hold that the demand of duty of Rs. 11,80,872/- alongwith interest under Section 28AA of the Customs Act is not sustainable in law and therefore, I set-aside the same but keeping in view his role in the entire smuggling activity, penalty of Rs. 1,00,000/- which has been imposed by the Ld. Commissioner of Customs under Section 112 of the Customs Act readwith Section 114 of the Customs Act is upheld.

7.2 Further, in the case of Appellant Shri Pardeep Saini, I find that he was serving as Assistant Manager (Fire Service) Airport Authority of India. No recovery has been directly affected from his possession but he is one of the man accused involving in the smuggling of the gold seized on 22.03.2019.

7.3 Further, I find that Shri Sahib Singh who was driver of the Bus has categorically stated in his statement that gold weighing 1Kg each was delivered to him on three previous occasions also and the same was handed over to Shri Pardeep Saini who has also admitted in his statement, he received Rs. 25,000/- for each transaction of gold.

7.4 Further, I find that the Ld. Commissioner, Customs has relied upon the judgement of the Hon'ble Supreme Court in the case of Naresh J. Sukhawani vs. Union of India [1996 (83) E.L.T. 258 (S.C.)] wherein it has been held that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973 and such statement of co- accused can be used as a substantive evidence.

7.5 Further, It has been held by the Hon'ble Supreme Court in the case of K.I. Pavunny v. Assistant Collr. (HQ), C. Ex. Collectorate, Cochin [1997 (90) E.LT. 241 (S.C.)], the confessional statement under Section 108 of Customs Act, 1962, if found to be voluntary, can form the sole basis of conviction and that the burden is on the accused to prove that the statement was obtained by threat, duress or promise.

7.6 Further, I find that it is relevant to reproduce the relevant finding of the Ld. Commissioner in the impugned order regarding the role played by some of the appellants which is quoted in Para 26 herein as under:-

"26 Noticee 1 in his statement dt. 22.03.19 has admitted that one kilogram gold bar was handed over to him by a passenger who came on board IndiGo flight 6E048 from Dubai and that he did not know the identity of that passenger but could identify him. He has categorically stated that Shri Pardeep Saini, (Noticee 2) was to collect this gold bar from him to whom he had delivered gold weighing 1 kilogram collected from the same passenger on previous occasions also. He identified that a cavity in the passenger bus was used on all these occasions to conceal gold.

Noticee 2, in his statement dt. 22.03.2019 has admitted that this one kilogram gold was

to be delivered to him by Noticee1 inside the Airport; that on previous three occasions gold had been handed over to him; that he identified Shri Narayan Sharma (Noticee 3) as the person who collected gold from him, who he elaborated was the passenger who had brought the gold bars on 22.03.2019 and it was to Noticee 3 that he would have handed over this gold bar.

Noticee 3, in his statement dt.25.03.2019, has stated that on 17.03.19, he landed in Dubai and was carrying 33,000 US Dollars, given to him by Sh Rakesh Rai (Noticee 5) and Noticee 2. After getting these US Dollars converted into Arab Emirates Dirham (AED), he purchased 1 kg gold bar that he brought to Amritsar on 22.03.19. He has admitted that as instructed by Noticee 2 and 5, he identified the person by a pre-decided identification signal and handed over that gold bar of one kilogram to the driver of the first bus of IndiGo Airlines that came to ferry passengers. Thereafter he stated that he left for Delhi.

I find that Sh Rakesh Rai (Noticee 5), in his statement dt. 27.08.19 & 28.08.19 has either denied what was imputed to him by other Noticees or given evasive and doubtful replies. It is clear that he joined the investigations being done by the Customs Staff as per orders passed by the Hon'ble High Court at Chandigarh.

On going through the above statements tendered by Noticee 1, 2, 3, and 5 under section 108 of the Act, it is clear that they knew each other and that a complex maze of network was built to act together. I find that Noticee 1, 2,3 and 5 in their statements made before the Customs Officer under Section 108 of the Customs Act have clearly confessed about their guilt of indulging in smuggling activity. I find that the Noticees have never alleged that those statements were obtained under duress or coercion and also that they have never retracted from those statements at any point of time thereafter. I have gone through the statements of the Noticees wherein they have clearly admitted the manner in which they were associated with the smuggling activity."

7.7 Further, I find that as far as the role played by Shri Rakesh Rai and Shri Vaibhav Rai is concerned, they were also actively involved in the entire smuggling of gold and it has also come in evidence that Shri Rakesh Rai has given the foreign currency of USD 33,000 to Shri Narayan Sharma who was a carrier of the gold.

7.8 Further, I find that the entire case is based on facts and statements of the appellants coupled with documentary evidence about purchase of gold in Dubai and how its purchase/smuggling was facilitated by the appellants and the role played by each one of them has been discussed in detail in order-in-original.

Further, after considering the entire facts and evidence, I am of the view that the penalties imposed on Shri Pardeep Saini and Shri Rakesh Rai amounting to Rs. 15,00,000/- each is on the higher side which I reduce to Rs. 5,00,000/- in each case.

7.9 In view of the categorical evidence against the appellants and their role played in the entire smuggling of gold without declaring the same to the Customs department under Section 77 of the Customs Act, 1962 is well established and therefore, I pass the following order:-

(i) I uphold the order of absolute confiscation of gold bar weighing

995.5 grams valued at Rs 32,98,350/-, seized under seizure memo dt.

22.03.2019, under section 111(d), 111(1), 111(1) and 111(m) of the Customs Act, 1962.

(ii) I dropped the demand of duty of Rs 11,80,872 under section 28 of the Customs Act, 1962 and order its recovery from Sh. Narayan Sharma.

(iii) I uphold the order of the Ld. Commissioner regarding absolute confiscation of Indian currency of Rs 2.20 lacs of Sh. Pardeep Saini, on 23.03.2019 under Section 121 of the Customs Act, 1962.

(iv) 1 reduce the penalty on Sh. Pardeep Saini from Rs. 15,00,000/- to 5,00,000/- under Section 112 of the Customs Act, 1962;

(v) I uphold the penalty of Rs. 1,00,000/- on Sh. Narayan Sharma, under Section 112 of the Act read with section 114 of the Act.

(vi) 1 reduce the penalty from Rs. 15,00,000/- to 5,00,000/- on Shri Rakesh Rai, under Section 112 of the Customs Act, 1962;

(vii) I uphold the penalty of Rs.5,00,000/- on Sh. Vaibhav Rai, under Section 112 of the Customs Act, 1962.

(viii) I uphold the penalty of Rs. 50,000/- on Smt. Sreet Saini, under Section 117 of the Act.

8. In result, all the appeals are accordingly disposed off in the above terms.

(Pronounced on 05.10.2023)

(S. S. GARG)

MEMBER (JUDICIAL)

G.Y.

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALCHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 60202 Of 2020

[Arising out of OIA No. CC(A)CUS/D-II/ICD-PPG/1594-1629/2019-20 dated19.03.2020 passed by the Commissioner (Appeals) of Customs, New Delhi]

Commissioner of Customs,
New Delhi (Import & General) : **Appellant (s)**

ICDs (ICD Palwal, Haryana) Delhi-110096

Vs

Namo Alloys Pvt. Ltd. : Respondent (s)
Dudhola Road, Village Prithla, Palwal, Haryana

With

2. Customs Appeal No. 60203 of 2020
3. Customs Appeal No. 60204 of 2020
4. Customs Appeal No. 60205 of 2020
5. Customs Appeal No. 60206 of 2020
6. Customs Appeal No. 60207 of 2020
7. Customs Appeal No. 60208 of 2020
8. Customs Appeal No. 60209of 2020
9. Customs Appeal No. 60210 of 2020
10. Customs Appeal No. 60211 of 2020
11. Customs Appeal No. 60212 of 2020
12. Customs Appeal No. 60213 of 2020
13. Customs Appeal No. 60214 of 2020
14. Customs Appeal No. 60215 of 2020
15. Customs Appeal No. 60216 of 2020
16. Customs Appeal No. 60217 of 2020
17. Customs Appeal No. 60218 of 2020
18. Customs Appeal No. 60219 of 2020
19. Customs Appeal No. 60220 of 2020
20. Customs Appeal No. 60221 of 2020
21. Customs Appeal No. 60222 of 2020
22. Customs Appeal No. 60223 of 2020
23. Customs Appeal No. 60224 of 2020
24. Customs Appeal No. 60225 of 2020
25. Customs Appeal No. 60226 of 2020
26. Customs Appeal No. 60227 of 2020
27. Customs Appeal No. 60228 of 2020
28. Customs Appeal No. 60229 of 2020
29. Customs Appeal No. 60230 of 2020
30. Customs Appeal No. 60231 of 2020
31. Customs Appeal No. 60232 of 2020
32. Customs Appeal No. 60233 of 2020
33. Customs Appeal No. 60234 of 2020
34. Customs Appeal No. 60235 of 2020
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35. Customs Appeal No. 60236 of 2020

[All arising out of Common OIA No. CC(A)CUS/D-II/ICD-PPG/1594-1629/2019-20 dated 19.03.2020 passed by the Commissioner (Appeals) of Customs, New Delhi]

APPEARANCE:

Shri Rajeev Gupta, Shri Pawan Kumar, DR for the AppellantShri Rajeev Agnihotri, Advocate for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL) HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

ORDER No. A/60631-60665/2023

Date of Hearing:21.08.2023Date of Decision:29.11.2023

Per : S. S. GARG

These 35 Appeals have been filed by the Revenue against the common impugned order dated 19.03.2020 passed by the Commissioner of Customs, New Delhi whereby the Commissioner (Appeals) has allowed the appeals of the respondent and directed the lower authorities to re-assess the duties at declared value.

2. Briefly the facts of the present case are that the respondent imported Aluminium Scrap by filing 35 bills of entries at ICD Palwaland self-assessed the duty. The Bills of entries were assessed by the Deputy/Assistant Commissioner of Customs, ICD Palwal at highervalue than the declared value which was voluntarily accepted by the respondent and did not ask for any speaking order and paid enhanced duty voluntarily without any protest. However, later on, the importer challenged the value assessment and filed appeals before the Commissioner of Customs (Appeals), New Delhi who vide the impugned order set aside the re-assessment of goods at enhanced value and restored the self-assessment at the declared value and allowed the appeals filed by the importer.

3. Heard the parties and perused the case records.

Ld. DRs appearing for the Revenue submitted that the impugnedorder is not sustainable in law as the same has been passed without properly appreciating the facts and evidence on record and without considering the law laid down by the Tribunal on identical issues. He further submitted that the Ld. Commissioner (Appeals) did not appreciate that the importer in this case after seeing the contemporaneous import data (prevailing during that period) has agreed to redetermination of value in their reply to query in EDI system and voluntarily forfeited their right of show cause notice and opportunity of personal hearing. He further submits that as per his acceptance, the value was enhanced by the department and duty was discharged by the importer without showing any protest up to thedate of Out of Charge. He also submits that nobody can stop the importer of its right to protest even if the clearance was being taken to save the demurrage charges, which the importer did not avail in thepresent case. The protest, wherever shown by the Importer at appeal stage is post clearance from which it cannot be concluded that the payment of duty by the importer was under protest. He also submits that the protest if any at the appellate stage cannot be considered because the duty was not paid under protest.

4. He further submits that the Ld. Commissioner (Appeals) has failed to appreciate that in several decisions where the courts and Tribunals have held that a written admission before an Assessing Officer of Customs is an admissible evidence and in the present case also, the importer has voluntarily accepted the value loading and has requested that he doesn't require show cause notice and Personal hearing in the said letter which is available on record of the appeal paper book.

5. Ld. DR further submits that an identical issue has been considered by the Division Bench of this Tribunal in the case ofCommissioner of Customs, Delhi vs. M/s Hanuman Prasad & Sons reported in 2020 (12) TMI 1092-CESTAT NEW DELHI wherein also the Commissioner has allowed the appeal of the importer and set-aside the enhancement but the Tribunal after considering all the provisions of Customs Act, 1962 relating to valuation and Valuation Rules, 2007 and the voluntary acceptance of the enhanced value by the importer, allowed the appeals of the department.

6. Ld. DR took us through the findings of the Division Bench in the case of M/s Hanuman Prasad & Sons cited (supra). He submits that subsequent to the passing of the judgement in the case of M/s Hanuman Prasad & Sons cited (supra), another Division Bench of the Principal Bench, New Delhi of the Tribunal in the case of M/s Sumridhi Aluminium (P) Ltd. vs. Commissioner of Customs, New Delhi vide FinalOrder No. 51191-51282 of 2023 dated 13.09.2023 again examined all the rules relating to valuation and by relying upon the decision in the case of M/s Hanuman Prasad & Sons cited (supra) and other decisions dismissed the appeals of the importer.

7. Ld. DR also relied upon the following decisions in support of his submissions that once the importer has voluntarily accepted the enhanced value then the department is not required to pass a speaking order as provided in Section 17 sub-section 5 of the CustomsAct, 1962.

- Jai Shiv Trading Company Vs. Commissioner of Central Excise, New Delhi2018 (359) ELT 208(Tri-Delhi)

- Aestrik Techno-Signs Vs. Commissioner of Customs, NCH, New Delhi. FinalOrder No. 1146/2021.
- M/s Sukhdev Exports Overseas Vs Commissioner of Customs (Export),Patparganj, New Delhi (2023 (4) TMI 17-CESTAT NEW DELHI)
- ICD Patparganj & Other ICDs Vs. Manvi Exim Pvt. Ltd. vide Final Order No.50552-50559/2022 dated 04.07.2022
- Surieet Singh Chabbra VIs UOI (reported as 1997 (89) ELT 646 (SC)

- Commissioner of Central Excise, Madras Vs Systems and ComponentsPrivate Limited reported in 2004 (165) ELT 136 (SC)
- Commissioner of Customs(Import), ICD-TKD., New Delhi Vs. M/s. SodagarKnitwear Pvt. Ltd. [2018(362)ELT819(Tri-Del)]

8. On the other hand, the Ld. Counsel for the respondent has vehemently supported the impugned order passed by the Commissioner (Appeals) of Customs, New Delhi. He further submits that the Commissioner (Appeals) has allowed the appeal of the importer mainly on the following grounds:-

a) That there is no evidence that the overseas supplier and the appellant arerelated and price is not sole consideration placing reliance on the decision of the Apex court in the case of South India Television (P) Ltd., (2007(214)ELT3(SC)].

b) That they have imported scrap of various grades and the price of each grade depends on negotiations between the buyer and seller and the price fixed on the basis of market conditions, demand and supply, content of Aluminium and the expected recovery of Aluminium from such scrap; that every document was before the assessing officer but he enhanced the value without any basis.

c) That as held in the case of Sanjivini Non-Ferrous Trading Pvt Ltd. 2017 (7)GSTL82 (Tri.All.)I, assessable value have to be arrived at on the basis of price which is actually paid and in a case where price is not the actual consideration, or if the buyer and seller are related persons, then after establishing price is not the sole consideration, the transaction value can be rejected and taking evidences into consideration, assessable value can be arrived at; that in the instant case such exercise has not been done.

d) That the assessing officer has not doubted their documents like invoice, Bill of lading etc. The declared value can be rejected only in terms of Rule 12 of CVR 2007 as per Hon'ble Supreme

Court Judgement in case of Century Metals (2019(367)ELT 3(SC)]."

9. Ld. Counsel further submits that the department did not follow the procedure contemplated under Rule 12 of the valuation rules to reject the transaction value declared by the importer. He also submitsthat NIDB data cannot be the sole basis to reject the transaction valuewithout any cogent reasons. He also submits that the burden of proof lies upon the department to prove the charge of under valuation,which burden has not been discharged in the present case.

10. After considering the submissions of both the parties and perusal of material on record, we find that on identical facts, this Tribunal in the case of M/s Hanuman Prasad & Sons cited (supra) has examined the provisions relating to valuation as prescribed in the Customs Act, 1962 and the Customs Valuation Rules, 2007 and after examining the same, the Tribunal has come to the conclusion that when the importer has voluntarily accepted the enhanced value without any protest then in that case it is not incumbent upon the department to pass a speaking order. Here, it is pertinent to reproduce the relevant findings of the coordinate bench in the case of M/s Hanuman Prasad & Sons cited (supra) which is reproduced herein below:-

"21 The Commissioner (Appeals), despite a categorical statement made by the importers that they did not desire a speaking order to be passed, observed "an obligation was cast on the assessing authority to pass a speaking order disclosing the grounds for rejecting the declared value and only then the assessing officer could have enhanced the value."This finding of the Commissioner (Appeals) is perverse as it is clearly contrary to the specific statement made by the importers in the letters submitted by them to the assessing officer. What has also to be kept in mind is that section 17(5) permits the importer to waive this right.

22 It is seen from a perusal of section 17(4) of the Customs Act that the proper officer can re-assess the duty leviable, if it is found on verification, examination or testing of the goods or otherwise that the self-assessment was not done correctly. Sub- section (5) of section 17 provides that where any re-assessment done under sub-section (4) iscontrary to the self-assessment done by the importer, the proper officer shall pass a speaking order on the re-assessment, except in a case where the importer confirms his acceptance of the said re-assessment in writing.

23 In the present case, as noticed above, the proper officer doubted the truth or accuracy of the value declared by the importer for the reason that contemporaneous data had a significantly higher value. It was opento the importers to requirethe proper officer to intimate the grounds in writing for doubting the truth or accuracy of the value declared by them and seek a reasonable opportunity of being heard, but they did not do so. On the other hand, the importers submitted in writing that though they had declared the value of the imported goods at 1.20 USD per kg., but on being shown contemporaneous data, they have agreed that the value of the goods should be enhanced to 1.80 USD per kg for Hanuman Prasad and to 1.94 USD per kg. for Niraj Silk. The importers also specifically stated that they did not want to avail of the right conferred on them under section 124 of the Customs Act and, therefore, they did not want any show cause notice to be issued to them or personal hearing to be provided to them. The importers also specifically stated that they did not want a speaking order to be passed on the Bills of Entry.It needs to be noted that section 124 of the Customs Act providesfor issuance of a show cause notice and personal hearing, and section 17(5) of the Customs Act requires a speaking order to be passed on the Bills of Entry, except in a case where the importer/exporter confirms the acceptance in writing.

24. It is no doubt true that the value of the imported goods shall be the transaction value of such goods when the buyer and the seller of goods are not related and the price is the sole consideration, but this is subject to such conditions as may be specified in the rules to be made in this behalf. The Valuation Rules have been framed. A perusal of rule 12(1) indicates that when the proper officer has reason to doubt the truth or accuracy of the value of the imported goods, he may ask the importer to furnish further information. Rule 12(2) stipulates that it is only if an importer makes a request that the proper officer shall, before taking a final decision, intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared and provide a reasonable opportunity of being heard. To remove all doubts, Explanation 1(iii)(a) provides that the proper officercan have doubts regarding the truth or accuracy of the declared value if the goods of a comparable nature were assessed at a significantly higher value at about the same time.

25. Explanation (1)(i) to rule 12 of the Valuation Rules, however, provides that the rule only provides a mechanism and procedure for rejection of declared value and does not provide a method for determination of value and if the declared value is rejected, the value has to be determined by proceedingsequentially in accordance with rules 4 to 9.

26. In **Century Metal Recycling,** the Supreme Court summarized the provisions of rule 12 of the Valuation Rules and the observations are as follows :

"15. The requirements of Rule 12, therefore, can be summarised as under :

(a) The proper officer should have reasonable doubt as to the transactional value on accountof truth or accuracy of the value declared in relation to the imported goods.

(b) Proper officer must ask the importer of such goods further information which may include documents or evidence.

(c) On receiving such information or in the absence of response from the importer, the proper officer has to apply his mind and decide whether or not reasonable doubt as to the truth or accuracy of the value so declared persists.

(d) When the proper officer does not have reasonable doubt, the goods are cleared on the declared value.

(e) When the doubt persists, sub-rule (1) toRule 3 is not applicable and transaction value is determined in terms of Rules 4 to 9 of the 2007 Rules.

(f) The proper officer can raise doubts as to thetruth or accuracy of the declared value on certain reasons which could include the grounds specified in clauses (a) to (f) in clause (iii) of the Explanation.

(g) The proper officer, on a request made by theimporter, has to furnish and intimate to the importer in writing the grounds for doubting thetruth or accuracy of the value declared in relation to the imported goods. Thus, the properofficer has to record reasons in writing which have to be communicated when requested.

(h) The importer has to be given opportunity ofhearing before the proper officer finally decides the transactional value in terms of Rules 4 to 9of the 2007 Rules.

16. **Proper officer can therefore reject the declared transactional value based on certain reasons to doubt the truth or accuracy of the declared value in which event the proper officer is entitled to make assessment as per Rules 4 to 9 of the 2007 Rules.** What is meant by the expression grounds for doubting the truth or accuracy of the value declared has been explained and elucidated in clause (iii) of Explanation appended to Rule 12 which sets out some of the conditions when the reason to doubt exists. The instances mentioned in clauses (a) to (f) are notexhaustive but are inclusive for there could be other instances when the proper officer could reasonably doubt the accuracy or truth of the value declared."

27. It is non-consideration of the factual position emerging from the statements made by Hanuman Prasad and Niraj Silk that led the Commissioner (Appeals) to believe that the declared value could be rejected only on the basis of reasonable and cogent evidence, which burden the Revenue failed to discharge as it could not prove that the invoice did not represent the true transaction value in the international market.

28. Despite the specific requests made by the importers in the letters submitted by them, it was sought to be contended by the importers in theAppeals filed by them before the Commissioner (Appeals) that the transaction value of the imported goods alone should have been treated to be the value of the goods, as provided for under rule 3(1) of the Valuation Rules, since none of the conditions stipulated in the proviso to sub-rule (2) of rule 3 were attracted and in any case, if the declared value could not be determined under sub-rule (1) of rule 3, it was required tobe determined by proceeding sequentially through rules 4 to 9.

29. Rule 3 of the Valuation Rules is, therefore, reproduced below:

"Rule 3. Determination of the method of valuation.-

(1) Subject to rule 12, the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule 10;

(2) Value of imported goods under sub-rule (1) shallbeaccepted:

Provided that –

(a) there are no restrictions as to the disposition oruse of the goods by the buyer other than restrictions which –

(i) are imposed or required by law or bythe public authorities in India;or

(ii) limit the geographical area in which thegoods may be resold; or

(iii) do not substantially affect thevalue ofthe goods;

(b) the sale or price is not subject to some condition or consideration for which a value cannot be determined in respect of the goodsbeing valued;

(c) no part of the proceeds of any subsequentresale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of rule 10 of these rules; and

(d) the buyer and seller are not related, orwhere the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below:

(3) xxxxxxxx xxxxxxxxx xxxxxxxxx

(4) If the value cannot be determined under theprovisions of sub-rule (1), the value shall be determinedby proceeding sequentially through rule 4to 9."

30. The very fact that the importers had agreed for enhancement of the declared value in the letters submitted by them to the assessing authority, itself implies that the importers had not accepted the value declared by them in the Bills of Entry. The value declared in the Bills of Entry, therefore, automatically stood rejected. Further, once the importers had accepted the enhanced value, it was really not necessary for the assessing authority to undertake the exercise of determining the value of the declared goods under the provisions of rules 4 to 9 of the Valuation Rules. This is for the reason that it is only when the value of the imported goods cannot be determined under rule 3(1) for the reason that the declared value has been rejected under sub rule 2, that the value of the imported goods is required to be determined by proceeding sequentially through rule 4 to 9. As noticed above, the importers had accepted the enhanced value and there was, therefore, no necessity for the assessing officer to determine the value in the manner provided for in rules 4 to 9 of the Valuation Rules sequentially.

31. In this connection, it would be useful to refer to a decision of this Tribunal in **Advanced Scan Support Technologies vs Commissioner of Customs, Jodhpur 2015 (326) ELT 185 (Tri.Del.),** wherein the Tribunal, after making reference to the decisions of the Tribunal in **Vikas Spinners vs Commissioner of Customs, Lucknow 2001 (128) ELT 143 (Tri.-Del.)** and **Guardian Plasticote Ltd. v. CC (Port), Kolkotta 2008 (223) ELT 605 (Tri. Kol.),**held that asthe Appellant therein had expressly given consent to the value proposed by the Revenue and stated that it did not want any show cause notice or personal hearing, it was not necessary for the Revenue to establish the valuation any further as the consented value became the declared transaction value requiring no further investigation or justification. Paragraph 5 of the decision is reproduced below:

"5. We have considered the contentions of both sides. We find that whatever may be the reasons, the appellant expressly gave its consent to the value proposed by Revenue and expressly stated that it did not want any Show Cause Notice or personal hearing. Even the duty was paid without protest. By consenting to enhancement of value and thereby voluntarily foregoing the need for a Show Cause Notice, the appellant made it unnecessary for Revenue to establish the valuation any further as the consented value in effect becomes the declared transaction value requiringno further investigation or justification. To allow the appellant to contest the consented value now is to put Revenue in an impossible situation as the goods are no longer available for inspection and Revenue rightly did not proceedto further collect and compile all the evidences/basis into a Show Cause Notice as doing so, in spite of the appellant having consented to the enhancement of value and requested for no Show Cause Notice, could/would have invited allegation of harassment and delay in clearance of goods. When Show Cause Notice is expressly foregone and the valuation is consented, the violation of principles of natural justice cannotbe alleged. In the present case, while value can be challenged but such a challenge would be of no avail as with the goods not being available and valuation earlier having beenconsented, the onus will be on the appellant to establish that the valuation as per his consent suffered from fatal infirmity and such onus has not been discharged. Further, valuation of such goods requires their physical inspection and so re- assessment of value in the absence of goods will not bepossible. The case of Eicher Tractors v. Union of India (supra) cited by the appellant is not relevant here as in that case there was no evidence that the assessee had consented to enhancement of value."

32. In **Vikas Spinners,** the Tribunal dealing with a similar situation, observed as under :

"7. In our view in the present appeal, the question of loading of the value of the goods cannot at all be legallyagitated by the appellants. Admittedly, the price of the imported goods declared by them was US $ 0.40 per Kg. but the same was not accepted and loaded to US $ 0.50 per Kg. **This loading in the value was done in consultation with Shri Gautam Sinha, the Representative and Special Attorney of the appellants who even signed an affirmation accepting the loaded value of the goods on the back of the Bill of Entry dated 7-5-1999**. After loadingof the value, the appellants produced the special import licence and paid the duty on the goods accordingly of Rs. 4,22,008/- on 19-5-1990. **Having once accepted the loaded value of the goods and paid duty accordingly thereon without any protest or objection they are legally estopped from taking somersault and to deny the correctness of the same**. There is nothing on record to suggest that the loaded value was accepted by them only for the purpose of clearance of the goods and that they reserved their right to challenge the same subsequently. They settled their duty liability once for all and paid the duty amount on the loaded value of the goods. The ratio of the law laid down by the Apex Court in Sounds N. Images, (supra) is not at all attracted to the case of the appellants. The benefit of thisratio could be taken by them only if they had contested the loaded value at the time when it was done, but not now after having voluntarily accepted the correctness of loaded value of the goods as determined in the presence of their Representative/Special Attorney and paid the duty thereon accordingly."

[emphasis supplied]

33. In **Guardian Plasticote Ltd.,** the Tribunal after placing reliance on the decision of the Tribunal in **Vikas Spinners,** had also observed as follows :

"4. The learned Advocate also cites the decision of the Tribunal in the case of M/s. Vikas Spinners v. C.C.,Lucknow - 2001 (128) E.L.T. 143 (Tri.-Del.) in support of his arguments. We find that the said decision clearly holds that enhanced value once settled and duty having been paid accordingly without protest, importer is estopped from challenging the same subsequently. **It also holds that enhanced value uncontested and voluntarily accepted, and accordingly payment of duty made discharges the burden of the department to establish declared value tobe incorrect**. In view of the fact that the Appellants in this case have not established that they had lodged any protest and on the contrary their letter dated 21-4-1999 clearly points to acceptance of the enhanced

value by them, the cited decision advances the cause of the department rather than that of the Appellants contrary to the claim by the learned Counsel."

34. In **BNK Intrade (P) Ltd. vs Commissioner of Customs, Chennai**[20],

the Tribunal observed as follows :

"2…….. It is also to be noted that the importer had also agreed for enhancement of the price based on contemporaneous prices available with the Department. We, therefore, find no merit in the contention raised in the appeal challenging the valuation and seeking the refund of the differential duty paid by the appellants on enhancement."

35. The following position emerges from the aforesaid decisions of the Tribunal:

(i) When an importer consents to the enhancement of value, it becomes unnecessary for the revenue to establish the valuation as the consented value, in effect, becomes thedeclared transaction value requiring no furtherinvestigation;

(ii) When an importer accepts the loaded value of the goods without any protest or objection, the importer cannot be permitted to deny itscorrectness; and

(iii) The burden of the Department to establish the declared value to bein correct is discharged if the enhancedvalue is voluntarily accepted.

36. Learned Counsel appearing for the Respondent has, however, placed reliance upon certain decisions passed by the Tribunal to contend that the transaction value has to be first rejected and thereafter the assessing officer can re-assess with reasons and in accordance with theprovisions of the Valuation Rules.

37. The first decision is **Maruti Fabric Impex,** a matter concerning the present appellant. The Tribunal observed:

"2. As per facts on record, the respondents imported fabrics and filed bills of entries declaring the transaction value as the assessable value in terms of the provisions of Section 14 of Customs Act. **The bills of entries were assessed by the proper officer by enhancing the declared assessable value. The respondents cleared the goods on payment of duty on the enhancement.**

3. The Appellate Authority took into consideration various facts including the issue as to whether an assessee can file an appeal against assessment made inthe bills of entries, once he pays duty on the same and clears the goods, observed that acceptance of enhanced value proposed by the Department by an assessee does not preclude him from challenging the enhancement by way of appeal.

As regards enhancement of assessable value, heobserved that no reasons stand given by the Revenue for such an enhancement. There is no rejectionof the transaction value and in such a scenario, the transaction value has to be adopted as the assessable value. He also observed that though no reasons stand reflected in the Revenue's assessment but the same seems to have been done on the basis of a DRI Alert dated 9-5-2011.

6. As regards the second issue, we find that Commissioner (Appeals) has gone into detailed examination ofthe provisions of Section 14 as also theCustoms Valuation (Determination of Value of Imported Goods) Rules, 2007. **As rightly observed by him, for adopting the provision of Customs Valuation Rule, the transaction value is required to be rejected as incorrectvalue. There being no evidence to show that the importer has paid over and above than the transaction value, to the seller ofthe goods, there is virtually no reasons to reject the transaction value**. It is also a settled law that DRI Alerts cannot be adopted as a reason for enhancing the value. As such, we find no infirmity in the views adopted by Commissioner (Appeals)so as to interfere in the impugned order. Accordingly, the appeals filed by the Revenue are rejected."

38. The Tribunal noticed that with regard to the enhancement of the assessable value, the Appellate Authority had observed that no reasons had been recorded by the assessing officer for

such enhancement and there was no rejection of the transaction value. It needs to be noted that there is nothing in the decision which may indicate that the importer had himself accepted the transaction value indicated by the proper officer in writing or that he had forgone his right to a speaking order.

39. This decision of the Tribunal in **Maruti Fabric Impex** was followedin **Hanuman Prasad.**

40. The next decision relied upon by learned Counsel for the Respondent is **Artex Textile Private Limited.** The Tribunal observed that:

"**2**. The brief facts are that the respondent importer of polyester knitted fabrics were filing Bill of Entry fromtime to time at ICD Sonepat on the basis of self assessment of duty on the declared transaction value. **The Bills of Entry were assessed by Assistant/Deputy Commissioner of Customs, byenhancing the value over and above the declared**

value. However, no speaking order was passed giving reasons for rejection of the declared value and enhancement thereof.

7. **Having considered the rival contentions, we find that assessing officer have been making enhancement in a routine manner and the respondent who are regular importers are leftwith no choice but to sign on the dotted line for taking delivery of their goods to carry on their business, and also save the demurrage charges if the consignment is delayed in the port for want of clearance.** Relying on the precedent Final Order No. 63455- 63456/2018 dated 25.10.2018 of this Tribunal and also in view of the Order- in-Appeal No. CC(A)/CUS/D- II/ICD/788-1083/2014 dated 31.12.2014 had been accepted in respondent own case, we uphold the impugned common order(s) in appeal. Accordingly, these appeals by Revenue are dismissed being without merit. The stay applications also stand disposed of accordingly."

41. A perusal of the aforesaid decision also does not indicate that the importer had accepted the declared value in writing or that the importerhad waived his right to a speaking order. In fact, only a general statement has been made that the assessing officer have been making enhancement in a routine manner and that an importer has no choice but to sign in order to save demurrage charges.

42. It has to be noted that the two importers, Hanuman Prasad and Niraj Silk, had not made any statement that they haveaccepted the value of the goods proposed by the Revenue to savedemurrage charges nor did they state in the letter that the value was being accepted by them under protest and they would agitate the matter in appeal. It is only in this appeal that it has been suggested that the value was accepted to save demurrage charges, perhaps prompted by the observations made by theTribunalin **Artex Textile Private Limited.**

43. Learned Counsel for the Respondent also relied upon the decision of the Tribunal in **Commissioner of Customs, New Delhi (ICD TKD) vs M/s Uniexcel Polychem Pvt. Ltd[21].** The Tribunal observed that :

"4. On the merit of enhancement of value, we are in agreement with the findings in the impugned order. **Nodetailed reason has been given by the Original Authority for rejection of the transaction value. Apparently he was guided only by DRI alert which formed basis of enhancement of value**. It has been repeatedly held by this Tribunal as well as Hon'ble High Courts that the transaction value cannot be rejected mechanically based on suspicion or general alert without supporting evidence to the effect that the invoice value does not reflect the transaction value required for assessment. In the present case, we find that no evidence of any nature has been brought out or discussed before such enhancement. Even contemporaneous value of similar or identical goods have not been examined and discussed."

44. This decision also does not indicate that the importers had accepted the value of the goods proposed by the Revenue in writing or that the importers had waived their right to a speaking order. In fact, it was the DRI alert that formed the basis of enhancement of value.

45. The Supreme Court observed in Eicher Tractors Ltd., which decision has also been relied

upon by the learned counsel for the Respondent, that it is only when the transaction value under rule 4 of the Valuation Rules is rejected that the transaction value is required to be determined by proceeding sequentially through rules 5 to 8. The decision of the Supreme Court in Century Metal Recycling also holds that if the declared transaction value is rejected, then it has to be determined in accordance with the procedure prescribed in rules 4 to 9. These decisions of the Supreme Court, for the reasons stated above, do not help the respondent.

46. Learned counsel for the respondent has also emphasized that NIDB data cannot be the sole basis to reject the transaction value without any cogent reasons. As seen above, the importers had in writing accepted the transaction value and it is perhaps for this reason that they did not require any show cause notice to be issued to them or a personal hearing to be granted to them. The respondent is, therefore, not justified in asserting that the transaction value has been determined on the basis NIDB data. It was their acceptance of the value that formed the basis for determination of the value. The decisions relied upon by the respondent to support the contention sought to be raised are, therefore, of no benefit to them.

47. The general observations made the Commissioner (Appeals) in the impugned order that the value declared in the Bills of Entry were being enhanced uniformly by the Department for a considerable period of time was uncalled for. The Commissioner (Appeals) completely failed to advert to the crucial aspect that the importers had themselves accepted the enhancedvalue. The Commissioner (Appeals) in fact, proceeded to examine the matteras if the assessing officer had enhanced the declared value on the basis of other factors and not on the acceptance by the importers. This casual observation is not based on the factual position that emerges from the records of the case.

48. Thus, for all the reasons above, the Commissioner (Appeals)was notjustified in setting aside the orders passed by the assessing officer on the Bills of Entry.

49. When on merits it has been found that the Commissioner (Appeals)committed an error in allowing the appeals, it is not necessary to decide whether the appeals against the accepted transaction value were maintainable or not.

50. All the 36 orders passed by the Commissioner (Appeals) that have been impugned, therefore, deserve to be set aside and are, accordingly, set aside and the 36 Appeals filed by the Commissioner of Customs are allowed."

11. Further, we find that this Tribunal in the case of SumridhiAluminium (P) Ltd. cited (supra) after relying upon the decision of the Tribunal in the case of M/s Hanuman Prasad & Sons cited (supra) and other decisions, dismissed the appeals of the importer.

12. We also find that in the case of Commissioner of Customs(Import), ICD, TKD, New Delhi vs. M/s Sodagar Knitwear Pvt. Ltd. cited (supra) where the Tribunal has held that once the importer voluntary accepted the enhancement then he is precluded from challenging the same. This judgement of the Tribunal has beenupheld by the Hon'ble Apex Court as reported in 2018 (362) ELT A213(S.C.) wherein the Hon'ble Apex Court has held that "we do not find any infirmity in the order passed by the CESTAT, the appeal is dismissed."

13. In view of our discussion above, we are of the considered view that the impugned order is not sustainable in law and therefore, we set-aside the same by allowing the appeals of the department.

(Pronounced on 29.11.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)
G.Y.

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALCHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 60151 Of 2021

[Arising out of OIA No. JNK-EXCUS-APP-160/19-20 dated 05.09.2019 passed by the Commissioner (Appeals) of Central Excise and Customs, Jammu]

Royal International **: Appellant (s)**
12/7 City Centre, Amritsar, Punjab

Vs

Commissioner of Customs, Amritsar : Respondent (s)
Preventive Customs House, C.R. BuildingThe Mall, Amritsar Punjab

APPEARANCE:

Shri Vivek Salathia, Advocate for the Appellant

Shri Narinder Singh, Shri Ravinder Jangu, Authorised Representatives for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

ORDER No. A/60034/2024

Date of Hearing:15.11.2023Date of Decision:31.01.2024

Per : S. S. GARG

The present appeal is directed against the impugned order dated05.09.2019 passed by the Commissioner (Appeals) of Central Excise &Customs, Jammu whereby the appeal of the appellant is rejected and the order of the Adjudicating Authority is confirmed by imposingpenalty of Rs. 1,00,000/- under Section 114(i) of the Customs Act, 1962.

2. Briefly the facts of the case are that the appellant exported Alprazolam tablets, which were manufactured by M/s Hindustan Pharmaceuticals, Amritsar, under the trade name of Axemex and Axamex, to M/s Sehat Co. Ltd, Khaitkhana, Kabul, Afghanistan
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through the ICD/CFS, Ludhiana. The details of exports of AlprazolamTablets made by the appellant are given in table herein below:-

Sr. No.	Shipping Bill No.	Date	Quaniti ty (Numb erof boxes)	Valu e (Rs.)	ICS/CFS
1	00321	26.07.2008	2160	1614 06	OWPL, Ludhiana
2.	1106716	03.11.2008	3240	2412 99	OWPL, Ludhiana
3.	1116669	20.01.2009	7230	4316 43	OWPL, Ludhiana
4.	1120901	24.09.2009	5440	3291 19	OWPL, Ludhiana
5.	1148071	24.09.2009	4320	2610 90	OWPL, Ludhiana
6.	1157893	08.12.2009	5644	2661 59	OWPL, Ludhiana
7.	2387472	01.02.2011	6048	3405 78	OWPL, Ludhiana
8.	1100367	09.03.2010	20640	1179 060	OWPL, Ludhiana

2.1 For making the above exports of Alprazolam tablet, which appears at Sr. No. 30 and Salts thereof at Sr. No. 111 of the Scheduleof the Psychotropic Substances notified under Section 2(xxiii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the "NDPS Act"), the appellant was required to obtain export authorizationfrom the Competent Authority, i.e Narcotics Commissioner, Central Bureau of Narcotics, Gwalior in terms of Rule 58 of the NDPS Rules, 1985 read with Section 8 of the NDPS Act.

2.2 As per the Department, the appellant exported the said goods without obtaining the export authorization from the Competent Authority and the said goods were prohibited and were liable toconfiscation under Section 113 (d) of the Act and the appellant also appeared liable to penal action in terms of Section 114(i) of the Act.

2.3 On these allegations, a show cause notice dated 01.05.2015 wasissued to the appellant by the Adjudicating Authority as to why the penalty should not be imposed on the appellant in terms of Section 114 (i) of the Customs Act, 1962.

2.4 After following due process, the Adjudicating Authority vide its order dated 15.02.2016 imposed a penalty of Rs. 1,00,000/- under Section 114(i) of the Customs Act, 1962.

2.5 Aggrieved by the said order, the appellant filed appeal beforethe Commissioner (Appeals) who upheld the order of the adjudicating authority.

2.6 Hence, the present appeal.

3. Heard both the parties and perused the material on records.

4. Ld. Counsel for the appellant submits that the impugned order imposing penalty of Rs. 1,00,000/- under Section 114(i) of the Customs Act, 1962 is not sustainable in law as the same has been passed without appreciating the provisions of Section 28 of the Customs Act, 1962. He further submits that imposing penalty under the Act *mens- rea* is a pre-requisite whereas the appellant did not have any intention to export by violation of the Customs Act and NDPS Act. He further submits that the appellant has been regularly exporting the impugned goods for the last 7-8 years and no objection was raised by the Customs Authorities at any point of time. He further submits that the appellant has not concealed any materialfacts from the department and onus to prove that the appellant has violated the provisions of the Act is on the department. In support of his submission, he

relied on the decision of the Hon'ble Apex court in the case of Commissioner of Customs, Mumbai vs. M.M.K. Jewellers & Another bearing Civil Appeal No. 813-814 of 2004 as decided on 11.03.2008 wherein while discussing the already set precedents of the Hon'ble Supreme Court only, it was categorically held that:-

"...In view of the clear legal position crystallized by a series of judgments that in case where the assessees are not guilty of suppression of facts, collusion or willful misstatement of facts, therefore, the extended period oflimitation cannot be invoked under proviso to section 28(1) of the Customs Act, 1962 in the instant appeal and the other connected appeals. Consequently, this appeal and other connected appeals filed by the appellant have to be dismissed being time barred.."

4.1 On the other hand, Learned Authorized Representative defended the impugned order and submitted that the exported goods fall in the schedule of psychotropic substances of NDPS Act, 1985 andthus export authorization was required in terms of Rule 58 of the NDPS Rules, 1985 read with Section 8 of the NDPS Act, 1985. He further submits that Alprazolam tablet has been mentioned at Sr. No. 30 of the schedule of psychotropic substances and the salt thereof at Sr. No. 111 of the NDPS Act.

4.2 Learned Authorized Representative also took me through Rule 58 and 53 of the NDPS Rules and submits that no narcotic drugs, or psychotropic substances as mentioned in the schedule of psychotropicsubstances, notified under Section 2(xxiii) of the NDPS Act shall be exported from India without an export authorization issued by the Competent Authority.

4.3 Further, Section 8 of the NDPS Act among others prohibit any export from India of any narcotic drugs or psychotropic substance, except with the permission of the competent authority.

4.4 He further submits that the show cause notice as well as the impugned order clearly bring out that the appellant was required to obtain export authorization for export of Alprazolam tablets under NDPS Act and the NDPS Rules and admittedly, the appellant had not obtained any such authorization from the competent authority.

4.5 Learned Authorized Representative further submits that the limitation under Customs Act, 1962 only prescribes for recovery of duty and not for confiscation or imposition of penalty. For this submission, he relied upon the judgement of the Division Bench of CESTAT, Mumbai in the case of Gulbir Singh Anand vs. Commissioner of Customs (import), Raigarh-2019 (370) ELT 1588 (Tri.-Mumbai).

4.6 He further submits that the *mens-rea* is not required for imposition of penalty in the present case as only the penalty under Section 114(i) of the Customs Act has been imposed which does not require intend to be proved and the only condition that has to be satisfied is that goods should be liable for confiscation which is clearlysatisfied in the present case.

5. After considering the submissions of both the parties and perusal of material on record and the decisions relied upon by both sides, I find that admittedly in the present case, the appellant has exported Alprazolam tablets which fall in the schedule of psychotropic substances of NDPS Act, 1985 and is mentioned at Sr. No. 30 of the schedule of Psychotropic and the salt thereof at Sr. No. 111 of the Actfor which the export authorization is required from the Competent Authority i.e. Narcotics Commissioner, Central Bureau of Narcotics, Gwalior in terms of Rule 58 of the NDPS Rules, 1985 read withSection 8 of the NDPS Act.

5.1 The defence of the appellant that he was not aware of the requirement of law to obtain export authorization from the Competent Authority before exporting the said goods is not tenable inlaw in view of the specific provisions made in the NDPS Act with regard to export of goods falling in the schedule of psychotropic substances of NDPS Act, 1985.

5.2 Further, I find that the defence of the appellant that previously no objection was raised by the customs authorities and he has been exporting the said goods for the last 7-8 years is not a properdefence to justify the export of the impugned goods without proper export authorization.

5.3 Further, I find that the Division Bench of the CESTAT Mumbai inthe case of Gulbir Singh Anand cited (supra) has held as under:-

"10. Customs Act, 1962 prescribes limitations for the recovery of duty under Section 28 of Customs Act, 1962. However, there is no such limitation insofar as confiscation proceedings are concerned and, likewise, on the imposition of penalty. There is no doubt that a reasonable proximityof detriment with the cause is a consummation devoutly to be sought for. Nevertheless, that cannot be a reason, or a ground, for failing to act within the confines of the statute that is intended to protect the country from the ill-effects of smuggling. We find no illegality in the imposition of penalties for incidents that have occurred more than five years prior."

5.4 Further, in the present case, I find that the goods were liablefor confiscation as per Section 113(d) of the Customs Act, 1962 and penalty has been rightly proposed under Section 114(i) of the Customs Act and no limitation of 5 years has been prescribed under both the sections.

5.5 Further, I find that clearances in the past cannot be justified subsequent exports which are prohibited according to the provisionsof law and required authorization for its exports.

5.6 Further, I also hold that under Section 114(i) of the CustomsAct under which penalty has been imposed in this case, does not require intend to be proved and the only condition that has to be satisfied is that the goods should be liable for confiscation which is clearly satisfied in the present case.

5.7 In view of this, I do not find any infirmity in the impugned orderwhich I uphold subject to the reduction of the penalty to the extent ofRs. 50,000/-.

6. Appeal is accordingly disposed of in the above terms.

(Pronounced on 31.01.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

G.Y.

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATETRIBUNAL, SOUTH ZONAL BENCH, CHENNAICOURT HALL No.III

CUSTOMS APPEAL No. 40160 OF 2020

(Arising out of Order-in-Appeal Seaport C.Cus.II No.713/2019 dt. 12.12.2019 passed by Commissioner of Customs (Appeals-I), 60, Rajaji Salai, Custom House, Chennai 600 001)

M/s. Nanda Agency House Shipping Services Pvt. Ltd. **…. Appellant**

171, Aberdeen Bazar,

Port Blair 744 101

Versus

The Commissioner of Customs **…Respondent**

No.60, Rajaji Salai,Custom House, Chennai 600 001.

APPEARANCE :

Ms. Madhumitaa Bagchi, AdvocateFor the Appellant

Mr. R. Rajaraman, Assistant Commissioner (A.R)For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL) HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 18.08.2023DATE OF DECISION : 24.08.2023

FINAL ORDER No.40715/2023

ORDER : Per Ms. SULEKHA BEEVI, C.S.

The above appeal is filed by the appellant against the orderpassed by Commissioner (Appeals) who granted interest on delayed Customs Appeal No. 40160 of 2020 refund at notified rate of interest (6%) to the appellant and disallowed the prayer for enhanced rate of interest.

2. Brief facts are that, appellant M/s.Nanda Agency House Shipping Services Pvt. Ltd. filed Bill of Entry dt. 28.08.2015 forclearance of goods viz. "Glass Bottom Boat Looker 350" for which classification was declared as CTH 89011030 attracting 'Nil' rate of duty. The Department was of the view that the correct classification was CTH 89039200 attracting merit rate of duty which resulted in payment of duty of Rs.93,47,327/- by the appellant. Thereafter, the bill of entry was reassessed classifying the goods under CTH 89011030 at 'Nil' rate of duty itself. The appellant filed refund claim of the duty of Rs.93,47,327/- paid by them vide challan dt. 01.09.2015. The refund claim was filed on 03.02.2016. The refund ought to have been granted on 03.05.2016. However, the refund wasgranted only on 11.01.2017. There was a delay of 253 days ingranting the refund. The appellant therefore filed another application for interest on the delayed refund to the tune of Rs.68,01,648/- on 03.07.2017 under Section 27A of Customs Act, 1962. The said claim of interest was rejected vide Order-in-Original dt. 18.04.2018. Aggrieved by such order, the appellant filed appeal before the Commissioner (Appeals) who vide order dt. 22.06.2018 directed to pay interest from 03.05.2016 to 11.01.2017 @ 6%. Accordingly, the appellant was sanctioned interest of Rs.3,88,746/-. Aggrieved bysuch order passed by Commissioner (Appeals) who has granted interest only @ 6%, the appellant is now before the Tribunal.

3. Ld. Counsel Ms. Madhumitta Bagchi appeared and argued for the appellant. It is submitted that the appellant had imported Looker Boat from Russia and had furnished all the records before the department evidencing that the Boat is a 30 seater boat meant for tourism purposes only. However, the department adopted the classification under CTH 89039200 by which the appellant had to pay a huge amount as duty. The said amount was borrowed as loan from State Bank of India, Mohanpuram, Port Blair at the interest rate of 12.45% per annum. The duty was paid on 01.09.2015 and after retaining it for 16 months, the same has been

refunded only on 11.01.2017. The appellant in order to obtain the refund of the customs duty had to travel eleven times in between Port Blair and Chennai which involved huge expenditure. The appellant had intended to start business using the imported boat for the purpose of tourism. All these eventualities caused immense financial constraintsupon the appellant who had to borrow loan from private financiers also. The appellant is suffering huge monetary loss due to the interest paid to the bank and other private financial institutions. It is prayed that the appellant ought to be allowed interest at the rate of 9% for 455 days as computed from the date of payment of dutyitself.

4. Ld. Counsel relied upon the decision in the case of *CC Airport & ACC, Bangalore* Vs *Pfizer Products India Pvt. Ltd*. - 2015 (324) ELT 259 (Kar.) and decision of the Hon'ble Supreme Court in the case of *Ranbaxy Laboratories Ltd. Vs Union of India* – 2011 (273) ELT 3 (SC). Customs Appeal No. 40160 of 2020 The decision of the Tribunal in the case of *BBM Impex Pvt. Ltd. Vs CCNew Delhi* vide Final Order No.50737/2022 dt. 03.08.2022 was also relied upon. Ld. Counsel prayed that the appeal may be allowed.

5. Ld. A.R Sri R.Rajaraman appeared for the appellant. It is submitted that as per the provisions contained in Section 27A, interest is liable to be paid only in case of delay after 3 months from the date of application of refund. In the present case, the application for refund is filed on 03.02.2016 and the refund ought to have been granted on 03.05.2016. The appellant has received the refund on 11.01.2017. There is delay of 253 days when computed from 03.05.2016 till 11.01.2017. Interest has been sanctioned @ 6%which is the notified rate of interest. There are no special circumstances in the present case to grant increased rate of interest. He prayed that the appeal may be dismissed.

6. Heard both sides.

7. The appellant seeks interest on delayed refund at a higher rate than the notified rate of 6%. So also, they have computed the delay till interest amount @ 6% has been received by them i.e. 04.01.2019. According to them, till the payment of interest @ 6% (04.01.2019) there is a delay of 455 days and further the appellant has to be granted higher rate @ 9%. In the present case, there is a delay of 253 days in granting the refund of duty. The Commissioner (Appeals) has allowed interest @ 6% for the delay upto the date of sanctioning the refund. In the case of *Pfizer Products India Pvt. Ltd.* Customs Appeal No. 40160 of 2020 (supra) as well as *Ranbaxy Laboratories* (supra) there was huge delay in granting the refund. The Hon'ble Apex Court had considered all such facts to grant increased rate of interest. The Commissioner (Appeals) has relied on the said cases only to take the view that the appellant is eligible for interest due to delay. This does not mean thatan assessee is always eligible for enhanced rate of interest than the notified rate of interest. We do not find any circumstances in the present case warranting to grant increased rate of interest to the appellant. The decision in the case of *BBM Impex Pvt. Ltd.* (supra) is not applicable to the facts of this case as the same is with regard to the refund of pre-deposit.

8. From the foregoing, the impugned order is sustained. Appeal is dismissed as being devoid of merits.

(Pronounced in court on 24.08.2023)

sd/-
(VASA SESHAGIRI RAO)
Member (Technical)

sd/-
(SULEKHA BEEVI C.S.)
Member (Judicial)

gs

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 42310 of 2013
(Arising out of Order-in-Original No. 662/2013 dated 05.09.2013 passed by the Commissioner of Customs, Air Cargo Complex, Meenambakkam, Chennai – 600 027)

N. Akbar, **: Appellant**
Proprietor of M/s. Ghazzali Trading
No. 12/28, S.M.J. Plaza, Shop No. 15, 2nd Line Beach,
Parrys, Chennai – 600 001
VERSUS

Commissioner of Customs **: Respondent**
(Airport and Air Cargo Complex)
New Custom House, Meenambakkam, Chennai – 600 027

AND

Customs Appeal No. 42311 of 2013
(Arising out of Order-in-Original No. 662/2013 dated 05.09.2013 passed by the Commissioner of Customs, Air Cargo Complex, Meenambakkam, Chennai – 600 027)

M/s. Ghazzali Trading **: Appellant**
No. 12/28, S.M.J. Plaza, Shop No. 15, 2nd Line Beach,
Parrys, Chennai – 600 001
VERSUS

Commissioner of Customs **: Respondent**
(Airport and Air Cargo Complex)
New Custom House, Meenambakkam, Chennai – 600 027

APPEARANCE:
Shri G. Derrick Sam, Advocate for the Appellant

Shri Rudra Pratap Singh, Additional Commissioner for the Respondent

CORAM:
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOs. 40868-40869 / 2023

DATE OF HEARING: 10.08.2023
DATE OF DECISION: 05.10.2023

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

These appeals are filed by the assessee and the appellant has a strange history. The source of the case appears to be from a letter written by the assessee himselfto the Department dated 10.12.2012.

2. In the said letter, the assessee had alleged a seriousissue as to the misuse of its IEC, as the alleged misuse is a very serious issue, the Revenue issued an alert in the EDIsystem of its New Custom House, thereafter referred the pending/live bills-of-entry of the appellant-assessee to theSpecial Intelligence and Investigation Branch – SIIB, for verification. It appears that the SIIB started/initiated investigation which had resulted in summoning the assessee as well as its manager, who was claimed by the assessee himself as having signed on the relevant documents accompanying the bills-of-entry filed at the time of import of consignments.

3. It is a fact borne on record that the assessee thereafter tried to impress upon the SIIB/Revenue, by claiming that insofar as the three air way bills / bills-of- entry were concerned, they were filed properly by it/its office and that there was no misuse of its IEC.

4. During the course of investigation, the SIIB, having summoned the assessee's manager, chose to record his statement, but it appeared to the SIIB that the assessee was claiming that the documents accompanying the bills- of-entry were signed by his manager, whereas his managerhad denied having signed all the documents in respect of each and every bill-of-entry filed, he had admitted as to signing a few of the documents/bills-of-entry and had clearly denied having signed on some of the other documents. That is to say, his manager clearly denied as having affixed his signature on all the documents accompanying all the bills-of-entry filed with the Revenue.It is also a fact on the record that his manager had clearly admitted that signature affixed on some of the documentswere different from his signature.

5. The Revenue also entertained a doubt based on theadmission of the assessee/his manager as to the filing of bills-of-entry under self-clearance basis, since during its investigation, it clearly emerged that no such request for self-clearance basis was ever made by the assessee or in the name of the assessee's firm.

6. Thus, in view of contrary statements after creating sufficient confusions starting from his own letter, a Show Cause Notice dated 28.06.2013 came to be issued, proposing therein as to the confiscation of goods importedas per bills-of-entry nos. 8761027, 8713098 and 8695651.It was also proposed in the Show Cause Notice as to imposition of penalty under Section 112 (a) of the CustomsAct, 1962 on both the assessee as well as his manager.

7. It emerges from the Order-in-Original that the assessee had filed Writ Petitions before the Hon'ble High Court of Madras. But however, the Court having directed the assessee to file reply and participate in theproceedings, the assessee chose to appear for personal hearing before the adjudicating authority. The said authority, during adjudication, appears to have heard the assessee through his advocate and thereafter, vide impugned Order-in-Original No. 662/2013 dated 05.09.2013, however, appears to have confirmed the demands proposed in the Show Cause Notice, and it is against this order that the present appeals have been filedbefore this forum.

8. Today, when the matter was taken up for hearing Shri G. Derrick Sam, Ld. Advocate peering appearing for the assessee-appellant, submitted as under: -

- The assessee in the course of his business had imported mobile phones vide AWB Nos. 160 64290026, 129 03358132 and 098 6501766 and

Bills-of-Entry Nos. 8695651 dated 07.12.2012,8713098 dated 10.12.2012 and 8761027 dated14.12.2012.
[our observation: date of intimation as to misuse – 10.12.2012]

- In the clearance process, the appellant had filed thedocuments on self-clearance basis without engagingthe services of CHA.

[controverted by the investigation as no suchrequest was there in the appellant's name]

- The assessee received anonymous calls on his mobile informing about some unknown persons misusing the IEC of the assessee and the assessee immediately communicated the same to the respondent.

- On 12.12.2012, the assessee had specifically writtento the Revenue that the above three bills-of-entry were of the assessee himself, and that he had filed the bills-of-entry with the Customs.

- The appellant had not referred to the above bills-of-entry in his letter dated 10.12.2012, but still the same was referred to the SIIB for further investigation.

- The assessee had clearly and specifically written to the respondent that the goods covered in the abovebills-of-entry were his, but however, merely going by minor variation in the signature in the documentsfiled for clearance, it was held by the Department that the goods in question were not that of the assessee.

- The Department, having denied that the goods did belong to the assessee, had failed to give a finding as to the real owner of the goods.

- The original authority, having held that the goods inquestion corresponded with the descriptionmentioned in the bills-of-entry, there was no contravention of Section 46 of the Customs Act andconsequently, the confiscation of the same under Sections 111(d) and (m) was not warranted.

- The authority should have considered the duty in thesubject bills-of-entry were debited directly from theaccount maintained by the assessee immediately after the assessment of goods which implies that theassessee was in fact, the owner of the goods since no person would pay duty on goods belonging to others.

- Even if it is assumed that the assessee is not the realowner of the goods in question, there is no violationof any law, since even lending of IEC is held to be not an offence in the following cases:

i. Atul D. Sonpal v. Commissioner of Cus. (Acc. & Import), Mumbai [2012 (275) E.L.T. 248 (Tri. – Mum.)]

ii. Hamid Fahim Ansari v. Commissioner of Cus.(Import), Nhava Sheva [2009 (241) E.L.T. 168 (Bom.)]

9. *Per contra*, Shri Rudra Pratap Singh, Ld. Additional Commissioner, defended the order of the Commissioner. He would vehemently contend that the assessee had clearly violated the Foreign Trade (Development and Regulation) Act, 1992 and Foreign Trade Regulations and resultantly, the import has been held to be improper, for which reason the goods in question have been ordered to be confiscated. He would also contend that it is not the question of minor variation in the signature, but the personwho is alleged to have signed has himself admitted that there is either change in the same or that the same was not his signature; hence assessee clearly knew as to who had affixed signature on the documents, but

however, hasnot revealed the same, the same clearly amounts toforgery which is very serious in nature and hence, the contentions of the Ld. Advocate are clearly without any basis and devoid of any merits.

10. The details of the air way bills and the correspondingbills-of-entry filed for clearance of the goods in question are as given below: -

Sl. No.	**AWB No.**	**Bill-of-Entry No.**	**Date of filing**
1.	160 64290026	8695651	07.12.2012
2.	129 03358132	8713098	10.12.2012
3.	098 6501766	8761027	14.12.2012

11. Having heard both sides, we find that the assessee is trying to blow hot and cold at the same end; on the onehand, he writes a letter complaining about the misuse of its IE Code, two days later he says that there is no misuseof his code insofar as the present bills-of-entry are concerned. But in any case, when a complaint which is of serious nature is received, the authority has initiatedinvestigation into the same and hence, we find that the subsequent letters/request made by the assessee while theinvestigation was on, were only to distract the progress ofthe investigation.

12.1 There is also a serious issue as to the signatures in document accompanying the bills of entry: assessee'smanager categorically denies some of the signature as hisown insofar as some of the signatures are concerned; he clearly says that there were some differences, which fact has not at all been denied by the assessee in any of his pleadings either before the lower authority or before us. Hence, the fact that there were differences in signature stood established. The same is not a minor variation as canvassed by the Ld. Advocate before us, since we find thatthe same has origin in the letter dated 10.12.2012 filed by the assessee himself. It is also a fact borne on record thatwhile the assessee categorically admits that signatures were by his manager, but his manager denies having signed on all the documents; he also denies some of the signatures and points out that there were differences in respect of some of the signatures. This aspect has not beenexplained by the assessee in any way. The appellant has nowhere tried to explain this, nor has there been any request for cross-examination of its manager who disputedthe signature.

12.2 In the synopsis filed before us, it has been clearly admitted that in the clearance process, the assessee himself had filed the documents on self-clearance basis without engaging the services of CHA. The investigation carried by the SIIB, as brought out in the impugned order,clearly establishes that neither the appellant-assessee northe firm in the name of M/s. Ghazzali Trading, Chennai didseek any clearance on self-clearance basis, which is a very serious issue according to us. Other than merely claiming so, the assessee has not furnished any documentary evidence in his support.

12.3 It may be a fact that the assessee might have felt asto the misuse of his IE code, but however, there is no explanation as to what prompted the assessee to change his mind and claim that the air way bills/bills of entry in question were filed by him and that there was no misuse of his IE code insofar as these bills were concerned.

13. From the emerging facts of the case, therefore, we are satisfied to hold that the assessee has not proved beyond reasonable doubt that the goods in question imported under the air way bills/bills-of-entry in dispute were in fact filed by him and hence the only naturalcorollary available to the Revenue is the confiscation of thesame. For this, the Revenue need not prove the owner of the goods; when a claimant does not prove that the goodsin question belongs to

him, it is not for the Revenue to thereafter establish a certain actual owner of the goods. The assessee made the Revenue believe his words, which resulted in the initiation of investigation and thereafter, he also claimed that he was the actual owner of the goods imported. Hence, we are of the opinion that the assessee could be held to be 'any person' within the meaning of Section 112 of the Customs Act, 1962 and therefore, the Revenue is justified in imposing penalty on the assessee- appellant.

14. In view of the above, we do not see any merit in the appeals, for which reason the appeals are dismissed.

(Order pronounced in the open court on **05.10.2023**)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal Nos. 40578 to 40587 of 2016

(Arising out of Order-in-Appeal C.Cus. II No. 37 to 46/2016 dated 13.01.2016 passed by the Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. HLG Trading **: Appellant**
Space "E", 3rd Floor, Surya Kiran Complex, 92, The Mall,
Ludhiana – 141 001
VERSUS

Commissioner of Customs (Chennai IV) **: Respondent**
Custom House, No. 60, Rajaji Salai,Chennai – 600 001

WITH

Customs Appeal No. 40096 of 2017

Customs Appeal No. 41828 of 2017

(Arising out of Order-in-Appeal C.Cus.-I No. 133 & 134/2016 dated 29.02.2016 passed by the Commissioner of Customs (Appeals-I), 60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. Aditya International Limited **: Appellant**
Suite No. 226, Bussa Industrial Premises Co-op. Soc. Ltd.,
Century Bazar Lane, Prabhadevi,
Mumbai – 400 025
VERSUS

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

WITH

Customs Appeal No. 40032 of 2021

(Arising out of Order-in-Appeal Seaport C.Cus. No. II/994-995/2020 dated 29.10.2020 passed by the Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai – 600 001)

Commissioner of Customs Chennai-II Commissionerate **: Appellant**
Custom House, No. 60, Rajaji Salai,Chennai – 600 001

VERSUS

M/s. Aditya International Limited **: Respondent**
Suite No. 226, Bussa Industrial Premises Co-op. Soc. Ltd.,
Century Bazar Lane, Prabhadevi,
Mumbai – 400 025

AND

Customs Appeal No. 40034 of 2021

(Arising out of Order-in-Appeal Seaport C.Cus. No. II/996-999/2020 dated 29.10.2020 passed by the Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai – 600 001)

Commissioner of Customs Chennai-II Commissionerate **: Appellant**
Custom House, No. 60, Rajaji Salai,Chennai – 600 001

VERSUS

M/s. Microweb Enterprises Private Limited Suite No. 226, **: Respondent**
Bussa Industrial Premises Co-op. Soc. Ltd.,Century Bazar
Lane, Prabhadevi,
Mumbai – 400 025

APPEARANCE:
Shri B. Satish Sundar, AdvocateSmt. J. Ragini,
Advocate
Shri M.A. Mudimannan, Advocate

for the Assessee(s)/Importer(s)
Shri R. Rajaraman, Assistant Commissioner
Smt. Anandalakshmi Ganeshram, Superintendent

for the Revenue

CORAM:
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOs. 40902-40915/2023

DATE OF HEARING: 03.10.2023
DATE OF DECISION: 12.10.2023

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

A common issue being involved in all these appeals,they are taken up for common disposal, for the sake of convenience. The details of the appeals filed by the assessees/importers are as follows: -

Sl. No.	AppealNo.	Appellant	Impugned Order No. & Dt.	Bill-of-Entry No.	Date ofBill-of-Entry
1.	C/40578/16	HLG Trading	Order-in-Appeal C.Cus. I I No. 37 to 46/2016 dated 13.01.2016	2079449	30.07.2015
2.	C/40578/16	HLG Trading		2079071	30.07.2015
3.	C/40578/16	HLG Trading		2079080	30.07.2015
4.	C/40578/16	HLG Trading		10415	31.07.2015
5.	C/40578/16	HLG Trading		10419	31.07.2015
6.	C/40578/16	HLG Trading		10420	31.07.2015
7.	C/40578/16	HLG Trading		10421	31.07.2015
8.	C/40578/16	HLG Trading		2246791	14.08.2015
9.	C/40578/16	HLG Trading		2247668	14.08.2015
10.	C/40578/16	HLG Trading		2286708	18.08.2015
11.	C/40096/17	Aditya InternationalLtd.	Order-in-Appeal C.Cus. -I No. 133 & 134/2016 dated 29.02.2016	2349159	24.08.2015
12.	C/41828/17	Aditya InternationalLtd.		2340218	24.08.2015

2.1 Brief facts which are relevant for our consideration are that the assessees are engaged in the business of wholesale trading of polyester spun yarn, blankets, fabric,knit fabrics, etc., covered under Chapters 50 to 63 of the Customs Tariff Act, 1975 / Central Excise Tariff Act, 1985,imported the same through Chennai Sea Port and also claimed the benefit of Notification No. 30/2004-C.E. dated 09.07.2004, as amended by Notification No. 34/2015-C.E. dated 17.07.2015 and Notification No. 37/2015-C.E. dated21.07.2015. It is the case of the assessee-importer that since the Notification was not uploaded in the EDI system, the importer approached the assessment group for filing the bills-of-entry manually, but the same having not beenaccepted, they paid the duty under protest and thereafterpreferred appeals before the first appellate authority.

2.2 The assessees-importers also appears to have approached the Hon'ble High Court of Judicature at Madrasby filing Writ Petition in W.P. No. 24507 of 2015 and W.P.Nos. 26010-26011 of 2015 thereby challenging the *vires* ofNotification Nos. 34/2015 and 37/2015 *ibid.,* and it is a matter of record that by means of an interim order, the Hon'ble High Court acceded to the request of the importerthereby permitting the importer to file manual bills-of- entry seeking the benefit of Notification No. 30/2004 *ibid.*

2.3 It is also a matter of record that vide judgement in the above Writ Petitions in the assessees' own cases dated30.10.2015 reported in *2016 (331) E.L.T. 561 (Mad.),* theHon'ble High Court dismissed the batch of Writ Petitions, the first appellate authority vide respective impugnedOrders-in-Appeal also rejected the appeals filed by the importers and it is against these orders that the present appeals have been preferred before this forum.

3.1 Heard Shri B. Satish Sundar, Ld. Advocate for the assessee at Sl Nos. 1 to 10 of the above table andSmt. J. Ragini, Ld. Advocate for the assessee at Sl. Nos. 11 and 12 therein. He would contend that the issue in theseappeals lie on a very narrow compass and the only issue, according to him, is whether the assessee is entitled to thebenefit of Notification No. 30/2004 *ibid.,* as amended. He would rely on the following decisions of the Hon'ble Apex Court to contend that identical issue has been decided by the Hon'ble Apex Court: -

i. Hyderabad Industries Ltd. v. Union of India [1999 (108)
E.L.T. 321 (S.C.)]

ii. SRF Ltd. v. Commissioner of Customs, Chennai [2015 (318) E.L.T. 607 (S.C.)]

iii. Aidek Tourism Services Pvt. Ltd. v. Commissioner of Cus.,New Delhi [2015 (318) E.L.T. 3 (S.C.)]

3.2 He would also refer to the following orders of variousco-ordinate Benches of the CESTAT in his support: -

i. Sri Vasavi Gold & Bullion Pvt. Ltd. v. Commissioner of Cus., Chennai [2016 (343) E.L.T. 429 (Tri. – Chennai)]

ii. Artex Textile Pvt. Ltd. v. Commissioner of Cus. (I&G), New Delhi [2016 (339) E.L.T. 592 (Tri. – Del.)]

iii. Commissioner of Customs (Port), Kolkata v. Enterprise International Ltd. & ors. [Civil Appeal Diary No.9454/2017 dated 24.07.2017 (S.C.)]

iv. Artex Textile Pvt. Ltd. v. Commissioner of C.Ex. & Cus., Faridabad [Final Order No. 57663 of 2017 dated 01.11.2017 in Customs Appeal No. 51730 of 2016 – CESTAT, New Delhi]

v. Artex Textile Pvt. Ltd. v. Commissioner of Cus., Delhi [Final Order No. 51850 of 2019 dated 21.10.2019 in Customs Appeal No. 50869 of 2019 – CESTAT, New Delhi]

vi. Commissioner of Cus., Patparganj v. Artex Textile Pvt. Ltd. [Final Order Nos. 50875-50921 of 2017 dated 15.02.2017 in Customs Appeal No. 50043 of 2017 & ors.
– CESTAT, New Delhi]

vii. Commissioner of Cus. (Port), Kolkata v. Enterprise International Ltd. [Final Order Nos. 76658-76659 of 2018dated 20.09.2018 in Customs Appeal Nos. 76229-76230 of 2017 – CESTAT, Kolkata]

viii. Commissioner of Cus. (Port), Kolkata v. Enterprise International Ltd. [2019 (369) E.L.T. 1108 (Tri. – Kol.)]

ix. Artex Textile Pvt. Ltd. v. Commissioner of Cus., ICD, Patparganj [Final order Nos. 50953-50954 of 2019 dated24.07.2019 in Customs Appeal Nos. 50492-50493 of2019 – CESTAT, New Delhi]

x. Elegant Fabric v. Commissioner of Cus., Chennai [2011
(263) E.L.T. 623 (Tri. – Chennai)]

xi. Commissioner of Cus. (Seaport-Export), Chennai v. Enterprises International Ltd. [2017 (346) E.L.T. 423 (Tri.
– Chennai)]

xii. International Steel Corporation v. Commissioner of Cus.,Jamnagar (Prev.) [2015 (325) E.L.T. 881 (Tri. – Ahmd.)]

xiii. Royal Impex v. Commissioner of Cus., Chennai-II [2019 (366) E.L.T. 820 (Mad.)]

3.3 It is also his contention that the appellants have filedSpecial Leave Petitions against the above judgement of theHon'ble High Court in the Writ Petitions *(supra)* and the Hon'ble Supreme Court was pleased to grant leave in *Petition for Special Leave to Appeal (C) No. 16798 of 2016dated 11.03.2019.* He would also contend that special leave having been granted against the said order of the Hon'ble High Court, the impugned judgement of the Hon'ble High Court would be in jeopardy; the subject matter of the *lis*, unless determined by the Hon'ble Supreme Court, cannot be said to have attained finality. Inthis regard, he would rely on the following: -

i. Kunhayammed v. State of Kerala [2001 (129) E.L.T. 11 (S.C.)]

ii. Union of India v. West Coast Paper Mills Ltd. [2004 (164)
E.L.T. 375 (S.C.)]

3.4 Ld. Advocates representing other appellants adopted the same arguments advanced by Shri B. Satish Sundar, Ld. Advocate in respect of M/s. HLG Trading.

3.5 He would thus pray for allowing the appeals therebyreversing the impugned orders.

4.1 *Per contra,* Shri R. Rajaraman, Ld. Assistant Commissioner defending the impugned order, would submit that the first appellate authority has applied the change in law brought about by means of amendments, which were in vogue as on the date of filing of theimpugned bills-of-entry and therefore, the Revenue cannotbe held to have applied the improper law as on the dates of the imports.

4.2 He would also invite our attention to the said judgement of the Hon'ble High Court in the above Writ Petitions *(supra)* wherein the Hon'ble High Court, having taken note of the change in law, has clearly held that the law declared in *Aidek Tourism Services Pvt. Ltd. v. Commissioner of Cus., New Delhi [2015 (318) E.L.T. 3 (S.C.)], Hyderabad Industries Ltd. v. Union of India [1995*
(78) E.L.T. 641 (S.C.)], SRF Ltd. v. Commissioner ofCustoms, Chennai [2015 (318) E.L.T. 607 (S.C.)], Thermax Pvt. Ltd. v. Collector of Customs [1992 (61) E.L.T.352 (S.C.)] were not applicable since the said judgementswere passed based on the existing / prevalent law at the relevant point of time, before the amendments.

4.3 He would also invite our attention to the judgementof the Hon'ble Supreme Court in the case of *M/s. SRF Ltd.(supra),* to start with, to indicate that what was consideredby the Hon'ble Supreme Court was a different Notificationand hence, the Hon'ble Supreme Court did not deal with the amended Notifications impugned in the present appeals.

4.4.1 Smt. Anandalakshmi Ganeshram, Ld.

Superintendent, invited our attention to the common orderof CESTAT, New Delhi in the case of *M/s. Soir International& ors. v. Assistant Commissioner of Customs, Delhi & ors.[Final Order Nos. 50356-50372 of 2023 dated 21.03.2023in Customs Appeal Nos. 52158-52164 of 2016 & ors. – CESTAT, New Delhi] and connected appeals*, wherein the co-ordinate Bench has, after following the decision of the Hon'ble Madras High Court in the Writ Petitions (*supra*), dismissed the appeals. She would invite our attention to paragraph 21 of the said order, which reads as under: -

"21. Another internationally accepted principle of trade is "National Treatment" which subjects the imported goods to the same restrictions as are applicable to domestically manufactured goods. If the appellant's submissions are accepted, it will result in preferential treatment to imported goods which is not warranted."

4.4.2 She would also refer to paragraph 27, which reads as under: -

"27. Therefore, in our considered view, the benefit of theexemption notification 30/2004-CE dated 9.7.2004 as amended by Notification No. 34/2015-CE dated 17.7.2015 will not be available to the goods which are imported. We have considered the contrary views taken by coordinate benches of this Tribunal in Enterprise International Ltd., Artex Textiles Pvt. Ltd and SednaImpex India. However, we find the Hon"ble High Court ofMadras in HLG Trading and in Prashray Overseas held that the benefit of the exemption notification will not beavailable to the imported goods …."

4.4.3 She would finally refer to paragraph 30, which readsas under: -

"30. In the facts of these cases, the matters pertained tothe period after the amendment 34/2015-CE dated 17.7.2015 adding the new condition that central excise duty should have been paid on the inputs was introducedand further after the explanation was inserted by 37/2015-CE dated 21.07.2015. The undisputed position is that there are two conditions (1) no CENVAT credit should have been availed which is fulfilled and (2) that excise duty should have been paid on the inputs which has not been fulfilled."

4.5 The Ld. Assistant Commissioner also pointed out that most of the judgements and orders of co-ordinate Benches relied upon by the Ld. Advocate were given priorto the change in law brought about vide amended Notification Nos. 34/2015 and 37/2015 *ibid.* and hence, they are not applicable.

4.6 Insofar as the order in the cases of: -

(i) Commissioner of Cus. (Port), Kolkata v. Enterprise International Ltd. [Final Order Nos. 76658-76659 of 2018dated 20.09.2018 in Customs Appeal Nos. 76229-76230 of 2017 – CESTAT, Kolkata]

(ii) Commissioner of Cus. (Port), Kolkata v. Enterprise International Ltd. [2019 (369) E.L.T. 1108 (Tri. – Kol.)] [Final Order Nos. A/75172-75176/KOL/2019 dated 17.01.2019 – CESTAT, Kolkata]

(iii) Artex Textile Pvt. Ltd. v. Commissioner of Cus., ICD, Patparganj [Final order Nos. 50953-50954 of 2019 dated24.07.2019 in Customs Appeal Nos. 50492-50493 of2019 – CESTAT, New Delhi]

(iv) Sedna Impex India Pvt. Ltd. v. Commissioner of Cus., Mundra [Final Order Nos. A/10106-10190/2022 dated 18.02.2022 in Customs Appeal Nos. 10514 to 10598 of 2017 – CESTAT, Ahmedabad] are concerned, wherein though the co-ordinate Benches have

considered the above Notification Nos. 34/2015 and 37/2015 *ibid.,* he would submit that in view of the bindingdecision of the Hon'ble jurisdictional High Court in the assessees' own cases *(supra),* the same are not applicable.

4.7 He would thus pray for sustaining the impugned orders.

5. Heard both sides and perused the documents placedon record. We have very anxiously considered the variousdecisions of higher judicial fora and we have also considered the orders of the co-ordinate Benches of the CESTAT.

6. After hearing both sides and considering the fact that by the time the assesssees-importers had filed their bills-of-entry the new / amended Notifications having comeinto force, the issue to be decided by us is: whether the appellants are entitled to the benefit of Notification No. 34/2015-C.E. dated 17.07.2015 and Notification No. 37/2015-C.E. dated 21.07.2015?

7.1 At the outset, given the undisputed facts, we do notfind any reasons at all to interfere with the impugned Orders-in-Appeal since we find that the Hon'ble High Courtof Judicature has analysed the law and the change broughtabout by subsequent Notification Nos. 34/2015 and 37/2015 *ibid.* has been followed. The Hon'ble High Court has in fact considered the following decisions in W.P. No. 24507 of 2015 & ors. dated 30.10.2015 as reported in *2016 (331) E.L.T. 561 (Mad.)* wherein two of the appellantsnamely, M/s. HLG Trading and M/s. Aditya International Ltd. were the petitioners: -

- *Ahujasons Shawl Wale (P) Ltd. v. Commissioner of Cus.,New Delhi [2015 (319) E.L.T. 576 (S.C.)]*

- *Aidek Tourism Services Pvt. Ltd. v. Commissioner of Cus.,New Delhi [2015 (318) E.L.T. 3 (S.C.)]*

- *Ashok Traders v. Union of India [1987 (32) E.L.T. 262(Bom.)]*

- *Collector of C.Ex., Vadodara v. Dhiren ChemicalIndustries [2002 (139) E.L.T. 3 (S.C.)]*

- *Collector of C.Ex., Patna v. Usha Martin Industries Ltd.[1997 (94) E.L.T. 460 (S.C.)]*

- *Commissioner of C.Ex., New Delhi v. Hari Chand ShriGopal [2010 (260) E.L.T. 3 (S.C.)]*

- *Commissioner of C.Ex., Jalandhar v. Kay Kay Industries[2013 (295) E.L.T. 177 (S.C.)]*

- *Commissioner of Cus. (Prv.), Amritsar v. MalwaIndustries Ltd. [2009 (235) E.L.T. 214 (S.C.)]*

- *Hyderabad Industries Ltd. v. Union of India [1995 (78)* E.L.T. 641 (S.C.)]

- *Khandelwal Metal & Engineering Works v. Union of India[1985 (20) E.L.T. 222 (S.C.)]*

- *Motiram Tolaram v. Union of India [1999 (112) E.L.T. 749(S.C.)]*

- *SRF Ltd. v. Commissioner of Customs, Chennai [2015(318) E.L.T. 607 (S.C.)]*

- *Thermax Pvt. Ltd. v. Collector of Customs [1992 (61)*

E.L.T. 352 (S.C.)]

7.2 Though the *vires* of amended Notification Nos.

34/2015-C.E. dated 17.07.2015 and 37/2015-C.E. dated 21.07.2015 were challenged before the Hon'ble jurisdictional High Court, the Hon'ble High Court has held

as under: -

"74. Though Para 7 of the Circular extracted aboveindicates that the domestic manufacturer would continueto be exempt from Excise Duty or subject to concessionalrate of Duty as the case may be, as they were prior to 17-7-2015, we do not think that by a Circular, the notification issued in exercise of the statutory powers could be whittled down. Moreover, we are called upon inthis case to test the vires of the notifications dated 17-7-2015 and 21-7-2015. The vires of these notifications canbe tested only on the touchstone of the source of power or the Constitutional provisions or other legally accepted parameters. The validity of the notifications statutorily issued cannot be tested on the basis of a Circular issued by the department, post facto. Therefore, the above argument of the writ petitioners cannot be accepted.

75. One more contention raised by Mr. R. YashodhVardhan, learned senior counsel for the petitioner is thatthe Court should make a distinction between a condition precedent and a condition subsequent, before finding outwhether the benefit of the exemption notification is available to an importer or not. In other words, hiscontention is that if the exemption notification imposes acondition that can be complied with only at the pre- production stage by the domestic manufacturer, such a condition precedent cannot be expected to be complied with by an importer. On the contrary, if the exemption notification prescribes a condition that could be compliedpost-production by the domestic manufacturer, as it happened in the case of Aidek Tourism, then an importercan be expected to comply with such a condition. A condition which is impossible of being complied with by an importer, such as the conditions that arise at the pre-production stage, cannot be put against the importers.

76. Though the aforesaid argument has a sound logicalbasis, it does not have a legal basis. This can be seen, if we take a relook at the nature of the exemptions contemplated under Section 5A. We have given in a previous paragraph, a chart. It can be found from the chart that certain exemptions could be absolute andunconditional. If an exemption notification is absolute andunconditional, all domestic manufacturers, will be entitledto the benefit of the same. As a consequence, the importers will also be entitled to the benefit of the same.

77. But in cases where the exemption is only conditional, it is only those domestic manufacturers who fulfil the conditions, who will be entitled to thebenefit of the exemption notification. A domestic manufacturer who does not fulfil the condition prescribed in the exemption notification, will not beentitled to the benefit of exemption.

78. Let us go by the very logical premise on which the Supreme Court decided Thermax or Hyderabad Industries. If we do so, we have to imagine the writ petitioners herein or all importers for that matter, as if they are domestic manufacturers. To this extent there isno difficulty. But after we imagine an importer to be a domestic manufacturer of a like product, the next question that we should address ourselves is as to whether he would be entitled to the benefit of the exemption notification, after or without fulfilling the conditions stipulated in the notification.

79. So far, the Courts were not confronted with a situation where some domestic manufacturers are entitled to the benefit of the exemption notification and some domestic manufacturers are not. If by virtue of theconditions imposed in the exemption notification, some domestic manufacturers will be left without the benefit ofthe exemption notification, then the question arises whether the importer would be placed along with those domestic

manufacturers who got the benefit or whether they will be placed along with the domestic manufacturerswho do not get the benefit.

80. An answer to the above question can be found out by taking a very interesting example provided by Mr. S. Murugappan, learned counsel for the petitioner in the course of his submissions. The learned counsel gave the example of a domestic manufacturer who has suffered a duty of Excise to the extent of Rs. 100/- on the inputs, with which he manufactured another product. Assuming that the duty of Excise leviable on the product manufactured by him is Rs. 200/- and assuming such duty of Excise is exempt by virtue of a notification subject to the condition that the manufacturer has not taken CENVAT credit, he would have two options. The first option for him would be not to take CENVAT credit but toclaim the benefit of the exemption notification. In such anevent, he need not pay Rs. 200/- as duty of Excise on theproduct manufactured by him. But he would have used inputs which had already suffered a duty of Excise to theextent of Rs. 100/-. In other words, he is a person who gets the benefit of an exemption from payment of Rs. 200/-, due to his refusal to claim CENVAT credit to the extent of Rs. 100/-.

81. The second option open to him is to claim Cenvat credit. In which case, he will not be entitled to the benefitof the exemption notification. As a consequence, he has to pay Rs. 200/- as Excise duty on the goods manufactured by him. But due to his claim for Cenvat credit, he will end up paying Rs. 100/-.

82.** An importer, if the argument of the petitioners are accepted, will have the benefit of the best of both the options. Since he is manufacturing goods outside the country, he would not have paid duty of Excise to the Government of India on the inputs used in his product. Nevertheless he would equate himself with a person whohas not claimed CENVAT credit and avail the benefit of the exemption notification.* ***The result is that a domestic manufacturer pays an extra amount of Rs.100/-, in the example given above, while the importer does not pay anything. Neither Section 3 of the Customs Tariff Act, 1975, nor Article III of GATT required that an importer should be placed ina more advantageous position than the domestic manufacturer. The only requirement under GATT and even under Section 3 of the Customs Tariff Actis that the importer should not be put to a disadvantageous position than the domestic manufacturer. But what the petitioners want is to place the importer in an advantageous position. This is not permissible.

83. ***As we have indicated earlier, a challenge to a condition prescribed in an exemption notification can be tested only on very limited parameters.None of the parameters is satisfied in this case.*** *Theexemption notifications dated 17-7-2015 and 21-7-2015are issued in exercise of the power conferred by Section 5A. Section 5A(1) itself empowers the Central Government to grant exemption either absolutely orsubject to such conditions as they may stipulate. If the Central Government has the power to grant exemption subject to certain conditions, they have the power even to modify the conditions. This is why neither the source of power nor the method of exercise of such power is questioned by the writ petitioners. The impugned amendments are not in excess of the delegated power conferred under Section 5A(1). Therefore, at the outset, the amendments are not ultra vires Section 5A(1).*

84. The amendments are not ultra vires Section 3 sincethe importers are not placed in a more disadvantageous position than that of the domestic manufacturers. By prescribing certain conditions for availing the benefit of exemption, the impugned amendments treat even the domestic manufacturers differently. Placing the importers on par with those domestic manufacturers who do not getthe benefit of the exemption notification, does not strikeat the root of Section 3. Therefore, the notifications do not offend Section 3.

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89. It may be of interest to note that in the case of silkitself, the process of manufacturing of silk fabric from rawsilk, involves the following steps : (i) sorting and softening the cocoons, (ii) reeling the filament, (iii) packaging the skeins into bundles, (iv) forming silk yarn by twisting the reeled silk, (v) degumming the thrown yarn (to achieve softness and shine), (vi) dyeing wherever necessary. In these processes, a solution known as degumming solution is used. Sometimes, reeling the filament could happen mechanically, for whichcapital goods in the form of machinery may be used. Therefore, some of the items that are used in these processes, which naturally attract duty of excise, are treated as inputs. Once they are treated as inputs withinthe meaning of Rule 2(k) of the Cenvat Credit Rules, a credit can be claimed on the duty of excise duty on thoseinputs. Therefore, the fact that the raw materials do not attract a duty of excise is hardly a matter of concern. It would be a different matter if all the inputs which come within the definition of the expression "input" under Rule2(k) of the CENVAT Credit Rules attract only zero rate ofduty. Hence, the last argument is also rejected.

90. As we have pointed out earlier, we are supposed totake an importer to be a domestic manufacturer of a likeproduct by a deeming fiction. To this extent, the law is very clear and all the learned counsel for the petitioners are correct. ***Thereafter, the next question that we should ask is as to whether all domestic manufacturers would automatically be entitled to the benefit of the exemption notification. In respectof the exemption notifications that are absolute andunconditional, all domestic manufacturers will be entitled to the benefit of the exemption notification. Therefore, the importers will also be entitled. But, insofar as exemption notifications that are conditional in nature, the respondents will have to see whether all domestic manufacturers will automatically get exemption or some of them may not get exemption due to non-fulfilment of theconditions prescribed in the notification. If some ofthem are not entitled, due to non-fulfilment of the conditions, the importers, for whom it is impossible of complying with those conditions, are also not entitled to the benefit. It is this position that is sought to be clarified by the impugned amendmentnotifications dated 17-7-2015 and 21-7-2015.****Hence, there are no merits in the writ petitions. ……"*

8. We also note that in the case of *Commissioner of Cus. (Exports), Chennai v. Prashray Overseas Pvt. Ltd. [2016 (338) E.L.T. 44 (Mad.)]*, the very Hon'ble jurisdictional High Court had gone into the very same issueand held as under: -

"60. Hence, in fine, the propositions of law that would emerge out of the above discussion, can be summed up as follows :

(i) In cases where the exemption Notifications are absolute and they do not make the benefit available onlyupon the fulfillment of any condition, even the importer would be entitled to the benefit of exemption.

(ii) In cases where the Notifications for exemption stipulate only one condition namely that the inputs used in the manufacture of the exempted goods should have suffered a duty, then the benefit of the Notification will not be available to any of the importers, since he could have never paid any duty of excise on the inputs used intheir manufacture by the foreign manufacturer. This proposition is based upon the premise that the object of such Notifications is only to grant exemption to those final products, on which, some duty has been paid (in India) at the stage of inputs. In other words, Notifications of thisnature, are not merely conditional, but also restrictive innature, as they confer benefit not upon all manufacturersof exempted goods, even if they are domestic manufacturers, but only upon those, who use inputs thathad suffered duty.

(iii) In cases where the exemption Notification stipulates only one condition namely that no Cenvat creditought to have been availed on the inputs, the benefit of the Notification will be available only to those, who satisfytwo conditions namely that the inputs used by them suffered a duty and that they did not seek Cenvat credit.Since an importer can never satisfy the first condition, the second condition becomes inapplicable to him and he cannot be heard to contend that the inapplicability of thecondition by itself would make him eligible for the grant

of the benefit.

(iv) In cases where the exemption Notification stipulates two conditions, namely that the inputs should have suffered duty and that no Cenvat credit should havebeen availed, then the benefit of the Notification will be available only if both conditions are satisfied. An importer will never be able to satisfy both these conditions and hence, he cannot claim the benefit.

61. Therefore, we answer both questions of law against the assessee. As a consequence, the appeals of theRevenue are allowed. No costs."

9. We take note of the arguments of the Ld. Advocatein his rejoinder, that even against the said judgement in the case of *Prashray Overseas Pvt. Ltd. (supra),* Special Leave Petition has been filed before the Hon'ble Supreme Court, which has been admitted as reported in *2017 (355)*
E.L.T. A151 (S.C.).

10. The Ld. first appellate authority has only followed the binding decision of the Hon'ble High Court *(supra)* andtherefore, we do not find any fault with the impugned orders. In view of the above, we do not find any merit in the contentions of the appellants.

11. We will now consider the doctrine of merger in the light of the admission / granting of leave to appeal, againstthe order of the Hon'ble High Court *(supra).*

12.1 In the case of *Kunhayammed (supra),* the Hon'ble Apex Court has, at paragraph 14, expressed its opinion as to the legal position emerging upon discussion and the relevant portion reads as under: -

"14. …

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(3) If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in appellate arena is opened. The petitioner is in and therespondent may also be called upon to face him though in an appropriate case, in spite of having granted leave to appeal, the court may dismiss the appeal without noticingthe respondent.

(4) In spite of a petition for special leave to appeal having been filed, the judgment, decree or order againstwhich leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending theoperation or execution of the judgment, decree or order under challenge."

12.2 From Sl. No. (4) (*supra*), it is clear that upongranting of leave to appeal, though the finality of the judgement, decree or order appealed against is put in jeopardy, it continues to be binding and effective betweenthe parties unless it is a nullity or unless the court may pass a specific order staying or suspending the operation or execution of the judgement, decree or order under challenge.

12.3 Further, it is held at paragraph 39 as under: -

"39. We have catalogued and dealt with all the availabledecisions of this Court brought to our

notice on the point at issue. It is clear that as amongst the several two- Judges Bench decisions there is a conflict of opinion and needs to be set at rest. The source of power conferring binding efficacy on decisions of this Court is not uniform in all such decisions. Reference is found having been made to (i) Article 141 of the constitution, (ii) doctrine ofmerger, (iii) res judicata, and (iv) Rule of disciplineflowing from this Court being the highest court of the land."

13. The doctrine of merger was once again considered in the case of *West Coast Paper Mills Ltd. (supra)* and the relevant observations of the Hon'ble Apex Court are as under: -

"14. Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appealshall lie against any order passed by a Court or Tribunal.Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgment ofthe Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgmentis in jeopardy.

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38. In the aforementioned cases, this Court failed to take into consideration that once an appeal is filed beforethis Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subjectmatter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevanceonce this Court grants special leave and decides to hear the matter on merit."

14. There is no dispute that the Tribunal, as a lower judiciary, is bound by the decision of the Hon'ble jurisdictional High Court and the law laid down by the Hon'ble Apex Court being the law of the land, is always binding on all the lower courts.

15. After going through the observations of the Hon'ble Apex Court in the cases of *Kunhayammed* and *West CoastPaper Mills Ltd. (supra)*, it is clear to us and there is also no dispute that once leave is granted to appeal, theimpugned order therein does not become final. We therefore venture into the merits of the cases since, as contended by the Ld. Advocate, that issue in the present cases is open for consideration.

16.1 In the case on hand, going by the contentions, bothverbal and written, the assessees-importers sought the benefit of Notification No. 30/2004-C.E. which was not available in the Revenue's EDI system. Quite clearly, as onthe date of filing the impugned bills-of-entry, there was a change in the law brought about by the amended Notification Nos. 34/2015 and 37/2015 *ibid.* and hence, thesuperseded Notification can never be available in the EDI system. What would be available is as per the amended law, that is, the new Notifications would replace the earlierNotification in the system as well. Hence, when a new lawcomes into effect, an importer can avail the benefit of suchlaw only and if such law prescribes certain conditions, thenit is incumbent upon such claimant to satisfy the conditions prescribed thereunder. He cannot be still heard to stake aclaim for the benefit under an effaced Notification which isclearly not in vogue as on the date of import / filing of bills-of-entry. To us, therefore, the change in law as brought about in the amended Notifications, has clearly been appreciated by the Hon'ble High Court in its judgement in the assessees' own cases (*supra*), which has rightly been followed by the Ld. first appellate authority.

16.2 The prayer of the appellants even in the grounds-of-appeal reveal clearly that they are seeking the benefit of an erstwhile Notification which stood duly effaced, but however, there is no claim made as to satisfying the conditions prescribed under the amended Notification Nos.34/2015 and 37/2015 *ibid.* which were applicable.By the amending Notification No. 34/2015-C.E. dated 17.07.2015, the condition that was prescribed was as to the non-availment of CENVAT Credit on the inputs used inthe manufacture of goods. The admitted position is that theimporters i.e., the assessees before us, were not themanufacturers since the impugned goods were manufactured outside India and hence, it is quite obvious that no CENVAT Credit would be available to be availed onthe impugned goods. Perhaps to this extent, it appears thatthe only condition in Notification No. 34/2015 stands satisfied with

respect to the impugned goods, insofar as the appellants herein are concerned.

16.3 Per Notification No. 37/2015-C.E. dated 21.07.2015,yet another condition came to be inserted, which had the effect that Central Excise duty should have been paid on the inputs. This was perhaps impossible for the appellantsbefore us, to have paid the Central Excise duty on the inputs used in the manufacture of imported / impugned goods since, admittedly, the impugned goods were manufactured outside the territory of India. Hence, we donot find any difficulty in assuming that the second condition could not be satisfied by the assessees-importers before us. The assessees also did not claim to have paid the Central Excise duty on the inputs used, but however, it is their only claim that it was an impossible task to fulfil the second condition and therefore the said condition should be ignored.

16.4 Exemption Notifications are issued with a purpose and as we have observed elsewhere, some Notifications areabsolute and some are conditional and when it is a conditional one, it is imperative that the condition/s thereinought to be satisfied in order to avail any benefit flowing therefrom. Hence, it is also imperative on us to adopt purposive interpretation in such cases. If the claim of the appellants is to be entertained, then, the local manufacturers would be definitely put in a disadvantageous position as there may be increase inimports due to exemption. Thus, the purpose appears to us to be to encourage local manufacturers and therefore, the said conditions are put to restrict imports. Hence, we tend not to entertain such claims of the appellants who areonly the importers. In this context, we refer to the decisionof the Hon'ble Apex Court in the case of *Rohitash Kumar &ors. v. Om Prakash Sharma & ors. [(2013) 11 S.C.C. 451]*wherein the Hon'ble Court has clearly held that inconvenience of the taxpayer cannot be looked into: -

"19. In Bengal Immunity Co. Ltd. v. State of Bihar & Ors.,AIR 1955 SC 661 it was observed by a Constitution Benchof this Court that, if there is any hardship, it is for the legislature to amend the law, and that the Court cannot be called upon, to discard the cardinal rule of interpretation for the purpose of mitigating such hardship. If the language of an Act is sufficiently clear, the Court has to give effect to it, however, inequitable or unjust theresult may be. The words, 'dura lex sed lex' which mean"the law is hard but it is the law." may be used to sum up the situation. Therefore, even if a statutory provision causes hardship to some people, it is not for the Court toamend the law. A legal enactment must be interpreted inits plain and literal sense, as that is the first principle of interpretation.

20. In Mysore State Electricity Board v. Bangalore Woolen, Cotton & Silk Mills Ltd. & Ors., AIR 1963 SC 1128a Constitution Bench of this Court held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

21. In Martin Burn Ltd. v. The Corporation of Calcutta, AIR 1966 SC 529, this Court, while dealing with the sameissue observed as under:– "A result flowing from a statutory provision is never an evil. A Court has no powerto ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the resultor not." (See also: The Commissioner of Income Tax, West Bengal I, Calcutta v. M/s Vegetables Products Ltd.,AIR 1973 SC 927; and Tata Power Company Ltd. v. Reliance Energy Limited & Ors., (2009) 16 SCC 659).

Therefore, it is evident that the hardship caused to an individual, cannot be a ground for not giving effective andgrammatical meaning to every word of the provision, if the language used therein, is unequivocal."

17.1 Admittedly, what the appellants claimed is the benefit of exemption. Hence, when an exemption is claimed, the claimant should necessarily satisfy the conditions prescribed under the Notification under which such exemption is claimed. Conveniently, the appellants have chosen to make the exemption claim under a Notification which was not in existence at the time of imports. Hence, the authorities below have rightlyproceeded to examine the claim of exemption under the available / prevalent Notifications i.e., Notification Nos. 34/2015-C.E. and 37/2015-C.E. *ibid.,* and admittedly, the appellants have nowhere whispered about

fulfilling all the conditions of the said Notifications which replacedNotification No. 30/2004-C.E. The Hon'ble Supreme Courtin the case of *Commissioner of Customs (Import), Mumbai v. Dilip Kumar & Company [2018 (361) E.L.T. 577 (S.C.)]*has clearly laid down that when the benefit of an exemptionNotification is claimed, the claimant has to necessarily fulfilall the conditions prescribed under the said beneficialNotification.

17.2 We are therefore of the view that the claim of the appellants for the benefit of Notification No. 30/2004-C.E., as amended vide Notification No. 34/2015-C.E. and Notification No. 37/2015-C.E., is not entertainable and hastherefore been correctly rejected by the Ld. first appellateauthority. Hence, we do not find any case being made out for interfering with the impugned Orders-in-Appeal. Theissue, therefore, is decided against the appellants.

18. Resultantly, the appeals stand dismissed.

Customs Appeal No. 40032 of 2021:

19.1 In respect of the Department Appeal in Appeal No.

C/40032/2021, it appears that the assessee-respondent had filed two appeals against two communications dated 07.01.2020 and 30.04.2020 whereby the refund claims ofthe assessee in respect of 9 bills-of-entry and 3 bills-of- entry respectively were rejected by the Assistant Commissioner (Refunds).

19.2 The reasons given for rejection of these refundclaims made by the respondent herein by the original authority appears to be that the documents called for werenot submitted and the respondent also did not appear during the personal hearing. In respect of the second claim, the same was rejected as being time-barred in addition to non-submission of duplicate copy of bill-of- entry, re-assessed bill-of-entry and TR-6 challans. Consequently, the adjudicating authority rejected the claimafter referring to Public Notice No. 88/2019 dated 18.10.2019 on the ground that the order of assessment, including the self-assessment, should have been duly modified.

19.3 Against the said rejection, it appears that the respondent preferred two appeals contending that they hadsubmitted all the documents and the deficiency memos were only sent to their branch office. In respect of the second appeal, the respondent had contended that they had submitted to group for re-assessment, but the same was never assessed; the original bill-of-entry and TR-6 challans were misplaced, for which reason an indemnity bond was executed and since the duty was paid under protest, time-limitation would not apply.

19.4 During appellate proceedings, the first appellateauthority has recorded the grievance of the assessee, which *inter alia* read as under: -

"5. The appellant has made the following submissions.

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III. *The Appellant filed Bill of Entries and claimed exemption under Notification No. 30/2004 dated09.07.2004. The Department has not granted exemption to the said goods which forced the Appellant to pay excess duty to avoid demurrage charges and furthermore the Appellant paid duty* ***under protest and the same was communicated to the Department. The Appellant filed a communication on 19.01.2019 requesting the Department to issue a speaking order and re-assess the Bill ofEntries by granting exemption underNotification No. 30/2004 dated 09.07.2004.***

IV. ***Till date the Department has neither vacated the protest lodged by the Appellant nor issued a speaking order as envisaged under Section 17(5) of the Customs Act, 1962****.It is in*

this backdrop that the Appellant filed a refundclaim application on 13.04.2016 and the same was pending. As the appellant had applied for reassessment of the bill of entry and the same was pending they could not reply to the various communication asking for reassessed bills of entriesand the appellant received the final rejection order dt 07.01.2020 on 11.01.2020 though they have submitted all the documents on 08.01.2020 except for reassessed bill of entry. ..."

19.5 From the impugned Order-in-Appeal Seaport C.Cus.

No. II/994-995/2020 dated 29.10.2020, we find that the first appellate authority has held at paragraph 10 asunder:-

"10. In view of the discussions in the above paras,I hold the impugned goods are eligible for exemptionof CVD under Notification No. 30/2004-C.Ex. and therefore I reassess the bills of entry, modifying theorder of self assessment in respect of impugned billsof entry exempting the impugned goods from CVD under Notification No. 30/2004-C.Ex., and order the refund authorities to sanction refund. The 2 appealscited in Table:1&2 above are therefore allowed withconsequential relief.

Ordered accordingly"

20.1 What emerges from the above is that there was a request for re-assessment, but however, there was no attempt at all by the Department to consider the above request for re-assessment. To this extent, therefore, the impugned order appears to be correct. Further, the tableswhich are reproduced at page 3 of 11 / paragraph 1 of the
impugned order dated 29.10.2020 are reproduced below:-

Table:1

Appeal No. C3/II/127/R/2020 Against Communication vide F.No. SR No. 1530/2020/Refunds-II in respect of following bills of entries					
S. No.	**BE No.**	**BE Date**	**S. No.**	**BE No.**	**BE Date**
1	10174	29.05.2015	6	2047340	28.07.2015
2	9026522	24.04.2015	7	2057600	28.07.2015
3	2009921	24.07.2015	8	2321478	21.08.2015
4	2010254	24.07.2015	9	2032240	27.07.2015
5	2017340	28.07.2015			

Table:2

Appeal No. C3/II/473/R/2020 Against Communication vide F.No. SR No. 11/2020/Refunds-II in respect of following bills of entries		
S. No.	**BE No.**	**BE Date**
1	5165137	10.04.2014
2	7675184	12.12.2014
3	7987733	14.01.2015

20.2 From the above Table:1 in respect of 9 bills-of-entry,we find that the bills-of-entry at Sl. Nos. 1 and 2 therein are clearly before the first amending Notification No. 34/2015-C.E., which came into effect from 17.07.2015. The three other bills-of-entry at Table:2 above are also clearly prior to the amending Notification No. 34/2015-C.E.and hence, insofar as these bills-of-entry are concerned, we have no hesitation in approving the finding of the first appellate authority and to this extent, therefore, the orderof the first appellate authority is upheld.

20.3 Insofar as the bills-of-entry at Sl. Nos. 3 to 9 at Table:1 are concerned, we find that the same are after theamending Notification No. 37/2015-C.E. dated 21.07.2015and hence, the same have to be looked into from the pointof eligibility in terms of the conditions prescribed

under theamending Notification No. 37/2015 *ibid.* We have analysedthe same in respect of the other appeals and following thesame reasons, we do not approve the impugned order of the first appellate authority. To this extent, therefore, theimpugned order is set aside.

21. The appeal of the Revenue is therefore partly allowed, as discussed above.

Customs Appeal No. 40034 of 2021:

22.1 In respect of the Department Appeal in Appeal No.

C/40034/2021, we find from the tables reproduced at paragraph 1 of the impugned Order-in-Appeal Seaport C.Cus. No. II/996-999/2020 dated 29.10.2020 that all thebills-of-entry appear to have been filed during the subsistence of Notification No. 30/2004-C.E. and hence, wedo not find any difficulty in extending the benefit of the decision of the Hon'ble Supreme Court in the cases of *M/s. SRF Ltd. (supra)* and also *M/s. Aidek Tourism ServicesPvt. Ltd. (supra)*, which has rightly been allowed by the first appellate authority.

22.2 Hence, we do not find any merit in the Department's appeal, for which reason the same is dismissed.

23. Consequently, the appeals are disposed of, asindicated above.

(Order pronounced in the open court on 12.10.2023)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

Sdd

Back

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal Nos. 40578 to 40587 of 2016

(Arising out of Order-in-Appeal C.Cus. II No. 37 to 46/2016 dated 13.01.2016 passed by the Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. HLG Trading **: Appellant**
Space "E", 3rd Floor, Surya Kiran Complex, 92, The Mall,
Ludhiana – 141 001
VERSUS

Commissioner of Customs (Chennai IV) **: Respondent**
Custom House, No. 60, Rajaji Salai,Chennai – 600 001

WITH

Customs Appeal No. 40096 of 2017

Customs Appeal No. 41828 of 2017

(Arising out of Order-in-Appeal C.Cus.-I No. 133 & 134/2016 dated 29.02.2016 passed by the Commissioner of Customs (Appeals-I), 60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. Aditya International Limited **: Appellant**
Suite No. 226, Bussa Industrial Premises Co-op. Soc. Ltd.,
Century Bazar Lane, Prabhadevi,
Mumbai – 400 025
VERSUS

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

WITH

Customs Appeal No. 40032 of 2021

(Arising out of Order-in-Appeal Seaport C.Cus. No. II/994-995/2020 dated 29.10.2020 passed by the Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai – 600 001)

AND

Customs Appeal No. 40034 of 2021

(Arising out of Order-in-Appeal Seaport C.Cus. No. II/996-999/2020 dated 29.10.2020 passed by the Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai – 600 001)

Commissioner of Customs Chennai-II Commissionerate **: Appellant**
Custom House, No. 60, Rajaji Salai,Chennai – 600 001

VERSUS

M/s. Microweb Enterprises Private Limited Suite No. 226, **: Respondent**
Bussa Industrial Premises Co-op. Soc. Ltd.,Century Bazar
Lane, Prabhadevi,
Mumbai – 400 025

APPEARANCE:
Shri B. Satish Sundar, AdvocateSmt. J. Ragini,
Advocate
Shri M.A. Mudimannan, Advocate

for the Assessee(s)/Importer(s)
Shri R. Rajaraman, Assistant Commissioner
Smt. Anandalakshmi Ganeshram, Superintendent

for the Revenue

CORAM:
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOs. 40902-40915/2023

DATE OF HEARING: 03.10.2023
DATE OF DECISION: 12.10.2023

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

A common issue being involved in all these appeals,they are taken up for common disposal, for the sake of convenience. The details of the appeals filed by the assessees/importers are as follows: -

Sl. No.	AppealNo.	Appellant	Impugned Order No. & Dt.	Bill-of-Entry No.	Date ofBill-of-Entry
1.	C/40578/16	HLG Trading	Order-in-Appeal C.Cus. I I No. 37 to 46/2016 dated 13.01.2016	2079449	30.07.2015
2.	C/40578/16	HLG Trading		2079071	30.07.2015
3.	C/40578/16	HLG Trading		2079080	30.07.2015
4.	C/40578/16	HLG Trading		10415	31.07.2015
5.	C/40578/16	HLG Trading		10419	31.07.2015
6.	C/40578/16	HLG Trading		10420	31.07.2015
7.	C/40578/16	HLG Trading		10421	31.07.2015
8.	C/40578/16	HLG Trading		2246791	14.08.2015
9.	C/40578/16	HLG Trading		2247668	14.08.2015
10.	C/40578/16	HLG Trading		2286708	18.08.2015
11.	C/40096/17	Aditya InternationalLtd.	Order-in-Appeal C.Cus. -I No. 133 & 134/2016 dated 29.02.2016	2349159	24.08.2015
12.	C/41828/17	Aditya InternationalLtd.		2340218	24.08.2015

2.4 Brief facts which are relevant for our consideration are that the assessees are engaged in the business of wholesale trading of polyester spun yarn, blankets, fabric,knit fabrics, etc., covered under Chapters 50 to 63 of the Customs Tariff Act, 1975 / Central Excise Tariff Act, 1985,imported the same through Chennai Sea Port and also claimed the benefit of Notification No. 30/2004-C.E. dated 09.07.2004, as amended by Notification No. 34/2015-C.E. dated 17.07.2015 and Notification No. 37/2015-C.E. dated21.07.2015. It is the case of the assessee-importer that since the Notification was not uploaded in the EDI system, the importer approached the assessment group for filing the bills-of-entry manually, but the same having not beenaccepted, they paid the duty under protest and thereafterpreferred appeals before the first appellate authority.

2.5 The assessees-importers also appears to have approached the Hon'ble High Court of Judicature at Madrasby filing Writ Petition in W.P. No. 24507 of 2015 and W.P.Nos. 26010-26011 of 2015 thereby challenging the *vires* ofNotification Nos. 34/2015 and 37/2015 *ibid.,* and it is a matter of record that by means of an interim order, the Hon'ble High Court acceded to the request of the importerthereby permitting the importer to file manual bills-of- entry seeking the benefit of Notification No. 30/2004 *ibid.*

2.6 It is also a matter of record that vide judgement in the above Writ Petitions in the assessees' own cases dated30.10.2015 reported in *2016 (331) E.L.T. 561 (Mad.),* theHon'ble High Court dismissed the batch of Writ Petitions, the first appellate authority vide respective impugnedOrders-in-Appeal also rejected the appeals filed by the importers and it is against these orders that the present appeals have been preferred before this forum.

3.6 Heard Shri B. Satish Sundar, Ld. Advocate for the assessee at Sl Nos. 1 to 10 of the above table andSmt. J. Ragini, Ld. Advocate for the assessee at Sl. Nos. 11 and 12 therein. He would contend that the issue in theseappeals lie on a very narrow compass and the only issue, according to him, is whether the assessee is entitled to thebenefit of Notification No. 30/2004 *ibid.,* as amended. He would rely on the following decisions of the Hon'ble Apex Court to contend that identical issue has been decided by the Hon'ble Apex Court: -

i. Hyderabad Industries Ltd. v. Union of India [1999 (108)
E.L.T. 321 (S.C.)]

ii. SRF Ltd. v. Commissioner of Customs, Chennai [2015 (318) E.L.T. 607 (S.C.)]

iii. Aidek Tourism Services Pvt. Ltd. v. Commissioner of Cus.,New Delhi [2015 (318) E.L.T. 3 (S.C.)]

3.7 He would also refer to the following orders of variousco-ordinate Benches of the CESTAT in his support: -

i. Sri Vasavi Gold & Bullion Pvt. Ltd. v. Commissioner of Cus., Chennai [2016 (343) E.L.T. 429 (Tri. – Chennai)]

ii. Artex Textile Pvt. Ltd. v. Commissioner of Cus. (I&G), New Delhi [2016 (339) E.L.T. 592 (Tri. – Del.)]

iii. Commissioner of Customs (Port), Kolkata v. Enterprise International Ltd. & ors. [Civil Appeal Diary No.9454/2017 dated 24.07.2017 (S.C.)]

iv. Artex Textile Pvt. Ltd. v. Commissioner of C.Ex. & Cus., Faridabad [Final Order No. 57663 of 2017 dated 01.11.2017 in Customs Appeal No. 51730 of 2016 – CESTAT, New Delhi]

v. Artex Textile Pvt. Ltd. v. Commissioner of Cus., Delhi [Final Order No. 51850 of 2019 dated 21.10.2019 in Customs Appeal No. 50869 of 2019 – CESTAT, New Delhi]

vi. Commissioner of Cus., Patparganj v. Artex Textile Pvt. Ltd. [Final Order Nos. 50875-50921 of 2017 dated 15.02.2017 in Customs Appeal No. 50043 of 2017 & ors.
– CESTAT, New Delhi]

vii. Commissioner of Cus. (Port), Kolkata v. Enterprise International Ltd. [Final Order Nos. 76658-76659 of 2018dated 20.09.2018 in Customs Appeal Nos. 76229-76230 of 2017 – CESTAT, Kolkata]

viii. Commissioner of Cus. (Port), Kolkata v. Enterprise International Ltd. [2019 (369) E.L.T. 1108 (Tri. – Kol.)]

ix. Artex Textile Pvt. Ltd. v. Commissioner of Cus., ICD, Patparganj [Final order Nos. 50953-50954 of 2019 dated24.07.2019 in Customs Appeal Nos. 50492-50493 of2019 – CESTAT, New Delhi]

x. Elegant Fabric v. Commissioner of Cus., Chennai [2011
(263) E.L.T. 623 (Tri. – Chennai)]

xi. Commissioner of Cus. (Seaport-Export), Chennai v. Enterprises International Ltd. [2017 (346) E.L.T. 423 (Tri.
– Chennai)]

xii. International Steel Corporation v. Commissioner of Cus.,Jamnagar (Prev.) [2015 (325) E.L.T. 881 (Tri. – Ahmd.)]

xiii. Royal Impex v. Commissioner of Cus., Chennai-II [2019 (366) E.L.T. 820 (Mad.)]

3.8 It is also his contention that the appellants have filedSpecial Leave Petitions against the above judgement of theHon'ble High Court in the Writ Petitions *(supra)* and the Hon'ble Supreme Court was pleased to grant leave in *Petition for Special Leave to Appeal (C) No. 16798 of 2016dated 11.03.2019.* He would also contend that special leave having been granted against the said order of the Hon'ble High Court, the impugned judgement of the Hon'ble High Court would be in jeopardy; the subject matter of the *lis*, unless determined by the Hon'ble Supreme Court, cannot be said to have attained finality. Inthis regard, he would rely on the following: -

i. Kunhayammed v. State of Kerala [2001 (129) E.L.T. 11 (S.C.)]

ii. Union of India v. West Coast Paper Mills Ltd. [2004 (164)
E.L.T. 375 (S.C.)]

3.9 Ld. Advocates representing other appellants adopted the same arguments advanced by Shri B. Satish Sundar, Ld. Advocate in respect of M/s. HLG Trading.

3.10 He would thus pray for allowing the appeals therebyreversing the impugned orders.

4.4 *Per contra*, Shri R. Rajaraman, Ld. Assistant Commissioner defending the impugned order, would submit that the first appellate authority has applied the change in law brought about by means of amendments, which were in vogue as on the date of filing of theimpugned bills-of-entry and therefore, the Revenue cannotbe held to have applied the improper law as on the dates of the imports.

4.5 He would also invite our attention to the said judgement of the Hon'ble High Court in the above Writ Petitions *(supra)* wherein the Hon'ble High Court, having taken note of the change in law, has clearly held that the law declared in *Aidek Tourism Services Pvt. Ltd. v. Commissioner of Cus., New Delhi [2015 (318) E.L.T. 3 (S.C.)], Hyderabad Industries Ltd. v. Union of India [1995*
(79) E.L.T. 641 (S.C.)], SRF Ltd. v. Commissioner ofCustoms, Chennai [2015 (318) E.L.T. 607 (S.C.)], Thermax Pvt. Ltd. v. Collector of Customs [1992 (61) E.L.T.352 (S.C.)] were not applicable since the said judgementswere passed based on the existing / prevalent law at the relevant point of time, before the amendments.

4.6 He would also invite our attention to the judgementof the Hon'ble Supreme Court in the case of *M/s. SRF Ltd.(supra),* to start with, to indicate that what was consideredby the Hon'ble Supreme Court was a different Notificationand hence, the Hon'ble Supreme Court did not deal with the amended Notifications impugned in the present appeals.

4.4.4 Smt. Anandalakshmi Ganeshram, Ld.

Superintendent, invited our attention to the common orderof CESTAT, New Delhi in the case of *M/s. Soir International& ors. v. Assistant Commissioner of Customs, Delhi & ors.[Final Order Nos. 50356-50372 of 2023 dated 21.03.2023in Customs Appeal Nos. 52158-52164 of 2016 & ors. – CESTAT, New Delhi] and connected appeals*, wherein the co-ordinate Bench has, after following the decision of the Hon'ble Madras High Court in the Writ Petitions (*supra*), dismissed the appeals. She would invite our attention to paragraph 21 of the said order, which reads as under: -

"21. Another internationally accepted principle of trade is "National Treatment" which subjects the imported goods to the same restrictions as are applicable to domestically manufactured goods. If the appellant's submissions are accepted, it will result in preferential treatment to imported goods which is not warranted."

4.4.5 She would also refer to paragraph 27, which reads as under: -

"27. Therefore, in our considered view, the benefit of theexemption notification 30/2004-CE dated 9.7.2004 as amended by Notification No. 34/2015-CE dated 17.7.2015 will not be available to the goods which are imported. We have considered the contrary views taken by coordinate benches of this Tribunal in Enterprise International Ltd., Artex Textiles Pvt. Ltd and SednaImpex India. However, we find the Hon"ble High Court ofMadras in HLG Trading and in Prashray Overseas held that the benefit of the exemption notification will not beavailable to the imported goods …."

4.4.6 She would finally refer to paragraph 30, which readsas under: -

"30. In the facts of these cases, the matters pertained tothe period after the amendment 34/2015-CE dated 17.7.2015 adding the new condition that central excise duty should have been paid on the inputs was introducedand further after the explanation was inserted by 37/2015-CE dated 21.07.2015. The undisputed position is that there are two conditions (1) no CENVAT credit should have been availed which is fulfilled and (2) that excise duty should have been paid on the inputs which has not been fulfilled."

4.8 The Ld. Assistant Commissioner also pointed out that most of the judgements and orders of co-ordinate Benches relied upon by the Ld. Advocate were given priorto the change in law brought about vide amended Notification Nos. 34/2015 and 37/2015 *ibid.* and hence, they are not applicable.

4.9 Insofar as the order in the cases of: -

(i) Commissioner of Cus. (Port), Kolkata v. Enterprise International Ltd. [Final Order Nos. 76658-76659 of 2018dated 20.09.2018 in Customs Appeal Nos. 76229-76230 of 2017 – CESTAT, Kolkata]

(ii) Commissioner of Cus. (Port), Kolkata v. Enterprise International Ltd. [2019 (369) E.L.T. 1108 (Tri. – Kol.)] [Final Order Nos. A/75172-75176/KOL/2019 dated 17.01.2019 – CESTAT, Kolkata]

(iii) Artex Textile Pvt. Ltd. v. Commissioner of Cus., ICD, Patparganj [Final order Nos. 50953-50954 of 2019 dated24.07.2019 in Customs Appeal Nos. 50492-50493 of2019 – CESTAT, New Delhi]

(iv) Sedna Impex India Pvt. Ltd. v. Commissioner of Cus., Mundra [Final Order Nos. A/10106-10190/2022 dated 18.02.2022 in Customs Appeal Nos. 10514 to 10598 of 2017 – CESTAT, Ahmedabad] are concerned, wherein though the co-ordinate Benches have

considered the above Notification Nos. 34/2015 and 37/2015 *ibid.,* he would submit that in view of the bindingdecision of the Hon'ble jurisdictional High Court in the assessees' own cases *(supra),* the same are not applicable.

4.10 He would thus pray for sustaining the impugned orders.

7. Heard both sides and perused the documents placedon record. We have very anxiously considered the variousdecisions of higher judicial fora and we have also considered the orders of the co-ordinate Benches of the CESTAT.

8. After hearing both sides and considering the fact that by the time the assesssees-importers had filed their bills-of-entry the new / amended Notifications having comeinto force, the issue to be decided by us is: whether the appellants are entitled to the benefit of Notification No. 34/2015-C.E. dated 17.07.2015 and Notification No. 37/2015-C.E. dated 21.07.2015?

7.3 At the outset, given the undisputed facts, we do notfind any reasons at all to interfere with the impugned Orders-in-Appeal since we find that the Hon'ble High Courtof Judicature has analysed the law and the change broughtabout by subsequent Notification Nos. 34/2015 and 37/2015 *ibid.* has been followed. The Hon'ble High Court has in fact considered the following decisions in W.P. No. 24507 of 2015 & ors. dated 30.10.2015 as reported in *2016 (331) E.L.T. 561 (Mad.)* wherein two of the appellantsnamely, M/s. HLG Trading and M/s. Aditya International Ltd. were the petitioners: -

- *Ahujasons Shawl Wale (P) Ltd. v. Commissioner of Cus.,New Delhi [2015 (319) E.L.T. 576 (S.C.)]*

- *Aidek Tourism Services Pvt. Ltd. v. Commissioner of Cus.,New Delhi [2015 (318) E.L.T. 3 (S.C.)]*

- *Ashok Traders v. Union of India [1987 (32) E.L.T. 262(Bom.)]*

- *Collector of C.Ex., Vadodara v. Dhiren ChemicalIndustries [2002 (139) E.L.T. 3 (S.C.)]*

- *Collector of C.Ex., Patna v. Usha Martin Industries Ltd.[1997 (94) E.L.T. 460 (S.C.)]*

- *Commissioner of C.Ex., New Delhi v. Hari Chand ShriGopal [2010 (260) E.L.T. 3 (S.C.)]*

- *Commissioner of C.Ex., Jalandhar v. Kay Kay Industries[2013 (295) E.L.T. 177 (S.C.)]*

- *Commissioner of Cus. (Prv.), Amritsar v. MalwaIndustries Ltd. [2009 (235) E.L.T. 214 (S.C.)]*

- *Hyderabad Industries Ltd. v. Union of India [1995 (78)* E.L.T. 641 (S.C.)]

- *Khandelwal Metal & Engineering Works v. Union of India[1985 (20) E.L.T. 222 (S.C.)]*

- *Motiram Tolaram v. Union of India [1999 (112) E.L.T. 749(S.C.)]*

- *SRF Ltd. v. Commissioner of Customs, Chennai [2015(318) E.L.T. 607 (S.C.)]*

- *Thermax Pvt. Ltd. v. Collector of Customs [1992 (61)*

E.L.T. 352 (S.C.)]

7.4 Though the *vires* of amended Notification Nos.

34/2015-C.E. dated 17.07.2015 and 37/2015-C.E. dated 21.07.2015 were challenged before the Hon'ble jurisdictional High Court, the Hon'ble High Court has held

as under: -

"74. Though Para 7 of the Circular extracted aboveindicates that the domestic manufacturer would continueto be exempt from Excise Duty or subject to concessionalrate of Duty as the case may be, as they were prior to 17-7-2015, we do not think that by a Circular, the notification issued in exercise of the statutory powers could be whittled down. Moreover, we are called upon inthis case to test the vires of the notifications dated 17-7-2015 and 21-7-2015. The vires of these notifications canbe tested only on the touchstone of the source of power or the Constitutional provisions or other legally accepted parameters. The validity of the notifications statutorily issued cannot be tested on the basis of a Circular issued by the department, post facto. Therefore, the above argument of the writ petitioners cannot be accepted.

75. One more contention raised by Mr. R. YashodhVardhan, learned senior counsel for the petitioner is thatthe Court should make a distinction between a condition precedent and a condition subsequent, before finding outwhether the benefit of the exemption notification is available to an importer or not. In other words, hiscontention is that if the exemption notification imposes acondition that can be complied with only at the pre- production stage by the domestic manufacturer, such a condition precedent cannot be expected to be complied with by an importer. On the contrary, if the exemption notification prescribes a condition that could be compliedpost-production by the domestic manufacturer, as it happened in the case of Aidek Tourism, then an importercan be expected to comply with such a condition. A condition which is impossible of being complied with by an importer, such as the conditions that arise at the pre-production stage, cannot be put against the importers.

76. Though the aforesaid argument has a sound logicalbasis, it does not have a legal basis. This can be seen, if we take a relook at the nature of the exemptions contemplated under Section 5A. We have given in a previous paragraph, a chart. It can be found from the chart that certain exemptions could be absolute andunconditional. If an exemption notification is absolute andunconditional, all domestic manufacturers, will be entitledto the benefit of the same. As a consequence, the importers will also be entitled to the benefit of the same.

77. But in cases where the exemption is only conditional, it is only those domestic manufacturers who fulfil the conditions, who will be entitled to thebenefit of the exemption notification. A domestic manufacturer who does not fulfil the condition prescribed in the exemption notification, will not beentitled to the benefit of exemption.

78. Let us go by the very logical premise on which the Supreme Court decided Thermax or Hyderabad Industries. If we do so, we have to imagine the writ petitioners herein or all importers for that matter, as if they are domestic manufacturers. To this extent there isno difficulty. But after we imagine an importer to be a domestic manufacturer of a like product, the next question that we should address ourselves is as to whether he would be entitled to the benefit of the exemption notification, after or without fulfilling the conditions stipulated in the notification.

79. So far, the Courts were not confronted with a situation where some domestic manufacturers are entitled to the benefit of the exemption notification and some domestic manufacturers are not. If by virtue of theconditions imposed in the exemption notification, some domestic manufacturers will be left without the benefit ofthe exemption notification, then the question arises whether the importer would be placed along with those domestic

manufacturers who got the benefit or whether they will be placed along with the domestic manufacturerswho do not get the benefit.

80. An answer to the above question can be found out by taking a very interesting example provided by Mr. S. Murugappan, learned counsel for the petitioner in the course of his submissions. The learned counsel gave the example of a domestic manufacturer who has suffered a duty of Excise to the extent of Rs. 100/- on the inputs, with which he manufactured another product. Assuming that the duty of Excise leviable on the product manufactured by him is Rs. 200/- and assuming such duty of Excise is exempt by virtue of a notification subject to the condition that the manufacturer has not taken CENVAT credit, he would have two options. The first option for him would be not to take CENVAT credit but toclaim the benefit of the exemption notification. In such anevent, he need not pay Rs. 200/- as duty of Excise on theproduct manufactured by him. But he would have used inputs which had already suffered a duty of Excise to theextent of Rs. 100/-. In other words, he is a person who gets the benefit of an exemption from payment of Rs. 200/-, due to his refusal to claim CENVAT credit to the extent of Rs. 100/-.

81. The second option open to him is to claim Cenvat credit. In which case, he will not be entitled to the benefitof the exemption notification. As a consequence, he has to pay Rs. 200/- as Excise duty on the goods manufactured by him. But due to his claim for Cenvat credit, he will end up paying Rs. 100/-.

82.** An importer, if the argument of the petitioners are accepted, will have the benefit of the best of both the options. Since he is manufacturing goods outside the country, he would not have paid duty of Excise to the Government of India on the inputs used in his product. Nevertheless he would equate himself with a person whohas not claimed CENVAT credit and avail the benefit of the exemption notification.* ***The result is that a domestic manufacturer pays an extra amount of Rs.100/-, in the example given above, while the importer does not pay anything. Neither Section 3 of the Customs Tariff Act, 1975, nor Article III of GATT required that an importer should be placed ina more advantageous position than the domestic manufacturer. The only requirement under GATT and even under Section 3 of the Customs Tariff Actis that the importer should not be put to a disadvantageous position than the domestic manufacturer. But what the petitioners want is to place the importer in an advantageous position. This is not permissible.

83. ***As we have indicated earlier, a challenge to a condition prescribed in an exemption notification can be tested only on very limited parameters.None of the parameters is satisfied in this case.*** *Theexemption notifications dated 17-7-2015 and 21-7-2015are issued in exercise of the power conferred by Section 5A. Section 5A(1) itself empowers the Central Government to grant exemption either absolutely orsubject to such conditions as they may stipulate. If the Central Government has the power to grant exemption subject to certain conditions, they have the power even to modify the conditions. This is why neither the source of power nor the method of exercise of such power is questioned by the writ petitioners. The impugned amendments are not in excess of the delegated power conferred under Section 5A(1). Therefore, at the outset, the amendments are not ultra vires Section 5A(1).*

84. The amendments are not ultra vires Section 3 sincethe importers are not placed in a more disadvantageous position than that of the domestic manufacturers. By prescribing certain conditions for availing the benefit of exemption, the impugned amendments treat even the domestic manufacturers differently. Placing the importers on par with those domestic manufacturers who do not getthe benefit of the exemption notification, does not strikeat the root of Section 3. Therefore, the notifications do not offend Section 3.

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91. It may be of interest to note that in the case of silkitself, the process of manufacturing of silk fabric from rawsilk, involves the following steps : (i) sorting and softening the cocoons, (ii) reeling the filament, (iii) packaging the skeins into bundles, (iv) forming silk yarn by twisting the reeled silk, (v) degumming the thrown yarn (to achieve softness and shine), (vi) dyeing wherever necessary. In these processes, a solution known as degumming solution is used. Sometimes, reeling the filament could happen mechanically, for whichcapital goods in the form of machinery may be used. Therefore, some of the items that are used in these processes, which naturally attract duty of excise, are treated as inputs. Once they are treated as inputs withinthe meaning of Rule 2(k) of the Cenvat Credit Rules, a credit can be claimed on the duty of excise duty on thoseinputs. Therefore, the fact that the raw materials do not attract a duty of excise is hardly a matter of concern. It would be a different matter if all the inputs which come within the definition of the expression "input" under Rule2(k) of the CENVAT Credit Rules attract only zero rate ofduty. Hence, the last argument is also rejected.

92. As we have pointed out earlier, we are supposed totake an importer to be a domestic manufacturer of a likeproduct by a deeming fiction. To this extent, the law is very clear and all the learned counsel for the petitioners are correct. ***Thereafter, the next question that we should ask is as to whether all domestic manufacturers would automatically be entitled to the benefit of the exemption notification. In respectof the exemption notifications that are absolute andunconditional, all domestic manufacturers will be entitled to the benefit of the exemption notification. Therefore, the importers will also be entitled. But, insofar as exemption notifications that are conditional in nature, the respondents will have to see whether all domestic manufacturers will automatically get exemption or some of them may not get exemption due to non-fulfilment of theconditions prescribed in the notification. If some ofthem are not entitled, due to non-fulfilment of the conditions, the importers, for whom it is impossible of complying with those conditions, are also not entitled to the benefit. It is this position that is sought to be clarified by the impugned amendmentnotifications dated 17-7-2015 and 21-7-2015.****Hence, there are no merits in the writ petitions. ……"*

12. We also note that in the case of *Commissioner of Cus. (Exports), Chennai v. Prashray Overseas Pvt. Ltd. [2016 (338) E.L.T. 44 (Mad.)]*, the very Hon'ble jurisdictional High Court had gone into the very same issueand held as under: -

"60. Hence, in fine, the propositions of law that would emerge out of the above discussion, can be summed up as follows :

(i) In cases where the exemption Notifications are absolute and they do not make the benefit available onlyupon the fulfillment of any condition, even the importer would be entitled to the benefit of exemption.

(ii) In cases where the Notifications for exemption stipulate only one condition namely that the inputs used in the manufacture of the exempted goods should have suffered a duty, then the benefit of the Notification will not be available to any of the importers, since he could have never paid any duty of excise on the inputs used intheir manufacture by the foreign manufacturer. This proposition is based upon the premise that the object of such Notifications is only to grant exemption to those final products, on which, some duty has been paid (in India) at the stage of inputs. In other words, Notifications of thisnature, are not merely conditional, but also restrictive innature, as they confer benefit not upon all manufacturersof exempted goods, even if they are domestic manufacturers, but only upon those, who use inputs thathad suffered duty.

(iii) In cases where the exemption Notification stipulates only one condition namely that no Cenvat creditought to have been availed on the inputs, the benefit of the Notification will be available only to those, who satisfytwo conditions namely that the inputs used by them suffered a duty and that they did not seek Cenvat credit.Since an importer can never satisfy the first condition, the second condition becomes inapplicable to him and he cannot be heard to contend that the inapplicability of thecondition by itself would make him eligible for the grant

of the benefit.

(iv) In cases where the exemption Notification stipulates two conditions, namely that the inputs should have suffered duty and that no Cenvat credit should havebeen availed, then the benefit of the Notification will be available only if both conditions are satisfied. An importer will never be able to satisfy both these conditions and hence, he cannot claim the benefit.

61. Therefore, we answer both questions of law against the assessee. As a consequence, the appeals of theRevenue are allowed. No costs."

13. We take note of the arguments of the Ld. Advocatein his rejoinder, that even against the said judgement in the case of *Prashray Overseas Pvt. Ltd. (supra),* Special Leave Petition has been filed before the Hon'ble Supreme Court, which has been admitted as reported in *2017 (355)*
E.L.T. A151 (S.C.).

14. The Ld. first appellate authority has only followed the binding decision of the Hon'ble High Court *(supra)* andtherefore, we do not find any fault with the impugned orders. In view of the above, we do not find any merit in the contentions of the appellants.

15. We will now consider the doctrine of merger in the light of the admission / granting of leave to appeal, againstthe order of the Hon'ble High Court *(supra).*

12.4 In the case of *Kunhayammed (supra),* the Hon'ble Apex Court has, at paragraph 14, expressed its opinion as to the legal position emerging upon discussion and the relevant portion reads as under: -

"14. …

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(3) If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in appellate arena is opened. The petitioner is in and therespondent may also be called upon to face him though in an appropriate case, in spite of having granted leave to appeal, the court may dismiss the appeal without noticingthe respondent.

(4) In spite of a petition for special leave to appeal having been filed, the judgment, decree or order againstwhich leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending theoperation or execution of the judgment, decree or order under challenge."

12.5 From Sl. No. (4) (*supra*), it is clear that upongranting of leave to appeal, though the finality of the judgement, decree or order appealed against is put in jeopardy, it continues to be binding and effective betweenthe parties unless it is a nullity or unless the court may pass a specific order staying or suspending the operation or execution of the judgement, decree or order under challenge.

12.6 Further, it is held at paragraph 39 as under: -

"39. We have catalogued and dealt with all the availabledecisions of this Court brought to our

notice on the point at issue. It is clear that as amongst the several two- Judges Bench decisions there is a conflict of opinion and needs to be set at rest. The source of power conferring binding efficacy on decisions of this Court is not uniform in all such decisions. Reference is found having been made to (i) Article 141 of the constitution, (ii) doctrine ofmerger, (iii) res judicata, and (iv) Rule of disciplineflowing from this Court being the highest court of the land."

16. The doctrine of merger was once again considered in the case of *West Coast Paper Mills Ltd. (supra)* and the relevant observations of the Hon'ble Apex Court are as under: -

"14. Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appealshall lie against any order passed by a Court or Tribunal.Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgment ofthe Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgmentis in jeopardy.

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38. In the aforementioned cases, this Court failed to take into consideration that once an appeal is filed beforethis Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subjectmatter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevanceonce this Court grants special leave and decides to hear the matter on merit."

17. There is no dispute that the Tribunal, as a lower judiciary, is bound by the decision of the Hon'ble jurisdictional High Court and the law laid down by the Hon'ble Apex Court being the law of the land, is always binding on all the lower courts.

18. After going through the observations of the Hon'ble Apex Court in the cases of *Kunhayammed* and *West CoastPaper Mills Ltd. (supra)*, it is clear to us and there is also no dispute that once leave is granted to appeal, theimpugned order therein does not become final. We therefore venture into the merits of the cases since, as contended by the Ld. Advocate, that issue in the present cases is open for consideration.

16.5 In the case on hand, going by the contentions, bothverbal and written, the assessees-importers sought the benefit of Notification No. 30/2004-C.E. which was not available in the Revenue's EDI system. Quite clearly, as onthe date of filing the impugned bills-of-entry, there was a change in the law brought about by the amended Notification Nos. 34/2015 and 37/2015 *ibid.* and hence, thesuperseded Notification can never be available in the EDI system. What would be available is as per the amended law, that is, the new Notifications would replace the earlierNotification in the system as well. Hence, when a new lawcomes into effect, an importer can avail the benefit of suchlaw only and if such law prescribes certain conditions, thenit is incumbent upon such claimant to satisfy the conditions

prescribed thereunder. He cannot be still heard to stake aclaim for the benefit under an effaced Notification which isclearly not in vogue as on the date of import / filing of bills-of-entry. To us, therefore, the change in law as brought about in the amended Notifications, has clearly been appreciated by the Hon'ble High Court in its judgement in the assessees' own cases (*supra*), which has rightly been followed by the Ld. first appellate authority.

16.6 The prayer of the appellants even in the grounds-of-appeal reveal clearly that they are seeking the benefit of an erstwhile Notification which stood duly effaced, but however, there is no claim made as to satisfying the conditions prescribed under the amended Notification Nos.34/2015 and 37/2015 *ibid.* which were applicable.By the amending Notification No. 34/2015-C.E. dated 17.07.2015, the condition that was prescribed was as to the non-availment of CENVAT Credit on the inputs used inthe manufacture of goods. The admitted position is that theimporters i.e., the assessees before us, were not themanufacturers since the impugned goods were manufactured outside India and hence, it is quite obvious that no CENVAT Credit would be available to be availed onthe impugned goods. Perhaps to this extent, it appears thatthe only condition in Notification No. 34/2015 stands satisfied with respect to the impugned goods, insofar as the appellants herein are concerned.

16.7 Per Notification No. 37/2015-C.E. dated 21.07.2015,yet another condition came to be inserted, which had the effect that Central Excise duty should have been paid on the inputs. This was perhaps impossible for the appellantsbefore us, to have paid the Central Excise duty on the inputs used in the manufacture of imported / impugned goods since, admittedly, the impugned goods were manufactured outside the territory of India. Hence, we donot find any difficulty in assuming that the second condition could not be satisfied by the assessees-importers before us. The assessees also did not claim to have paid the Central Excise duty on the inputs used, but however, it is their only claim that it was an impossible task to fulfil the second condition and therefore the said condition should be ignored.

16.8 Exemption Notifications are issued with a purpose and as we have observed elsewhere, some Notifications areabsolute and some are conditional and when it is a conditional one, it is imperative that the condition/s thereinought to be satisfied in order to avail any benefit flowing therefrom. Hence, it is also imperative on us to adopt purposive interpretation in such cases. If the claim of the appellants is to be entertained, then, the local manufacturers would be definitely put in a disadvantageous position as there may be increase inimports due to exemption. Thus, the purpose appears to us to be to encourage local manufacturers and therefore, the said conditions are put to restrict imports. Hence, we tend not to entertain such claims of the appellants who areonly the importers. In this context, we refer to the decisionof the Hon'ble Apex Court in the case of *Rohitash Kumar &ors. v. Om Prakash Sharma & ors. [(2013) 11 S.C.C. 451]*wherein the Hon'ble Court has clearly held that inconvenience of the taxpayer cannot be looked into: -

"19. In Bengal Immunity Co. Ltd. v. State of Bihar & Ors.,AIR 1955 SC 661 it was observed by a Constitution Benchof this Court that, if there is any hardship, it is for the legislature to amend the law, and that the Court cannot be called upon, to discard the cardinal rule of interpretation for the purpose of mitigating such hardship. If the language of an Act is sufficiently clear, the Court has to give effect to it, however, inequitable or unjust theresult may be. The words, 'dura lex sed lex' which mean"the law is hard but it is the law." may be used to sum up the situation. Therefore, even if a statutory provision causes hardship to some people, it is not for the Court toamend the law. A legal enactment must be interpreted inits plain and literal sense, as that is the first principle of interpretation.

20. In Mysore State Electricity Board v. Bangalore Woolen, Cotton & Silk Mills Ltd. & Ors., AIR 1963 SC 1128a Constitution Bench of this Court held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

21. In Martin Burn Ltd. v. The Corporation of Calcutta, AIR 1966 SC 529, this Court,

while dealing with the sameissue observed as under:– "A result flowing from a statutory provision is never an evil. A Court has no powerto ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the resultor not." (See also: The Commissioner of Income Tax, West Bengal I, Calcutta v. M/s Vegetables Products Ltd.,AIR 1973 SC 927; and Tata Power Company Ltd. v. Reliance Energy Limited & Ors., (2009) 16 SCC 659).

Therefore, it is evident that the hardship caused to an individual, cannot be a ground for not giving effective andgrammatical meaning to every word of the provision, if the language used therein, is unequivocal."

17.3 Admittedly, what the appellants claimed is the benefit of exemption. Hence, when an exemption is claimed, the claimant should necessarily satisfy the conditions prescribed under the Notification under which such exemption is claimed. Conveniently, the appellants have chosen to make the exemption claim under a Notification which was not in existence at the time of imports. Hence, the authorities below have rightlyproceeded to examine the claim of exemption under the available / prevalent Notifications i.e., Notification Nos. 34/2015-C.E. and 37/2015-C.E. *ibid.*, and admittedly, the appellants have nowhere whispered about fulfilling all the conditions of the said Notifications which replacedNotification No. 30/2004-C.E. The Hon'ble Supreme Courtin the case of *Commissioner of Customs (Import), Mumbai v. Dilip Kumar & Company [2018 (361) E.L.T. 577 (S.C.)]*has clearly laid down that when the benefit of an exemptionNotification is claimed, the claimant has to necessarily fulfilall the conditions prescribed under the said beneficialNotification.

17.4 We are therefore of the view that the claim of the appellants for the benefit of Notification No. 30/2004-C.E., as amended vide Notification No. 34/2015-C.E. and Notification No. 37/2015-C.E., is not entertainable and hastherefore been correctly rejected by the Ld. first appellateauthority. Hence, we do not find any case being made out for interfering with the impugned Orders-in-Appeal. Theissue, therefore, is decided against the appellants.

18. Resultantly, the appeals stand dismissed.

Customs Appeal No. 40032 of 2021:

19.6 In respect of the Department Appeal in Appeal No.

C/40032/2021, it appears that the assessee-respondent had filed two appeals against two communications dated 07.01.2020 and 30.04.2020 whereby the refund claims ofthe assessee in respect of 9 bills-of-entry and 3 bills-of- entry respectively were rejected by the Assistant Commissioner (Refunds).

19.7 The reasons given for rejection of these refundclaims made by the respondent herein by the original authority appears to be that the documents called for werenot submitted and the respondent also did not appear during the personal hearing. In respect of the second claim, the same was rejected as being time-barred in addition to non-submission of duplicate copy of bill-of- entry, re-assessed bill-of-entry and TR-6 challans. Consequently, the adjudicating authority rejected the claimafter referring to Public Notice No. 88/2019 dated 18.10.2019 on the ground that the order of assessment, including the self-assessment, should have been duly modified.

19.8 Against the said rejection, it appears that the respondent preferred two appeals contending that they hadsubmitted all the documents and the deficiency memos were only sent to their branch office. In respect of the second appeal, the respondent had contended that they had submitted to group for re-assessment, but the same was never assessed; the original bill-of-entry and TR-6 challans were misplaced, for which reason an indemnity bond was executed and since the duty was paid under protest, time-limitation would not apply.

19.9 During appellate proceedings, the first appellateauthority has recorded the grievance of the assessee, which *inter alia* read as under: -

"5. The appellant has made the following submissions.

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III. *The Appellant filed Bill of Entries and claimed exemption under Notification No. 30/2004 dated09.07.2004. The Department has not granted exemption to the said goods which forced the Appellant to pay excess duty to avoid demurrage charges and furthermore the Appellant paid duty* ***under protest and the same was communicated to the Department. The Appellant filed a communication on 19.01.2019 requesting the Department to issue a speaking order and re-assess the Bill ofEntries by granting exemption underNotification No. 30/2004 dated 09.07.2004.***

IV. ***Till date the Department has neither vacated the protest lodged by the Appellant nor issued a speaking order as envisaged under Section 17(5) of the Customs Act, 1962****.It is in this backdrop that the Appellant filed a refundclaim application on 13.04.2016 and the same was pending. As the appellant had applied for reassessment of the bill of entry and the same was pending they could not reply to the various communication asking for reassessed bills of entriesand the appellant received the final rejection order dt 07.01.2020 on 11.01.2020 though they have submitted all the documents on 08.01.2020 except for reassessed bill of entry. …"*

19.10 From the impugned Order-in-Appeal Seaport C.Cus.

No. II/994-995/2020 dated 29.10.2020, we find that the first appellate authority has held at paragraph 10 asunder:-

"10. In view of the discussions in the above paras,I hold the impugned goods are eligible for exemptionof CVD under Notification No. 30/2004-C.Ex. and therefore I reassess the bills of entry, modifying theorder of self assessment in respect of impugned billsof entry exempting the impugned goods from CVD under Notification No. 30/2004-C.Ex., and order the refund authorities to sanction refund. The 2 appealscited in Table:1&2 above are therefore allowed withconsequential relief.

Ordered accordingly"

20.4 What emerges from the above is that there was a request for re-assessment, but however, there was no attempt at all by the Department to consider the above request for re-assessment. To this extent, therefore, the impugned order appears to be correct. Further, the tableswhich are reproduced at page 3 of 11 / paragraph 1 of the
impugned order dated 29.10.2020 are reproduced below:-

Table:1

Appeal No. C3/II/127/R/2020 Against Communication vide F.No. SR No. 1530/2020/Refunds-II in respect of following bills of entries					
S. No.	**BE No.**	**BE Date**	**S. No.**	**BE No.**	**BE Date**
1	10174	29.05.2015	6	2047340	28.07.2015
2	9026522	24.04.2015	7	2057600	28.07.2015
3	2009921	24.07.2015	8	2321478	21.08.2015
4	2010254	24.07.2015	9	2032240	27.07.2015
5	2017340	28.07.2015			

Table:2

Appeal No. C3/II/473/R/2020 Against Communication vide F.No. SR No. 11/2020/Refunds-II in respect of following bills of entries		
S. No.	**BE No.**	**BE Date**
1	5165137	10.04.2014
2	7675184	12.12.2014
3	7987733	14.01.2015

20.5 From the above Table:1 in respect of 9 bills-of-entry,we find that the bills-of-entry at Sl. Nos. 1 and 2 therein are clearly before the first amending Notification No. 34/2015-C.E., which came into effect from 17.07.2015. The three other bills-of-entry at Table:2 above are also clearly prior to the amending Notification No. 34/2015-C.E.and hence, insofar as these bills-of-entry are concerned, we have no hesitation in approving the finding of the first appellate authority and to this extent, therefore, the orderof the first appellate authority is upheld.

20.6 Insofar as the bills-of-entry at Sl. Nos. 3 to 9 at Table:1 are concerned, we find that the same are after theamending Notification No. 37/2015-C.E. dated 21.07.2015and hence, the same have to be looked into from the pointof eligibility in terms of the conditions prescribed under theamending Notification No. 37/2015 *ibid.* We have analysedthe same in respect of the other appeals and following thesame reasons, we do not approve the impugned order of the first appellate authority. To this extent, therefore, theimpugned order is set aside.

21. The appeal of the Revenue is therefore partly allowed, as discussed above.

Customs Appeal No. 40034 of 2021:

22.3 In respect of the Department Appeal in Appeal No.

C/40034/2021, we find from the tables reproduced at paragraph 1 of the impugned Order-in-Appeal Seaport C.Cus. No. II/996-999/2020 dated 29.10.2020 that all thebills-of-entry appear to have been filed during the subsistence of Notification No. 30/2004-C.E. and hence, wedo not find any difficulty in extending the benefit of the decision of the Hon'ble Supreme Court in the cases of *M/s. SRF Ltd. (supra)* and also *M/s. Aidek Tourism ServicesPvt. Ltd. (supra)*, which has rightly been allowed by the first appellate authority.

22.4 Hence, we do not find any merit in the Department's appeal, for which reason the same is dismissed.

23. Consequently, the appeals are disposed of, asindicated above.

(Order pronounced in the open court on 12.10.2023)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 41020 of 2014
(Arising out of Order-in-Appeal C.Cus. No. 185 to 186 of 2014 dated 06.02.2014 passed by the Commissioner of Customs (Appeals), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. Micro Labs Limited **: Appellant**
No. 11, Bank Street, Kilpauk, Chennai – 600 010

VERSUS

Commissioner of Customs **: Respondent**
No. 60, Rajaji Salai, Custom House,Chennai – 600 001

APPEARANCE:
Shri M. Harri Viswanaath, Advocate for the Appellant

Shri Harendra Singh Pal, Assistant Commissioner for the Respondent

CORAM:
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 40916 / 2023

DATE OF HEARING: 04.10.2023
DATE OF DECISION: 12.10.2023

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

Facts, as could be noticed from the documentsplaced on record including the Order-in-Appeal and the Order-in-Original, are that the appellant filed Bills-of-EntryNos. 9724542 dated 01.04.2013 and 2771333 dated 22.07.2013, for clearance of the goods imported by them, declaring the same as "HYDROCORTISONE", which were classified under Sub-Heading No. 2937 2100 attracting rate of duty at 7.5% + 12% + 2% + 1% + 4% and the duty appears to have been paid by way of debit in the scripunder Focus Market Scheme. The goods were given 'Out ofCharge' (OOC) on 26.07.2013.

2. The assessee, after noticing that the said Bills-of- Entry were assessed without the claim of benefit of Notification No. 12/2012-C.Ex Sl. No. 105, List 1 Sl. No. 11, appears to have requested the Deputy Commissioner of Customs (ACC), Chennai for cancellation of Out ofCharge (OOC) and further requesting for re-assessment interms of Section 17(4) of the Customs Act, 1962 vide theirletter dated 12.08.2013.

3. There being no action by the Revenue, the assesseeappears to have filed appeal before the first appeal authority. The first authority having rejected the claim of the appellant and thereby the appeal of the appellant videOrder-in-Appeal C.Cus. No. 185 to 186 of 2014 dated 06.02.2014, the present appeal has been filed before this court by the assessee.

4.1 We have heard Shri M. Harri Viswanaath, Ld. Advocate for the appellant, we have also gone through thegrounds-of-appeal and relief claimed in this appeal. It is the case of the appellant / assessee that they did not claimthe benefit of the Notification *(supra)* at serial number 105where the CVD was 'nil', but since the same was not claimed, the appellant had to pay Rs.91,576.67/- as CVD,which came to be debited in the FMS scrip furnished by the appellants. When the product under import, namely, Hydrocortisone, was fully exempt by way of the saidNotification, their prayer for reassessment should have been acceded to by the lower authority. According to the Advocate, this was a simple clerical error which should have been done even under Section 17(2) by the lower authority himself, but however, even when the same was brought to the notice, the original authority could have exercised his power under Section 149/154 of the CustomsAct for corrections of the clerical error pointed out.

4.2 It is their case that at least the first appellateauthority should have considered their request and directed to rectify the 'clerical error' as conveyed by them.By the above, according to the Ld. Advocate, the benefit ofNotification *(supra)* which was not claimed by them originally, came to be denied and hence, he would pray forsetting aside the impugned order, with a further direction to the lower authority to grant the benefit of the Notification to the assessee/appellant.

5. On the other hand, Shri Harendra Singh Pal, Ld. Assistant Commissioner, relied on the impugned orderand the findings therein. He would also take us through serial number 105 of the said Notification and the description thereunder. He would also invite our attention to the explanation whereby the Board has categorically clarified that for the purposes of that entry, the bulk drugsspecified in List 1 should conform to pharmacopoeial or other standards specified in the Second Schedule to the Drugs and Cosmetics act, 1940; thus, the assessee havingfailed to demonstrate before the lower authorities as to theimported goods conforming to any standards of pharmacopoeia specified in the Second Schedule of the Drugs and Cosmetics Act, therefore, the appellant/assessee is not entitled to the benefit of the Notification *(supra).*

6. Having considered rival contentions, the only issue to be decided by us is: whether the appellant/assessee wasright in its claim for nil rate of CVD in terms of theNotification *(supra)*?

7. We find that serial number 105 describes the "bulk drugs specified in List 1" which would attract nil rate of duty, and there is no dispute that List 1 includes Hydrocortisone (Sl. No. 11) as well. But the description ofexcisable goods at Column No. (3) has something more, byway of explanation. That means the description has to be read along with the explanation and the same are not mutually exclusive. The explanation provides the purposesof that particular entry - bulk drug to mean any pharmaceutical, chemical, biological or plant product, including its salts, esters, stereo-isomers and derivatives, **conforming to pharmacopoeial or other standards specified in the Second Schedule to the Drugs and Cosmetics Act, 1940, and which is used as such or asan ingredient in any formulation**. It is therefore incumbent upon the importer who imports any of the goodsor bulk drugs as in the case on hand specified in List 1 to demonstrate that the same are conforming to the pharmacopoeia or other standards specified in the SecondSchedule to the Drugs and Cosmetics Act, 1940. Hence, the appellant's claim after clearance of goods from Customs charge that since it imported Hydrocortisone which has a specific entry in List 1, the same attracts 'nil' rate of duty, does not sound to be correct, since the description at Column No. (3) has to be read in full, alongwith the explanation provided thereunder and, according to us, it is the explanation which controls the 'description of goods' for eligibility for rate of duty at 'nil'. Admittedly, the appellant/assessee has nowhere demonstrated that the goods imported by it did conform tothe standards specified under the explanation nor are the goods available for testing as they were cleared from Customs control before making the claim for exemption. We do not have any hesitation in holding the authorities below were absolutely correct in rejecting the claim of the appellant.

8. Consequently, the appeal filed by the assessee is liable to be dismissed, which we hereby do.

(Order pronounced in the open court on **12.10.2023**)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 41972 of 2014
(Arising out of Order-in-Appeal C.Cus. No. 905/2014 dated 12.06.2014 passed by the Commissioner of Customs (Appeals), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. Balaji Building Technologies (P) Limited **: Appellant**
SY No. 12, Byagadadenahalli,Chandapura-Anekal Road,
Anekal, Bangalore Urban – 562 106

VERSUS

Commissioner of Customs (Import) **: Respondent**
Custom House, No. 60, Rajaji Salai,Chennai – 600 001

APPEARANCE:
Shri L. Gokulraj, Advocate for the Appellant

Shri Rudra Pratap Singh, Additional Commissioner for the Respondent

CORAM:
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 41121 / 2023

DATE OF HEARING: 30.11.2023
DATE OF DECISION: 13.12.2023

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

This appeal is filed by the importer againstOrder-in-Appeal C.Cus. No. 905/2014 dated 12.06.2014 passed by the Commissioner of Customs (Appeals), Chennai.

2. The importer filed Bill-of-Entry No. 4312798dated 10.01.2014 upon import of goods described therein as "Extra Clear Glass". On account of glitch inthe EDI system, the said Bill-of-Entry could not be cleared under RMS and therefore, was referred back to the Appraising Group for assessment. During manual examination by the examining officers, it appears that the goods carried clear description as "Clear Float Glass Thickness 12mm, country of origin
– China".

3. It appears that upon being pointed out, the importer requested for adjudication without ShowCause Notice and without personal hearing.

4. Accordingly, Order-in-Original No. 24049/2014 dated 20.02.2014 came to be passed. The said orderhas placed reliance on the observations of the examining parties and the examination report, and finally concluded that the imported goods were nothing but Clear Float Glass which attracted Anti- Dumping Duty, ordered confiscation of the same withan option of redemption fine, apart from imposing penalty under Section 112(a) of the Customs Act, 1962 and Anti-Dumping Duty of Rs.3,86,682/-.

5. Aggrieved by the said order, it appears that theimporter filed an appeal before the first appellate

authority. The first appellate authority per Order-in- Appeal C.Cus. No. 905/2014 dated 12.06.2014, however, having rejected their appeal, the present appeal has been filed before us.

6. Heard Shri L. Gokulraj, Ld. Advocate for the appellant and Shri Rudra Pratap Singh, Ld. AdditionalCommissioner for the Revenue. The only issue to be decided by us is whether the impugned order issustainable.

7.1 We have gone through the documents placed on record; copy of the Bill-of-Entry reveals the description as: "12MM Extra Clear Glass", whereas theOrder-in-Original reveals that what was imported was"Clear Float Glass" as described on the goods itself and that the country of origin as available on the goods was China. The above manual examinationreport by the Shed Officers of the Department was never questioned by the importer, who opted not to participate in the personal hearing, and also requesting for the non-issuance of Show Cause Notice.

7.2 We find that by its letter dated 10.02.2014, theappellant has himself requested for the non-issuanceof Show Cause Notice with the further request to adjudicate the case without personal hearing as well. By this, the appellant avoided the further investigation/examination by the authorities and the original authority, having no other option, proceededto conclude the adjudication based on the unrebuttedexamination report of the officers of the Revenue. Thisalso makes it clear that the appellant did not raise anyobjection at the first available instance by raising protest to the observations of the manual examination officers. Later on, also, the appellant chose not only not to seek for any Show Cause Notice, but also optednot to participate in the personal hearing as well, thereby putting in black-and-white its explanation. Hence, at the threshold we are of the *prima facie* viewthat the authorities were justified in going by the examination report of the Shed Officers.

8.1 The Ld. Advocate has referred to one of the letters dated 03.02.2014, wherein the appellant appears to have maintained that what was imported by the cargo was Extra Clear Glass, which was also based on the commercial invoice of the foreign supplier, but however, other than a mere claim, no other supporting evidence has been placed on record.The supplier is an interested party just like the importer and hence, a supporting document in the form of an expert opinion was required to be filed by the importer to establish the fact that what was imported was Extra Clear Glass and not Clear Float Glass. When the Revenue doubted the description based on the manual/physical inspection of goods anddescription mentioned on the goods, the Bill-of-Entryand the commercial invoice would amount toself-serving documents and hence, an independent report of an expert would have come to the aid of theappellant.

8.2 The appellant having not done so, we do not findany lacuna in the findings of the lower authorities andhence the order of the first appellate authority is required to be upheld which we hereby do.

9.1 The Ld. Advocate invited our attention to the hypothetical duty liability as worked out by him, to urge that what was paid by the appellant was far morethan the duty liability if the value as suggested by theDepartment were to be adopted.

9.2 Even if the duty paid by the appellant were morethan what was demanded, it would not in any way affect the classification as such. There was a fundamental dispute as regards classification since clear float glass attracted ADD; the Revenue went by the first check/personal inspection of the cargo and the description label on the goods. The same was adopted since it was never challenged.

The appellant, by raising a ground that the duty was paid for Extra Clear Glass, is indirectly trying to justifyits classification which cannot be permitted. When there were clearly no doubts in the minds of the Revenue as to what was imported was float glass, then necessary consequences ought to follow,inasmuch as the liability to ADD cannot be overlookedjust because the appellant has been magnanimous inremitting more duty. If the said theory is accepted, then the same would affect the classification itself! Hence, the theory of the appellant cannot be acceptedas the same lacks any merit.

10. Insofar as the Anti-Dumping Duty levy is concerned, the appellant-importer has given aworking wherein it has claimed that what was paid asduty by it was more than what was hypothetically worked out by the Revenue, but however, we cannotget into the arithmetics of the same since, the scope of the appeal is limited.

11. In that view of the matter, we do not find any merit in the case of the appellant for which reason wedismiss the appeal.

(Order pronounced in the open court on **13.12.2023**)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 40645 of 2020

(Arising out of Order-in-Appeal No. 31/2020-TTN (CUS) dated 06.08.2020 passed bythe Commissioner of G.S.T. and Central Excise (Appeals), No. 1, Williams Road, Cantonment, Tiruchirappalli – 620 001)

M/s. TamilNad Dyes and Chemicals **: Appellant**
N-3, South Masi Street,Madurai – 625 001

VERSUS

Commissioner of Customs **: Respondent**
Custom House, New Harbour Estate,Tuticorin – 628 004

APPEARANCE:
Shri Akshit Malhotra, Advocate for the Appellant

Smt. Anandalakshmi Ganeshram, Asst. Commissioner for the Respondent

CORAM:
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 41124 / 2023

DATE OF HEARING: 26.10.2023
DATE OF DECISION: 14.12.2023

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

This appeal is filed against the Order-in-AppealNo. 31/2020-TTN (CUS) dated 06.08.2020 passed bythe Commissioner of G.S.T. and Central Excise (Appeals), Tiruchirappalli whereby the first appellate authority, though having recorded as to what was imported was 'Kerosene' by declaring the same as LowAromatic White Spirit ('LAWS' for short), has chosen to set aside the Order-in-Original with a direction to pass a *de novo* order. The first appellate authority, while remanding the case back to the file of the original authority, has held that the appellant had made fresh submissions and case-law apart fromsome fresh grounds, to justify his order. It is against this order that the importer-appellant has preferred the present appeal before this forum. Revenue has, however, not filed any appeal.

2. Heard Shri Akshit Malhotra, Ld. Advocate for theappellant and Smt. Anandalakshmi Ganeshram, Ld. Assistant Commissioner for the Revenue in virtual mode.

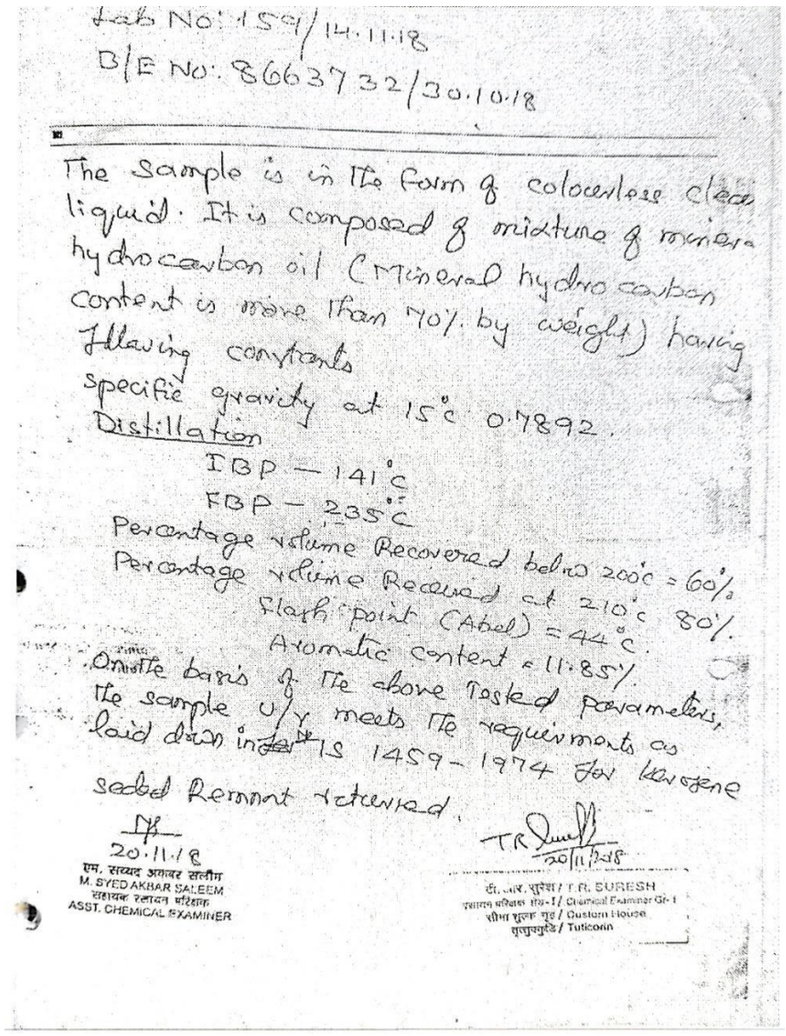
3. The primary contention of the appellant is that the order as to remanding the matter back to the fileof the adjudicating authority by the first appellate authority was not in accordance with law and that based on the available materials, the Commissioner (Appeals)

himself should have passed an order. The appellant has also filed a paper book containing synopsis and decisions of various higher judicial fora in support.

4.1 Brief facts that are relevant for ourconsideration are that the appellant imported two consignments of what was claimed by it as LAWS, which was sought to be cleared vide Bills-of-Entry dated 30.10.2018 and 12.11.2018 by classifying the same under CTH 2710 1990 of the Customs Tariff Act,1975.

4.2 The Revenue chose to draw samples from eachof the consignments and sent the same for testing, tothe Chemical Examiner, Custom House, Tuticorin, whofiled test reports dated 20.11.2018 and 21.12.2018 –copies of which were filed by the appellant before us,opining in a nutshell as under: -

- Test Report dated 20.11.2018: -



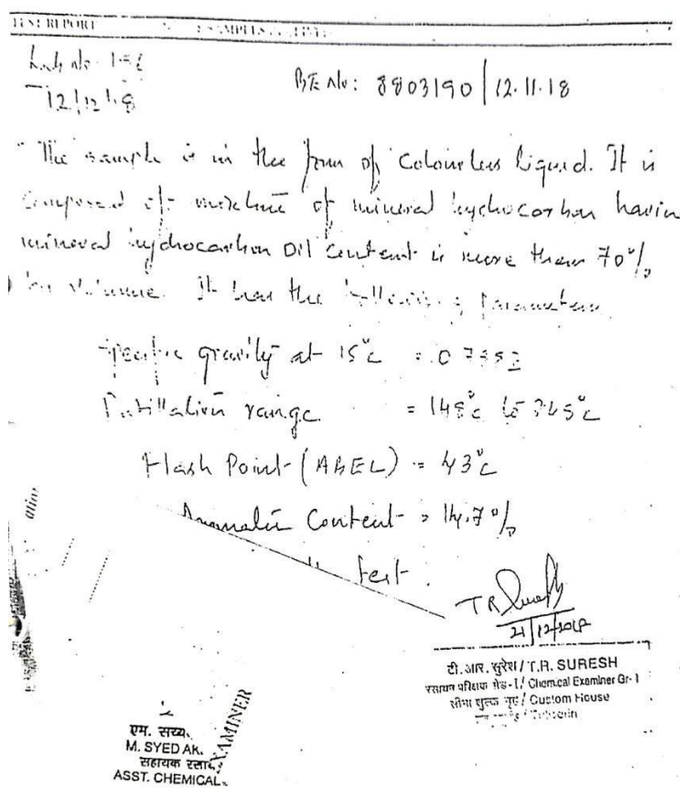
Lab No: 159/14.11.18
B/E No: 8663732/30.10.18

The sample is in the form of colourless clear liquid. It is composed of mixture of various hydrocarbon oil (Mineral hydro carbon content is more than 70% by weight) having following constants
Specific gravity at 15°C 0.7892.
Distillation
IBP – 141°C
FBP – 235°C
Percentage volume Recovered below 200°C = 60%
Percentage volume Recovered at 210°C 80%.
Flash point (Abel) = 44°C.
Aromatic content = 11.85%
On the basis of the above Tested parameters, the sample U/Y meets the requirments as laid down in the IS 1459 – 1974 for kerosene
Sealed Remnant returned.

20.11.18
एम. सय्यद अकबर सलीम
M. SYED AKBAR SALEEM
सहायक रसायन परीक्षक
ASST. CHEMICAL EXAMINER

20/11/2018
टी. आर. सुरेश / T.R. SURESH
रसायन परीक्षक ग्रेड-I / Chemical Examiner Gr-I
सीमा शुल्क गृह / Custom House
तूतुकुडि / Tuticorin

- Test Report dated 21.12.2018 (as provided): -



TEST REPORT — SAMPLES TEST

Lab No: 1-6
12/12/18

B/E No: 8803190 | 12.11.18

The sample is in the form of Colourless liquid. It is composed of mixture of mineral hydrocarbon having mineral hydrocarbon Oil content is more than 70% by Volume. It has the following parameters

Specific gravity at 15°C = 0.7852
Distillation range = 145°C to 265°C
Flash Point (ABEL) = 43°C
Aromatic Content = 14.7%

Test.

TR Suresh
21/12/2018

टी. आर. सुरेश / T.R. SURESH
रसायन परीक्षक ग्रेड-I / Chemical Examiner Gr-I
सीमा शुल्क गृह / Custom House
Tuticorin

एम. सय्य.
M. SYED AK.
सहायक रसा.
ASST. CHEMICAL EXAMINER

4.3 It appears that not satisfied with the above reports, the appellant requested for a second opinion / re-testing, alleging that the above test reports wereinconclusive and non-conformative.

4.4 Based on the above, it appears that the Revenue drew samples once again, which were forwarded to the Central Revenue Control Laboratory(CRCL), New Delhi. The samples were drawn vide Mahazar dated 02.01.2019 and it is not disputed thatthe appellant was duly represented while drawing thesamples and also while drawing up of the Mahazar to that effect. The CRCL, New Delhi appears to have given its opinion / report dated 11.02.2019 whereby, in a nutshell, the said authority has opined as under[made available by the appellant in its paper book before us] : -

-2-

S.No	Characteristics	Requirement of Kerosene as per IS: 1459-2018	Test Results pertaining to Lab No. CLR-65 dated 11.02.2019 B/E No.8663732 dated 30.10.2018	Test Results pertaining to Lab No. CLR-66 dated 11.02.2019 B/E No. 8803190 dated 12.11.2018
1	Acidity, Inorganic	Nil	Nil	Nil
2	Density at 15°C, Kg/m3	Not limited but to be reported	782.8	782.7
3	Distillation:			
	a)Initial Boiling Point, °C	–	161	161
	b)% recovered below 200°C, percentage (v/v,) Min.	20	66	65
	c)Final Boiling Point, °C, Max.	300	248	248
	d)Dry Point, °C	–	241	241
4	Flash point (Abel), °C, Min.	35	46	46
5	Smoke point, mm, Min.	18	23	23
6	Aromatic Content, % by Volume	–	15	17
7	Copper strip corrosion for 3h at 50°C	Not worse than No.1	Not worse than No.1	Not worse than No.1

4. On the basis of above parameters, the samples under reference conforms to the specification of Kerosene as per IS 1459:2018. Each do not meet the requirements for Petroleum Hydrocarbon Solvents as per IS : 1745 – 1978 in respect of Final Boiling Point.

5. A officer may be deputed to collect the sealed remnant samples from CRCL, New Delhi.

Yours faithfully

5. Based on the above, a Show Cause Notice dated29.05.2019 came to be issued proposing

inter alia tore-classify the product under import as ‘SuperiorKerosene Oil’ under CTH 2710 1910 as against LAWSwhich was classified by the importer under CTH 27101990.

6. It appears from the documents placed on recordthat the appellant filed its reply dated 04.07.2019 to the above Show Cause Notice disputing the stand of the Revenue and essentially, the proposedre-classification of the goods in question.

7. The original authority having considered theavailable evidences in the form of expert opinion andthe reply filed by the appellant during adjudication, vide Order-in-Original No. 22/2019 dated 23.08.2019confirmed the re-classification as proposed in theShow Cause Notice under CTH 2710 1910.

8. Thereafter, the appellant approached the first appellate authority, who vide impugned Order-in- Appeal No. 31/2020-TTN (CUS) dated 06.08.2020 having accepted the re-classification, however, has remanded the case to the file of the original authorityfor *de novo* adjudication and the said order is assailedbefore us.

9. The appellant has assailed the impugned order of the first appellate authority on the following grounds: -

- The impugned order passed by the first appellate authority remanding the appeal to the adjudicating authority for fresh decision is ex-facie illegal, baseless and completely unsustainable both in law and on facts.
- Without prejudice to the above, the appellant submits that the first appellate authority has, without appreciating the submissions made by the appellant in its appeal, blindly agreed with the findings of the adjudicating authority and remanded the case to the adjudicating authority.
- Even otherwise, without prejudice to theaforesaid, the first appellate authority has no power vested with him under Section 128A of the Customs Act, 1962 to remand the matter by citing the reason that the appellant had made fresh submissions and / or cited case laws.
- Without prejudice to the above, it is submitted that there is no dispute that CRCL, New Delhi isa competent authority to analyse the samples inall technical matters pertaining to classification.It is submitted that the appellant’s challenge islimited to the conclusions and the readingsarrived at by the CRCL in the Report and not onthe competency of CRCL, which are two independent and distinct aspects.

- Method of testing is decisive in determining theauthenticity and veracity of a reading arrived atfor a particular property/parameter. It was pointed out by the appellant that the entire TestReport being relied upon in the Notice, nowherediscloses the method of testing, rendering the same as inconclusive.
- The samples have been collected and stored by the Department in ‘plastic containers’.

- The Test Report has opined only 7 parameters out of the 10 parameters enlisted under IS 1459: 2018.
- In the light of the aforesaid, the first appellate authority ought not to have rejected the appellant’s challenge against the Test Report ofCRCL, New Delhi.
- Without prejudice to the above, the first appellate authority has failed to appreciate the submission of the appellant in the appeal memorandum that the onus cast upon the Department to classify the product in question under a particular heading has not been discharged in the instant case.

- Without prejudice to the above, it is submitted that the only document being relied upon in theinstant matter is the Test Report dated11.02.2019 issued by the CRCL.
- Without prejudice to the above, the appellant inits appeal had categorically submitted that during the period of dispute viz. 2018, for a product to be classified as kerosene under the Customs Tariff Act, 1975, the same was required to meet the specification envisaged in Supplementary Note (c) to Chapter 27.
- A perusal of the said Supplementary Note clearly indicated that a product can be classifiedas kerosene only if it conforms to IS 1459-1974(reaffirmed in 1996) and not to any other IS specification.
- Even though the Customs, in the instant case, has tested the product in question under IS 1459-2018, still to hold that the product in question is kerosene, it was obligatory to examine whether the testing and thereafter theresults reported therein are conforming to IS 1459-1974 or not.
- Without prejudice to the above, the appellant had therefore submitted that on perusal of the said IS 1459-1974, it clearly emerged that thereare 8 parameters which are required to betested and reported for confirming whether a product is kerosene or not.
- Without prejudice to the above, the appellant submits that the three parameters that have notbeen tested by CRCL are as under: -

i. Burning Quality, which includes testing the Char Value, mg/kg of oil consumed and Bloom on glass chimney

ii. Colour (Saybolt)

iii. Total Sulfur

- Without prejudice to the above, the respondenthas failed to appreciate that no evidence has been produced either in the Notice or in the adjudication order or even the impugned order to even suggest, let alone prove that the said parameters were met.
- Assuming that IS 1459-2018 was applicable, still no reliance can be placed on the Test Reportdated 11.02.2019. It is submitted that under IS1459-2018, there are 10 parameters which arerequired to be tested and reported in order to confirm that the product in question is kerosene.
- Without prejudice to the above, the first appellate authority has rejected the submissions made by the appellant regarding the unreliability of the CRCL Test Report citing certain vague and unspecific grounds.
- Without prejudice to the above, the first appellate authority has completely erred in rejecting or discarding the appellant's submissions on the unreliability of the CRCL Test Report.
- Without prejudice to the above, the appellant submits that the End-Use certificates submittedby it have been ignored by the first appellate authority.
- It had been importing identical goods fromKuwait which were cleared by the Customs authorities in Tuticorin Custom House classifying the same under T.I. 2710 19 90 and,that too, based on test reports from their own lab.
- Without prejudice to its above contentions and submissions on the merits of the matter, in the alternate, the appellant submitted that the firstappellate authority has failed to deal with the submission that redemption fine and penalty imposed on it in the impugned order was excessive and completely unjustified.
- The first appellate authority has remained silentin the impugned order on the benefit of paymentof reduced penalty sought by the appellant in the appeal memorandum under Section 112(a)of the Customs Act, 1962.
- It is pointed out that as the order passed by theadjudicating authority has resulted into changeof classification, leading to payment of higher rate of Customs duty from 5% as claimed to 10%, as ordered by the adjudicating authority,the duty has been determined under Section 28(8) of the Customs Act, 1962. Accordingly, the benefit of proviso to Section 112(a) is available to the appellant.
- Without prejudice to the above, it is submitted that since no duty, fine or penalty was payablein the matter, as submitted by it, the appellantis entitled to refund of the same.

- Without prejudice to the above, the appellant has submitted that since the product in question is not kerosene, the reference made to STE or the fact that the appellant did not take licence for import of the said product, in paragraph 16 of the impugned order, is irrelevant, unwarranted and inconsequential.

10. The tenor of the grounds-of-appeal, writtensubmission and the arguments advanced before us clearly indicates that the importer is under the impression that filing of the Bills-of-Entry upon importof the disputed goods by the appellant was a sufficientcompliance with the requirements of law and that its declaration as to the classification was to be acceptedas gospel truth and that it was for the Revenue to disprove the appellant's case, irrespective of the non-availability of any documentary evidence in support of the appellant's claim.

11.1 No doubt, the burden of proof is on the Revenuesince it was the Revenue that disputed the declarationof the imported goods as LAWS under CTH 2710 1990.However, the initial burden, according to us, stood discharged once the opinion of an expert in the field was obtained by the Revenue.

11.2 Further, the appellant has also seriouslyobjected to drawing of the samples and sending the same to CRCL, New Delhi before us, but however, we do not find any of such objections taken either at thefirst available opportunity i.e., drawing up of samplesvide Mahazar dated 02.01.2019 or even at a later stage, while filing its reply to the Show Cause Notice.It is a different matter altogether that the appellant has objected to the report / expert opinion of CRCL, New Delhi. If we were to accept the above stand of the appellant and ignore the only available evidence,then there remains nothing other than an uncorroborated claim of the appellant as to classification of the goods in dispute under CTH 27101990 in its Bills-of-Entry, which do not lead us anywhere.

12.1 In the relied case of the Hon'ble Apex Court in the case of *M/s. Tata Chemicals Ltd. v. Commissionerof Cus. (Preventive), Jamnagar [2015 (320) E.L.T. 45(S.C.)]*, the facts are slightly different inasmuch as theimporter therein had, by way of abundant precaution,filed the Bill-of-Entry along with the certificate of CASCO and, as observed by the Hon'ble Apex Court, the Department at no stage stated that they did not accept the CASCO report or that the same was defective in any manner, whereas in the case on handbefore us no such certificates are filed along with theBill-of-Entry or even later. Moreover, the observationby the Hon'ble Apex Court is that the samples were not drawn in the presence of any employee of the appellant therein, whereas the appellant herein has never disputed the drawing up of the mahazar while drawing the samples in the presence of its representatives. Based on the above, the Hon'ble Apex Court has concluded that the samples were notdrawn in accordance with law, which fact was ignoredby the Tribunal.

12.2 In the case of *M/s. Hindustan Ferodo Ltd. v. Collector of Central Excise, Bombay [1997 (89) E.L.T. 16 (S.C.)]*, which is also relied upon by the Ld. Advocate, the Hon'ble Apex Court has in very clear terms reiterated the function of the Tribunal in the following words: -

"3. It is not in dispute before us, as it cannot be, that the onus of establishing that the said rings fell within Item 22F lay upon the Revenue. The Revenue led no evidence.The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should,nonetheless, have been allowed.

4. It is not the function of the Tribunal to enter into thearena and make suppositions that are tantamount to theevidence that a party before it has failed to lead. Other than supposition, there is no material on record that suggests that a small scale or medium scale manufacturer of brake linings and clutch facings "would be interested inbuying" the said rings or that they are marketable at all.As to the brittleness of the said rings, it was for the Revenue to demonstrate that the appellants' averment inthis behalf was incorrect and not for the Tribunal to assess

their brittleness for itself. Articles in question in an appealare shown to the Tribunal to enable the Tribunal to comprehend what it is that it is dealing with. It is not an invitation to the Tribunal to give its opinion thereon, brushing aside the evidence before it. The technical knowledge of members of the Tribunal makes for better appreciation of the record, but not its substitution.

5. The Revenue sought to make the said rings dutiable as asbestos articles. The affidavit evidence of a dealer inasbestos was of some relevance. So was the affidavit evidence that explained the character and use of the saidrings. It was wrong of the Tribunal to find that the deponents of these affidavits were "not the right personsto give opinion on the type of the products" with which itwas concerned.

6. Regretably, the Tribunal's order under appeal shows that it was not fully conscious of the dispassionate judicialfunction it was expected to perform, and it must be quashed.

7. Learned Counsel for the Revenue submitted that the matter be remanded to the Tribunal so that the evidenceon record may be reappreciated. As we have stated, no evidence was led on behalf of the Revenue. There is, therefore, no good reason to remand the matter."

13. In the case on hand before us, the facts are theother way around i.e., having disputed the classification, the Revenue approached an expert and obtained the expert's opinion, whereas the appellant,having filed its Bills-of-Entry, did not lead any evidence, but kept on raising objections afterobjections in the approach of the Department as wellas the expert opinions. No affidavit is filed, nor did it file any iota of evidence in its support. Hence, going by the dictum of the Hon'ble Apex Court (*supra*), since we are not the experts, we have to go by the only evidence available, that is, expert opinion of CRCL, New Delhi since, admittedly, the appellant did not leadany evidence. Classification, as we understand, cannot be determined based only on arguments sincearguments, howsoever forceful, cannot take the placeof proof or substitute evidence.

14. We find that the Revenue in order to reach the conclusion as to the classification of the impugned goods, has placed reliance on the expert opinion andthe same is not based on assumptions and presumptions and nor is it the personal view of the adjudicating authority.

15. In the light of the above discussion, we do not find any piece of evidence to take a contrary view to the finding of the first appellate authority as to the classification of the imported goods as 'Superior Kerosene Oil' by rejecting the uncorroborated classification as LAWS by the appellant. Hence, as objected to by the appellant, we are also of the view that the Commissioner (Appeals) should have closed the case instead of remanding the matter back to thefile of the original authority, which is against the amended provisions of Section 128A of the Customs Act, 1962, which has withdrawn the power of the Commissioner (Appeals) to remand the case for fresh adjudication except for those issues mentioned at Section 128A(3)(b), which does not cover the impugned issue.

16. In that view of the matter, we dismiss theappeal filed by the appellant, however, setting aside that part of the impugned order whereby the first appellate authority has remanded the matter back tothe file of the original authority.

17. In the result, the order of the original authorityis restored.

(Order pronounced in the open court on **14.12.2023**)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI COURT HALL No.III

CUSTOMS APPEAL No.40275 OF 2016

(Arising out of Order-in-Appeal C.Cus.II No.822/2015 dated 03.09.2015 passed by Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai 600 001.)

The Commissioner of Customs, ….Appellant
Commissionerate-IV, Custom House,

No.60, Rajaji Salai, Chennai 600 001.

Versus

M/s.Gamesa Wind Turbines P. Limited …Respondent
No.7, G.S.T. Road,

Pazhamaathur Village, Madurantakkam Taluk,

Kanchipuram District 603 111.

APPEARANCE :

Mr. R. Rajaraman, Assistant Commissioner (A.R) For the Appellant

Mr. M. Kannan, Advocate For the Respondent

CORAM :
Hon'ble Ms. SULEKHA BEEVI C.S., Member (Judicial) Hon'ble Mr. VASA SESHAGIRI RAO, Member (Technical)
Date of Hearing : 20.10.2023 Date of Decision : 20.10.2023

FINAL ORDER No.40947/2023

ORDER : Per Ms. SULEKHA BEEVI C.S.

Brief facts are that the respondent imported parts of Wind Operated Electricity Generators vide various Bills of Entry. As per Notification No.21/2012-Cus. dt. 17.3.2012 as amended by Notification No.21/2014-Cus. dated 11.07.2014, the respondent would be eligible for the benefit of exemption, if they produce a certificate at the time of import from the Ministry of New and Renewable Energy (M.N.R.E) The respondent herein did not produce the requisite certificate at the time of import and later on the basis of an Office Memo issued by the M.N.R.E, they filed a refund claim for the refund of the Special Additional Duty (S.A.D) paid by them. The said refund claim was rejected by the original authority vide order dt. 16.06.2015 stating that the refund claim cannot be allowed as the respondent has not challenged the assessment. Against this order, the respondent filed appeal before the Commissioner (Appeals). After taking note of the submissions made by the respondent, the Commissioner (Appeals) vide order impugned herein held that the respondent is eligible for the benefit of Notification No.21/2012 as they have produced the required certificate from M.N.R.E. The original authority's assessment order was set aside and the matter was remanded to the Assessment Group to recall and reassess the Bill of Entry extending the benefit of Notification No.21/2012 as amended by Notification No.21/2014- Cus. Aggrieved by such order, the Department is now before the Tribunal.

2. Ld. A.R Sri R. Rajaraman appeared and argued for the Department. It is submitted by the Ld. A.R that the condition in the Notification No.21/2012-Cus. as amended by Notification No.21/2014-Cus., is that the importer has to furnish a certificate at the time of import. In the present case, the respondent has not produced the certificate at all and they have produced only an office memorandum issued by the M.N.R.E. The said document cannot be accepted as a certificate required to be produced as per the notification. The finding of the Commissioner (Appeals) that the respondent is eligible for the benefit of notification is therefore erroneous. It is argued that the Commissioner (Appeals) ought not to have remanded the matter to reassess the bills of entry as the respondent has not produced the certificate at the time of import. It is prayed that the appeal may be allowed.

3. Ld. Counsel Sri M. Kannan appeared for the respondent. It is submitted by the counsel that the respondent could not obtain the certificate as required by the said notification at the time of import. They had obtained an office memorandum in regard to the certificate. Ld. Counsel prayed that the said office memorandum may be treated as in par with the certificate as required under the Notification No.21/2012-cus as amended. It is prayed by the learned counsel that Commissioner (Appeals) having remanded the matter to recall and reassess the bills of entry there is no infirmity in the impugned order.

4. Heard both sides.

5. The facts narrated above show that one of the conditions for availing the benefit of the exemption from S.A.D at the time of import of the impugned goods is that the importer has to produce a certificate from the Ministry of New and Renewable Energy, Govt. of India. The respondent has not furnished the certificate while filing the Bills of Entry. There is nothing stated in the notification that the said condition can be condoned even if the respondent does not have the required certificate and have furnished only an office memorandum issued by the M.N.R.E. We therefore find that the order passed by the Commissioner (Appeals) is not legal and proper. The direction to remand the matter so as to recall and reassess the bills of entry cannot therefore sustain. The impugned order is set aside. The order passed by the original authority is restored. The appeal filed by the Department is allowed.

(dictated and pronounced in court)

sd/- sd/-

(VASA SESHAGIRI RAO) **(SULEKHA BEEVI C.S.)**

Member (Technical) Member (Judicial)

gs

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 41705 of 2017

(Arising out of Order-in-Original Sl. No.: 01/2017-(Cus.) Commissioner dated 30.01.2017 passed by the Commissioner of Customs, Central Excise and Service Tax, 6/7, A.T.D. Street, Race Course Road, Coimbatore – 641 018)

M/s. Premier Enterprises **: Appellant**
123, Pillaiyar Koil Street, Kattoor, Ram Nagar,
Coimbatore – 641 009

VERSUS

Commissioner of Customs, Central Excise and Service Tax **: Respondent**
6/7, A.T.D. Street, Race Course Road, Coimbatore – 641 018

APPEARANCE:
Shri Shravan Kochar, Advocate for the Appellant

Shri R. Rajaraman, Assistant Commissioner for the Respondent

CORAM:
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 40077 / 2024

DATE OF HEARING:
28.11.2023
DATE OF DECISION:
24.01.2024

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

This appeal is filed by the Custom House Agent/appellant against the Order-in-Original Sl. No.: 01/2017-(Cus.) Commissioner dated 30.01.2017 passed by the Commissioner of Customs, Central Excise and Service Tax, Coimbatore.

2. Heard Shri Shravan Kochar, Ld. Advocate for the appellant and Shri R. Rajaraman, Ld. Assistant Commissioner for the Revenue.

3. Facts, as could be gathered, are that: -

(i) The appellant had made a request vide letter dated 13.01.2011 requesting to replace Mr. R. Mahadevan with Mr. Bose Thomas as their authorized person, to transact Custom House work on behalf of the appellant-firm, which appears to have been accepted by the Deputy Commissioner (Customs), Coimbatore vide communication dated 12.04.2011.

(ii) The appellant vide letter dated 27.05.2011 sought for issuance of duplicate CHA Licence for the reasons set out therein.

(iii) Much later i.e., on 13.03.2012, the appellant appears to have submitted Form-A and other relevant documents, including the 'Minutes of meeting held on 27-12-2010 for removal of Shri R. Mahadevan and inclusion of Shri Bose Thomas as an authorized person to transact

Custom House Work' (Sl. No. 7 of the contents, at page 49 of the appeal memorandum) to the Deputy Commissioner of Customs (Policy), Coimbatore.

(iv) On account of dispute, it appears that Mr. R. Mahadevan filed a civil suit, but no supporting documents have been filed before us in this regard other than print-outs of telegrams dated 16.07.2012 (placed at pages 45-A, 45-B and one unnumbered page in the appeal memorandum).

(v) Application dated 14.12.2015 was filed by the appellant for renewal of Customs Broker's Licence. Form-A records the fact (at row no. 4) that 'R. MAHADEVAN' was being replaced by a person by name 'K. SRIRAM' (page 44), which is contrary to the enclosure at Sl. No. 7 of the appellant's letter dated 13.03.2012 (placed at page 49 of the appeal memorandum).

(vi) The renewal application dated 14.12.2015 was returned vide communication dated 22.01.2016 (placed at page 40 of the appeal memorandum) on account of discrepancies/deficiencies. In the said communication, it is also observed that there was suppression as to the inclusion of Mr. Bose Thomas and that the clarification sought vide letter dated 16.07.2012 regarding the status of Mr. Bose Thomas was not submitted.

4. Thereafter, the appellant appears to have approached Hon'ble High Court of Madras, the reason being its non-renewal of license. For brevity, we deem it appropriate to refer to paragraph 3 of the Order of the Hon'ble High Court in W.P. No. 42073 of 2016 dated 30.11.2016, which reads as under: -

"3. It is seen that the petitioner's application for renewal was well within the period of limitation and it was submitted on 08.12.2015. On 14.12.2015, the petitioner submitted 10 documents and requested the third respondent to consider the same and renew the customs broker license. After receipt of those documents, the fourth respondent issued a notice, dated 22.01.2016 returning the petitioner's application for reasons stated therein. The petitioner re-presented the application along with their letter dated 25.02.2016, giving clarification for the queries pointed out. It is thereafter, once again, the fourth respondent issued another communication dated 01.04.2016 stating that there are deficiencies and discrepancies in the application for renewal and returned the application. The said application was re-presented by the petitioner along with the letter dated 11.04.2016. However, in the said letter, the petitioner has not specifically clarified the deficiencies and discrepancies pointed out in the communication dated 01.04.2016 of the third respondent, but has requested the third respondent to refer to his reply dated 25.02.2016. However, the said reply, dated 25.02.2016 has not been appended to this Writ Petition and therefore this Court is not in a position to readily examine as to what was the contents of the reply."

4.2 After hearing both sides, the following Order came to be passed by the Hon'ble High Court: -

"5. In the light of the above, there will be a direction to the petitioner to submit a clarification to the deficiencies and discrepancies pointed out in the Communication, dated 01.04.2016 issued by the fourth respondent within a period of two weeks from the date of receipt of a copy of this order and also enclose a copy of this order. On receipt of the same, the fourth respondent shall consider and pass a speaking order on merits and in accordance with law, within a period of three weeks from the date of receipt of the reply."

4.3 Thereafter, vide letter dated 29.12.2016, a request was made by the appellant for renewal of Licence in terms of the Order of the Hon'ble Madras High Court (*supra*).

5. Personal Hearing was granted and it appears that the appellant appeared in the Personal Hearing before the Commissioner, as evidenced by the Record of Personal Hearing dated 18.01.2017, which is placed on record before us. Thereafter, the Order-in-Original Sl. No.: 01/2017-(Cus.) Commissioner dated 30.01.2017 came to be passed, against which the present appeal has been filed before this forum.

6. Initially, the appellant-firm was having only two partners, which was reconstituted with

the induction of Mr. R. Mahadevan as per the "Deed of Reconstitution of Partnership" dated 30.05.2000 (placed at pages 60 to 67 of the appeal memorandum). The appellant was granted Licence to transact Custom House business (as per Section 146 of the Customs Act, 1962) for five years.

7. The contentions of the appellant are as under: -

- The dispute / exclusion of Mr. R. Mahadevan was purely an internal matter. Mr. R. Mahadevan was sent out of firm due to serious differences and he had retained the original license of the appellant.

Our observation: The above contention is incorrect since as per the communication dated 27.05.2011, which is placed at page 50 of the appeal memorandum, the appellant through its Managing Director had pleaded for issuance of duplicate CHA Licence for the reason that the original CHA Licence was not traceable.

- The Reconstitution was informed to the Department and renewal was granted for ten years, but subsequent renewal was not made.
- The appellant has a right for renewal of the Licence, which has to be looked into only in terms of the Customs Brokers Licensing Regulations (CBLR), 2013; the Revenue should have taken up the application for renewal even before the expiry of the Licence.

- The appellant had a good track record of work as a CHA and hence, the non-renewal of Licence by the Department is clearly erroneous.
- The application for changing the person authorized to do customs clearance work was pending consideration for more than three years for no fault of the appellant. Initially, Mr. R. Mahadevan was the authorized signatory, who was deleted from the firm with effect from 12.04.2011. Subsequently, Mr. Bose Thomas was appointed and he too resigned in July 2012. Immediately thereafter, the appellant appointed Mr. K. Sriram as the authorized signatory for carrying out the customs clearance work. Non-acceptance of the same by the Department vide communication dated 22.01.2016 was without any rhyme or reason.

8.1 *Per contra*, the Ld. Assistant Commissioner for the Revenue supported the order of the Commissioner. He has also referred to the letter dated 12.04.2011 from the Deputy Commissioner (Customs) to the appellant, which is placed at page 56 of the appeal memorandum, wherein the said authority has intimated the acceptance of the appellant's request to replace Mr. R. Mahadevan with Mr. Bose Thomas as the authorized person to transact Custom House work on their behalf under Regulation 17 of the CHALR, 2004.

8.2 He would also refer to the findings at various paragraphs of the impugned order, the relevant portions of which are reproduced hereunder: -

- *"Then Shri K.N. Pai, Managing Partner of M/s. Premier Enterprises approached this office to issue a Duplicate Customs Broker Licence as the same is missing/non-traceable for which this office informed him to get a FIR copy from Police regarding non-traceability/missing and he submitted the same and this office issue duplicate Customs Broker Licence on 22.07.2011. Later on, Shri Mahadevan, the other Partner submitted the original Customs Broker Licence issued to them which reveals that the Managing Partner Shri K.N. Pai knows that the original licence is with the disputed partner and hiding this fact he has applied for duplicate Customs Broker Licence."*

- *"During 05.07.2012, the Managing Director of M/s. Premier Enterprises approached this office to include Shri Shriram as authorized signatory for which this office asked clarification regarding the existing authorized signatory Shri Bose Thomas which was not replied till now and hence the same was not accepted. Further, it is a fact that during 2012 itself, Shri Bose Thomas resigned from M/s. Premier Enterprises, the same fact was not informed to Customs by the partners of the firm and also not requested this office to delete Shri Bose Thomas from the Customs authorized signatory of M/s. Premier Enterprises."*

- *"As such, M/s. Premier Enterprises is not having any customs authorized signatory from 2012 onwards which makes their Customs Broker Licence invalid/could not be operated.*

But Shri K.N. Pai, Managing Director of M/s. Premier Enterprises knowing fully well of the above facts operated the licence without the Customs authorized signatory continuously for 3 years i.e. 2013, 2014 and 2015 and cleared various consignments which can be seen from their business volume details."

8.3 He would also draw our attention to the letter dated 01.04.2016 of the Assistant Commissioner (Customs) addressed to the appellant with regard to renewal of Customs Broker Licence, which is placed at page 36 of the appeal memorandum, the relevant paragraph of which reads as under: -

"03. Even though, Shri Mahadevan was removed by you as a Partner of the Firm, it was not officially accepted by this office as Shri Mahadevan vide his letter given during 2012 informed this office that there is a dispute between the Partners. As the above said deletion of Shri Mahadevan from the Partnership was not accepted by Commissioner, the application for renewal of Customs Broker Licence should contain Shri Mahadevan's name as one of the Partners and not that of the other two new Partners whose names have not been accepted by the Commissioner till date."

9. In his rejoinder, the Ld. Advocate reiterated the grounds urged, highlighting that the dispute, if at all, between the appellant and one of the erstwhile partners was a private dispute; the renewal of the Licence in question is to be judged only in terms of the Regulations and that the findings in the impugned order and the consequent decision not to renew the Licence are vitiated on account of the same taking into account irrelevant and extraneous materials. The appellant has also urged in their grounds-of-appeal that the impugned order had serious civil consequences and the appellant's operation as a CHA has come to a complete standstill due to non-renewal of its Licence.

10. We have considered the rival contentions and perused the documents placed on record.

11. Regulation 9 of the CBLR, 2013 reads as under:-

"9. Period of validity of a licence.

(1) A licence granted under regulation 7 shall be valid for a period of ten years from the date of issue and shall be renewed from time to time in accordance with the procedure specified in sub regulation (2):
Provided that a licence granted to a Customs Broker, authorised under the Authorised Economic Operator Programme referred to in Board's Circular No. 28/2012 Customs dated 16.11.2012, shall not require renewal till such time the said authorisation is valid.

(2) The Commissioner of Customs may, on an application made by the licensee before the expiry of the validity of the licence under sub-regulation (1), ***renew the licence for a further period of ten years from the date of expiration, if the performance of the licensee is found to be satisfactory with reference, inter alia, to the obligations specified in this regulation including the absence of instances of any complaints of misconduct.***
(3) The fee for renewal of a licence shall be five thousand rupees."

12. Regulation 13(1) of the CBLR, 2013, as applicable, which is also relevant, reads as under: -

"Regulation 13. Change in constitution of any firm or a company. — (1) In the case of any firm or a company, holding a licence under these regulations, any change in the constitution thereof shall be reported by such firm or company, as the case may be, to the Principal Commissioner or Commissioner of Customs as early as possible, and any such firm or a company indicating such change shall make a fresh application to the said Principal Commissioner or Commissioner of Customs within a period of sixty days from the date of such change for the grant of licence under regulation 7, and the Principal Commissioner or Commissioner of Customs may, ***if there is nothing adverse against*** *such firm or company, as the case may be, grant a fresh licence:"*

(Emphasis added)

13.1 From the above Regulations, we find that any licence granted under the CBLR is always a conditional one and not absolute and that the granting authority has a discretion to allow the renewal as well, as and when requested for. In the impugned order, the Commissioner has highlighted the conduct of the Managing Director of the appellant-firm: firstly, it appears that the Managing Partner suppressed the fact of the original licence having been available with the other partner namely, Mr. R. Mahadevan, and approached the Revenue for issuance of a duplicate licence on the ground that the same was missing / not traceable; it is also an undisputed fact that the said Managing Director reported the loss of licence to the police and obtained a copy of FIR from the police. Secondly, a subsequent application for issuance of licence is alleged to have been made "***with the same old date and some pages were changed … This forgery of partnership deed was carried out by the Managing Partner…***". Thirdly, the subsequent application was made for the inclusion of Mr. Sriram as the authorized signatory, for which the office sought clarification as the records indicated that the existing authorized signatory was one Mr. Bose Thomas.

13.2 Further, there is also an observation in the impugned order, at page 6, that the appellant-firm was not having any Customs authorized signatory from 2012 onwards and hence, their Customs Broker Licence could not be operated, but the appellant, knowing fully well, had operated the Licence without the Customs authorized signatory continuously for three years i.e., 2013, 2014 and 2015 and cleared various consignments, which could be seen from their business volume details. The above observations are quite serious, having known that the other party had with him the original licence, the appellant appears to have filed a false complaint with the police alleging about the loss of the original licence, a copy of which was also filed with the Revenue authorities requesting for a duplicate of the same on the very same ground of loss/misplacement. There was also an allegation of forgery. The appellant against whom the above serious allegations/observations were made was therefore required to offer reasonable explanation and establish his *bona fides*, but however, the above allegations remain unanswered even before us. The other crucial misconduct which is highlighted in the impugned order is that the appellant had operated the licence without the Customs Authorized Signatory for three years, which fact also shakes the *bona fides* of the appellant. Instead of offering plausible explanation for the said misconduct, the appellant has only questioned the authority of the Commissioner as going beyond the issue.

14. In the light of our above observations and discussions, we do not find any irregularity or illegality committed by the Commissioner, Regulations of the CBLR authorize the Commissioner to check if there is anything adverse against a firm or company seeking fresh licence and to grant renewal of the same if there are no instances of any complaints of misconduct.

15. Hence, we do not find any merit in the appeal filed by the appellant, for which reason the appeal is dismissed.

(Order pronounced in the open court on **24.01.2024**)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 40737 of 2021
(Arising out of Order-in-Appeal Air C.Cus. I. No. 128/2021 dated 21.04.2021 passed by the Commissioner of Customs (Appeals-I), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. IQDS Dental India Private Limited **: Appellant**
No. 20, Sri Vijaya Lakshmi Nagar, Ambal Naga, Kovur,
Chennai – 600 118

VERSUS

Commissioner of Customs **: Respondent**
Chennai-VII Commissionerate,
New Custom House, Air Cargo Complex,
Meenambakkam, Chennai – 600 027

APPEARANCE:
Shri Gokulraj L., Advocate for the Appellant

Smt. O.M. Reena, Additional Commissioner for the Respondent

CORAM:
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 40075 / 2024

DATE OF HEARING:21.11.2023
DATE OF DECISION: 23.01.2024

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

The assessee had imported 1000 pieces of "Infrared Thermometer" for medical use and 5000 pieces of "Fingertip Pulse Oximeter Blue Colour" from China. Accordingly, the assessee filed Bill-of-Entry by self-assessing the goods under CTH 9025 1910.

1.2 It appears that on account of an alert circular issued by the DRI, New Delhi, in connection with excessive undervaluation in the import of non-contact infrared thermometer, the importer was asked to justify the valuation declared by it.

2. It appears, in response, that the importer paid the duty under protest, requesting the original authority to issue speaking order, since, according to it, the cargo was urgently required. Accordingly, original authority issued a speaking order No. 501/2020 ACC dated 07.09.2020, rejecting the self- assessment of the importer, thereby re-assessing at a higher value, against which the importer filed an appeal before the first appellate authority, who vide Order-in-Appeal AIR C.Cus.I. No. 268/2020 dated 12.11.2020 set aside the above speaking order dated 07.09.2020 with a direction to redo the adjudication and issue a fresh speaking order after providing all evidences to the importer.

3.1 It appears that the matter was once again considered by the original authority, who, after hearing the importer, passed a *de novo* order No. 27/2021 ACC dated 11.01.2021 wherein he had once again rejected the declared value. The original authority thus re-

determined/enhanced the value of both the "Infrared Thermometer" as well as "Fingertip Pulse Oximeter Blue Colour" in terms of Rule 5 of the Customs Valuation Rules, 2007.

3.2 Against this order, the importer preferred an appeal before the first appellate authority and the first appellate authority vide the impugned Order-in- Appeal Air C.Cus. I. No. 128/2021 dated 21.04.2021 has upheld the rejection of the declared value, however, has modified/reduced the enhanced value of the Infrared Thermometer alone. In doing so, the first appellate authority has referred to contemporaneous imports in which the transaction value/declare value of similar thermometer was at US$ 20.80/- per unit, which was directed to be applied in the case on hand as well.

4. It is against this order that the present appeal has been filed by the importer before this forum.

5.1 Heard Shri Gokulraj L., Ld. Advocate, for the appellant. He would submit, at the outset, that the so-called contemporaneous imports referred to and relied upon by the first appellate authority are in the nature of fresh evidences which were never put across to the appellant for rebuttal or were not forming part of the records before the original authority and hence, the impugned order is required to be set aside at once.

5.2 He would elaborate that even the first appellate authority has not brought on record as to how the alleged contemporaneous imports were comparable with the import of the appellant herein; in any case, principles of natural justice have been violated by the first appellate authority who had introduced the contemporaneous imports for the first time in his order, which were not shared with the appellant for rebuttal.

5.3 Ld. Advocate also contended that the enhancement in the value was made without providing the copies of bills-of-entry and invoices that were relied upon by the lower authority. Further, it is contended that the first appellate authority has gone beyond the scope of the original proceedings; the appellant-importer had provided the commercial invoice issued by the supplier and the bank remittance details to prove the transaction value and therefore, the declared value was to be treated as the transaction value; and that there is also no finding that the supplier was a related party or that there was a flow of any additional consideration over and above the invoice price.

6. *Per contra*, Smt. O.M. Reena, Ld. Additional Commissioner for the Revenue, supported the findings of the lower authorities. She also invited our attention to the findings in the speaking order dated 11.01.2021 and also in the impugned Order-in-Appeal. She would thus contend that the rejection of the declared value and re-determination of the same in the impugned order is in order and therefore, the same requires to be upheld.

7. We have considered the rival contentions and perused the orders of the lower authorities.

8. After hearing both sides, we find that the only issue to be decided by us is: whether the Revenue is justified in re-valuing the goods in question?

9.1 At the outset, we are clear that the principles of natural justice have not been followed by the first appellate authority insofar as the Infrared Thermometers are concerned, instances of imports relied upon have not been furnished to the appellant, but the same have been used against the appellant. There is no denial by the Revenue on the above facts. Hence, it appears that at least insofar as valuation of the thermometer in question is concerned, the re-determination of the value is not proper.

9.2 We are therefore of the view that the contemporaneous imports relied upon by the first appellate authority having not been put across for rebuttal, the impugned order suffers from serious legal infirmity, being violative of the principles of natural justice. The first appellate authority has undoubtedly proceeded beyond the scope of the appellate jurisdiction as prescribed under the statute and therefore, the impugned order to this extent cannot sustain.

10. Insofar as the enhancement of value of Fingertip Pulse Oximeter is concerned, no specific arguments were advanced before us. Even from the grounds-of- appeal as well as the synopsis filed during the course of arguments, we do not find any specific ground to this effect questioning the enhancement of transaction value insofar as the oximeter is concerned. Therefore, the appeal insofar as the enhancement of value of the oximeter is concerned, is

dismissed.

11. In the result, the appeal is partly allowed and partly dismissed, as discussed above.

(Order pronounced in the open court on **23.01.2024**)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL,

KOLKATA

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 75462 of 2014
(Arising out of Order-in-Appeal No.17/CUS(Apprg)/KOL(P)/2014 dated 15.01.2014 passed by Commissioner (Appeals), Kolkata)

M/s. Alcock Mcphar Geotech India
(7A, K. S. Roy Road, Jitendra Chambers, Kolkata-700001)

Appellant

VERSUS

Commr. of Customs (Admn & Port), Kolkata **Respondent**
(Customs House, 15/1, Strand Road, Kolkata-700001)

APPEARANCE :

None for the Appellant

Mr. Faiz Ahmed, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL) HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.75087/2024

Date of Hearing : 25 January 2024Date of Decision: 25 January 2024
PER R. MURALIDHAR:

The Appellant had exported their goods. Due to their rejection by the overseas importer, these goods were re-imported in India. At the time of re-import, the Appellant has opted to get the benefit of Notification No. 27/2002-Cus dated 01/04/2002. As per this Notification, the re-imported goods have to be re-exported within six months or latest within one year if the extension is sought by the Appellant to do so. In the present case, the Appellant has re-exportedthe goods after three years. On this ground, the Show Cause Notice was issued and the lower authorities have confirmed the demands. Being aggrieved, the Appellant is before the Tribunal.

2. No one has appeared on behalf of the Appellant today.

3. On going through the records, it is seen that more than four adjournments had been granted to the Appellant in the past few yearsand on each of the occasion, they were not present. Since the Appeal pertains to the year 2014, in the interest of justice, the Appeal itself was taken up for hearing with the help of the Learned AR.

4. On going through the Appeal papers and other enclosed documents, it is seen that the Appellant has re-exported the goods only after three years. Since Notification No. 27/2002-Cus dated01/04/2002 is a conditional Notification, the conditions specified therein have to be fully complied with by the importer in order to enjoy the exempted benefit.

5. The Commissioner (Appeals) vide impugned OIA has given the following findings:-

I went through the order of the adjudicating authority and statement of the appellant, written replies of the department and the provisions of Notification No. 27/2002-Cus dated 01/04/2002. In the personal hearing dated 12/12/2013, heard the appellant. In the PH< on behalf of the appellant Shri S. Sinha Roy, Director, had informed about the financial problems and ~~also told that few official documents could not~~ be provided because the above office had been closed due to which re-export was delayed. Considering the financial problems of the appellant, if found it appropriate to hear the appeal without the pre- deposit under 129€ Customs Act 1962 proviso. Keeping in view the error in the preamble, the extra 17 days delay after the legally allowed 60 days period in filing the appeal is condoned and, I consider the appeal to be disposed of. It is clear from the facts and statements of the appeal that the period of 6 month for re-export by the appellant is over long back. The appellant did not submit any application to the competent authority for the extension of the period to one year, and did re-export after three years of the limit of extended period getsover, thus prima facie the Notification No. 27/2002-Cus dated 01/04/2013 has been violated, and on this basis only the appeal can be considered to bedisposed off. The financial trouble of the appellant can not be the basis of his defence. The Hon'ble Supreme Court has ruled in the case of Eagle Flask that "the Conditions of the Notifications should be adhered verbatim" 2004 (171) E.L.T. 296 (S.C.). In the case of Parle Export the Hon'ble Supreme Court has ruled "The notification must be read as a whole in the context of the Act as if they are included in the Act itself. Notifications have statutory powers as well as legal accreditation." 1988 (38) E.L.T. 741 (S.C.)

6. After the above detailed findings, he has dismissed the Appeal.

7. Since the facts are not in dispute, we do not see any reason to interfere with the detailed and considered order passed by the Commissioner (Appeals).

8. Accordingly, we dismiss the present Appeal.

(Dictated and pronounced in the open court.)

Sd/-

(R. Muralidhar)Member (Judicial)

(Rajeev Tandon)

Member (Technical)

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

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 75641 of 2014
(Arising out of Order-in-Appeal No.604/Pat/Cus/Appeal/2014 dated 18/02/2014passed by Commissioner (Appeals), Customs, Central Excise, Service Tax, Patna.

Shri Pankaj Kumar Sharma

(S/o-Shri Yaswant Kumar Sharma, R/O-Mohalla-Balughat, Brahmasthan,

P. S.- Muzaffarpur Town, Anchal Mushari, District-Muzaffarpur, Bihar) **Appellant**

VERSUS

Commr. of Customs, Patna

(2nd Floor, Central Revenue Building, Birchand Patel Path, Patna-800001)

R**espondent**

APPEARANCE :

None for the Appellant

Mr. Faiz Ahmed, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL) HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.75018/2024

Date of Hearing : 05 January 2024Date of Decision:05 January 2024

PER R. MURALIDHAR:

No one has appeared on behalf of the Appellant. Since the matter pertains to the year 2014, in the interest of justice, we have taken up the Appeal for disposal with the help of the learned AR.

2. The Learned AR points out that the Commissioner (Appeals) has passed the impugned Order on the ground that the Appellant has filedthe Appeal with the delay of 198 days.

On going through the OIA, it is seen that the Commissioner (Appeals) has conducted proper enquiry and has found that the OIO dated 09/07/2013 was delivered to the Appellant on 15/07/2013 by Speed Post. On the same issue, the Department has also sent a letteron 05/11/2013 to the Appellant to the effect that the OIO was sent by Speed Post and was delivered to them on 15/07/2013. The detailed findings of the Commissioner (Appeals) are extracted below:-

3. The appellant submitted that impugned order was received by them on 29.11.2013. The appellant submitted that they came to know about the passing of impugned order on 10.10.2013 and then they made a correspondence on 10.10.2013 to the Assistant Commissioner, Customs Divn. Muzaffarpur for providing of Adjudicating Order as the same has not been received by them. However on verification from the office of Assistant Commissioner, Customs Divn. Muzaffarpur, it was not found correct. The copy of proof of corroborative postal receipt was also submitted by the department vide their letter C.No.VIII(10)208-Cus/Seiz/Muz/12-13/6716 dated 03.02.2014. This postal receipt clearly shows that impugned order at given address was delivered on 15.07.2013. Earlier, vide departments letter C.No.VIII (10)208-Cus/Seiz/Muz/12-13/5359 dated 05.11.13, it has been intimated to the appellants that the impugned order has been sent to them by speed post and the same has alreadybeen delivered to them on 15.07.2013. On 22.11.2013, the appellant made further correspondence to the Assistant Commissioner, Customs Divn. Muzaffarpur referring the said department's letter and mentioning that impugnedorder has not been received by them and requested for supply of the same. In turn, Department vide letter C.No.VIII(10)208-Cus/Seiz/Muz/12-13/5651 dated 29.11.2013 provided the photocopy of the impugned order.

4. However, after going through the said letter and statement made by the postal authorities, I find that Order in question was dispatched to the appellantby registered speed post and delivered on 15.07.2013 which confirms the delivery thereof to the addressee as well as proper service under Section 37Cof the Central Excise Act, 1944 which is applicable in customs matter equally. Besides, the appellant failed to justify any source which has apprised him on

10.10.13 regarding passing of impugned order by the Ld.Adjudicator. Accordingly, I find that impugned order was properly served on 15.07.2013 and there was extraordinary delay in filing the appeal.

5. The appeal has been filed beyond the statutory period of 60 days from the date of communication of decision/order to the appellant. The instant appeal has been filed on 23.01.14 i.e. after 198 days which is beyond the prescribed limits for filing appeal under Sec. 128 of the Customs Act, 1962 & the condonation power of the Commissioner(Appeal). The time limit of filing appeal is 60 days from receipt of the order. The condonation limit is further 30 days hence making it 90 days in all. Thus, it is beyond Commissioner(Appeal)'s condonable power. Accordingly, the appeal is dismissed as barred by limitation.

3. The Hon'ble Supreme Court in the case of **Singh Enterprises Vs CCE Jamshedpur – 2008 (221) ELT 163 (SC)** has held that when the delay is beyond the condonable period of 30 days, neither the Tribunal nor the High Court or Supreme Court has any power to condone the same. Therefore, when the Commissioner (Appeals) has got factual details verified and has given a detailed findings, we do not see any reason to interfere with the same.

Accordingly, the Appeal stands dismissed.

(Dictated and pronounced in the open court.)

(R. Muralidhar)Member (Judicial)

Sd/- (Rajeev Tandon)

Member (Technical)

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATETRIBUNAL, KOLKATA

EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.1

Customs Appeal No.75162 of 2019

(Arising out of Order-in-Original No.02/COMMR/CUS/SLG/16-17 dated 10.05.2016passed by Commissioner of Customs, Central Excise & Service Tax, Siliguri.)

Saleh Ahmed
(S/o. Late Karim Chowdhury, Vill: Nat Bama (Part), Sijubari, P.S. : Hatigan, Sub-Division-Guwahati, Dist: Kamrup (Metro) Assam,

M/s. Beauty Palace, S.S.Road, Lakhotia, Guwahati-781001.)

…Appellant

VERSUS

Commissioner of Customs (Preventive), Kolkata

(15/1, Strand Road, Custom House, Kolkata-700001.) **…..Respondent**

WITH

Customs Appeal No.75163 of 2019

(Arising out of Order-in-Original No.02/COMMR/CUS/SLG/16-17 dated 10.05.2016passed by Commissioner of Customs, Central Excise & Service Tax, Siliguri.)

Sanowar Ali
(S/o. Late Romjan Ali, Vill.- Dhobakura, P.O. – Rajmita, P.S. Lakhipur, Dist-Goalpara, Assam-783129.)

Appellant

VERSUS

Commissioner of Customs (Preventive), Kolkata

(15/1, Strand Road, Custom House, Kolkata-700001.)

…..Respondent

APPEARANCE

Ms. Atika Sumran Ahmed, Advocate for the Appellant (s)

Shri Tariq Suleman, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)

FINAL ORDER NO. 77722-77723/2023

DATE OF HEARING : 21 December 2023DATE OF DECISION : 21 December 2023

ASHOK JINDAL :

The appellants are in appeal against the impugned order wherein the penalties under section 112 of the Customs Act, 1962 has been imposed on them of Rs.10.00 Lakhs and Rs.1.00 Lakh respectively.

2. The facts of the case are that acting upon the intelligence given by DRI at about 4.30 p.m. on 17.06.2015, the officers of DRI, Shillong Regional Unit intercepted a red coloured Hyundai i20 car bearing Registration No. [WB-20Z-7017] at Ghoshpukur Toll Gate while the saidvehicle was coming from Bagdogra side and moving towards Kolkata. The three occupants of the intercepted car disclosed their identities as Md. Addul Hannan (the driver), Md. Saleh and Sanowar Ali. On questioning by the DRI officers the said intercepted persons denied to be carrying any type of contraband. When the DRI officers proposed to search their persons, luggage and vehicle at that place, the occupants of the vehicle requested the officers to carry out search at a secured place as the place of interception was a public place. Conceding to the request of the apprehended persons, the DRI officers brought theintercepted vehicle along with its three occupants to the DRI Office.

3. On reaching DRI office at about 18.00 hrs. on 17.06.2015, the said three persons were again asked by the DRI officers in presence of two Panchas whether they were carrying any contraband with them to which they again replied in the negative. The said three persons were then searched one by one in presence of two independent witnesses (Panchas). On search, one mobile phone each was recovered from the three persons. A mobile phone brand Micromax Bold Q324 was recovered from the possession of Md. Abdul Hannan, a mobile brand Karbonn was recovered from Md. Sanowal Ali and one mobile phone of brand Samsung was recovered from the possession of Md. Saleh Ahmed. Thereafter, the vehicle having MV Registration No.WB-20Z- 7017 was searched by the DRI officers in presence of Panchas and the three occupants of the vehicle.

On search, nothing incriminating was recovered from there except the certificate of registration of the said vehicle, one Form-26 showing transfer of ownership of vehicle, one photocopy of trade license of M/s. Laxmi Creations and one signed photocopy of PAN card of Shri Krishna Kumar Kedia, Proprietor of M/s. Laxmi Creations, application and grant of NOC by registerin authority, Kolkata PVD, one money receipt of Rs.2,85,000/- (Rupees two lakh eighty five thousand only) given by Krishna Kumar Kedia and one Sale Deed in Rs.50/- (Rupees fifty only) Non-Judicial Stamp paper executed by one FM Abul Kalam of Manipur in favour of Md. Abdul Hanner.

4. As the intelligence suggested that the gold would be concealed in the vehicle having MV Registration No.WB-20Z-7017, it was felt that to look for hidden cavities where the gold might have been possiblyconcealed, help of a mechanic is required for conducting a thorough search of the said vehicle. Accordingly, a mechanic was requisitioned and in presence of the said three occupants and two independentwitnesses, a thorough search of the vehicle was carried out with the assistance of said mechanic. From the fuel chamber under the rear seatof the vehicle four packets wrapped in white cloth, each containing some very heavy objects were recovered.

5. The said four packets wrapped in while cloth were brought inside the office of DRI Siliguri and opened in presence of the three intercepted persons and the Panchas. On opening of the said packages, each such packet was found to contain 30 pcs of Yellow Metal in biscuit form believed to be gold of foreign origin. In total 120 pcs. Of such Yellow metal biscuits were recovered from the said 04 packets. Though some metal biscuits were marked with foreign inscriptions, foreignmarkings on the other biscuits were found to be obliterated. After recovery of the yellow coloured metal biscuits in front of them, the said three persons – Md. Abdul Hannan, Md. Saleh Ahmed and Md. SanowarAli finally admitted that the said Yellow Coloured Metals in biscuit form were actually gold of foreign origin that were smuggled into Indiathrough the Indo-Myanmar border at Morey in Manipur and were handed over to them for delivery at Kolkata. On demand, they could not produce any licit documents in support of importation/possession, carrying transportation or dealing with the said yellow coloured metals believed to be gold of foreign origin. Thereafter, the said gold was seized and further investigation was conducted. After investigation a show cause notice was issued to the appellants proposing imposition of penalty under section 112 of the Customs Act, 1962. Thereafter, the matter was adjudicated, the gold was not claimed by anybody to be theowner of the same, therefore, the gold was absolutely confiscated and penalty of Rs.10.00 Lakhs and Rs.1.00 has been imposed on the appellants. Aggrieved from the imposition of penalties, the appellants are before me.

6. The Ld.Counsel for the appellants submits that the appellantswere not knowing about the fact that the vehicle was having gold. In fact they were asked to deliver the vehicle at Kolkata and in good faith they have taken the vehicle in their possession and travelling to Kolkata. It was only hearsay that suggested that there was gold in the vehicle, therefore, the appellants are not liable for penalty.

7. On the other hand, the Ld.AR for the department submitted thatit is a case of smuggling of gold, which was not owned by anybody and during the course of search of the vehicle, the appellants were carrying,120 pieces of gold which were of foreign origin. In that circumstances, penalty under section 112 of the Customs Act, 1962 is rightly imposed.

8. Heard the parties, considered the submissions.

9. I find that during the course of investigation, voluntarystatements of the appellants were recorded, which is as under :-

[A] Saleh Ahmed (Noticee No.1) along with Abdul Hannan (Noticee No.2) and Salowar Ali (Noticee no.3) was intercepted on 17.06.2015 bythe DRI officers of Siliguri on the basis of specific intelligence, near Ghoshpukur of Darjeeling district, while, they were travelling in a Hyundai i20 car bearing Registration No.[WB-20Z-7017]. All of them initially denied having any contraband in their possession. Subsequently, after recovery of impugned gold bars from the inside of

fuel tank of said car [in presence of them], admitted that they were knowingly carrying the subject consignment of gold bars as per instruction of Ayub Ali [@ F.M. Abdul Kalam] owner of the said car. Saleh Ahmed (Noticee No.1) in his statement dated 17.06.2015, recorded under Section 108 of the Customs Act, 1962 had categorically confessed that (i) he got acquainted with F M Abdul Kalam of Lilong (Imphal) few days before the incident; (ii) that Abul Kalam was a business man but he had no idea about his exact business; (iii) that F MAbul Kalam was popularly known as 'Ayub Bhai' (iv) that Ayub Bhai hadpurchased impugned car [Hyundai i20] from one Krishna Kedia in the month of January 2015; (v) that on 14.06.2015 'Ayub Bhai told himthat his i20 Hyundai car bearing registration No. [WB-20Z-7017] had tobe taken to a certain place at Kolkata (vi) that 'Ayub Bhai' had further said that a huge quantity of gold that had been smuggled into India through the Indo-Myanmar border at Moreh (Manipuar) and would be secreted (concealed) in the fuel chamber of the said Hyundai i20 car; (vii) that said 'Ayub Bhai' promised a handsome amount of money to him for carrying out the said job; (viii) that for earning quick money, heagreed to the proposal of Ayub Bhai (F.M. Abul Kalam); (ix) that as per the direction fo the said 'Ayub Bhai], he had instructed to Abdul Hannan(the driver of Ayub Bhai's Hyundai i20 car), to park the said car in front of his shop at Lakhtokia Market, (Guwahati) and hand over the keys of the car to him, 'Ayub Bhai' took the car keys from him (Saleh Ahmed)in the night of 15.06.2015 and handed back the car in the earlymorning of 16.06.2015 with the subject consignment of gold loaded in the fuel tank of the car; (x) that on 16.06.2015 at about 07.00 hourshe along with Abdul Hannan, (the driver of Ayub Bhai) and one Sanowar Ali, a hawker started towards Kolkata; (xi) that he had offeredto pay Sanowar Ali handsome amount of money to help intransportation of the smuggled gold to Kolkata; (xii) that his mobile number was 9954313486 and Mobile number of FM Abul Kalam @ AyubBhai was 7085227280, 'Ayub Bhai' kept contact with him throughmobile number 7085227280; (xiii) that he had associated himself in this illegal act of smuggling for sheer greed of money.

10. Further statement of Sanowar Ali was recorded, which is asfollows:-

Sanowar Ali (Noticee No.3) in his statement dated 17.06.2015, recorded under section 108 of the Customs Act, 1962 had categorically confessed that (i) On 15.06.2015, Saleh Ahmed had told him that he had a job to hand over a car at Kolkata and if he accompanied Saleh Ahmed he would give him some money, on his query Saleh Ahmed told him that consignment of gold smuggled into India through Indo- Myanmar border at Moreh (Manipur) would be carried in the car; after hearing of this he initially refused to accompany him but Saleh Ahmed assured him that there was no risk in the job, the smuggled gold would be concealed in such a manner that nobody would ever be able to trace it; (ii) that finally for the sake of earning some easy money he agreedto accompany Saleh Ahmed to Kolkata; (iii) that on 16.06.2015 at about 07.00 hours, as per schedule, eh along with Saleh Ahmed and Abdul Hannan (the driver of the car) had started towards Kolkata in a Hyundai i20 car having Registration No. [WB-20Z/7017] (iv) that hewas only a hawker and had associated himself in this instant act of smuggling for greed of money; (v) that he did not know anyone named F M Abdul Kalam alias Ayub Bhai.

11. On going through these statements of the appellants which were recorded during the course of investigation, the appellants themselves have admitted that one Ayub Bhai has told them that the vehicle is carrying 120 pieces of gold which were kept in fuel chamber secretly concealed in the said vehicle. The said fact was in the knowledge of the appellants and at the time of interception of the vehicle, the appellants have made statement that they were not carrying any contraband goods with them, which shows that the *mala fides* of the appellants, in that circumstances, the penalty is rightly imposed by the adjudicating authority to meet the ends of justice and to teach a lesson to the appellants not to involve in such activities in future. Therefore, I do not find any infirmity in the impugned order for imposing penalty on the appellants.

12. Accordingly, the impugned order qua imposing penalties on the appellants of Rs.10.00 Lakhs and Rs.1.00 Lakh respectively, is upheld. The appeals filed by the appellants are dismissed.

(Dictated and pronounced in the open Court.)

Sd/

(ASHOK JINDAL) MEMBER (JUDICIAL)

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

REGIONAL BENCH – COURT NO.1

Customs Appeal No.75140 of 2017

(On behalf of Appellant)

(Arising out of Order-in-Original No.01-Cus/CC/JBN/2016 dated 25.10.2016 passed by Commissioner of Customs, Patna)

Pranav Kumar
S-455, 2nd Floor, Greater Kailash II, New Delhi-110048

Appellant

VERSUS

Commissioner of Customs, Patna
C.R.Building, Birchand Patel Path, Patna-800001

Respondent

WITH

Customs Appeal No.75241 of 2017

(On behalf of Appellant)

(Arising out of Order-in-Original No.01-Cus/CC/JBN/2016 dated 25.10.2016 passed by Commissioner of Customs, Patna)

Shri Sudhir S.Chamria

40/41,A-2206 (A-Wing), Vishnu Shivam Tower, Thakur Village, Mumbai-400101

Appellant

VERSUS

Commissioner of Customs, Patna
C.R.Building, Birchand Patel Path, Patna-800001

Respondent

AND

Customs Appeal No.75242 of 2017

(On behalf of Appellant)

(Arising out of Order-in-Original No.01-Cus/CC/JBN/2016 dated 25.10.2016 passed by Commissioner of Customs, Patna)

M/s Innovagen Compserv Private Limited
40/41,A-2206 (A-Wing), Vishnu Shivam Tower, Thakur Village, Mumbai-400101

Appellant

VERSUS

Commissioner of Customs, Patna
C.R.Building, Birchand Patel Path, Patna-800001

Respondent

AND

Customs Appeal No.75243 of 2017

(On behalf of Appellant)

(Arising out of Order-in-Original No.01-Cus/CC/JBN/2016 dated 25.10.2016 passed by Commissioner of Customs, Patna)

Smt. Lata S.Chamria wife of Shri Shudhir S.Chamria
40/41,A-2206 (A-Wing), Vishnu Shivam Tower, Thakur Village, Mumbai-400101

Appellant

VERSUS

Commissioner of Customs, Patna
C.R.Building, Birchand Patel Path, Patna-800001

Respondent

APPERANCE :

None for the Appellant

Shri Subrata Debnath, Authorized Representative for the Respondent

CORAM:

HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL) HON'BLE MR.RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO…77581-77584/2023

DATE OF HEARING : 04.12.2023
DATE OF DECISION : 04.12.2023

Per Ashok Jindal :

Today matters were listed for hearing. Besides notice, none appeared on behalf of the appellants. Earlier also, the appellants sought adjournment, but did not appear.

2. From the facts, it is evident that the appellants sought to export the Silk Mixed Fabrics in guise of old and used garments. On examination of the export consignment, it was found that the goods have been mis-declared and the supporting manufacturer is found non-existent during the course of investigation.

3. In that circumstances, the whole of the consignment was confiscated and the redemption fine was imposed and penalties on all the appellants were imposed.

4. From the facts which are not disputed, it is clear that the appellants were actively involved in the export of the said consignments by mis-declaring the goods.

5. In that circumstances, the adjudicating authority has rightly imposed penalties on them in terms of law.

6. In view of the above, we do not find any infirmity in the impugned order and do not find any merit in the appeals, accordingly, the same are dismissed.

(Dictated and pronounced in the open court)

Sd/-

(Ashok Jindal) Member (Judicial)

Sd/- (Rajeev Tandon)

mm **Member (Technical)**

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

REGIONAL BENCH – COURT NO.1

Customs Appeal No.75634 of 2021

(Arising out of Order-in-Appeal No.Kol/Cus (Prev.)/DINHATA/AKR/25/2021 dated 07.01.2021 passed by Commissioner (Appeals) of Customs, Kolkata)

Smt. Suparna Karmakar
APC Roy Road, Baman Para, Kharabari,Coochbihar-736101

Appellant

VERSUS

Commissioner of Customs (Prev.), Kolkata
15/1, Strand Road, Kolkata-700001

Respondent

APPERANCE :

Shri R.N.Bandopadhyay, Advocate for the Appellant

Shri Tariq Sulaiman, Authorized Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)

FINAL ORDER NO…77195/2023

DATE OF HEARING : 05.10.2023
DATE OF DECISION : 05.10.2023

Per Ashok Jindal :

The appellant has filed this appeal against the impugned order wherein the ld.Commissioner (Appeals) dismissed the appeal as barred by limitation.

2. During the course of hearing, the ld.Counsel for the appellant drew my attention that they have gone before the Hon'ble High Court of Calcutta and the Hon'ble High Court has dismissed their Writ Petitionto avail alternative remedy available to them vide order dated 20.07.2021. Thereafter, they have filed this appeal before this Tribunal.

3. The facts of the case are that the adjudication order was passedon 31.07.2019. Against the said order, the appellant filed an appeal before the ld.Commissioner (Appeals) on 28.11.2019. The ld.Commissioner (Appeals) has dismissed the appeal as barred by limitation as the appeal has been filed beyond the prescribed period

under Section 128 (1) of the Customs Act, 1962. Against the said order, the appellant is before us.

4. Today, when the matter was called, the ld.Counsel for the appellant drew my attention to the order of the Hon'ble High Court dated 20.07.2021 where it is stated that the Hon'ble High Court has condone the delay in filing the appeal before the Ld.Commissioner (Appeals). I have gone through the order passed by the Hon'ble High Court, which is extracted herein below :

20.07.2021
p.b.
Sl. No.1.

W.P.A. 986 2021

Suparna Karmakar
Vs.
Union of India & Ors.
(Via Video Conference)

Mr. Sagar Bandopadhyay,
Mr. Abhishek Banerjee.
.....for the petitioner.

Mr. K. K. Maiti,
Mr. Tapan Bhanja.
.....for the Customs Authority.

In this matter, the petitioner has challenged the impugned seizure order dated 20th November, 2017 and the impugned show-cause notice dated 26th April, 2018 and the adjudication order dated 31st July, 2019 by filing this writ petition in April, 2021.

It appears from record that the petitioner has challenged the impugned order of adjudication after considering the case of the petitioner both on merit and on the point of limitation and on the ground of delay and by discussing the matter in detail in its order. The petitioner could not deny that the aforesaid impugned order dated 7th January, 2021 is an appeallable order. The petitioner himself has admitted in course of submission that the order of the authority is appeallable but he could not file the appeal in time. Petitioner wants this Court to condone

the delay in filing the appeal before the Appellate authority. Apart from the above fact, this writ petition was filed in April, 2021 and he wants this Court to grant him relief of not giving effect to the seizure order passed on 20th November, 2017 and show-cause notice issued on 25th April, 2018 and the order of the adjudicating authority dated 31st July, 2019 without explaining as to what prevented him from challenging the aforesaid impugned seizure order of 2017 and notice dated 25th April, 2019 before the writ court immediately if at all those orders and notices were illegal. Even the present order dated 7th January, 2021 is also an appeallable order.

Considering the facts as appears from record and in view of the availability of alternative remedy to- the petitioner by way of appeal under the statute, I am not inclined to entertain this writ petition and, accordingly, this writ petition is dismissed without calling for affidavits. Dismissal of this writ petition, however, will not prevent the petitioner from availing the alternative remedy before the appropriate forum in accordance with law and the appellate authority will decide the case on its own merit and strictly in accordance with law.

Accordingly, W.P.A. 986 of 2021 is dismissed.

(Md. Nizamuddin, J.)

On going through the above order passed by the Hon'ble High Court, I find that that the Hon'ble High Court has never condoned the delay in filing the appeal before the ld.Commissionere (Appeals) and only the observation is that they are entitled to avail an alternative remedy against the impugned order. In that circumstances, the delay is not condoned by the Hon'ble High Court in filing the appeal before the ld.Commissioner (Appeals).

5. Further, I find that as per Section 128 of the Customs Act, 1962,they have filed appeal beyond the condonable period.

6. In that circumstances, I do not find any infirmity in the impugnedorder and the same is upheld.

7. In the result, the appeal filed by the appellant is dismissed.(Dictated and pronounced in the open court)

Sd/-

(Ashok Jindal)Member (Judicial)

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IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Customs Appeal No. 75459 of 2015

(Arising out of the Order-in-Original No. KOL/CUS/COMMISSIONER/PORT/82/2014 dated 26.12.2014 passed by Commissioner of Customs (Port), Kolkata.)

Shri Manoj Baid,

Baid Organissation, 23B, Netaji Subhas Road,1st Floor, Room No. 124, Kolkata-700001.

…Appellant (s)

VERSUS

Commissioner of Customs (Port), Kolkata.

Customs House, 15/1, Strand Road, Kolkata-700001.

. ...**Respondent(s)**

APPERANCE :

Shri B. N. Pal, Advocate for the Appellant

Shri S. Debnath, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL) HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No…77208/2023

DATE OF HEARING : 04.10.2023DATE OF DECISION : 04.10.2023

PER K. ANPAZHAKAN :

The present appeal has been filed by the Appellant Shri. Manoj Baid, against the imposition of personal penalty of Rs.1,00,000/- in the impugned Order-in-Original dated 26.12.2014, passed by Commissionerof Customs (Port), Kolkata.

2. The brief facts of the case are that the Directorate of Revenue Intelligence issued a show cause notice dated 13/12/2013 in connectionwith seizure of cigarettes of Indonesian origin imported by concealment inside a consignment declared as Dining Sets under Bill of Entry No. 2556558 dated 28.06.13. Notice was issued to Appellant also for imposition of penalty on the ground that the Appellant involved himself in clearance of the said consignment for monetary consideration, despite having no CHA license and not authorized to deal with the consignment. It was alleged that the Appellant has misused name, stamp and signature of a CHA firm in clearance of the said consignment and facilitated the clearance process. For this act of omission andcommission, the adjudicating authority has imposed a penalty of Rs.1,00,000/- under Section 112(a) of the Customs Act, 1962, in the impugned order. Aggrieved against imposition of penalty on him, the Appellant has filed the present appeal.

3. In their submission the Appellant stated that he has only assisted theCHA M/s Nepa Agency in clearance of the said consignment. He was notdealing with the clearance of the

import consignment as he was not having CHA license. He has no knowledge about the misdeclaration of the goods. He has not misused the name and stamp of the CHA firm as alleged in the impugned order. Accordingly, he prayed for setting aside the penalty imposed on him in the impugned order.

4. The Ld. A. R. stated that the Appellant has actively played role in clearance of cigarettes of Indonesian origin which were concealed insidea consignment declared as Dining Sets. Accordingly, he justified the penalty imposed on them for abetting the offence.

5. Heard both sides and perused the appeal records.

6. We observe that the adjudicating authority has imposed a personal penalty of Rs.1,00,000/- in the impugned Order-in-Original dated 26.12.2014, under Section 112(a) of the Customs Act, 1962. In Para 47of the Order-in-Original, the adjudicating authority has given a finding detailing the role of the Appellant, which is reproduced below:

*"*47. Shri Manoj Baid of Baid Organization (noticee No. 6) acted as defacto CHA in this case. At the material time his own agency licence remained suspended. Therefore, he used M/s Nepa Agency & o Pvt. Ltd., (noticee No. 7) to handle the import of the impugned consignment in question after paying remuneration to the said CHA. In effect the authorized signatory of M/s Nepa Agency ony signed the documents and all the other work like sourcing the present work of import was done by Shri Manoj Baid wo even deployed his own employees to look after thepresent import. Thus the said noticee No. 6 also involved himself in clearance of the said consignment for monetary considerations despite having no CHA license and not authorized to deal with thesaid consignment. He sourced the work from a stranger without even knowing or meeting him and also received money andutilized it for the purpose of handling the subject import for his personal gain. He misused name, stamp and signatures of a CHA firm in clearance of the said consignment and facilitated the clearance process of the said consignment. Thus, for his acts of omission and commission which rendered the said goods liable to confiscation, as elaborated at para 42 supra, Sri Manoj Baid is liable to penalty under Section 112(a) of the Customs Act, 1962.*"*

7. From the above findings, we observe that the Appellant has deployedhis employees to look after the clearance of the import consignment. We also observe that the Appellant has admitted that they have assisted the CHA in clearance of the consignment of cigarettes of Indonesian origin which were concealed inside a consignment declared as Dining Sets. Thus, we hold that penalty is imposable on the Appellantfor the abetting the commission of the Offence. We observe that the adjudicating authority has imposed a personal penalty of Rs.1,00,000/- in the impugned Order-in-Original dated 26.12.2014, which appears reasonable and commensurate with the offence committed. Accordingly,we find no reason to interfere with the impugned order imposing penalty on the Appellant. Accordingly, we uphold the penalty imposed on the Appellant in the impugned order and reject the appeal filed bythe Appellant.

8. The appeal filed by the Appellant is rejected.

(Dictated and pronounced in the open Court)

Sd/-

(R. Muralidhar) Member (Judicial)

Tushar**Sd/-**

(K. Anpazhakan) Member (Technical)

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

REGIONAL BENCH – COURT NO.2

Customs Appeal No.75406 of 2016

(Arising out of Order-In-Appeal No.1003-04/Pat/Cus/Appeal/2015 dated 22/12/2015 passed by Commissioner (Appeals) Customs, Central Excise, Service Tax, Patna)

Shri Raj Kumar
(S/o-Late Hirdaya Nand Prasad, At-Gobari, P. O.-Moklishpur,

P. S. Banjaria, Dist. East Champaran)

Appellant

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Patna
(C. R. Building, 2nd Floor, Birchand Patel Path Patna-800001)

Respondent

With

Customs Appeal No.75407 of 2016

(Arising out of Order-In-Appeal No.1003-04/Pat/Cus/Appeal/2015 dated 22/12/2015 passed by Commissioner (Appeals) Customs, Central Excise, Service Tax, Patna)

Sh Dipender Ji @ Deependra Sharaf
(S/o- Sh. Chuman Sah, R/o, Birjan Sub Metropolitan City, Ward No. 15, Dist. Parsa, Nepal)

Appellant

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Patna
(C. R. Building, 2nd Floor, Birchand Patel Path Patna-800001)

Respondent

APPEARANCE :

Mr. Nilotpal Chowdhury, Advocate for the Appellant
Mr. S. Debnath, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNI CAL)

FINAL ORDER NO.77160-77161/2023

Date of Hearing : 21st September 2023 Date of Pronouncement : 27/09/2023

PER R. MURALIDHAR:

The Customs officers seized 1000 grams of gold worth of Rs. 29 Lakhs from the Appellant. No documents were produced to show the licit purchase of the same by the Appellant. The Department ascertained that the gold were of foreign origin with clear marking "The Perth Mint Australia". The Appellant submitted that he was not involved directly but one Mr. Dipender Ji who was running a cloth shop at Ghanta Ghar, Birganj, Nepal had given the packet and asked him to deliver the goods to one Singham Ji at Motihari. After due process, the gold with value of Rs.29 Lakhs was confiscated absolutely and the seized Hero Honda vehicle valued at Rs.60,000/- was also confiscated with an option to redeem the same on payment of Redemption fine of Rs.30,000/-. Penalty of Rs. 2 Lakhs was imposed on the Appellant Shri Raj Kumar. Being aggrieved, the Appellant is before the Tribunal. In case of the Appellant Shri Dipender, penalty of Rs.10,00,000/- was imposed. Being aggrieved, he is before the Tribunal.

2. The appellant Shri Raj Kumar submits that he is a small time trader with very less income. He has taken the packet from Mr. Dipender Ji of Nepal for delivery at Motihari as he was promised some amount in return for this work. He was not aware about the contents of the packet.

3. The Learned AR reiterates the findings of the Adjudicating Authority and submits that there is no dispute that the gold in question was of foreign origin and was seized. The gold was being carried by the Appellant Shri Raj Kumar in his shoes in a concealed manner. In case of Shri Dipenderji, he was the mastermind of the whole operation. Therefore, he justifies the penalty imposed on the Appellants.

4. Heard both sides and perused the documents.

5. Admittedly, without doubt, the gold is of foreign origin and the Appellant Shri Raj Kumar has carried the same in a concealed way which shows that he was very much involved in the movement of the gold. Therefore, he would be liable to be penalized under Section 112(b) of the Customs Act, 1962.

6. However, considering the factual details, and the value of the absolutely confiscated good, we modify the penalty to Rs. 20,000/- Shri Raj Kumar, which has already been paid by him as pre-deposit while filing the present Appeal [Appeal No. C/75406/2016].

7. In case of the Appellant Sh. Dipender Ji, it is clear from the above discussions that he was the mastermind in the entire transaction. He has given the gold to Raj Kumar to be carried to India from Nepal. Therefore, he is liable to pay the penalty under Section 112(b) of the Customs Act, 1962. Considering the value of the confiscated goods, we modify the penalty imposed on him which would stand at Rs. 5 Lakhs [Appeal No. C/75407/2016].

8. The Appeals are disposed of thus.

(Pronounced in the open court on 27/09/2023)

Sd/-

(R. Muralidhar) Member (Judicial)

Sd/- (Rajeev Tandon)

Member (Technical)

Pooja

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

REGIONAL BENCH – COURT NO.2

Customs Appeal No.233 of 2011

(Arising out of Order-In-Appeal No. KOL/CUS/CKP/126/2011 dated 11/04/2011passed by the Commissioner of Customs (Appeals), Kolkata.)

M/s. India Potteries Ltd.
(91, Dharmatala Street, Kolkata-700013)

Appellant

VERSUS

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

APPEARANCE :

None for the Appellant

Mr. S. Debnath, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL) HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNI CAL)

FINAL ORDER NO.77142/2023

Date of Hearing : 21 September 2023Date of Decision: 21 September 2023

PER R. MURALIDHAR:

This Appeal has been filed in 2011 and several adjournments have been granted to the Appellant. In spite of the Hearing Notice issued for today, no one has appeared. However, in the interest of justice, the Appeal was taken up for disposal on merits with the helpof the Learned AR.

2. The Appellant had imported a second hand machinery known as"NETZSCH, DE-AIRING PUGMILL MODEL V35 COMPLETE WITH NECESSARY ELECTRICAL PANEL, SWITCH , etc. from Germany. They filed the Bill of Entry No. 168061 dated 11.11.2010 enclosing therewith commercial invoice raised by the foreign supplier showing the value of the second hand machinery as Euro 15506. After examination of the commercial invoice and the Certificate issued by the Chartered Engineer, engaged by the exporter. The Department proposed for enhancement of the declared value of the second hand machinery. The Department enhanced the value to Euro 28,280. On this value, the Customs Department has worked out the differential duty which was confirmed. Being aggrieved, the Appellant is before the Tribunal.

3. On going through the facts of the case, it emerges that the Appellant along with Invoice issued by the overseas exporter had alsosubmitted copy of the Chartered Engineer's Certificate dated28/07/2010 (annexed at Page 48 of the Appeal Book).The Chartered Engineer has certified that the gross value of the machinery if purchased as new, to be Euro 84,500. He has also certified that if old machinery is purchased, the value of overhauling would be to thetune of Euro 7,000/-.

4. The Learned AR submits that the Board vide Circular No. 4/2008-Cus dated 12/2/2008 has specified that when the accuracy of value is doubt, the value should be adopted as per the Rule 12 of the Customs Valuation (Determination of value of imported goods), Rules, 2007. Vide Circular No. 493/124/86-Cus, Vi dated 19/11/1987, the Directorate General of Valuation has clarified that in case of the second hand machinery, the maximum depreciation allowed would be to the tune of 70%. The AR produced copy of the Circular dated 12/02/2008 and Circular dated 19/11/1987. He submits that thelower authorities have correctly enhanced the value to EURO 28,280/-after following the instructions contained in these Circulars. He submits the value adopted is after taking into account the fact that the Chartered Engineer himself has certified all the relevant values including that of the overhauling charges. Therefore, the AR submits that there is no error in the Orders passed by the Lower Authorities.

5 After going through all the documentary evidence and the Appeal Papers, we find that the Chartered Engineer of the overseas exporter has given the Test Certificate/Certificate of Inspection dated 28/7/2010 along with the value of equivalent machinery in the International market and the value towards overhauling in case of second hand machinery.

6. The Board Circular cited by the Revenue clarifies that in case of second hand machinery, the maximum allowable limit of depreciation is 70%. The Adjudicating Authority has followed this circular and arrived at the enhanced value of Euro 28280. The Appellant in his submissions has not brought in any evidence to rebut the valuation certified by the Chartered Engineer.

7. In view of the foregoing, we do not see any merit in the Appeal filed by the Appellant. Accordingly, the Appeal stands dismissed.

(operative part of the order was pronounced in the open court.)

Sd/-

(R. Muralidhar)Member (Judicial)

Sd/- (Rajeev Tandon)

Member (Technical)

Pooja

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

REGIONAL BENCH – COURT NO.2

Customs Appeal No.76416 of 2014

(Arising out of Order-In-Appeal No.746/Pat/Cus/Appeal/2014 dated 27/06/2014passed by Commissioner (Appeals), Customs, Central Excise & Service Tax, Patna.)

Sri Madan Kumar

(S/o Late Saryug Ram,

Panch Mandir, Road Motihari, Dist. East Champaran)

Appellant

VERSUS

Commissioner of Customs, Patna
(C. R. Building, Bir Chand Patel Path, Patna, 800001)

Respondent

APPEARANCE :

Mr. N. K. Chaudhary, Advocate for the Appellant

Mr. S. Debnath, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL) HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNI CAL)

FINAL ORDER NO.76446/2023

Date of Hearing : 16 August 2023

Date of Pronouncement : 24/08/2023

PER R. MURALIDHAR:

A truck with Registration No. JH-02N-1631 was intercepted on 26.12.12 at 14:00 AM at Chhapwa which is a place between Raxaul & Motihari. It was found that a consignment of 3420 Kgs of Betelnut valued at Rs. 3,42,000/- was being transported. On being intercepted, the Driver fled away and no documentary evidence was produced before the Customs Officials towards the consignment beingtransported.

2. On 21/01/2013, the present Appellant Shri Madan Kumar submitted an application claiming the ownership of the consignment and sought provisional release of the Betel Nuts. He claimed that he was transporting the betel nuts from Motihari to Patna for sale. On the way, it was seized by the Customs officials. He submitted that theBetel Nuts were purchased from M/s. Om Sai Enterprises vide Bill No. 55 dated 24/12/2012.

In turn M/s Om Sai Enterprise had purchased the said goods on 28/09/2012 by participating in the E-Auction conducted by the Customs Division, Motihari. The goods were released provisionally after depositing Rs. 1,50,000/- as Redemption Fine and payment of Customs Duty of Rs. 4,29,032/- by the Appellant. Subsequently, the Show Cause Notice was issued on 10/06/2013 and OIO was passed by the Adjudicating Authority confiscating the goods valued at Rs. 3,42,000/- with an option to redeem the same on payment of Rs. 1,00,000/- as Redemption Fine. He held that appropriate Customs Duty is required to be paid. The Adjudicating Authority also imposed a penalty of Rs. 50,000/- against the present Appellant. Being aggrieved, the Appellant is before the Tribunal.

3. The Learned Advocate submits that the entire case is based on assumptions and presumptions just because the driver fled away and could not show the licit document at the time of interception. This on its own cannot allow the Department come to a conclusion that the goods were being smuggled from Nepal. He submits that the Authorities relied upon some circumstantial evidence, which at best may arouse some doubts but cannot be applied to say that the goods are of foreign origin and hence are liable to be confiscated under Section 111(b) and 111(d) of the Customs Act. He submits that the Betel Nuts were not under the prohibited item list. It is for theDepartment to prove the smuggled character of the goods. Though the Appellant has clearly stated that they have purchased the Betel Nut on 24/12/2012 from M/s Om Sai Enterprises vide Bill No. 55dated 24/12/2012, the Adjudicating Authority failed to give due consideration of the same. He further submits that M/s Om Enterprises have in their Recorded Statements clarified that they have participated in the E-Auction conducted by the Customs Division,Motihari and bought the same on 28/09/2012. Therefore, the Appellant has been able to satisfactorily explain that the Betel Nuts in question were bought within India and are of Indian Origin only. Considering these factual details and the evidence produced in by the Appellant, he submits that the Adjudicating Authority is in a gross error in ignoring the same and imposing the Redemption Fine and penalty on the Appellant. Accordingly, he prays that the presentAppeal may be allowed.

4. The Learned AR submits that it is an admitted fact that thetruck was intercepted at Chhapwa located in between Raxual and Motihari. While the Appellant is claiming that the goods were moving from Motihari to Patna, there is no possibility/necessity for the Truck to go on Northern direction towards Raxaul to reach Patna. Since Chhapwa is not located between Motihari and Patna, the Appellant cannot claim that the goods were being transported from Motihari to Patna. Hence, it can be concluded that the Consignment was moving from Raxaul to Motihari only. Further he submits that though, the Appellant has claimed that the goods were being dispatched from Motihari to Patna, no transit Invoice Challan was found either with theDriver or in the Truck. The Driver, Rajendra Yadav has submiited that the goods were loaded at Raxaul and were to be transported to Patna.He further submits that though the goods were seized on 12/06/2012, the present Appellant took 25 days to claim the ownership of the seized Betel Nut. If they have dispatched the consignment on 25/12/2012 to Patna, he should have been searching for the vehicle and lodged FIR for not findings the vehicle loaded with the goods valued at Rs.3,42,000/-. The Appellant has not taken anyof such actions. The AR further points out to the findings of the Adjudicating Authority wherein, it is observed that if the Appellant hasprocured the goods from vendor who had purchased on E-Auction, as to why it has taken 25 days to claim the ownership of consignment. The Adjudicating Authority has also noted that the Appellant claimed that he is a small businessman engaged in purchase and selling of thesaid goods having no license for purchase and sale of goods and does not have any Income Tax PAN Number. In such a case, he has failed to prove evidence of payment of Rs. 2,97,675/- plus Vat for a single transaction when financially he is not strong. Therefore, the Adjudicating Authority held that the goods in question were being transported from Raxul (Nepal) and were of foreign origin having no licit documents. Accordingly, the AR submits that the present Appealis required to be dismissed.

5. On a query from the Bench about the copy of the Invoice No. 55 dated 24/12/2012 which the Appellant claims to be the purchase Invoice, the Learned Advocate submits that the copy is not available. The Bench has also queried as to whether the payment of Rs. 2,97,675/- plus VAT was made through Banking channel or any other Channel. He submits that no such evidence was brought in before the Adjudicating Authority nor the same is the part of the present Appeal.On another query as to the copy of the Sale Invoice by the

Appellant while transporting from Motihari to Patna, he pleads that the same was not part of the submissions made before the Adjudicating Authority nor the same is part of the present Appeal. He submits that from the fact that the Appellant was released the goods vide Order dated 28/08/2014 by the Assistant Commissioner, Customs, Motihari,wherein the Appellant was made to deposit Rs. 1,50,000/- Redemption Fine and Customs Duty of Rs. 4,29,032/-, the same shows that the Department has treated the Appellant as a genuine owner of the consignment. He once again submits that the Department has not fulfilled the onus of proving that the goods in question were being smuggled from Raxaul while the Appellant has been able to prove that the goods in question were purchased inIndia.

6. Heard both sides and perused the documents.

7. There is no dispute that the consignment in question was seizedby the officials at Chhapwa. It is not disputed that Chhapwa is locatedin between Raxaul and Motihari. The Appellant while claiming that thegoods have been purchased within India, has not even produced the copy of Invoice No. 55 dated 24/12/2012 before the Adjudicating Authority nor has he enclosed the same along with the Appeal Papers and Synopsis filed today. Since the amount involved under this Invoice is for Rs.3,42,000/-, the Appellant is not in a position to sayas to how this payment was made to the vendor. Another unansweredquestion is what was the serial number of Invoice raised by the Appellant when the goods were being transported from Motihari to Patna. No copy of the sale Invoice has been produced before the Adjudicating Authority nor have they done so before the Tribunal. There is no proper explanation forthcoming as to why the truck has proceeded in the northern direction towards Chhapwa when Patnawas located to the south of Motihari. Had the Appellant producedthese details before the Adjudicating Authority then they could have claimed that they have provided enough evidence towards legitimacy of the transaction. Having failed to do so, they cannot take the plea that the Department has not discharged their onus. In such cases the onus gets shifted from one party to another. When initially the truck was seized and proceedings were initiated by way of Show Cause Notice, it was for the Appellant to counter the same along with properdocumentary evidence. If this was done, it can be taken that the Appellant has shifted onus to the Department, and only in that case, the Department has to counter the same to fortify their initial allegations. As can be seen from the factual matrix, the Appellant has failed to discharge the onus placed on him.

8. In view of the foregoing, we do not see any merits in the arguments adduced by the Appellant and see no need to interfere with the Order passed by the Appellate Authority.

9. Accordingly, we dismiss the Appeal filed by the Appellant.

(Pronounced in the open court on 24/08/2023)

Sd/-

(R. Muralidhar)Member (Judicial)

Sd/- (Rajeev Tandon)

Member (Technical)

Pooja

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATETRIBUNAL, KOLKATA

EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.1

Customs Appeal No.76183 of 2018

(Arising out of Order-in-Appeal No.KOL/CUS(Port)/AA/6/2018 dated 02.01.2018passed by Commissioner (Appeals) of Customs, Kolkata.)

Commissioner of Customs (Port), Kolkata

(15/1, Strand Road, Custom House, Kolkata-700001.)

…Appellant

VERSUS

M/s. Opel Exports

…..Respondent

(10, Saha Lane, Kolkata-700007.)

WITH

Customs Appeal No.76184 of 2018

(Arising out of Order-in-Appeal No.KOL/CUS(Port)/AA/5/2018 dated 02.01.2018passed by Commissioner (Appeals) of Customs, Kolkata.)

Commissioner of Customs (Port), Kolkata

(15/1, Strand Road, Custom House, Kolkata-700001.)

…Appellant

VERSUS

M/s. R.K.Exports

…..Respondent

(17A, Ratan Sarkar Garden Street, Kolkata-700007.)

APPEARANCE

Shri Manish Mohan & Shri S.Debnath, both Authorized Representatives forthe Appellant (s)

NONE for the Respondent (s)

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL) HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 76275-76276/2023

DATE OF HEARING : 2 August 2023
DATE OF DECISION : 2 August 2023

Per : ASHOK JINDAL :

Revenue is in appeal against the impugned orders passed by the Ld.Commissioner(Appeals) for provisional release.

2. The facts of the case are that initially after importation on filing ofthe Bill of Entry, the goods were seized and the respondents sought therelease of the goods provisionally under section 110A of the Customs Act, 1962. The said request of the respondents were rejected by the adjudicating authority on 07.12.2017. The said letter has been issuedto the respondents by Deputy Commissioner of Customs, Gr.VI, Customs House, Kolkata with the approval of the Commissioner of Customs (Port). The respondent challenged the said orders before the Ld.Commissioner(Appeals) on the ground that these orders have been passed by the Deputy Commissioner of Customs Gr.VI, Customs House,Kolkata. The Ld.Commissioner(Appeals) dealt the issue and allowed provisional release. Against the said orders, the revenue is in appeal saying that the Ld.Commissioner(Appeals) has no power to hear the appeal against the order passed by the Commissioner of Customs(Port). Therefore the impugned orders are to be set aside.

3. None appeared on behalf of the respondent.

4. We heard the Ld.AR for the department and perused the records.

5. We find that whole dispute arose in respect of the letter issued by Deputy Commissioner of Customs dated 07.12.2017 which is extracted here :-

GOVERNMENT OF INDIA

OFFICE OF THE COMMISSIONER OF CUSTOMS (PORT) CUSTOMS HOUSE, 15/1, STRAND ROAD, KOLKATA-700001.

F.NO.S37C(Misc)-158/2017A(6) DATE:___/12/2017

To

M/s. R.K.Exports

17A, Ratan Sarkar Garden StreetKolkata-70007

Subject: Provisional release of goods as imported Bills of EntryNo.3081943 dated 29.09.2017 – reg.

Please refer to the letter dated 03.10.2017 on the above subject.The request has been examined

In this connection reference is made to Section 110A of the Customs Ac5, 1962, relating to provisional release of goods, documents and things seized pending adjudication, which stipulates that *"anygoods, documents or things seized under section 110, may, pending theorder of the [adjudicating authority], be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require.*

However, on the basis of DRI, Kolkata Zonal Unit investigation, so far, it revealed that goods are imported by Shell Company and ownership of the goods is yet to be investigated. IEC holder is also not co-operating with the investigation authority.

In view of above request for provisional release of the goods under section 110A of the Customs Act, 1962, for the Bills of Entry No.3081943 dated 29.09.2017, is rejected.

This issues with approval of Commissioner of Customs (Port).

Sd/ 07/12/17

(Md.Faizul Haque)Deputy Commissioner of Customs (Gr.VI)

Customs House, Kolkata

6. As the said letter has been issued to the respondents with approval of the Ld.Commissioner of Customs (Port), in that circumstances, it is held that the said order has been passed by the Commissioner of Customs (Port) and against the order passed by the Commissioner of Customs (Port), the appeal lies before this Tribunal. Therefore, the Ld.Commissioner(Appeals) has no power to entertain theappeals against the order passed by Ld.Commissioner of Customs (Port). Accordingly, we set aside the impugned orders by allowing the appeals filed by the revenue.

(Dictated and pronounced in the open Court.)

Sd/

(ASHOK JINDAL) MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN) MEMBER (TECHNICAL)

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

REGIONAL BENCH – COURT NO.2

Customs Appeal No.178 of 2011

(Arising out of Order-In-Original No. 15/COMMR/CUSTOMS/BOL/11 dated 17.03.2011 passed by the Commissioner of Central Excise & Customs, Bolpur)

M/s. Beximco International
(2, N. C. Dutta Sarani, 4th Floor, Sagar Estate, Kolkata-700001)

Appellant

VERSUS

Commissioner of Central Excise & Customs, Bolpur
(Nanoor Chandidas Road, Sian, Bolpur, Dist. Birbhum)

Respondent

APPEARANCE :

None for the Appellant

Mr. S. Debnath, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNI CAL) FINAL ORDER NO.77144/2023

Date of Hearing : 21st September 2023 Date of Decision : 21st September 2023

PER R. MURALIDHAR:

Inspite of notice, nobody is present on behalf of the Appellant.

2. It is seen from the records that in the past also on several occasions, the Appellant has not attended the hearings granted. This shows that the Appellant is not interested in pursuing their Appeal. However, in the interest of justice, we have taken up the matter for disposal and perused the documents on record with the help of Learned AR.

3. The Learned AR submits that the Appellant had filed the Bill of Entry stating that the goods are of Chinese origin. On physical inspection of the consignment, it turned out that the shoes were of Chinese, Italian and Austrian origin. The Lower Authorities have followed the principles of natural justice and had adjudicated fairly by giving the detailed finding for the demand which has been confirmed against the Appellant.

4. We have gone through the OIO passed by the Adjudicating Authority who has passed the OIO after granting the Personal Hearing on 02/03/2011 which was attended by two Consultants on behalf of the Noticee. The relevant portions of the OIO are reproduced below:-

4.4 Now, I come to the first point. I observe that the notice, at the time of submission of B/E and the concerned Invoice, did not declare the imported goods as stock-lot. But later on, they produced a copy of a correspondence with the seller of the goods where it had been mentioned that the goods they wanted to import were stock losts. Now, from the study of the case and reply of the notice, I observe that the notice imported the goods taking the opportunity of economic recession in European Countries which were making hectic efforts to sell their products at a reduced price with some conditions as detailed herein-before. Therefore, this was nothing but import of brand-new footwear at a heavily discounted price as a business policy. If there was no economic recession, the importer would have had to procure the same new footwear at higher prices depending upon varieties and qualities thereof. Thus, the factor that worked behind the import of shoes at a uniform rate in this case irrespective of size and quality was only to get the benefit of stock clearance at a reduced sale price by the exporter who faced certain problems related to market economy. This is not a case of sale of seconds or old goods. The notice also admitted in their written submission that they imported new footwear and also from the correspondence made by the importer with paolo Sanini Spol, the exporter, I do not find any mention that the footwear so imported as of second-hand quality.

4.8 Now, I come to the second point, i.e. country of origin. I observe that the noticee in the B/E declared the country of origin of the product as China. However, during joint examination of the consignment at ICD, it was observed by the departmental officers that there was only a nominal number of footwear that were of Chinese origin. Most of the goods were of Austrian origin. I observe that the notice in their letter (relied upon in the SCN as Annexure 4) informed "We purchased this stock lot from out seller, M/s Paolo Santini Spol, s.r.o, who informed us that they were made in China and we also believe that they were of Chinese origin. We sincerely regret if in the stock lot purchased by us, there were some shoes which were manufactured in Austria Or Italy". However, in their written submission, they reverted to their former stand and submitted that the declaration was made according to the certificate of Slovak Chamber of Commerce. In this regard, I refer to the case of Surabhi Supreme Marbles & Granites Pvt. Ltd. Vs. CC, Chochin [2007 (219) ELT 377 (Tri.-Bang)] wherein it is held by Tribunal that "the item has been manufactured in Sri Lanka and they have to be considered as having been imported from Sri Lanka and not from China." So the stand of the notice is not tenable. The notices therefore had mis- declared their goods as goods of Chinese origin.

4.9. Now, I come to the last point regarding value of goods. I observe that the notice declared the goods as stock lot and submitted in the B/E the discounted value as transaction value. Since the goods have been, as discussed before, not stock lots but new ones and are liable to be sold in India as new ones, therefore, I observe that the value shown in the B/E was not the real value of the imported goods but a very much reduced value and had no nexus with actual sale price of the goods. Therefore, transaction value in terms of Section 14 of the Customs Act, 1962 read with Rule 3(1) of CVR'07 was not applicable. Also, as the maximum quantity of goods were of Austrian origin and the value of similar or identical goods of Austrian origin was not available from known sources and also, as there was no market price of such goods available at Durgapur, i.e. the place of importation since such goods are not sold in the wholesale markets at Durgapur

in the ordinary course of trade there and as the notice also failed to produce that, therefore, I observe that Rules 4 to Rule 8 of CVR'07 were also not applicable. In this regard, I also refer to Paras 2.4, 2.5 and 2.6 of this order. Accordingly, I hold that residual Rule 9 of CVR'07 is applicable in this case. [Emphasis supplied]

5. We find that the Adjudicating Authority has gone into considerable details of the consignment imported and has passed a very considered Order justifying all his findings. We do not feel any necessity to interfere with the same. Accordingly, we dismiss the Appeal.

(Dictated and pronounced in the open court.)

Sd/-

(R. Muralidhar) Member (Judicial)

Sd/- (Rajeev Tandon)

Member (Technical)

Pooja

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH - COURT NO. 01

Customs Appeal No. 85580 of 2023

(Arising out of Order-in-Original No. 04/2023-24/COMMR/MS-GEN/CAC/JNCH dated18.04.2023 passed by the Commissioner of Customs (General), CCSP Cell, JNCH, Nhava Sheva)

M/s Container Corporation of India Ltd. **…. Appellant**

(DRT CONCOR CFS), Sector-2,

Plot No. 33, 34 & 35, Navi Mumbai – 400707.

Versus

Commissioner of Customs, Nhava Sheva **…. Respondent**

CCSP Cell, JNCH, Nhava Sheva,Uran, Navi Mumbai- 400707.

Appearance:

Shri V.M. Doiphode, Advocate for the Appellant

Ms. Manisha Goel & Shri Ashwini Kumar, Auth. Representatives for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL) HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86353/2023
Date of Hearing: 12.05.2023Date of Decision: 11.09.2023

PER : *M.M. PARTHIBAN*

This appeal has been filed by M/s Container Corporation of India Limited, Mumbai (referred herein as 'appellant's), who are operating Dronagiri Rail Terminal Container Freight Station (CONCOR-DRT CFS), at Nhava Sheva, being aggrieved against the Order-in-Original No. 04/2023-24/COMMR/MS- GEN/CAC/JNCH dated 18.04.2023 (referred to as 'impugned order') passed by the learned Commissioner of Customs (General), Jawaharlal Nehru Custom House(JNCH), Nhava Sheva.

2.1 Briefly stated, the facts of the case are that the appellants herein was appointed as a 'custodian' of Container Freight Station (CFS) under Section45(1) and 141(2) of the Customs Act, 1962 and also as a Customs Cargo Service Provider (CCSP) duly approved by the Commissioner of Customs (General), JNCH, Nhava Sheva under Regulation 10 of Handling of Cargo in Customs Areas Regulations (HCCAR), 2019. The CCSP license for the appellants was renewed from time to time by the Commissioner of Customs (General), JNCH and the latest approval as a CCSP was issued by Public Notice No.134/2020 dated 14.10.2020 for five years with effect from 15.03.2020.

2.2 A Shipping Bill No.5807023 dated 05.06.2013 was filed by an exporterM/s. Krish Exports, Mumbai, before JNCH Customs for export of "household articles of stainless steel, SS Utensils" to Hong Kong, in a factory stuffedcontainer GESU-3997518 and the same was given "Let

Export Order" (LEO) fromthe appellant's CFS. Special Intelligence & Investigation Branch (SIIB) of JNCH Customs on the basis of a specific information received about smuggling of Red Sanders wood logs stuffed into the container No. GESU-3997518 had put onhold the export goods in the said the container, and examined the same by drawing panchanama dated 14.06.2013 at the appellant's CFS. It was found thatas against the declared goods of '7454 Kgs. of stainless steel household articles' mentioned in the said Shipping Bill, the goods present in the containers actually were found to be the 'Red Sanders of 12695 Kgs.,' which are prohibited for export. The prohibited goods attempted for illegal export were seized under the Customs Act, 1962 and handed over for safe custody with the appellants, being custodian of import/export goods under a Panchnama dated 14.06.2013.

2.3 Subsequently, during a surprise visit conducted by JNCH Customs officers at the premises of the appellants CFS on 14.08.2014, an empty container havingunique No. XINU 1349960 was placed near another container having customs seized goods bearing same unique No. XINU 1349960. Thus, it was found that two containers with the same unique container number were found to have beenkept adjacent to each other in the area for storage of customs seized containers.On detailed examination, it was found that the empty container was markedwith the container No.XINU 1349960 on all four sides of its body. However, on the top of the empty container and on the CSC plate, which is affixed at the timeof its manufacture, the actual No. XINU 1106045 was declared. Thus, the modusof removing seized red sanders kept in safe custody in the appellants CFS, by substituting the container having seized goods with another empty container pasted with same unique container number, similar to the seized goods container, by certain unscrupulous elements was identified and the illegal actwas stopped by JNCH Customs. After this incident, JNCH Customs undertook complete physical inventory of containers having seized goods that were put on hold by Customs. As a result it was found that container GESU-3997518 handed over to the appellants CFS for safe custody vide panchanama dated 14.06.2013 having seized red sanders of 12695 Kgs. were found stolen by adopting the above modus operandi.

2.4 In view of the above, the department had initiated separate show cause proceedings against the exporter and other persons concerned in respect of the attempt to smuggle red sanders under the Customs Act, 1962, by issue of SCN No.SG/MISC-119/2013/SIIB(X) JNCH dated 28.11.2013. Further, show cause proceedings was also initiated against the appellants in respect of violations of clauses (a), (b), (f), (i) and (q) of sub-regulation (1) of Regulation 6 of Handlingof Cargo in Customs Areas Regulations, 2009 (HCCAR) and Sections 45(2), 141 of the Customs Act, 1962 by issue of SCN No.1254/19-20/CFS M.Cell/CAC/JNCH dated 16.03.2020.

3. Learned Advocate appearing for the appellants stated that HCCAR is applicable only to import/export goods; these regulations will not apply to seizedgoodswhich have been handed over for safe custody to the appellants. Further, he stated that the provisions of Section 45(2) ibid, apply only in respect of imported goods, and since the goods involved are 'export goods', invocation of the above legal provision in the impugned order cannot be sustained. He also claimed that there was no letter or *Supratnama* given for handing over the seized export goods for safe custody with the appellants. Further, he stated that the appellants have not failed to provide security to the seized goods, as in the Police investigation none of the employees of the appellants were found to be involved. Hence, he stated that the appellants are not responsible for the theft which occurred due to their contractors. Learned Advocate also stated that the order for recovery of the value of seized goods which have been pilfered, in terms of HCCAR and imposition of penalty under Section 117 under the CustomsAct, 1962 are not sustainable as the legal provisions only provide for demand of duty on goods and such penalty is applicable only for violation of the provisions of the Customs Act and not Regulations. Thus, he claimed that the impugned order is not legally sustainable and the same be setaside. In the additional written submission of the learned Advocate, he claimed that the insurance policyof the New India Assurance Company Ltd. for the relevant period provides for insurance liability in relation to cargo and containers and such liability is in respect of loss or destruction of, or damage to cargo as per CBEC regulations on handling of cargo in Customs area. Since as per the comprehensive package insurance policy, insurance is covered for claims made against duty imposed by the customs authority which is legally payable for loss or damage to cargo, and in this case the export cargo does not attract any export duty, he stated that there is no liability on the appellants towards customs duty and therefore the confirmation of liability on the part of the appellants to pay the value of the goods referred to the customs Department is not sustainable.

4. The Authorised Representative appearing for the Revenue reiterated the findings of the Commissioner of Customs (General) and contended that thesame is sustainable in view of the legal provisions cited in the impugned order. He had also submitted a copy of Public Notice No.52/2009 dated 06.08.2009 providing for the procedure to be followed in respect of entry of factory stuffed (including self sealed) export containers in the JNCH Custom House, and the appellant's CFS has been designated as one of the facility where such export containers would be handled for processing customs work relating to exports. The copy of the shipping bill No.5807023 dated 05.06.2013 extracted from Customs EDI system clearly indicate that the export container GESU-3997518,in which smuggling of red sanders was attempted, was initially processed at the appellant's CONCOR-DRT CFS for completion of export formalities. Further, the panchanama dated 14.06.2013 specifically states in the second last paragraph that the custody of the seized red sanders wood logs in container No. GESU-3997518 was handed over to the manager of the CONCOR-DRT CFS for safe custody. Thus the responsibility of the appellants as CCSP cannot be abdicated by claiming that no letter or *Supratnama* was given for handing over the seized export goods. Since the seized export goods were absolutely confiscated and were liable for disposal, the value of such goods is liable to be compensated by the appellants to the customs Department. Accordingly the value of disposal material was estimated on the basis of market value, as per valuation report dated 04.01.2016. He further submitted that the appellants have violated the provisions of section 141(2) ibid, and thus imposition of penalty under section 117 is correctly warranted. He also submitted that there have been continuous correspondences with the appellants from 2016 onwards by the Customs Commissionerate for recovering the value of pilfered cargo from them and after comprehensive investigation, conduct of inquiry proceedings as per HCCAR, the show cause proceedings have been initiated and hence the impugned order is sustainable in law.

5. Heard both sides and perused the records of the case including the additional written submissions made by both sides.

6. We find that the learned Commissioner in the impugned order dated18.04.2023, in exercise of the powers vested with him under Regulation 11(1) ofHCCAR, after duly following the procedure stated therein, had ordered forsuspension of approval which was granted to the appellants for operation as Customs Cargo Service Provider (CCSP) for a period of 15 days w.e.f. 01.05.2023 to 15.05.2023 subject to certain conditions or relaxation, for allowing import-live cargo pending clearance and existing export consignmentsto be exported and for auction of goods on which notices have been issued. Besides the above, the impugned order also imposed penalty on the appellants under Section 117 ibid and Regulation 12(8) of HCCAR and ordered for recovery of the value of pilfered goods under Regulation 5(6) of HCCAR. Thus, we would like to examine the case before us in great detail with respect each of its factual matrix as well as on the legality of the HCCAR-Regulations in terms of the Customs Act, 1962.

7. On perusal of the records and factual matrix of the case, it is seen that there was a specific information received by Special Intelligence & Investigation Branch (SIIB) of JNCH Customs that in the Shipping Bill (S/B) No.5807023 dated05.06.2013 filed by an exporter M/s. Krish Exports, Mumbai, instead of declared item of "household articles of stainless steel, SS Utensils of net weight 7454 kgs." intended for export to Hong Kong, an attempt is being made to smuggle 'Red Sanders wood logs' in the container No. GESU-3997518. The SB No.5807023 filed by the exporter in this case indicates at the relevant column, the name of customs authorised place as 'CONCOR CFS' where the customs procedures have been carried out and 'Let Export Order' was given by theproper officer of Customs under Section 52 ibid, on 06.06.2013 for loading the said container in the vessel for export. However, owing to the action taken by SIIB Customs on the basis of specific information, the said export container which was about to be exported was put on hold and the shipping line was directed to shift the said container that was about to be exported, by sending it back to CONCOR-DRT CFS on 14.06.2013 for the purpose of detailed examination and further investigation. Upon examination of export goods in container No. GESU-3997518 by SIIB Customs, it was actually found to contain non-declared goods viz., 'Red Sanders Wood of 12695 Kgs.' falling under S. No.143 &154 of Chapter 44 of Schedule 2 (Export Policy) of the Foreign TradePolicy 2009-2014 which are "Prohibited" for export as per the said Export Policy, inasmuch as Red Sanders (*Pterocarpus Santalinus*) is an endangered species and figures in Appendix II of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES). Thus, we are of the considered view that it is a clear case

of prohibited goods attempted for illegal export which were thwarted by SIIB wing of JNCH Customs by taking timely action and thus such export goods attempted for illegal export was rightly seizedas the same were liable to confiscation under Section 113 of the Customs Act, 1962.

8. It is also a fact on record that a panchanama dated 14.06.2013 was drawnupon seizure of the prohibited goods viz. 'Red Sanders Wood of 12695 Kgs.' stuffed in container No. GESU-3997518 at the appellant's CFS and the samewere handed over to the appellants for safe custody. The relevant paragraph of the panchanama dated 14.06.2013 is extracted below:
"…In our presence, the said one container bearing number GESU- 3997518 (20"), re-sealed with Customs Bottle seal No.1413790 and Concor Seal No. D 164229 prima facie containing prohibited goods were handed over to the Manager, DRT CFS for safe custody…"

This factual position is duly supported by the letter dated 10.11.2016 written by the appellants to M/s New India Assurance Co. Ltd., wherein it is *inter alia* mentioned that the subject container was handed over by SIIB Customs in loaded condition on 03.06.2013 and relevant copies of documents such as Customs letter 07.05.2013 regarding shifting of container from JNPT port to CONCOR-DRT CFS, panchanama dated 14.06.2013 prepared by SIIB officials have also been given to the appellants at the time of handing over the said container. Thus, the fact of handing over the seized goods for safe custody with the appellants, being custodian of import/export goods under a Panchnama dated 14.06.2013, is a proven fact beyond doubt. Thus, the argument advanced by learned Advocate for the appellants that the seized container was not an export cargo, but was kept in safe custody as a courtesy to customs departmentand the copy of Panchanama was not available with them, is factually incorrect.

9. In order to examine the legality of the orders passed by the learned Commissioner of Customs in the impugned order, we may like to refer to the provisions of Section 141(2) of the Customs Act, 1962 and the Regulations framed there under i.e., HCCAR. For ease of reference, the relevant portions of the said section/regulations are extracted below:
"Section 141. Conveyances and goods in a customs area subject to control ofofficers of customs. -

(1) All conveyances and goods in a customs area shall, for the purpose of enforcing the provisions of this Act, be subject to the control of officers of customs.

(2) The imported or export goods may be received, stored, delivered, dispatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed."

"Regulation 1. Short title and commencement.-

(1) These regulations may be called the Handling of Cargo in Customs Areas Regulations, 2009.

(2) They shall come into force on the date of their publication in the Official Gazette.
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Regulation 2. Definitions.-

(1) In these regulations, unless the context otherwise requires, -

(a) "Act" means the Customs Act, 1962 (52 of 1962);

(b) "Customs Cargo Services provider" means any person responsible for receipt, storage, delivery, dispatch or otherwise handling of imported goods and export goods and includes a custodian as referred to in section 45 of the Act and persons as referred to in sub-section (2) of section 141 of the said Act;
xxx xxx xxx xxx

Regulation 5. Conditions to be fulfilled by Customs Cargo Service provider -

The Customs Cargo Service provider for custody of imported goods or export goods and for handling of such goods in a customs area shall fulfill thefollowing conditions, namely:-

(1) Provide the following to the satisfaction of the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, namely :

(i) Infrastructure, equipment and adequate manpower for loading, unloading, stacking, handling, stuffing and de-stuffing of containers, storage, dispatchand delivery of containers and cargo etc., including :-
(a) standard pavement for heavy duty equipment for use in the operationaland stacking area;

(n) security and access control to prohibit unauthorized access into the premises, and
xxx xxx xxx xxx

(o) such other equipment or facilities as the Board or Principal Commissionerof Customs or Commissioner of Customs, as the case may be, may specify having regard to the screening, examination, custody and handling of imported or export goods in a customs area.
(ii) safe, secure and spacious premises for loading, unloading, handling and storing of the cargo for the projected capacity and for the examination and other operations as may be required in compliance with any law for the time being in force;

(iii) insurance for an amount equal to the average value of goods likely to be stored in the customs area based on the projected capacity, and for anamount as the Principal Commissioner of Customs or Commissioner of Customs, as the case may be may specify having regard to the goods which have already been insured by the importers or exporters.
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Regulation 6. Responsibilities of Customs Cargo Service provider:

(1) The Customs Cargo Service provider shall -

(a) keep a record of imported goods, goods brought for export or transshipment, as the case may be, and produce the same to the Inspector of Customs or Preventive Officer or Examining officer as and when required;

(aa) Provide information regarding arrival of the imported goods to the DeputyCommissioner or Assistant Commissioner of Customs immediately on arrival ofsaid goods in the customs area and also information about their departureafter the clearance thereof.

(b) keep a record of each activity or action taken in relation to the movement or handling of imported or export goods and goods brought for transhipment;
xxx xxx xxx xxx

(f) not permit goods to be removed from the customs area, or otherwise dealt with, except under and in accordance with the permission in writing of the Superintendent of Customs or Appraiser;

xxx xxx xxx xxx

(i) be responsible for the safety and security of imported and export goods under its custody;

(j) be liable to pay duty on goods pilfered after entry thereof in the customs area;
xxx xxx xxx xxx

(q) abide by all the provisions of the Act and the rules, regulations,notifications and orders issued thereunder."

We also find that the sub-section (2) to Section 141 was firstly introduced in the Union Budget for the year 2008, by amending Section 141 which is extracted below:

Amendment of section 141. **69.** Section 141 of the Customs Act shall be numbered as sub-section (*1*) thereof and, after sub-section (*1*) as so numbered, the following sub-section shall be inserted, namely:—

"(2) The imported or export goods may be received, stored, delivered, despatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed.".

In terms of the Rules of Procedure and Conduct of Business in Lok Sabha, there is a requirement for any bill providing for giving law making power on the subject or to any person i.e., power to make delegated legislation in the form of Regulations in this case, to follow the requirements of Rule 70. The said rule is extracted below:

"70. A Bill involving proposals for the delegation of legislative power shall further be accompanied by a memorandumexplaining such proposals and drawing attention to their scope and stating also whether they are of normal or exceptionalcharacter."

In this regard, We find that the Memorandum regarding Delegated Legislation contained as a part of the Finance Bill, 2008, provided the powers to the Central Board of Excise & Customs (CBEC) to make regulations as extracted below:

"Clause 69 of the Bill seeks to insert a new sub-section (2) to section 141of the Customs Act empowering the Central Board of Excise and Customs to make regulations in respect of the manner in which imported or exportgoods may be received, stored, delivered, despatched or otherwise handled in a customs area and also in respect of the responsibilities of persons engaged in such activities."

From the memorandum so accompanying the bill, it could be reasonably concluded that the parliament had possessed of the information regarding the delegated legislation that was introduced in the Finance Bill, 2008. The purpose of the memorandum to focus the attention of the members of the parliament to the provisions of the bill involving delegation of legislative powers have thusbeen fulfilled in this amendment. The members of the parliament avail of this opportunity and may move an amendment to these provisions for the delegationof such legislative power. From the above, it could thus be concluded that the memorandum attached to the Finance Bill, 2008 provides full information and, purport and effect of the delegation of power to subordinate authorities, the points which may be covered in the area of delegation, the particulars ofsubordinate authorities who are to exercise the delegated powers, and the manner in which such power is to be exercised, in respect of the above amendment. Thus the sub-section (2)n of Section 141 became part of the Customs Act, 1962, upon passing of Finance Act, 2008 w.e.f. 10.09.2008.Therefore, we find that the Handling of Cargo in Customs Areas Regulations, 2008 (HCCAR) which had been framed by CBEC in exercise of the powers thereof, as provided under Section 141(2) ibid, has proper force of law. Thus, anorder passed by the learned Commissioner in exercise of the powers vested withhim under Regulation 12(7) of HCCAR for suspension, imposition of penalty is legally sustainable.

10.1 Learned Advocate appearing for the appellants giving his written submission during the hearing challenged the impugned order on the grounds that the provisions of Section 45(2) of the Customs Act, 1962 apply only to imported goods and seized container which was meant for export, under the provisions of Section 50 and 51 do not have any restriction; and that HCCAR do not apply to seized goods given for safe custody. Thus he claimed that the learned Commissioner has erred in his order and thus the impugned order is not sustainable. Further, he had questioned about the legality of the order onrecovery of the value of pilfered goods kept in the safe custody of custodian/CCSP and the imposition of penalty in the impugned order.

10.2 It is a well settled principle that the statue must be read as a whole in its context to understand its true meaning and intent. When the question arises as to the meaning of a certain provision in the statue, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statues *pari materia*, the generalscope of the statue and the mischief that it was intended to remedy. This statement of rule was adopted by the Honourable Supreme Court in the case of *Poppatlal Shah vs The State Of Madras, Union Of India & Others*- 1953 AIR 274; 1953 SCR 677 as well as in the case of *Union of India Vs. Elphinstone Spinning*

& Weaving Co. Ltd. &Ors. – AIR 2001 SC 724. The relevant portion of the said judgement of Hon'ble Court in *Elphinstone* supra, is extracted below:

"*It is a settled rule of construction that to ascertain the legislative intent all the constituent parts of a statute are to be taken together and each word phrase or sentence is to be considered inthe light of the general purpose and object of the statue*."

10.3 In this context, we may like to refer the legislative history behind the basicprovisions of the Customs Act, in order to clearly bring out the correct legal position. The Customs Act, 1962, comprehensively provide for administration of Customs function of the Central Government, by consolidating the existing legal provisions governing Sea Customs, Land Customs and Air Customs, by enacting a new legislation through introduction of the Customs Bill, 1962 (Bill No. 56 of 1992) in the Parliament on 15th June, 1962, which became the Customs Act, 1962 (Act 52 of 1962) with effect from 13.12.1962. The Statement of objects and reasons for introduction of the Customs Bill and the relevant notes on clauses which explain the specific provisions of Section 141 ibid, is extracted below:

"STATEMENT OF OBJECTS AND REASONS

The Sea Customs Act which lays down the basic law relating to customs wasenacted more than 80 years ago. It has been amended from time to time and some important amendments were made by the Sea Customs (Amendment) Act, 1955. General and comprehensive revision of the Act hasnot so far been undertaken. Several provisions of the Act have become obsolete. Difficulties have also been experienced in the implementation of certain other provisions. The trade has been pressing for certain changes and facilities. Smuggling, consequent to controlled economy, has presented new problems. To meet these requirements, it has become necessary to revise the Act. The Land Customs Act was passed in 1924. It is not a self- contained Act and applies by reference provisions of the Sea Customs Act to land customs with certain modifications. There is no separate law relating toair customs, and the administration of air customs is governed by certain rules made under the Indian Aircraft Act, 1911. While revising the Sea Customs Act, it is proposed to consolidate the provisions relating to sea customs, land customs and air customs into one comprehensive measure.

The Notes on Clauses explain in detail all the changes which are proposed tobe introduced in the new law as compared with the existing law.

NEW DELHI;

The 8th June, 1962."

Extract of Section 45 &141 of the Customs Act, 1962 and relevant notes onclauses

Clearance of imported goods

"45.(1) Save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custodyof such person as may be approved by the Collector of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.

(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force,-

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area orotherwise dealt with, except under and in accordance with the permission in writing of the proper officer."

"Clause 45 replaces existing section 85 (of the Sea Customs Act, 1878) with the following amendments:-

(i) the existing section specifies that either the Port Trust or the Customs Department shall take charge of the landed goods. The new provisionenables the Collector of Customs to approve for this purpose other persons also like officers of State Governments in charge of minor ports, agents of the vessel or aircraft.

(ii) item (a) of sub-clause (2) is a new provision which provides specifically that the person in whose custody imported goods are kept shall keep a record of such goods and shall send a copy thereof to the proper officer of the Customs.

(iii) the existing obsolete provision making the ship's agents liable to discharge all claims for damage and short-delivery is being deleted."

CHAPTER XVII MISCELLANEOUS

"*141. All conveyances and goods in a customs area shall, for the purpose ofenforcing the provisions of this Act, be subject to the control of officers of customs."*

"Clause 141 is a new provision under which all conveyances and goods in a customs area shall for the purposes of enforcing the provisions of the new law be subject to the control of customs officers. This is necessary for effective control over goods and conveyances. The new clause covers the provisions in the existing Sections 77 and 78."

The plain reading of the above provisions and the notes on clauses explain that the earlier system of imported goods being discharged to the Port Commissioners or Port Trust were being replaced with the new provision of appointment of custodian under Section 45 of the newly introduced Customs Act in 1962. The then existing system of shipping agents being responsible for discharge and damage, if any, were deleted and under the new dispensation, thecustodian was being made responsible for accounting and holding custody of the imported goods, till the time these goods were cleared for home consumption or for transhipment or to be moved to bonded warehouses. At that relevant time, since port trusts were handling the activities in respect of major sea ports and similarly Airport Authority of India were handling such function in respect of all international airports, they were the natural custodians, being established by the respective acts of parliament. Thus, when the section 45 was first introduced in the year 1962, it started with the *non-obstante clause* for granting superimposing authority for those natural custodians to continue to functionwhile granting approval by the Collector of Customs for the new persons being appointed as custodian of imported goods under Section 45(2). However, in respect of export goods, as such goods after customs processing were allowed toloaded directly on the vessel intended to be carrying export goods, there were hardly any need for keeping its custody by any person. Simultaneously new Section 141 was introduced to provide overall control of conveyances and goods in customs area to be brought under the control of Customs officers for enforcingthe provisions of the new Act.

10.4 With the liberalization of the economy, widespread industrialization, enhanced economic growth, development of multi-modal transport system, a need was felt to develop Container Freight Stations (CFSs) which worked as extended arm of the port in avoiding congestion at sea ports and for expediting the unloading and loading of goods at the port terminals. Thus, major ports weremade efficient by concentrating on quick out turn of the vessels calling on the port, by modernising the port handling infrastructure, having PPP model ofdeveloping modern port terminals, material handling systems, specialised infrastructure for container vessels and bulk handling of cargo etc. thereby

reducing the dwell time of cargo and turnover time of vessels calling at the ports,which naturally lead to reduced transaction cost in international trade. In the process, the imported goods were immediately sent to CFS upon unloading at theport terminals. Similarly, in the hinterland the Inland Container Depots (ICDs) were allowed to perform the function like a dry port and offer common user Customs clearance facilities at the doorstep of importers and exporters. These CFSs/ICDs were appointed as custodians under Section 45 of the Customs Act, 1962 after the initial approval given by the Inter-Ministerial Committee under theMinistry of Commerce. The appellants are also one of such custodian who was initially appointed by the Commissioner of Customs, JNCH Customs vide Notification No.02/99 dated 18.07.1999 and were further given custodianship for extended area as per their application vide Notification No.6/2006 dated 21.03.2006 and the custodianship were periodically renewed from time to time. Therefore, it must be understood that the custodians appointed under Section 45(2) ibid, are governed by the legal provisions of the Customs Act, 1962 as a whole including Section 141 of the said Act.

11. The background behind the legislation of Section 141(2) ibid, indicates that the Comptroller & Auditor General of India (C&AG) had undertook a review on the working of ICDs/CFSs by conducting test check of records of customs as well as custodians for three years from 2000-2001 to 2002-2003 in relation to transmission of import/export goods between ICD/CFS and gateway port, properstorage, safe custody and clearance thereof on payment of appropriate Customs duty to the Government. The report of C&AG presented to the Parliament in paragraph 3.7 of Report of C&AG for the year ended March, 2004, No. 10 of 2005, Union Government (Indirect Taxes – Customs) were further examined by the Public Accounts Committee (PAC) and in its 27th Report (2005-06), the PAC had recommended for formulating appropriate legal provisions and guidelines to control the activities of custodians. The relevant recommendations of the PAC in this regard are extracted below:

"59. The Committee's examination of the subject is based on the Audit Review on the working of Inland Container Depots (ICDs)/Container Freight Stations (CFSs) in relation to clearance/disposal of uncleared/ unclaimed cargo on payment of appropriate customs duty to the Government. For this, Audit had conducted test-check of records of customs as well as custodians

i.e. ICDs/CFSs located in 13 Commissionerates for three years i.e. from 2000-01 to 2002-03 with the objective of assessing whether Revenue due to the Government viz. duty on unclaimed/uncleared goods at ICDs was recovered in time. The Committee's examination of the subject has revealeda number of deficiencies in the system. There have been instances where prescribed rules/regulations and procedures have not been followed in respect of disposal of uncleared/unclaimed goods leading to inordinate delay in their disposal and consequent non-recovery/delay in recovery of customs duty on auctioned goods etc. The existing monitoring mechanism in the Ministry/Department in respect of functioning of ICDs/CFSs, also seem to be very weak and ineffective. These issues have been discussed in detail in the succeeding paragraphs.

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65. Under the extant rules/arrangements, responsibility for clearance / disposal of goods lies with the Custodian and the role of Customs in disposal of cargo is to examine the status of cargo and give permission to Custodians when sought for under the Customs Act. The Committee are informed that in case of non-fulfilment of the obligations by the Custodians concerned Commissioners of Customs can cancel the approval given to them to operate ICDs/CFSs. However, no detail Rules empowering the Customs to take any punitive/deterrent action against the Custodians in such cases have been framed. Further, no safeguards for protection of Revenue in cases of negligence or violations of the conditions/guidelines by the Custodians existin the Customs Act. The Committee feel that Government should formulate appropriate rules and guidelines to control the activities of the Custodians so that in the event of their failure to adhere to the obligations, the Department/Board can take suitable punitive action against the erring Custodians so that revenue could be protected. For this, if necessary, the Customs Act, 1962 may be amended."

In pursuance of these recommendations, the Government had inserted a new Section 141(2) to the Customs Act, 1962 and thereafter under its authority framed the Handling of Cargo in Customs Areas Regulations, 2009 (HCCAR, 2009). The HCCAR, 2009 provide for the manner in which the imported goods/export goods shall be received, stored, delivered or otherwise handled ina Customs area. These regulations also prescribe the responsibilities of persons engaged in the aforesaid activities. The said

regulations also provided for transitional provisions under Regulation 4, whereby the existing custodians who were earlier appointed under Section 45 of the Customs Act, 1962 shall continueto operate without any disruption in their export/import operations. However,the regulations stipulated that the existing custodians would be required to provide specified facilities and fulfil the conditions mentioned in Regulation 5 and6, within the specified time period. It was also clarified by the CBIC in the circular No.13/2009- Customs dated 23.03.2009, that on fulfilment of the prescribed conditions the approval letter shall be issued by the jurisdictional Commissioner of customs to the existing custodians for having approved the facility for a period of 5 years and its renewal thereafter, as per Regulation 13 ofHCCAR. Accordingly, we find that in this case the appellants were continued tobe appointed as a custodian under Section 45(2) ibid, and were also approvedas 'Customs Cargo Service Provider (CCSP)' under HCCAR lastly by Public notice No.134/2020 dated 14.10.2020 for 5 years w.e.f. 15.03.2020.

12. From the detailed analysis of the background of the legislation for incorporating Section 141(2) in the Customs Act, 1962, and the formulation of HCCAR in the above paragraphs, it is clear that custodians appointed under Section 45(2) ibid, subsequent to the implementation of HCCAR, were also required to be approved as CCSP for handling of import/export goods in a customs area under Section 141(2) ibid and HCCAR. Considering the factual position that the appellants were notified by the jurisdictional Commissioner of Customs for handling both the export and import containers as well as for processing of related documents, right from the beginning vide various notifications dated 18.07.1999, and subsequent renewals vide notifications dated 11.11.2003, 21.03.2006, 04.01.2011 and thereafter periodically till the last renewal on 14.10.2020, the appellants cannot escape from the responsibilities and obligations cast upon them as CFS operator and CCSP under HCCAR for proper handling of import/export goods as mandated under Section 141(1) and (2) ibid. Hence, we are of the considered view, that all custodians who are handling the import/export goods, in a customs area are required to fulfil the conditions prescribed under Regulation 5 and are required to discharge their responsibilities as laid down under Regulation 6 ibid. Any violations of the said regulations may attract initiation of necessary action by the jurisdictional customs authorities in terms of Regulation 11, 12 ibid. Inasmuch as the learned Commissioner of Customs had followed the due process of law and abided bythe principles of natural justice in passing the impugned order, we find no infirmity in the said order.

13. In terms of Section 2 of the Customs Act, 1962, the phrases 'export' and 'export goods' have been defined. The relevant provisions have been extracted as below:

"*Section 2 Definition:*

In this Act, unless the context otherwise requires—

(18) "export", with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

(19) "export goods" means any goods which are to be taken out ofIndia to a place outside India;"

In the present case before us, the export goods stuffed in container No. GESU- 3997518 were brought in to the customs area and after completing the customs procedures was given clearance for exportation in the form of "Let Export Order". However, before the export goods were loaded on the vessel/conveyanceand it leaving India, timely action taken by SIIB JNCH Customs detected the attempt of smuggling Red Sanders wood logs stuffed into the said container No. GESU-3997518. As the said export goods were "prohibited" in terms of FTP, the same being liable for confiscation were promptly seized by the customs authorities and were handed over to the appellants for safe custody. From the above, it transpires that the said export goods which were brought into the customs area, for purported export after completing all the formalities and procedures of customs to be taken out of India, remained as 'export goods', despite these being liable for confiscation, and having been seized. The nature of the goods have clearly proved as 'export goods' and precisely for the illegal act of export, the customs authorities have initiated action on various persons concerned separately the provisions of Customs Act, 1962. Therefore, the argument advanced by the learned Advocate for the appellants that the goods under seizure, which were pilfered, are not 'export goods' do not find any support of law.

14.1. From the plain reading of the legal provisions under Section 110 of the Customs Act, 1962, about the category of persons to whom the seized goods could be handed over, in cases where it is not practicable to remove, transportor store or take physical possession of the seized goods, does not include the custodian/CCSP, as it lists out only the owner of the goods or the beneficial owner or any person holding himself to be the importer or any other personfrom whose custody such goods have been seized. Further, the instructions issued by the CBEC vide Instruction No.1/2017-Customs dated 08.02.2017, specifically provided that besides drawing a panchanama, the proper officer should also pass an appropriate order as 'Seizure memo/order etc.' clearly mentioning the reasons to believe that the goods are liable for confiscation. However, the said instructions specifically state that it applies only in all future cases, and do not cover the past cases. Further, the Panchanama dated 14.06.2013, specifically state that the attempted illegal export of 'Red Sanders' being prohibited for export, are being seized under the reasonable belief that thesame are liable for confiscation under the provisions of Customs Act, 1962.Thus, we find that the argument of the Advocate for the appellants that there is no *Supratnama* or order for handing over the seized goods to the appellants,and thus they are not liable for the pilferage of seized goods, does not have any legal validity.

14.2 Further, it is not the case of the appellants that the seized export goods were confiscated and thereupon such goods became the property of the Central Government and thus it is only the Customs who are responsible for the loss or pilferage of the goods and not the appellants. On the contrary, the export goods upon seizure on 14.06.2013 were handed over for safe custody with the appellants as custodian/CCSP, and before these could be confiscated and the property on such goods being vested with the Central Government, the pilferageof the seized goods from the custody of the appellants had occurred in this case.Hence, the value of such seized goods could not be confiscated and be disposed/ sold by following the due process of law, denying the entire disposal value of such goods being credited to the government's exchequer. In fact special dispensation had been provided for relaxation of the condition of the Chapter 44 of Schedule 2 of the ITC (HS) Classifications of Export and Import Items for allowing export of 9784.1363 MT of Red Sanders wood, in the form of log obtained out of confiscated/seized stock in respect of the Government of AndhraPradesh & Directorate of Revenue Intelligence (DRI) Vide DGFT Notification No. 47 (RE-2013)/2009-2014 dated 24.10.2013 as amended. Further, CBED also followed and e-auction process for sale through MSTC, a Government of India company, and thus it enables reasonableness to the value of Red Sanders adopted in the impugned order. Thus, the basis for valuation of the loss of goodshaving the basis on such value, as elaborated by the learned AR finds logic andis legally acceptable. Therefore, we are of the view that the action in the impugned order demanding the value of the seized goods that were pilfered from the custody of CCSP in terms of the action to safeguard interest of Revenuein respect of the seized goods, and thus recovery of the above amount under HCCAR and under the general powers vested with the Central Government underSection 142 ibid, is valid in law.

15. In examining the specific regulations which have been shown to have violated under the impugned order, we may like to refer to CBIC CircularNo.13/2009-Customs dated 23.03.2009 which was issued for explaining the salient features of the HCCAR. The relevant paragraph of the said circular is extracted below:

"Circular No.13/2009-Customs

F.No.450/55/2008-Cus.IV

Government of India Ministry of Finance Department of Revenue

Central Board of Excise & Customs

159A, North Block, New Delhi - 1.

23rd March, 2009. Subject:

"Handling of Cargo in Customs Areas Regulations, 2009"- regarding.

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A reference is invited to Notification No.26/2009-Customs (N.T.) dated 17.3.2009 bringing into effect the "Handling of Cargo inCustoms Areas Regulations, 2009" (referred in short as 'regulations'). The

regulations provide for the manner in which the imported goods/ export goods shall be received, stored, delivered or otherwise handled in a customs area. The regulations also prescribe the responsibilities of persons engaged in the aforesaid activities. It may be recalled that the Public AccountsCommittee (2005-06) in its twenty-seventh report had recommended for formulating appropriate legal provisions and guidelines to control the activities of custodians. In pursuance of the recommendations made by the Public AccountsCommittee (PAC), the Government had inserted anew sub-section (2) to section 141 of the Customs Act, 1962. These Regulations have been framed by the Department in pursuance of the recommendations of the PAC and consequent to the amendment of the Customs Act, 1962 as aforesaid. The salient features of the regulations are indicated in the following paragraphs.

2.1. The regulations shall be applicable to all 'Customs cargo service providers' (CCSPs) that is to say all persons operating in a customs area and engaged in the handling of import/export goods. These include the Custodians holding custody of import / export goods and handling such goods and all persons working on behalf of such custodians such as fork liftor material handling equipment operators, etc. The regulations would also cover consolidators/ break bulk agents and other persons handling imported/export goods in any capacity in a customs area. The regulations provide for various responsibilities and conditions for differentkinds of CCSPs. The conditions prescribed under Regulation 5 wouldapply to the CCSPs who desire to be approved as custodians of imported /export cargo and thus handle goods in customs areas. These conditions shall not apply to those persons who only provide certain services on their own or on behalf of the custodians referred above

2.2. Responsibilities prescribed in Regulation 6 on the other handapply to both categories of persons i.e. all Custodians and persons who provide various services as above. Certain responsibilities specificallyapply to one of the category. For example, the responsibility for safety and security, pilferage of goods under their custody, disposal of uncleared, unclaimed orabandoned goods within the prescribed time limit, payment of cost recovery charges of the customs officers posted in the facility are applicable to the persons who handle imported or export goods in the capacity of an approved custodian. On the other hand, responsibilities for publishing or display of the schedule of charges for theactivities undertaken in respect of imported/ export goods shall apply to both categories of persons. These responsibilities have been specifiedwith the overall objective of expeditious clearance of goods, reduction of dwell time, transaction cost and to safeguard revenue."

From plain reading the legal provisions of these regulations and the CBICCircular, it transpires that the CCSP is required to fulfil the responsibilities laid down under the HCCAR and this includes both in respect of activities under taken by him as custodian as well as in respect of various service providers contracted or employed by the CCSP for providing the services on their behalf. One of the conditions to be fulfilled for appointing as CCSP under Regulation 5(i)(n) and 5(ii) is that the CCSP shall provide security and access control to prohibit unauthorized access into the premises, as well as provide safe, secure and spacious premises for loading, unloading, handling and storing of the cargo and for the examination and other operations as may be required in compliance with any law for the time being in force. In the present case, the factory sealed export goods initially entered into the CONCOR-DRT CFS for complying with the customs procedures for export, and later brought in by SIIB Customs for detailed examination of attempted smuggled goods and later were handed over to the appellants for safe custody of the seized goods in container No.GESU- 3997518 at the appellant's CFS. The facts of the case and the customs andpolice investigation (which have given in detail in the following paragraphs) brings out clearly the conclusion that the appellant's facilities at CONCOR-DRT CFS, particularly the Kalmar fort lift, empty container, truck were used for pilferage of customs seized goods contained in container No.GESU-3997518.

16.1 Investigation conducted by Customs and the inquiry proceedings under HCCAR reveals that during a surprise visit conducted by JNCH Customs officersat the premises of the appellants CFS on 14.08.2014, the entire modus of removing the Customs seized goods in a container XINU 1349960, kept under safe custody with the appellants, by substituting similarly numbered containerby fabricating the unique container number (obliterating by repaint of thecontainer number on all four sides from XINU 1106045 to XINU 1349960) were identified. Further, JNCH Customs undertook complete physical inventory of containers having seized goods which had led to the present case of theft coming to the fore, and it was found that one another container GESU-3997518 handed over to

the appellants CFS for safe custody vide panchanama dated 14.06.2013 having seized red sanders of 12695 Kgs. were found stolen by adopting the above modus operandi. Thus, it transpires that there was a serious attempt to undermine the safety and security of the customs seized goods in theappellant's premises at CONCOR-DRT CFS and certain unscrupulous persons hadsucceeded in pilferage of the goods kept under the safe custody of the appellants. This fact is duly supported by the voluntary statements given by ShriVishal Patil, Deputy General Manager of CONCOR-DRT CFS before customs authorities, as he had stated that the empty containers after destuffing of the cargoes are stacked at empty stack yard of the CFS and thereafter these empty containers are shifted to the nominated empty container yard of shipping lines. CONCOR-DRT CFS had issued one order for empty container No. GESU-3630950to M/s Apna Logistics and issued container loading instruction to M/s Highway Roadlines for loading of container on 12.05.2014 and 25.05.2014; however, as the said container No. GESU-3630950 was not traceable in the yard, the matter was brought to the notice of the CONCOR-DRT CFS, who in turn have questionedthe container handling contractor, Security agency and transport contractor about the non availability of empty container and having found it missing had filed an FIR with Uran Police Station on 22.07.2014. The above facts clearly indicate that despite having knowledge of the pilferage of container from the appellant's CONCOR-DRT CFS premises and having taken action for filing of FIR with police authorities, the appellants had not taken any other action as is expected of a prudent CCSP in ensuring safety and security of the customs seized goods handed over to them for safe custody, as one another attempt was made for removing the Customs seized goods by substitution of container XINU 1349960, within a gap of few days, which was only identified by JNCH Customs on 14.08.2014.

16.2 We also find that the CBIC have clarified vide Circular No.13/2009 dated 23.3.2009 that the HCCAR is applicable to all Customs Cargo Service Providers (CCSP) including the CFS, ICDs, Ports, airports and LCS. It has been specifically provided that the conditions to be fulfilled as prescribed under Regulation 5 of HCCAR which *interalia* include "security and access control to prohibit unauthorised access into the premises", apply to custodians of import/export cargo i.e., CFS, ICD etc. Further, responsibilities prescribed under Regulation 6, *interalia*, included responsibility for the safety and security of imported and export goods under the custody of custodian, and this apply to all CCSPs including the service providers of CFS, ICD. This has been clarified specifically inthe said circular which state that "*it may however be clarified that custodian will be responsible for fulfilment of the conditions of these Regulations even in respect of CCSPs working on their behalf or with their permission*". Hence the appellants cannot escape from the responsibilities cast upon them under HCCAR,claiming that the theft has happened due to their contractual employees.

16.3 Thus, we find that it is clearly proved by the above factual reports arising out of the investigation conducted by Customs and Police authorities, and hence we do not have any hesitation in arriving at the conclusion that the appellantsdid not fulfil the conditions of Regulation 5(1)(i)(n) and 6(1)(i), by their failureto restrict unauthorized access into the premises and allowing the pilferage of goods and by their failure to provide safe and secure storage facility of customs seized goods kept in the containers within CONCOR-DRT CFS premises and allowed certain unauthorized persons to remove the customs seized goods.

17. It further transpires from the records of the case that a separate Police investigation had been conducted on the theft of seized goods and the final report/Charge Sheet No.182/14 dated 31.12.2014 in FIR 132/14 was filed by Uran Police before the Hon'ble Court of First Class Magistrate, Uran in which theyhad arrayed 6 persons as accused in the above fraud. It is stated in the said document that with criminal intention, the above group had put duplicate number on empty container lying in appellant's premises to substitute Customs seized goods, and moved the seized red sanders in original container by using appellant's Kalmar forklift and placed it on their truck MH-04-BU 8050 owned by

one of the accused, by outwitting the security guard and removed the samefrom appellants CFS. Hence, all the six accused were charged for violations under IPC and Forest Act, 1927 in the above case. The Police authorities have also drawn a panchnama dated 20.08.2014 of the fabricated container No. GESU-3630950 and handed it to the appellants CONCOR-DRT CFS for safe custody. However, learned Advocate for the appellants attempted to project thatthe seized container was not an export cargo, but was kept in safe custody as a courtesy to customs department; and the police investigation has not implicated any employee of appellants, and thus they are not responsible for the pilferageof the seized goods/container. The facts indicated in the police investigation and their final report/Charge Sheet being contrary to the stand taken by appellants and stands to prove the involvement of a number of unauthorized persons who had access to the CONCOR-DRT CFS, and the equipment available therein, for clandestine manner of removing the customs seized container. Thus, it is a clearly proven fact that the entire theft of customs seized red sanders have beenorchestrated by the group of miscreants using the equipment belonging to the appellant's contractor that were available in CONCOR-DRT CFS and the movement of the container (having seized goods) in the truck was organized by one of the appellant's operator, improperly without any documents and by violating the laid down procedures for movement of container/goods in Customs area. This also goes to prove that had they kept a proper record of the customs seized goods/container, and connected records relating to movement of such goods/container from the demarcated area, or any other container entering in orexiting from the CONCOR-DRT CFS, then the whole operation of bringing into CONCOR-DRT CFS empty container, fabrication of empty container so as to look like seized goods container, and taking away the customs seized goods container, without any authority of Customs department would have been very easily detected by the appellants themselves. The HCCAR apply to the custodian under the provisions of Section 141(2) of the Customs Act, 1962 which *interalia* prescribe the manner in which the goods shall be handled in a customs area andthe responsibilities have been framed accordingly. Besides this, the responsibilityof the custodian under Section 45(2) is to keep the imported goods in safe custody, maintaining of records and not to permit its removal without any authorization from Customs. The absence of proper system of security, control and maintenance of records in the present case of seized export goods *mutatis mutandis* apply to the imported goods also. Hence the appellant cannot escape from the responsibilities and obligations cast upon them as CFS operator under HCCAR for proper handling of import/export goods. In view of this, we find that the appellants have failed to fulfil the responsibilities entrusted on them under Regulation 6(1)(a) and 6(1)(b) of HCCAR.

18.1 We also find from comprehensive insurance package policy produced bythe Advocate for the appellants that relevant policy Section 6 covering the 'Liability in relation to cargo & containers including air cargo consignments' specifically provide *inter alia*, for the liability in respect of loss or destruction ofor damage to Cargo/Containers under:-

(a) approved trading conditions and/or:-

(b) as per Indian Railways Act, 1989 adopted by CONCOR

(c) as per CBEC regulation on handling of cargo in Customs area etc.

(d) Air cargo - …

(e) Liability in relation to cargo & containers whilst they are in their custody.However this liability shall be restricted to Rs.50/- per kg or actual whichever is lower, except for air cargo consignments.

Further, under policy Section 8 providing for "Insurance in respect of liabilities toCustoms authorities" it is also stated that any duty imposed by the Customs Authorities which the Insured, or other person acting on the Insured's behalf, becomes legally liable to pay in satisfaction of any claim or claims resulting fromLoss and/or damage to cargo as specified in Insured's Import/Export Continuity Bonds, provided the claims towards loss or damage to cargo become admissible under the policy. Thus, the plain reading of the above clauses of the comprehensive insurance policy entered into by the appellants, appear to cover the liability arising from the loss, destruction or damage to cargo and containers in the custody of the appellants, and more so in particular reference to the CBECregulations/HCCAR. It is also noted that the general exclusions to the said insurance policy *interalia* provides that

‘wilful act or wilful negligence or the Insured or his representative’ are not covered under the said insurance policy. The factual records also indicate that New India Assurance Company Ltd. i.e.,the insurer company, after detailed examination of the claim for insurance madeby the appellants have responded vide their letter dated 10.11.2016 in which they had *inter alia* stated that equipment available in the CFS belonging to oneof the contractor of appellant has been utilized and movement of the container (having seized goods) was organized by one of the operator without any document and against the contractual procedures. They have also stated thatthe goods were removed by alteration of container number on the sides of container and they have expressed that it is not clear that how such an exercise of alteration of number on all the sides could have been committed, if reasonable and proper care had been taken by the appellants. Thus they closed the insurance claim filed by the appellants as ‘No claim’. The above facts indicatethat this rejection of the insurance claim of the appellants does not entail the claim of the appellants that on account of no export duty, the claim has been rejected and hence they are not liable to pay for the pilferage of goods given to them for safe custody. Such rejection as discussed above is purely on the basis of the appreciation of the factual matrix in the specific claim by the insurance company and it does not have any bearing on the responsibility of the appellantstowards the HCCAR.

18.2 The Chief Manager of Container Corporation of India Ltd. Shri Arujay Kumar Singh had given a voluntary statement before Customs, stating that theysuspect a criminalized act in the theft of containers and their security systemand operational procedures have been tampered by some unscrupulous persons with involvement of few of their contractor’s staff. The aforesaid detailed discussion of the factual matrix of the case clearly points out that the appellants have deliberately violated 6(1)(f) and 6(1)(q) of the HCCAR.

19. The conditions applicable to CCSP, custodian/CFS under Regulation 5(6) include an undertaking to indemnify the Commissioner of Customs from any liability arising on account of damages caused or loss suffered on imported or export goods due to various unnatural causes or otherwise handling of such goods. Customs investigation conducted with regard to the export goods which were purportedly received in a factory sealed container, with the jurisdictional Central Excise authorities i.e. the Deputy Commissioner, Central Excise, Vasai division, Thane-II Commissionerate vide their letter dated 05.07.2012 also revealed that no such container bearing No. GESU-3997518 had been stuffed bythe officers of Tech-III, Vasai division and the officers who were named in the Stuffing/ Examination Report for self-sealing had not attended the said export. Thus, it appeared that the export of goods was *ab initio* had an element of fraud.It is on record in the chargesheet filed by the police authorities that there was a criminal element in the theft of seized red sanders that had happened on 25.05.2014. Further during the surprise visit of JNCH Customs on 14.08.2014, Customs have found one another attempt for removal of seized red sanders, by substitution of empty container with the seized red sander container. The seriousviolations on security of the CFS and the goods stored inside the CFS, established through inquiry report under HCCAR and Police investigation, have led to the action to safeguard government interest on the seized goods, andthus recovery of the above amount. Hence, we find that there is no illegality in the impugned order in seeking recovery of the value of the goods which were pilfered from the custody of the appellants as CCSP, due to aforesaid act of negligence and improper handling of cargo in customs area. Further, we find thatthe Customs department had been in correspondence with the appellants to deposit Rs.4,44,32,500/- way back vide letters dated 03.11.2016, 25.01.2017, 17.04.2018 and 20.11.2018 written by the Commissioner of Customs. Further, on the basis of the appellant’s reply dated 19.12.2018 to keep the issue in abeyance till the time of receipt of report of police investigation, the Customs authorities have awaited and then proceeded as per law. Hence, we find that there is no undue delay or any illegality in the action taken by Customs department.

20. Regulation 11 of HCCAR provide for suspension of approval forappointment as the Customs cargo service provider by the jurisdictional Commissioner of Customs, by following the prescribed procedure. In this case show-cause notice dated 16.03.2020 was issued and upon completion of inquiry,the enquiry report dated 27.05.2012 was submitted and on this basis theimpugned order dated 18.04.2023 was issued. It is on record that the adjudicating

authority has given personal hearing to the appellants on 17.03.2023 and 05.04.2023 and after taking into account the submissions made by them, the learned Commissioner under Regulation 12(8) ordered for suspension of the operation of CCSP for 15 days besides imposition of penaltyfor the contravention of the provisions of HCCAR for an amount of Rs.50,000/-. Hence, we find that there is no illegality in the action taken on imposing penalty and for suspension of CCSP approval granted to the appellants for limitednumber of 15 days. We also find that in the clarification issued by CBEC vide circular No. 13/2009-Customs dated 23.03.2009, the provisions of Regulation 7(2) has been explained stating that in order to overcome situations where clearances of imported/export goods are getting affected by congestion at a particular CFS, the Commissioner of Customs may consider regulating the entry of goods in that particular CFS for a temporary period, say 15 days, in terms of this regulation. In such cases, the Commissioner of Customs may not allow any import/export cargo to be received and handled in the facility or may allow such reduced quantity as considered sufficient for being handled efficiently for such temporary period till the congestion is cleared and the delay in clearance of goods is sorted out. Thus the guidance of the Circular for temporary suspension of CCSP's operation even without involving any violation of the Regulation by a CCSP, is to ensure the overall objective of expeditious clearance of goods, reduction of dwell time, transaction cost and to safeguard revenue. In fact, the order of dispensation for suspension of the appellants CONCOR-DRT CFS in the impugned order, had followed the above guidelines of the CBIC circular and thusdid not put any embargo on existing export goods meant for export and imported goods-live consignments already available with the CFS for its home consumption clearance by the importers. Further, auction of the goods for whichnotices have been issued under Section 48 by the custodian/CCSP and under other auction process were also permitted during such suspension period. Hence, the export and import trade has not been affected by this suspension action. Further, it is clear that the appellants work was not entirely shutdown and that there was sufficient work for the personnel employed and the contractors engaged by the appellants, disproving the appeal made by the learned Advocate that the suspension action has adversely affected the importers and exporters community and that livelihood of a large number of persons employed by them were affected. However, as the period for which the suspension of 15 days was ordered was in terms of specific dates, i.e., from 01.05.2023 to 15.05.2023, which had expired during the process of this appeal, no precipitative action was taken by the Customs pending this appeal, and the impugned order to this extent has become infructuous. Thus, even the illusory adversity of closure of the appellants CONCOR-DRT CFS has not happened in reality and hence there is no ground for entertaining the appeal on this ground.

21. We find that Section 117 of Customs Act, 1962 provide for imposition of penalty on any person who contravenes any provision of the said Act or abets any such contravention or who fails to comply with any provision of this Act withwhich it was his duty to comply, where no express penalty is elsewhere providedfor such contravention or failure, to be liable to a penalty not exceeding four lakhs rupees. The maximum amount of penalty prescribed under Section 117 initially at Rs. One lakh was revised upwards to Rs. Four lakhs, with effect from 01.08.2019. The detailed discussions in the preceding paragraphs clearly prove that the appellants not only failed to fulfil the conditions and to abide by the responsibilities reposed on them as CCSP, but also failed to rectify the situation as one another attempt was made again for illegal removal of seized redsanders, which was identified by SIIB Customs on 14.08.2014. Hence, there are clear violations of the HCCAR and Section 141(2) of the Customs Act, 1962 by the appellant and thus we do not find any infirmity in the impugned orderimposing penalty under Section 117 *ibid* on the appellants.

22. In view of the above, the appeal filed by the appellants is dismissed.

(Order pronounced in the open court on 11.09.2023)

(S.K. Mohanty) Member(Judicial) (M. M. Parthiban) Member (Technical)

Back

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNALMUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 1132 OF 2007

[Arising out of Order-in-Original No: 131/2007/CAC/CC (I)/SP/Gr VA dated 28th September 2007 passed by the Commissioner of Customs (Import), Mumbai.]

Shashi Dhawal Hydraulics Pvt Ltd … ***Appellant***
45 Vikas Centre, SV Road, Near Santacruz Bus Depot,Santacruz (W), Mumbai – 400 054

versus

Commissioner of Customs (Import) ***…Respondent***

New Customs House, Ballard Estate, Mumbai – 400 001

APPEARANCE:

Shri T Viswanathan, Advocate for the appellant

Shri Ashwini Kumar, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86778/2023

DATE OF HEARING: 12/04/2023

DATE OF DECISION: 11/10/2023

PER: C J MATHEW

Though this appeal is before the Tribunal for the second time, and even, in a manner of speaking, for the third time considering disposal of application filed under section 129B of Customs Act, 1994 for 'rectification of error apparent on record that came to be rejected, the entirety of the original cavil against order[1] of Commissioner of Customs (Import), Mumbai is not. A narrative, albeit briefly, of the facts and circumstances till now is, therefore, unavoidable.

2. The appellant, M/s Shashi Dhawal Hydraulics Pvt Ltd, wasproceeded against by notice dated 26th September 2006 for recovery of ₹ 20,31,302 that had allegedly been short-paid on import of 'David Brown hydraulic pumps' between December 2001 and April 2003 from M/s S&H Universal, UK upon enhancement of assessable value from GBP 90 to GBP 212 apiece by adopting the value in imports effected by M/s Shashi Charu Hydraulic Pvt Ltd, a sister concern of the appellant, from the manufacturer themselves. The impugned order also held the impugned goods liable for confiscation under section 111(m) of Customs Act, 1962

while imposing fine of ₹ 20,00,000 in *lieu* thereof besides invoking section 112 of Customs Act, 1962 for imposition of penalties. The order[2] of the Tribunal disposing off the appeal[3] had set aside the confiscation, as well as imposition of penaltiesthereon, while confirming the demand in the impugned order.

3. In appeal before the Hon'ble Supreme Court, the apparent incongruity of the finding that there was no 'misdeclaration' and the finding that circumstances did warrant 'invoking of the extended period' afforded by section 28 of Customs Act, 1962 was the bedrock of the plea of the appellant as it also was in the application before the Tribunal referred to *supra* prior to recourse of appellate remedy provided for in section 130E of Customs Act, 1962.

4. Upon this submission, the Hon'ble Supreme Court remanded the matter back to the Tribunal thus

'12. We need not make any other comments in the matter, but in the totality of circumstances, deem it appropriate that the question of availability of extended period be examined by the Tribunal with reference to the facts of the case and the law applicable. We also do not deem it necessary to delve into thefindings of the Tribunal with reference to the fact that there was no mis-declaration so as to justify confiscation or redemption fine, because the preliminary issue herein would be as to whether the elements of the Proviso to Section 28 hadbeen existing in the first place, which would be decided independent of the findings/observations of the Tribunal inthe second impugned order dated 17.07.2019.

13. In view of the above, the impugned orders are modified tothe extent that Appeal No. C/1132/2007 stands restored; and the question as to whether the extended period in terms of the Proviso to Section 28(1) of the Act of 1962 is available in thismatter or not is remitted for consideration of the Tribunal in accordance with law. The parties shall stand at notice toappear before the Tribunal on 17.03.2023.'

to circumscribe the present proceedings accordingly.

5. We have heard Learned Counsel for the appellant and Learned Authorized Representative at length on the limited issue of 'bar of limitation' in section 28 of Customs Act, 1962 and the extent to whicha finding on section 111(m) of Customs Act, 1962 operates concurrently. The issue for consideration, therefore, is the acceptability of facts relating to the import and assessment under section 17 Customs Act, 1962 that, on their own, would merit restricting the demand, if any, under section 28 of Customs Act, 1962 to the normal period of limitation and, if not, the legality of distinguishing 'suppression/misrepresentation' and 'misdeclaration' for independent consequences.

6. It is well-settled that invoking of the extended period, as empowered by

'Provided that where any duty has not been levied or has beenshort-levied or the interest has not been charged or has been partpaid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression offacts by the importer or the exporter or the agent or employee ofthe importer or exporter, the provisions of this sub-section shallhave effect as if for the words "one year" and "six months", thewords "five years" were substituted.'

in section 28 of Customs Act, 1962, is to be determined by facts on record. The impugned order has clearly elaborated on the transactions that a 'sister concern' had had with the manufacturer from whom the supplier of the appellant had sourced the impugned goods and that the variation in the transacted prices was within the knowledge of the authorized persons of the appellant-importer. The framework for valuation of imported goods for such difference in price to have the consequence of resort to rule 5 to rule 8 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 was also then existing. Invoking of the 'extended period' for recovery of 'import duties' that had been 'short-paid' was contingent upon establishing that 'suppression/misrepresentation' – not of the value,

necessarily, but of aspects that would have influenced invoking of the impugned Rules – had occurred even as the transacted price may not have been exceeded but which, however, owing to

'Provided that—

(a) the sale is in the ordinary course of trade under fully competitive conditions;

(b) the sale does not involve any abnormal discount or reduction from the ordinary competitive price;

(c) the sale does not involve special discounts limited to exclusive agents;

(d) objective and quantifiable data exist with regard to theadjustments required to be made, under the provisions of rule 9, to the transaction value;

(e) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which -

(i) are imposed or required by law or by the publicauthorities in India; or

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(f) the sale or price is not subject to same condition or consideration for which a value cannot be determined in respect of the goods being valued;

(h) no part of the proceeds of any subsequently resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordancewith the provisions of Rule 9 of these rules; and

(h) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below.'

in rule 4(2) of Customs Valuation (Determination of Price of ImportedGoods) Rules, 1988 may not be acceptable as the assessable value.

7. The matter was heard and disposed off in 2018; then Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 had been in operation for over a decade. The present dispute, aslegacy of the erstwhile framework for valuation, had been evaluated accordingly, and not by the rigidity of mandate for acceptance of the 'declared value', save in specified circumstances, that is the hallmark of the contemporary Rules. It, therefore, remains to determine in the remand proceedings, if any additional facts thereto have been placed by the appellant. We do not find any such leaving only the issue of concurrence of findings on 'confiscation' and 'limitation' – arising from independent provisions in Customs Act, 1962.

8. In the erstwhile framework wherein acceptance of 'declared value' as 'transaction value' could be jeopardized by the latitude of deviating circumstances, determination of consequent duty liabilitydid not necessarily imply misdeclaration of value and it could well be the inexorable purpose of rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 that may have given rise to 'short payment' owing to the transactional circumstances having been 'suppressed' at the time of assessment with its own consequence. With the imposition of fine for redemptionof goods that were not available for confiscation having been frowned upon in the decision of the Hon'ble High Court of Bombay in *Commissioner of Customs (Import), Mumbai v. Finesse Creation Inc [2009 (248) ELT 122 (Bom)]* and the Hon'ble High Court of Madras in *Visteon Automotive Systems India Ltd v. CESTAT, Chennai [2018 (9) GSTL 142 (Mad)]*, relied upon by Learned Authorised Representative, merely observed that the decision of the jurisdictional High Court does not apply to the case of the appellant before them, we are bound by the decision in the former to set aside the charging of redemption fine under section 125 of Customs Act, 1962. There is noevidence on record that the value declared by the importer is incorrect.Had the circumstances which prevailed prior to 1998, depicted in the decision of the Hon'ble Supreme Court in *Eicher Tractors Ltd*

v. Commissioner of Customs, Mumbai [2000 (122) ELT 321 (SC)], and in accord thereof, be found to have justified the invoking of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for re-determination of the assessable value by addition to the extent of concealed price of procurement, it would well have been within the scheme of law to confiscate the goods by resort to section 111 of Customs Act, 1962. The fresh determination would have been a consequence of non-compliance with section 14 of Customs Act, 1962and rule 4 (2) of the said rules arising from deliberate misrepresentation of the 'transaction value' in filing bill of entry.

9. Section 111(m) of Customs Act, 1962 may be invoked only upon material particulars being misdeclared and this detriment is in addition to duty liability determined under section 28 of Customs Act,1962. For such confiscation to be correct in law, it is necessary thatthe circumscribing circumstances must exist; the 'value' itself has not been established as 'misdeclared' even if the said 'value' was placed on record for assessment without making known the circumstances in which the same goods had been procured from the manufacturer at higher price. That was the consequence of the special framework, deviating from the Agreement on Customs Valuation (ACV) that was adhered to only in the subsequent Rules, and the incorporation of rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 setting the two apart. A finding on inapplicability of confiscation did not necessarily extend to 'suppression/ misrepresentation' deployed for enhancement of value for assessment.

10. The legislative intent of compartmentalization of the two is evident in the incorporation of section 114A in Customs Act, 1962 that empowered imposition of penalty in consequence of such 'suppression/misrepresentation' and explicitly excluding recourse to the penalty consequential to 'misdeclaration' in proceedings for recovery of 'short paid' duty. We, therefore, find ourselves unable to accept the submission of the appellant that relief from confiscation amounts to relief from being subjected to the 'extended period' for recovery of duty under section 28 of Customs Act, 1962.

11. As no new facts pertaining to circumstances in which the parallel transaction with manufacturer of the impugned goods was not tantamount to 'suppression/misrepresentation' is on record and the non-applicability of the re-determined value is not in dispute in these proceedings, we find no reason to set aside the demand on ground of limitation.

12. Appeal is, accordingly, dismissed.

(Order pronounced in the open court on 11/10/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 86403 of 2019

(Arising out of Order-in-Original CAO No. 59/CAC/CC(G)/RC/CBS(Adj.) dated 28.03.2019 passed by the Commissioner of Customs (General), Mumbai Zone-I and remanded by Hon'ble Bombay High Court vide order dated 27.08.2021 in Custom Appeal (L) No.3447 of 2020)

Srinivas Clearing & Shipping (I) Pvt. Ltd. …. Appellants

C.B. No.11/171 – Palkiwala Building,296, Shahid Bhagat Singh Marg, FortMumbai – 400 001

Versus

Commissioner of Customs (General) …. Respondent

Mumbai

New Custom House, Ballard Estate,Mumbai - 400001

Appearance:

Ms. Pooja Reddy, Advocate for the Appellant

Shri Sai Krishna Hatangadi, Authorised Representative for theRespondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL) HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85005/2024

Date of Hearing:

04.07.202

3Date of Decision:

03.01.202

4

Per: M.M. PARTHIBAN

This is an appeal filed by M/s Srinivas Clearing & Shipping (I) Private Limited (herein after, referred to as 'the appellants') assailing the Order-in-Original CAO No. 59/CAC/CC(G)/RC/CBS(Adj.) dated 28.03.2019 (referred to as 'impugned order') passed by the learned Commissioner of Customs (General), Mumbai Zone-I. Earlier, theTribunal had passed a Final Order No. A/87405/2019 dated21.11.2019 in allowing the appeal filed by the appellants by holding

that *there is nothing on record to arrive that the appellant 'G' Card– holder, who was investigated for his key role in the conspiracy to smuggle 'red sanders' out of India, was concerned with the activities for which appellant herein was licensed; the allegedly nefarious activities of such a pass-holder, although obtained through the licensed customs broker, cannot be visited upon the broker in the absence of a link between the two in the context of established misdemeanor.* Accordingly, by following the principles laid down by the Hon'ble High Court of Bombay in the *Unison Clearing P Ltd.,* the Tribunal held that the case does not merit continued revocation of theCustoms Broker (CB) license, and ordered the CB license to be restored. The department had preferred an appeal against the above order of the Tribunal before the Hon'ble High Court of Bombay in Custom Appeal No. (L) No.3447 of 2020, in which the Hon'ble High Court of Bombay vide its Order dated 27.08.2021 had ordered the following:

"2. The appeal has been admitted by this Court on 22nd October 2020on the following substantial questions of law:

'a) whether, on the facts and in the circumstances of the case, the important delay in completion of proceeding for revocation of license vitiates the Order-in-Original dated 28.03.2019 first by the Commissioner of Customs (General)?

b) Whether on the facts and in the circumstances of the case, the CESTAT was right in holding that there is no link between the smuggling of red sanders by Shri Vijay Poojary with the activities permitted the Respondent herein was licensed?'

xx xx xx xx

33. With respect to the first question, we observe that the CESTAT as referred to the decision in the case of Principal Commissioner of Customs (General), Mumbai Vs. Unison Clearing P. Ltd. (supra) to give a finding that the delay in commencement of the proceedings for revocation of license does not command itself is indicative of proper understanding of responsibility and that the delay in commencement of the proceedings for revocation of license was not justifiable. It has also observed that there is an implicit responsibility on the part of the competent authority to adhere tothe time lines with acceptable justification for delays, if any. The Tribunal has referred to that although the suspension waswithdrawn on 11th January, 2017, another 15 days had elapsed for inquiry proceedings to commence and, thereafter there was a lapse of more than six months in completion of inquiry and a further lapseof the more than two months in revocation of the license, whereas the incident has its origin in November 2015. We first observe that Tribunal has only dealt with delay in commencement of the proceedings but nowhere dealt with submissions on delay in conclusion of proceedings. We also observe that the Tribunal has failed to consider the submissions of timelines as canvassed by the parties nor the explanation for delay furnished by the Revenue. In any event, we are unable to agree with the CESTAT's interpretation as from a plain reading of the decision in the case of Principal Commissioner of Customs (General), Mumbai Vs. Unison Clearing P. Ltd. (supra), where after considering the provisions of CBLR in detailas well as Customs Act, the background, object and the scheme of the CBLR in particular Regulation 20, this Court had concluded that timelines contained in Regulation 20 cannot be construed to be mandatory but are directory. This conclusion was arrived at by this court after deliberations on various Supreme Court decisions and jurisprudence on the subject……

34. The Tribunal completely erred in ignoring the true import and misread the binding decision of this court. We observe that the Tribunal has failed to consider the detailed submissions as sought tobe made out on behalf of the parties and without even dealing with the detailed explanation as well as the necessary facts, allowed the appeal of Respondent. In our view, the Tribunal ought to have discussed each of the submissions before coming to any conclusion.

41. In our view, reliance by the CESTAT on the decision in the case of Principal Commissioner of Customs (General), Mumbai Vs. UnisonClearing P. Ltd. (supra) to restore the

license of the Respondent is completely misplaced and a complete non-application of mind.

42. In accordance with the above discussion, we are of the view thatthe findings of the Tribunal are unsustainable and the matter is required to be sent back for reconsideration by the Appellate Authority taking into account all the aspects to arrive at a proper decision. We, therefore, set aside the order of the Tribunal dated21st November, 2019. The matter is remanded back to the CESTAT for fresh adjudication.

43. The Appeal is accordingly disposed in the above terms. No orderas to costs."

2. In the impugned order the learned Commissioner of Customs (General), in exercise of powers conferred upon him under Regulation
17 (7) of the Customs Brokers Licensing Regulations, 2018 (CBLR) had revoked the CB license issued to the appellants for acting as a Customs Broker under the above regulations ibid, besides imposition of penalty of Rs.50,000/- and forfeiture of entire security deposit furnished by the appellants. Being aggrieved against the impugned order, the appellants had earlier filed an appeal before the Tribunal.

3.1 Briefly stated, the facts of the case are that the appellants herein is a Customs Broker (CB) holding a regular CB license issuedby the Mumbai Customs under Regulation 7(2) of Customs Brokers Licensing Regulations (CBLR), 2018. A specific intelligence was developed by Directorate of Revenue Intelligence (DRI), Mumbai Zonal Unit (MZU), Mumbai regarding smuggling of red sanders for illegal export out of the country in an export consignment in container No. DRYU 2306380 to Jebel Ali port on the basis of forged documents at Jawaharlal Nehru Customs House (JNCH). The said intelligence developed by DRI also indicated that the shipment was handled by a shipping agent namely M/s. Emirates Shipping Agencies (India) Private Limited (ESA), and the freight booking for the above export consignment was done by M/s. Krrish Corporation, Pune (KCP). In pursuance of the said intelligence, the container No. DRYU 2306380, when it was about to be exported, was called back to Allcargo Logistics Container Fright Station (CFS) functioning under JNCH for 100% examination on the export goods. During physical examination of the said container under panchanama proceedings on 27.11.2015,it was found that as against the declared goods as "Fabric Glue", the actual export cargo was found to be 7.800 MTs of wooden logs of red sanders, which is a prohibited item for export under Convention of International Trade in Endangered Species of Wild Fauna and Flora (CITES) totally valued at Rs.3.12 crore. Accordingly, the said goods were seized being liable for confiscation under Section 113(d), 113(f),113(g), 113(h), 113(k), 115(2) ibid, read with Section 50 ibid and read with Section 11 of Foreign Trade (Development & Regulation) Act, 1992 and Rule 14 (2) of Foreign Trade (Regulation) Rules, besides being liable for penalty under Section 114(i) and 114AA ibid. The investigation proposed for search of the premises of the exporter-KCP revealed that no such business entity or address was found to be existent in the given address. Preliminary enquiry conducted in the operations division of ESA, revealed that the freight booking for the said export consignment was done by one person namely Shri Vijay Poojary, who is also a Freight Forwarder and a customs broker by profession operating those business entity in the name of M/s Marine Trans India Private Limited and M/s Srinivas Clearing and Shipping

India Private Limited (SC&SIPL). Further investigation of the case withESA (through Shri Shivdas Ramesh Tandel, Deputy Manager) revealedthat the said Shri Vijay Poojary is a good friend and close associate of Shri Harshavardhan Hegde, Managing Director of ESA, and on his directions, he

had facilitated booking of containers for Shri VijayPoojary without any KYC verification of the business entity which is sending the request for containers in which the export goods are to bestuffed and transported out of the country. He had also assisted Shri Vijay Poojary in a similar manner recently for export of goods by M/s
R.N. Laboratories Private Limited, SEZ Diamond Park, Sachin, Surat for container No. DRYU 2315571 and several export consignments in the past. DRI MZU investigation revealed that Shri Vijay Poojary, Director of SC&SIPL is involved in export of prohibited goods by using dummy/fake IEC holders as exporters to avoid detection of smugglingand by operating behind the scene, and fabricating all documents such as invoices of exporter, packing list, bill of lading and obtaining the prohibited goods through his own business accomplices. The total smuggling by this modus operandi in the past exports were estimatedby DRI to be of 120 MTs totally valued at Rs.48 crore. An offence report of DRI, MZU vide their letter F. No. DRI/MZU/C/ Inv-111/2015 dated 16.05.2016 was received by Principal Commissioner of Customs(General), Mumbai, wherein it was informed about the involvement ofappellants CB in the smuggling of prohibited goods; and that a detention order has been issued under COFEPOSA Act, 1974 forpreventive detention against said Shri Vijay Poojary on 21.03.2016 and that he is presently absconding.

3.2 On the basis of such offence report/letter received from DRI. MZU, Mumbai, the jurisdictional Principal Commissioner of Customs (General), Mumbai-I had concluded that there is a prima facie case against the appellants for having contravened Regulations 10(a),10(e), 10(j), 10(k) and 10(n) of CBLR, 2018 [earlier 11(a), 11(e), 11(j), 11(k) and 11(n) of CBLR, 2013]. Accordingly, he had immediately suspended the CB license of the appellants under Regulation 16(1) *ibid* [earlier 19(1) of CBLR, 2013], vide Order No. 13/2016-17 dated 10.06.2016 issued on 24.06.2016; and such suspension was continued vide Order No. 17/2016-17 dated 14.07.2016 pending inquiry proceedings. The appellants had filed an appeal against the said suspension order dated 14.07.2016 before theTribunal, who vide Order No. A/85309/17/B dated 11.01.2017, had ordered that the same is unsustainable as the Tribunal is of the view that the lower authorities may not be able to complete the proceedings within the stipulated period of 270 days, and held thatthe said Order dated 14.07.2016 of the lower authority isunsustainable only on the ground that the lower authorities have not issued any show cause notice to date from the date of confirmation ofsuspension of CB license. Further, on submission of the appellant, in an miscellaneous application filed before the Tribunal, stating thatthat the Department has not still implemented the final order dated 11.01.2017 passed by the Tribunal, it had directed the respondent Commissioner to implement the said final order and report compliance report the bench on 29.01.2018 by issue of Order No. I/2/18 dated 15.01.2018. On the basis of the directions given by the Tribunal, the CB license of appellants was restored by the Departmentvide Notice No.234/2017-18 dated 24.01.2018. Further, show cause notice dated 14.05.2018 was also issued for initiating inquiry proceedings under Regulation 20 *ibid*, against violations of CBLR as above.

3.3 Subsequently, during the inquiry proceedings conducted by the Inquiry Officer, he gave personal hearing opportunities to the appellants on 09.07.2018, 17.07.2018, 23.07.2018, 27.07.2018, 02.08.2018, 08.08.2018, 13.08.2018, 14.08.2018, 23.08.2018, 24.08.2018 and also conducted examination of evidences of witnesses and cross examination of witnesses by the Advocate representing the appellants on 27.08.2018, 30.08.2018, 12.09.2018. Upon completion of the inquiry, a report was submitted on 30.10.2018 concluding that all charges framed against the

appellants have been proved. Accordingly, the Principal Commissioner of Customs (General), Mumbai, being the licensing authority had passed the impugned orderdated 28.03.2019 under Regulations 17 (7) and 18 *ibid*, for revoking CB License of the appellants and for forfeiture of entire amount of security deposit and imposition of penalty.

3.4 In the first round of litigation, the Tribunal had passed a Final Order No. A/87405/2019 dated 21.11.2019. The Department, being aggrieved by the said order of the Tribunal, had filed an Appeal beforethe Hon'ble High Court of Bombay in Customs Appeal (L) No.3447 of 2020. While admitting the appeal filed by the Department, the Hon'ble High Court vide its Order dated 22.10.2020 had stayed the operation of the Tribunal's order dated 21.11.2019. Subsequently the Hon'ble High Court of Bombay had passed its final judgement in the above case. Presently on the basis of the final judgement of the Hon'ble High Court of Bombay pronounced on 27.08.2021, remandingback the case to the Tribunal, this appeal is being taken up for fresh adjudication.

4.1. Learned Advocate for the appellants contends that there was anunexplainable delay in the issuance of an inquiry notice of 638 days; there is no mention of any reasons for the delay in the inquiry report and in issue of the impugned order. Thus, by placing reliance on the judgement of the Hon'ble High Court of Bombay, this stated that the timelines have not been followed by the Department and therefore the entire inquiry proceedings are required to be set aside. Further, the learned Advocate had stated that the appellants were never the authorised customs broker in the case on hand and therefore never played any role in facilitating clearances for alleged illegal export of Red Sanders. The learned advocate also stated that the customs broker license has been issued in the name of private limited company by submitting a copy of license No. 11/171 issued in the name of CHA/CB-M/s Srinivas Clearing & Shipping (I) Private Limited.

4.2. In respect of non-compliance to the time lines laid down in the regulations for various actions under inquiry proceedings, they claimed that the Tribunal had already set aside the suspension orders issued earlier by the Commissioner vide Order No. 13/2016-17 dated 10.06.2016. In arriving at the impugned order, they submitted that there were major delays in the inquiry proceedings viz., 18 months delay in issue of the Show Cause/Inquiry Notice after receipt ofoffence report on 16.05.2016; 37 days delay in submission of inquiry report. As there was gross delay in the conclusion of inquiry proceedings for which there is no explanation, without prejudice their submission on merits, they stated that on the ground of non- adherence with the time limits, the impugned order is liable to be set aside. In view of the above, they requested that impugned order be set aside and consequential relief be granted to them.

5. Learned Authorised Representative (AR) reiterated the findings made by the Principal Commissioner of Customs (General) in the impugned order and submitted that each of the violation under sub- regulations (a), (e), (j), (k) and (n) of Regulation 10 *ibid*, has been examined in detail by the Principal Commissioner. The appellants CBis a private limited company, in which 99.9% of the shares is held by its director Shri Vijay Poojary, who is also a "G" card holder. The said Shri Vijay Poojary had fabricated the export documents without using the name of his from for circumventing the legal provisions, forsmuggling of Red Sanders, the export of which is prohibited under theForeign Trade Policy as it is an item of CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora). The learned AR also stated that said Shri Vijay Poojary is an habitual offender and was held under preventive detention under COFEPOSA in2006,

in the present case. In view of his role as a mastermind and thekey conspirator in smuggling of Red Sanders with the aid of his accomplices, by defrauding the government through fabrication of documents, the learned AR stated that it is a fit case for revocation of the customs broker license, imposition of penalty and forfeiture of security deposit. Thus, learned AR justified the action of Principal Commissioner of Customs (General) in revocation of the appellant'sCB license and forfeiture of security deposit in the impugned orderand stated that the same is sustainable in law. It is further stated by him that the impugned order viewed that the timelines specified in CBLR are directory in nature and not a mandatory factor. The delay incompleting the CBLR proceedings was partly on account of failure on the part of the appellants to appear for personal hearing opportunities given to them and due to their seeking of adjournments.

6. The facts of the case in brief has already been explained in the previous paragraphs no. 3.1 to 3.4, above.

7. We have heard both sides and have gone through the records ofthe case. We have also considered the additional written submissions given in the form of paper books by learned Advocate for the appellants as well as Authorised Representative for the Revenue.Further, we have also carefully perused the judgement of the Hon'ble High Court of Bombay in remanding the case back to the Tribunal for afresh adjudication of the case.

8. From the perusal of the records and factual matrix of the case,it is seen that the Department had initiated independent action against the appellants under CBLR, 2018 on the basis of DRI's investigation report dated 16.05.2016 about alleged irregularities on the part of CHA/CB and freight forwarders as they aided and assisted illegal export of prohibited goods. Accordingly, the jurisdictional Principal Commissioner suspended the CB license under Regulation 16(1) of CBLR, 2018 [earlier 19(1) of CBLR, 2013] on 10.06.2016. Subsequently, after giving a post-decisional hearing the jurisdictional Principal Commissioner continued the suspension by issue of an order No.17/2016-17 dated 13.07.2016. Further, regular inquiry proceedings were initiated under Regulation 17(1) ibid [earlier 20(1) of CBLR, 2013], by issue of show cause notice No.11/2018-19 dated 14.05.2018, specifying the grounds on which the appellants have alleged to have been violated CBLR, 2018. In conclusion of these proceedings, the impugned order was passed by the jurisdictional Principal Commissioner revoking the Customs Broker license granted to the appellants for the failure on the part of appellants to fulfill the obligations cast on them under Regulations 10(a), 10(e), 10(j), 10(k) and 10(n) of CBLR, 2018 [earlier 11(a), 11(e), 11(j), 11(k) and 11(n)of CBLR, 2013] and also imposed penalty of Rs.50,000/- besides forfeiture of entire security deposit.

8.1 In order to examine the above issues, and the divergent stand taken by both the parties, we would like to firstly examine the facts contained in the DRI investigation and the allegations specificallyframed against the appellants for having violated the CBLR ibid. Fromthe findings of the Principal Commissioner in impugned order dated 28.03.2019, the following facts have been specifically recorded about the role of appellants in the investigation report. The extract of the same is given below:

"25. … During the investigations, CB Director Shri. Vijay Poojary in his statement recorded under section 108 of Customs Act, 1962 on 09.12.2015 has admitted that he got acquainted with Shri Badshah Malik while both were lodged in Mumbai Central Prison in earlier cases of violations of the provisions of the Customs Act, 1962; that Shri Badshah Malik has offered him payment of Rs.75 Lakhs per container for arranging such shipments; that in the year 2014 hehad approached Shri

Harshvardhan Hegde, Managing Director of M/sEmirates Shipping Agencies (India) Pvt. Ltd. with a request to arrange for freight booking of containers that were to be used for shipping wooden logs of Red Sanders to Middle East Asia; that dueto his financial hardship, Shri Harshvardhan Hegde had agreed and arranged for freight booking for 18 containers in which Red Sanders were stuffed for shipment to Middle East Asia on behalf of Shri Badshah Malik; that having realized the prohibition of such exports, he had used the names of bogus forms for framed booking; that he had used his personal equation with Shri Harshvardhan Hegde for making freight booking in the names of such bogus forms; forproviding the said the services Shri Badshah Malik had been paying him an amount of Rs.75 Lakhs per container, which he was sharing with Shri Harshvardhan Hegde and another accomplice; that subsequent to detection of the case by DRI, he had met Harshvardhan Hegde and requested him not to reveal his name dealing inquiries. Both Shri. Vijay Poojary and Shri Badshah Malik were arrested on 09.12.2015 under the provisions of Section 104 of the Customs Act, 1962 on account of the involvement in smuggling activities that are punishable under section 135(1) of the Customs Act, 1962.

26. Further investigations carried out with the Exporters whose names were misused by Shri. Vijay Poojary for preparing documentsrevealed that all the documents required for customs clearance for export of goods viz. Bill of Lading, Shipping Bill, Form-13, Invoices, Packing List were forged in respect of all 17 shipments in the names of M/s R.N. Laboratories (7 Nos.), M/s Repro India Ltd. (6 Nos.),and M/s Banco Products (I) Ltd. (4 Nos.). statements of key employees of M/s Srinivas Clearing & shipping (India) Pvt. Ltd. revealed that booking of freight for all the 18 consignments wasdone by Shri. Vijay Poojary in benami names by making cash payments. Employees of the firm further admitted that they had destroyed the export documents such as Invoice, Packing List, Shipping Bill etc., post shipment of the said consignments on the directions of Shri. Vijay Poojary.

27. Examination of the present consignment revealed that the container was containing 7.8 MTs of Red Sanders valued at Rs. 3.12 Crores. The estimated quantity of Red Sanders that have beensmuggled out in past seventeen consignments booked by Shri. VijayPoojary by using bogus names of Freight Forwarders as well as shippers works out to 120 MTs valued at Rs.48 crores. DRI has also reported that Shri. Vijay Poojary was earlier detained under COFEPOSA Act, 1974 under PSA-1205/18(1)/SPL-3(A) dated
17.02.2006 during the period 17.02.2006 to 20.10.2006 a new case investigated by DRI, MZU (F. No. MZU/D/PSA-12/2005 – M/s Rama Creations and others) related to fraudulent exports of garments and for obtaining undue benefits under the DEPB Scheme.Consequently, his CHA license No.11/171 which was issued in the name of Kunverji Dharshi & Sons was suspended vide Order No.41/ 2005 dated 14.09.2005 by Commissioner of Customs (General).The license was revoked by The Commissioner of Customs (General)vide his order dated 06.11.2012.

27.1 There is no denying that the CB has a history of being an offender and is thus as a chronic offender his continuation in business world would be detrimental to the national security, Govt. Revenue in the environmental crimes such as export of red sanders which is violative of International Convention such as CITES, 1973 (the Convention on International Trade in Endangered Species of wildFauna and Flora) which are major, serious and heinous crimeshaving both national and international ramifications. In past also Shri. Vijay Poojary has been detained under COFEPOSA Act, 1974. He has himself admitted his role in the smuggling of red sanders and the CB in this case is involved beyond doubt in the serious economic, tax-related and environment crimes. I am of the considered opinion that the inquiry report is based on the correct application of mind and appreciation of the facts and circumstances of the case. The Director of the CB company Shri. Vijay Poojary, is king pin and the key conspirator and the perpetrator of the crime of exporting red-sanders and deserves stringent possible punishment under CBLR, 2013 (now CBLR,2018) and the same has been proved beyond doubt by the Inquiry officer in his report and I completely agree with the findings of the Inquiry officer, as detailed in hisreport submitted on 14.11.2018."

The above findings clearly point out that the appellants CB were found to be involved in the export fraud relating to smuggling of prohibited Red Sanders.

8.2 Further, the legal provisions contained in the Customs Act, 1962 in respect of import/export of goods provide for making an entry giving the details of goods that are imported/exported by an importer/exporter and the attendant liabilities for any omission or commission in respect of any violations of the said Act. The extract of the relevant provisions of the Act and Regulations are given below:

*"**Section 46. Entry of goods on importation. -***

(1) The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by

presenting electronically on the customs automated system to the proper officer a bill of entry for home consumption or warehousing in such form and manner as may be prescribed :....

Section 50. Entry of goods for exportation. -

(1) The exporter of any goods shall make entry thereof by presenting electronically on the customs automated system to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export [3] [in such form and manner as maybe prescribed:

.....

Section 146. Licence for customs brokers-

(1) No person shall carry on business as a customs broker relatingto the entry or departure of a conveyance or the import or export of goods at any customs station unless such person holds a licence granted in this behalf in accordance with the regulations……"

Customs Brokers Licensing Regulations, 2018 (CBLR)

2. Definitions.— (1) In these regulations, unless the context otherwise requires, …….

....

(d)"Customs Broker " means a person licensed under these regulations to act as an agent on behalf of the importer or an exporter for purposes of transaction of any business relating to the entry or departure of conveyances or the import or export of goods at any Customs Station including audit;

.....

(g) "F card holder" means a person who has passed the examination referred to in regulation 6 and has been issued a photo identity cardin Form F;

(h) "G card holder" means a person who has passed the examinationreferred to in regulation 13 and has been issued a photo identitycard in Form G;

(i) "H card holder" means a person who has not passed the examination referred to in regulation 13 and has been issued a photo identity card in Form H;

5. Conditions to be fulfilled by the applicants.—

(1) The applicant for a license to act as a Customs Broker in a Customs Station, shall before applying to the PrincipalCommissioner of Customs or Commissioner of Customs, meet the following conditions that: —

(a) he is a citizen of India;

(b) he is a person of sound mind;

(c) he is not adjudicated as insolvent;

(d) he holds an Aadhaar number;

(e) he holds a valid PAN card;

(f) he has not been penalised for any offence under the Act, the Central Excise Act, 1944 (1 of 1944), the Finance Act, 1994(32 of 1994), the Central Goods and Services Act, 2017 (12 of 2017) and Integrated Goods and Services Tax Act, 2017 (13 of 2017);

(g) he has neither been convicted by a competent court for an offence nor any criminal proceeding is pending against him in any court of law;

(h) an individual applicant or in case the applicant is a firm, its partner or in the case of a company, its director or an authorised employee who may handle the Customs work shall —

(i) be a graduate from a recognized University; and

(ii) possess a professional degree such as Masters or equivalent degree in Accounting, Finance or Management, CA/CS/MBA/LLM/ACMA/FCMA or Diploma in Customs Clearance work from any Institutes or University recognised by the Government or is havingat least two years' experience in transacting Customs Broker workas G-Card holder;

xx xx xx xx xx

6. Examination of the applicant. —

(1) An applicant, who satisfies the requirements of regulation5, shall be required to appear for a written (preferably online) as well as oral examination conducted by the DirectorateGeneral of Performance Management:

Provided that an applicant who has already passed the examination referred to in regulation 9 of the Custom House Agents LicensingRegulation, 1984 or regulation 8 of the Custom House Agents Licensing Regulation, 2004 or regulation 6 of the Customs Brokers Licensing Regulations, 2013 shall not be required toappear for any further examination.

(2) The written examination shall be conducted on specified dates in the month of January of each year for which intimationshall be sent individually to applicants in advance before the date of examination and the result of the said examination shall be declared by end of May each year.

(3) The applicant who is declared successful in the written examination shall be called for an oral examination on specified dates in the month of June of each year, the resultof which shall be declared in the month of July of each year.

(4) The applicant shall be required to clear both the written examination as well as corresponding oral examination.

xx xx xx xx xx

(7) The examination may include questions on the following:
(a) preparation of various kinds of bills of entry, bills of export, shipping bills, and other clearance documents;

(b) arrival entry and clearance of vessels;

(c) tariff classification and rates of duty;

(d) determination of value of imported and export goods;

(e) conversion of currency;

(f) nature and description of documents to be filed with various kinds of bills of entry, shipping bills and other clearance documents;

(g) procedure for assessment and payment of duty including refund of duty paid;

(h) examination of goods at Customs Stations;

(i) prohibitions on import and export;

(j) bonding procedure and clearance from bond;

(k) re-importation and conditions for free re-entry;

(l) drawback and export promotion schemes including the Special Economic Zone scheme;

(m) offences under the Act;

(n) provisions of the allied Acts including the Central Goods and Services Act, 2017 (12 of 2017) and section 5 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017),the Indian Explosives Act, 1884 (4 of 1884), the Destructive Insects and Pests Act 1914 (2 of 1914),the Dangerous Drugs Act, 1930 (2 of 1930), the Drugs and Cosmetics Act, 1940 (23 of 1940), the Central Excise Act, 1944 (1 of 1944), the Copy Right Act, 1957 (14 of 1957), the Trade and Merchandise Marks Act 1958 (43 of 1958),the Arms Act 1959 (54 of 1959), the Patents Act, 1970 (39 of 1970), the Narcotics Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Environment (Protection) Act, 1986 (29 of 1986), the Foreign Trade (Development and Regulations) Act, 1992 (22 of 1992), the Foreign Exchange Management Act, 1999 (42 of 1999), the Design Act, 2000 (16 of 2000) and the Food Safety and Standard Act, 2006 (No. 34 of 2006)and other laws for the time being in force applicable to EXIM trade and the rules and regulations made under these Acts in so far as they are relevant to clearance of goods through Customs;

(o) provisions of the Prevention of Corruption Act, 1988 (49 of 1998);

(p) procedure for appeal and revision applications under the Act; and

(q) online filing of electronic bills of entry and shipping bills vide the Indian Customs and Central Excise Electronic Commerce or Electronic data interchange gateway (ICEGATE)and Indian Customs Electronic data Interchange System (ICES).

(r) knowledge of regulations, rules, notifications, etc. under the Customs Act and other Allied Acts.

(8) The Principal Commissioner of Customs or Commissioner of Customs shall satisfy himself that the individual applicant or in cases where applicant is a firm or company, its partner or Director or authorised employees who may be engaged for handling the customs work shall possess satisfactory knowledgeof English and the local language of the Customs Station:

Provided that in case of a person deputed to work extensivelyin the docks, knowledge of English shall not be compulsory and knowledge of Hindi shall be considered as desirable qualification.

xx xx xx xx xx

13. Engagement or employment of persons.—

(1) A person who has qualified the examination referred to in regulation 6 may engage himself in the work relating to the clearance of goods through customs on behalf of a firm or a company licensed under these regulations.

(2) A Customs broker who has been issued a license under sub-regulation (2) of regulation 7 shall be issued a photo-identity card in Form F by the Deputy Commissioner of Customs or AssistantCommissioner of Customs, as the case may be:

Provided that in the case of the license issued under clause (b)of sub-regulation (2)of regulation 7, the photo-identity card in Form F shall be issued to the person or persons who has actually passed the examination referred to in regulation 6

....

(5) The person referred to in sub-regulation (3) shall, within four attempts from the date of his appointment, pass a written examination conducted by the said Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the casemay be, and the examination shall be such as to ascertain the adequacy of knowledge of such person regarding the provisions of the Act subject to which goods and baggage are cleared through Customs and the person shall, on passing the examination, be issued a photo-identity card in Form G by the Deputy Commissioner of Customs or Assistant Commissioner ofCustoms, as the case may be.

(6) Notwithstanding anything contained in sub-regulation (5), a G card holder who is employed under a Customs Broker may, onhis employment under any other Customs Broker, with the approval or no objection of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, be exempted from passing of such examination.

(7) A Customs Broker shall authorise only such employee who has been issued a photo identity card in Form F or Form G as the case may be to sign the declaration on the bills of entry, shipping bills, annexure thereof or any other document generated in connection with the proceedings under the Act or the rules or regulations made thereunder.

(8) Where the Customs Broker has authorised any person employed by him in accordance with sub-regulation (7) to sign documents relating to his business on his behalf, he shall file with the Deputy Commissioner of Customs or Assistant Commissioner of Customs of each Customs Station, as the casemay be, a written authority in this behalf and give prompt notice in writing if such authorisation is modified or withdrawn."

In view of the specific provisions under section 146 ibid, and the definition of 'customs broker' under CBLR, 2018, in case of anyviolations of the Customs Act, 1962 read with any other law for the time being in force, and the rules and regulations made thereunder, besides the importer/exporter, the concerned customs broker who filethe documents as an agent of the importer/exporter is also liable for action under the Act of 1962. The CBLR specifically provide for the individual person who intends to act as CB, shall make an application;and that such applicant in case of firm, shall be filed by its partner; and in case of a company, shall be filed by its director or an authorised employee. These applicants are required to pass the examination, both oral and written, in order to demonstrate that they have sufficient knowledge of the Laws of Customs and other alliedlaws governing the international trade, import and export, domestic legislations relating to compliance to various prohibitions,environmental protection, import/export restrictions, conformity with the quality and standards, financial/foreign exchange compliances in relation to enforcement of customs law and allied Acts concerning import/export of goods. The above requirements under CBLR clearly brings out the role of a Customs Broker who files the documents on behalf of the exporter, shall examine all aspects of the transaction to rule out that the export of goods are not in violation of any of the Acts, Rules or Regulations.

8.3 Thus, the above independent system of checks of documents before the same is filed in the form of checklist for shipping bill, require the 'F' or 'G' cadre holder to sign the declaration of shippingbill subscribing the truth of its contents after examining each of the aspect in detail for undertaking the responsibility of furnishing currentinformation in the customs declaration/shipping bill. In the present case, the persons involved in the export fraud including Shri. Vijay Poojary and his accomplices, employees have adopted a modus of

fabricating the documents, business entity of exporter, so that in the event of detection by the

Department, they would be able to escape from the clutches of law. The findings in the impugned order clearly prove that Shri. Vijay Poojary who is a director and a majority shareholder of the appellants CB M/s Srinivas Clearing & Shipping (I) Private Limited, had played an active role in devising the entiremodus for smuggling of Red sanders, a prohibited item for export along with one Shri Badshah Malik. But for the detailed investigation conducted by DRI, by the purposive avoidance of use of the name of CB for filing of the export documents, Shri. Vijay Poojary, director of the appellant's CB would have escaped from the clutches of law. However, the detailed investigation by DRI as reflected in the findingsof the learned Pr. Commissioner in the impugned order clearly bring out the role of appellants CB, in the export fraud.

8.4. The detailed investigation by DRI also shows that in the presentconsignment covered by container No. DRYU 2306380 covering exportgoods to Jebel Ali port, the actual export goods were found to be of 7.80MTs of Red Sanders which are prohibited goods. Further, we also find that this is not an isolated incident of mis-declaration but of a planned smuggling of prohibited goods, not once but in the past seventeen containers quantified in total as 120MTs valued at Rs.48Crore.

8.5. The various statements given under Section 108 ibid by the persons involved in the export fraud before DRI investigation officers also revealed that the appellants CB had played major role in the smuggling of Red Sanders. To illustrate, Shri Shivdas Ramesh Tandel,Deputy Manager (Operations) of the shipping agent M/s Emirates Shipping Agencies (India) Pvt. Ltd. in his statement dated 27/28.11.2015 had stated he attended the work of documentationand online submission of IGMs/EGMs to Customs authorities. He knewShri Vijay Poojary, Director of appellants CB as a friend Shri Harshavardhan Hegde, Managing Director of the same shipping agency in which he is working; on the specific directions of said Shri Harshavardhan Hegde, M.D. he facilitated smooth operations/clearance of export containers for Shri Vijay Poojary; he had prepared the 'Via loading request' as the request of Shri Vijay Poojary, for changing the vessel of export container from *MV Esperanza* to *MV Diaporos* and later emailed for change of port of destination from Khorfakkan, UAE to Jebel Ali, UAE; he had even sent the request for de-manifesting the export container to the terminal operator and gotit de-manifested on the directions of Shri Vijay Poojary, having got alerted that the said container was put on hold by Customs investigation agency; he had deleted all call records and messages from his mobile as per the directions of Shri Vijay Poojary.

8.6 Similarly, Shri Harshavardhan Hegde, Managing Director of shipping agent M/s Emirates Shipping Agencies (India) Pvt. Ltd. had also given voluntary statement dated 28.11.2015, stating that he knew Shri Vijay Poojary from 2001 and he had handled more than 200 export containers through their shipping agent company; upon knowing that the export container has been put on hold by investigation agency, Shri Vijay Poojary had asked him to change the vessel of the said container, which appears to be clear manipulationto avoid detection by such investigation agencies. Later in his subsequent statement given on 30.11.2015, he had stated that when he was in discussion with their Chief Financial Officer visiting from Delhi on 28.11.2015, who had come to specifically to meet after the seizure of Red Sanders by DRI in container No. DRYU 23063080, he was called by one Advocate Anish Desai and later when he met him atthe address given by him, he found that the office cabin was having the name place of Shri C.Subba Reddy and he had asked him regarding the questions DRI had asked him and the answers given by him. After 10 minutes Shri Vijay Poojary also entered the cabin and they had told him that he need

not worry about this incident and theywould handle everything. However, later upon meeting the Advocate Shri Chetan Anand, engaged by their shipping agent company, he hadadvised him to reveal everything to DRI investigation and thus he informed all the facts relating to the seizure of the container No. DRYU 2306380 and all the containers that were booked by Shri Vijay Poojary, in the past.

8.7 The records of the case also indicate that DRI investigation of various exports conducted in the past by the appellants CB firmthrough Shri Vijay Poojari, the Director, had adopted a commonmodus operandi of the following: (i) in most of the BLs the commoditywas declared as 'Fabric glue' (ii) the consignors in all the B/Ls were some unit in Surat SEZ and (iii) the consignee were mostly some General Trading firm based in the UAE. It was also revealed by the statement of Shri Shri Harshavardhan Hegde, that M/s Pidilite Industries was a client of the appellants CB's freight forwarding company M/s Srinivas International run by Shri Vijay Poojary and thushe was well aware of the product specifications' like weight, description, pricing, etc. which had come to his aid in preparation of forged export documents by using the description 'Fabric Glue'.

8.8 DRI investigation also proved that a representative sample ofthe wooden log, drawn under panchanama dated 27.11.2015 from theimpugned export consignment was forwarded to the Institute of WoodScience & Technology, Bengaluru vide letter F.No. DRI/MZU/ C/INT-III/2015 dated 30.12.2015 for ascertaining its identity. As per reply dated 12.02.2016 received from RO, Wood Properties and Engineered Wood Division, Institute of Wood Science & Technology, Bangalore, it was confirmed that the said representative sample of wood was of Red Sanders (Pterocarpus Santalinus), which is a prohibited item for export from India.

8.9 The records of the case also reveal that when the offence reportfrom DRI was received by the jurisdictional Pr. Commissioner on 16.05.2016, the said Shri Vijay Poojary was absconding. Meanwhile, intelligence was received by DRI that on 09.12.2015, the said Vijay Poojary would come to meet his accomplice Shri Badshah Majid Malik, who was his close associate in the smuggling of Red Sanders, at Starbucks Coffee, Bandra-Kurla Complex, Mumbai. A discreet watch was kept at the said location and the said S/Shri Vijay (Subbanna) Poojary and Badshah Majid Malik were identified while they were in a meeting and their voluntary statements under Section 108 of the Customs Act, 1962 under summons proceedings. On enquiry by DRI officers, Shri Vijay Poojary informed that he had come there to meet Shri Badshah Majid Malik who was his associate and master mind in the smuggling racket of Red Sanders. The said Badshah Malik had asked him to arrange freight booking for shipments of wooden logs to be shipped to the Middle-East Asia; on his further questioning, Shri Badshah Malik confided that the wooden logs would be of Red Sanders and that the shipment would have to be made very carefully without disclosing the actual identity of the goods as export of Red Sanders was not allowed; in return for tactful handling of such shipments Shri Badshah Malik offered him an amount of Rs. 75 lakhs per container load. The description of goods and the names of the consignors and consignee for such consignments were provided to him by Shri Badshah Malik by way of Whatsapp messages on his mobile phone number 9920030007; the same were forwarded by him to one person by name Shri Noor Mohammed @ Noora, a resident of Vikhroli (East), Mumbai; he got acquainted with Noor Mohammed sometime in April 2014 and had known Shri Noor as a person who owned few trailers and who specialized in stuffing of export containersat discreet locations around Navi Mumbai. The said Shri Noor claimed that he had known lots of shut down factories around Navi Mumbai, where he could arrange for stuffing of any type of

consignment in a very discreet manner; besides, Shri Noor was well versed with preparation of export documents, accordingly, he assigned the following tasks to Shri Noor Mohammed the job of preparation of documents for those export consignments, taking delivery of empty trailers from the empty container yard, stuffing of the container with wooden logs of Red Sanders provided by Shri Badshah Malik, and transporting the loaded containers to the port for shipment; for the said job he offered Shri Noor Mohammed @ Mani Rs.20 lakhs per container.

8.10 The detailed investigation conducted by DRI revealed that Shri Vijay Poojary had booked freight for 18 containers through Emirates Shipping Agencies (India) Pvt. Ltd for shipment of Red Sanders on behalf of Shri Badshah Malik; those 18 containers included the consignment of Red Sanders which was under seizure in the present case; the freight & other charges for the above 18 containers were paid by him to M/s ESAIPL in cash which was delivered in their Andheri office by his employee Shri Baburao, who also used to collect the final Bill of Lading; Shri Badshah Malik used to provide him the name and address of the person based in Dubai to whom the final Bill of Lading used to be couriered by him; he had thrown his Laptop, used by him for sending e-mails for the above said freight bookings, into the Vashi creek along with his i-Phone Plus and i-Phone 4S mobile phones after the seizure of the consignment of Red Sanders byDRI and post the arrest of Shri Harshavardhan Hegde as he had got scared; he had received money only for 17 consignments out of the18 containers for which he had done freight booking ad shipment for Shri Badshah Malik, as the last consignment was caught by DRI.

8.11 The DRI investigation further revealed that the appellants CB M/s SC&SIPL (CHA/CB no. 11/171) through its Director Shri Vijay (Subbanna) Poojary, had rendered services of their employees for filing of forged documents for illegal export and got the export consignments of Red Sanders cleared by mis-declaring them as “Fabric Glue/Assorted Acrylic colours/Radiators”. The company’s Director had also floated factious business entities as freight forwarders, exporters to facilitate such illegal export.

8.12 We also find from the CHA/CB license No.11/171 issued by the jurisdictional Commissioner of Customs, being the licensing authority that initially the CHA/CB firm was in the name of M/s Kunverji Dharshi& Sons, which was later renamed/reconstituted as M/s Srinivas Clearing & Shipping (India) Pvt. Ltd. and the same was endorsed in their CHA/CB license on 12.08.2009. At that time the said Shri Vijay Poojary became as Working Director from his earlier position as non- working partner. With subsequent changes, the said Shri Vijay Poojary took entire control of the appellants CB as he was holding 99.9% of shareholding of the appellants company. These facts goeson to prove that with the entire control of the appellants CB firm, the act of illegal export of Red Sanders was orchestrated by Shri Vijay Poojary along with his accomplices.

9. From the analysis of the foregoing evidences, we are of the considered view that the appellants have committed the export fraud of exporting prohibited Red Sanders along with other connectedpersons.

10. In order to further examine the specific Regulations which are alleged to have been violated by the appellants, we have examined these individually on the basis of factual matrix of the case as follows.The relevant part of the CBLR, 2018 dealing with the obligations ofthe Customs Broker is extracted below:

"Regulation 10. Obligations of Customs Broker: -A Customs Broker shall -

xxx xxx xxx xxx

(a) obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;

xxx xxx xxx xxx

(e) exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage;

xxx xxx xxx xxx

(j) not refuse access to, conceal, remove or destroy the whole or any part of any book, paper or other record, relating to his transactions as a Customs Broker which is sought or may be sought by the Principal Commissioner of Customs or Commissionerof Customs, as the case may be;

(k) maintain up to date records such as bill of entry, shipping bill, transhipment application, etc., all correspondence, other papers relating to his business as Customs Broker and accounts including financial transactions in an orderly and itemised manner as may be specified by the Principal Commissioner of Customs or Commissioner of Customs or the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;
xxx xxx xxx xxx

(n) verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information;"

11. In respect of Regulations ibid, it is on record in the impugned order at paragraph No. 26 that the CB forged all documents concerning the export in the present consignment and all earlier 17 past consignments. The detailed investigation conducted by DRI had revealed that in respect of past consignments in which by adopting similar modus, smuggling of red Sanders were exported, one container was detained by customs authorities at port of Jebel Ali; similarly one another container had been lying uncleared at Ajman port. Further in respect of verification with the Development Commissioner, SEZ, Vadodara, it was revealed that the purported shipping bills shown as generated in SEZ were fake, inasmuch asthese had never been generated from their SEZ office. Similarlyverification with the Development Commissioner, SEZ, Surat, in respect of past containers was also reported by them, that the export goods were not manufactured by impugned units, shown as exportersin the respective shipping bills. The above facts clearly prove that the appellants CB have violated the obligations that are required to be complied under Regulation 10(a), 10(e), 10(n) of CBLR, 2018. Further, the employees the appellants CB firm have admitted thatthey had destroyed the export documents such as Invoice, Packing List, Shipping Bill etc., post shipment of the said consignments on the directions of Shri. Vijay Poojary. These facts goes to prove that the appellants CB had also violated the requirements of Regulation 10(j) and 10(k) of CBLR, 2018.

12. We further find that in respect of delay in suspension proceedings of customs broker license, the Hon'ble High Court of Bombay in the case of *Principal Commissioner of Customs (General), Mumbai Vs. Unison Clearing P. Ltd., reported in 2012 (361) E.L.T. 321 (BOM – HC)* have elaborately discussed the issue and came to a conclusion that the only way to effectively

implement the provisions in theinterest of both the parties is that the reasons for delay can then be tested to derive a conclusion whether the deviation from the time line prescribed in the Regulation, is "reasonable" or ‘not’. The relevant paragraph of the judgement is extracted below:

“15. In view of the aforesaid discussion, the time-limit contained in Regulation 20 cannot be construed to be mandatory and is held tobe directory. As it is already observed above that though the time line framed in the Regulation need to be rigidly applied, fairness would demand that when such time limit is crossed, the period subsequently consumed for completing the inquiry should be justified by giving reasons and the causes on account of which the time-limit was not adhered to. This would ensure that the inquiry proceedings which are initiated are completed expeditiously, are notprolonged and some checks and balances must be ensured. One step by which the unnecessary delays can be curbed is recording of reasons for the delay or non-adherence to this time-limit by the Officer conducting the inquiry and making him accountable for not adhering to the time schedule. These reasons can then be tested to derive a conclusion whether the deviation from the time line prescribed in the Regulation, is "reasonable". This is the only way bywhich the provisions contained in Regulation 20 can be effectively implemented in the interest of both parties, namely, the Revenue and the Customs House Agent.”

13.1 From the records of the case, we find that there is definitely delay in adjudication and that for the export transactions occurred in November, 2015, the order of revocation of appellant’s customs broker license has been passed on 28.03.2019. Though Revenue has not explained why there was such a long delay of 3 years and ² months in taking action against appellants, when the informationabout fraudulent exports was received on 16.05.2016. Though thefirst order-in-original revoking immediate suspension, was passed on 10.06.2016, action against the appellants under CHALR/CBLR vide Show Cause Notice was issued on 14.05.2018. The impugned order has been passed after almost nine months from the date of issue of SCN. In this regard we find that the appellants had filed an appeal before the Tribunal against the order dated 10.06.2016, which was disposed by the Final Order of the Tribunal dated 11.01.2017. Further, during the inquiry proceedings ten opportunities for personal hearing on different dates have been given and three more opportunities for cross examination was given to the appellants CB. They were also agitated by the departmental action and the prolongeddelay in inquiry proceedings was partly contributed by the appellants CB with a number of personal hearings to be given to them. Thus there was reasonable cause for delay in inquiry proceedings. Therefore, we are of the view that even though no detailed reasons were recorded in detail justifying the delay in passing the impugned order by the learned Principal Commissioner, there were reasonable grounds for alleged delay, in terms of the test laid down by the Hon’ble High Court of Bombay.

13.2 Furthermore, in order to appreciate the importance of the role of Customs Broker/Custom House Agent and the timely action which could prevent the export frauds, we rely on the judgement of the Hon’ble Supreme Court in affirming the decision of the Co-ordinateBench of this Tribunal in the case of *Commissioner of Customs Vs. K.M. Ganatra & Co.* in Civil Appeal No.2940 of 2008 reported in 2016 (332) E.L.T. 15 (S.C.). The relevant paragraph of the said judgementis extracted below:

*“**15.** In this regard, Ms. Mohana, learned senior counsel forthe appellant, has placed reliance on the decision in Noble Agency v. Commissioner of Customs, Mumbai 2002 (142) E.L.T. 84 (Tri. - Mumbai) wherein a Division Bench of the CEGAT, West Zonal Bench, Mumbai has observed:-*

"The CHA occupies a very important position in the Customs House. The Customs procedures are complicated. The importers have to deal with a multiplicity of agencies viz.carriers, custodians like BPT as well as the Customs. The importer would find it impossible to clear his goods through these agencies without wasting valuable energy and time. The CHA is supposed to safeguard the interests of both the importers and the Customs. A lot of trust is kept in CHA by the importers/exporters as well as by the Government Agencies. Toensure appropriate discharge of such trust, the relevant regulations are framed. Regulation 14 of the CHA Licensing Regulations lists out obligations of the CHA. Any contravention of such obligations even without intent would be sufficient to invite upon the CHA the punishment listed in the Regulations….."

We approve the aforesaid observations of the CEGAT, West Zonal Bench, Mumbai and unhesitatingly hold that this misconduct has to be seriously viewed."

14. In view of the above discussions and on the basis of the judgement of the Hon'ble Supreme Court in the case of K.M.Ganatra supra, we find that the appellants did not fulfill their obligation as a Customs Broker for exercising due diligence in terms of the various obligations given to them. The facts brought out in the DRI investigation and the findings in the impugned order, clearly demonstrate that when the documents relating to the export goods were fabricated and declared goods of 'Fabric glue/carpets' was substituted with prohibited 'Red Sanders', a clear attempt to smuggle the goods in an illegal manner in violation of the Customs Act, 1962 and Foreign Trade Policy have been orchestrated by the appellants CB. Thus, we find that revocation of CB license, imposition of penalty and forfeiture of security deposit by the learned Principal Commissioner on account of the appellants' failure in not fulfilling of

Regulations (a), (e), (j), (k) and (n) of Regulation 10 *ibid* CBLR, 2018is appropriate and justifiable.

15. In view of the foregoing discussions, we do not find any infirmity in the impugned order passed by the learned Principal Commissioner of Customs (General), Mumbai in revoking the licenseof the appellants and for forfeiture of security deposit, inasmuch as the violations had arisen on account of alleged nefarious activities of 'G' card pass holder who is a director of the appellants CB.

16. Therefore, we do not find any reason for interfering with the impugned order, and accordingly dismiss the appeal filed by theappellants.

(Order pronounced in open court on 03.01.2024)

(S.K. Mohanty)Member (Judicial)

(M.M. Parthiban)Member (Technical)

Sinha

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Miscellaneous Application No.70113 of 2020
(On behalf of appellant)

in

Customs Appeal No.70269 of 2020

(Arising out of Order-in-Appeal No.104-CUS/APPL/LKO/2020 dated 29.05.2020 passed by Commissioner (Appeals) Customs, GST & Central Excise, Lucknow)

Shri Arun Kumar **…..Appellant**
(R/o Chowk Bazaar, Post-Shohratgarh,District-Siddharthnagar, U.P.-272205)

VERSUS

Commissioner of Customs (Preventive),

Lucknow **….Respondent**

(3/194, Vishal Khand, Gomti Nagar, Lucknow)

APPEARANCE:

Shri Shubham Agarwal, Advocate for the Appellant

Shri Sarweshwar T. Khairnar, Authorised Representative for theRespondent

CORAM: **HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

MISCELLANEOUS ORDER NO. - 70014/2023FINAL ORDER NO. - 70020/2023

DATE OF HEARING : 07 August, 2023DATE OF DECISION : 07 August, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.104- CUS/APPL/LKO/2020 dated 29.05.2020 passed by Commissioner(Appeals) Customs, GST & Central Excise, Lucknow. By the impugned order Commissioner (Appeals) has held as follows:-

"6. I have gone through the case record. The contention ofthe department is that foreign currency imported fromNepal is in violation of Notification No.9/96-CUS-NT dated

22.01.1996 which prohibits import of any third country goods from Nepal to India. The respondent has also admitted that the impugned foreign currencies were improperly imported from Nepal. Therefore, the foreign currencies are liable for absolute confiscation. Thus, the Department has correctly argued that redemption of the impugned foreign currencies was not proper. In view of the above, the impugned foreign currencies are absolutely confiscated. The impugned order is modified in above manner and the appeal is allowed."

2.1 Appellant was intercepted by the officer of SSB near border Pillar No.556 (53), when he was coming from Nepal into India and was handed over to the Customs Authorities alongwith seizure and apprehension memo dated 10.03.2019.

2.2 From his possession some foreign currencies i.e. 5825Yuan, 10,600 US Dollar, 3495 Dirham, 2100 Euro were recovered by SSB and seized as per the seizure memo dated 10.03.2019.

2.3 In his statement dated 11.03.2019 he stated that he worksfor Western Union firm at Shohratgarh and its proprietor is his mother. He collected the aforesaid foreign currencies from foreigners for commission. He was bringing the said currencies from Taulihawa, Nepal to exchange the same from the authorized money exchanger in India. He could not produce any document related to aforesaid foreign currencies.

2.4 In view of the above, customs officers of LCS-Khunwa, seized the said foreign currency under section 110 Customs Act, 1962 on reasonable belief that the recovered foreign currency total valued at Rs.10,38,380/- (Rupees Ten Lacs Thirty Eight Thousand Three Hundred Eighty only) was liable for confiscation under section 111 of the Customs Act, 1962. As the same was brought from Nepal into India in contravention of Foreign Exchange Management Act, 1999 and Foreign Trade Policy 2015-2020 by Panchnama dated 11.03.2019.

2.5 The appellant waived the requirement of show cause notice and personal hearing on 05.07.2019 and requested for adjudication of the case. He also stated that he is ready to pay any penalties that are imposed on him by the adjudicating authority.

2.6 The matter was adjudicated by the Additional Commissioner Customs, Lucknow vide order No.08/ADC/2019 dated 30.07.2019 holding as follows:-

"In light of above, I observe that the said seized goods arefreely importable up to a certain limit not exceeding US$5,000/-(US Dollars five thousand) or its equivalent. Therefore, I find that the said seized goods are liable to bereleased on payment of redemption fine under Section 125of the Customs Act, 1962 along with applicable duty & charges, if any.

The above details also make it clear that Shri Arun Kumar was caught while he was smuggling the recovered and seized foreign currencies from Nepal into India, therefore he is liable to penalty under Section 112 (b) of the Act for the reasons discussed above.

Whether the seized vehicle is liable for confiscation of motor cycle or not:

Motor Cycle (TVS) bearing Regn No. UP-55-V-3282 valued at Rs.30,000/- was used in the transportation of the said currency is also liable for confiscation under Section 115 ofthe Customs Act, 1962.

Accordingly, I order as under:ORDER

i. I order to confiscate of the seized foreign currencies amounting to Rs.10,38,380/- under Section 111 (d) of the Customs Act, 1962. I however give an option under Section 125 of the Customs Act, 1962, to redeem the goods for home consumption on fine of Rs.1,50,000/- (Rupees One Lakh Fifty Thousand Only) along with applicable duty and charges, if any, to its lawful owner against the confiscation of the said goods.

ii. I order confiscation of the seized motor cycle (TVS) bearing Regn No. UP-55-V-3282 valued at Rs.30,000/-under Section 115 (2) of the Act. However, I give an option under Section 125 of the Customs Act, 1962, to redeem the said vehicle on a redemption fine of Rs.3,000/- (Rupees Three Thousand Only) under Section 125 of the Customs Act, to its lawful owner.

iii. I impose penalty of Rs.30,000/- (Rupees Thirty Thousand only) upon Shri Arun Kumar S/o Sadanand R/o Chowk bazar, Post Shoharatgarh, Siddharth Nagar under Section 112 (b) of the Customs Act, 1962. "

2.7 Revenue being aggrieved by the above order filed theappeal before Commissioner (Appeals). Commissioner (Appeals) as vide the impugned order allowed the appeal filed by the Revenue against the option of redemption given to the appellant by the Original Authority and have held that seized foreigncurrency is liable for absolute confiscation under Section 111 (d) and confiscated the same absolutely.

2.8 Aggrieved appellant filed this appeal before the Tribunal.

3.1 I have heard Shri Shubham Agarwal learned Advocateappearing for the appellant and Shri Sarweshwar T. Khairnar Authorized Representative appearing for the Revenue.

3.2 Arguing for the appellant learned counsel submits that the appellant do not dispute any of the findings recorded by the original authority in respect of the confiscation of the seized currencies, vehicle and the penalty imposed. His only grievanceis against the impugned order whereby the order allowing the redemption against fine has been converted into an order of absolute confiscation. He relies on following decisions wherein it has been held that the seized currency needs to be allowed for redemption on payment of redemption fine.

➢ Rajinder Nirula [2017 (346) ELT 9 (Bom)].

➢ T Soundrajan [2008 (221) ELT 258 (T-Chennai)].

3.3 Arguing for the revenue learned authorized representative while reiterating the findings recorded in the impugned order submits that:

➢ As per Notification No.9/96-Cus (NT) dated 22.01.1996, the import of the goods of third country origin through Nepal was totally prohibited.

➢ As per Section 2 (22) of the Customs Act, 1962, thecurrencies are included in the definition of the goods.

➢ Thus in terms of Notification No.9/96-Cus (NT), import of foreign currencies from Nepal is totally prohibited and therefore the order of Commissioner (Appeal) cannot be faulted with.

4.1 I have considered the impugned order along with the submissions made in appeal and

during the course of arguments.

4.2 The only issue that needs to be decided in this appeal is whether the seized foreign currencies collectively valued at Rs.10,38,380/- is liable for absolute confiscation or should have been given the option of redemption against the redemption fineof Rs.1,50,000/-.

4.3 Original authority as in his order referred to RBI Circular ETC stating as follows:-

"In light of above, I observe that RBI/2015-16/310

A.P. (DIR Series) Circular No.45/2015-16[(1)/6(R)] dated 04.02.2016 provides the permissible limit for import of foreign exchange into India. The relevant portion of the said Circular is reproduced as under:-

Import of Foreign Exchange into India

A person,

i. may send into India without limit foreign exchange inany form other than currency notes, bank notes and travelers cheques;

ii. may bring into India from any place outside India without limit foreign exchange (other than unissued notes)subject to the condition that such person makes, on arrivalin India, a declaration to the Customs authorities in Currency Declaration Form (CDF). It shall not be necessaryto make such declaration where the aggregate value of theforeign exchange in the form of currency notes, bank notesor travelers cheques brought in by such person at any one time does not exceed US$10,000 (US Dollars tenthousand) or it equivalent and/ or the aggregate value of foreign currency notes brought in by such person at any one time does not exceed US$5,000 (US Dollars five thousand) or its equivalent."

On the basis of the above circular he concluded that the foreign currency seized can be allowed to be redeemed against redemption fine. Revenue being aggrieved by this finding challenged the impugned order only to the extent of allowing thecurrency to be redeemed against payment of redemption fine of Rs.1,50,000/-.

4.4 Commissioner (Appeals) has referred to the Notification No.9/96-Cus(NT) dated 22.01.1996 which prohibits the import ofany third country goods from Nepal to India. He holds that currency being covered by the definition of goods as per section 2(22) of the Customs Act, 1962 currency also falls under the category of goods. Hence holding that as this seized foreign currency is prohibited it is liable for absolute confiscation and hold accordingly.

4.5 Section 2 (22) of the Customs Act, 1962 reads as follows:

(22) "goods" includes -

(a) ……

(b) …..

(c) ……

(d) currency and negotiable instruments; and

(e) ……;

There is no dispute about the fact that in terms of the definition of the "goods" as per section 2 (22) ibid, foreign currency is included in the definition of goods. The order of Commissioner (Appeal) cannot be faulted to this extent.

4.6 However the issue for consideration is whether this foreigncan be absolutely confiscated for being imported contrary to the prohibitions imposed by Notification No.09/1996-Cus (NT) dated 22.01.1996. The text of the Notification is reproduced below:

"G.S.R. 43 (E).—In exercise of the powers conferred by Sub- Section (I) of Section 11 of the Customs Act, 1962 (52 of 1962) and in supersession of the Notification No. 76/F. No.80/83/65- LC1, dated the 19th June, 1965 published in the Gazette of Indiavide No. GSR 848 dated the 19th June, 1965, the Central Government, being satisfied that for the prevention of smugglingit is necessary so to do, hereby prohibits the import from Nepalto India of goods which have been exported to Nepal fromcountries other than India :"

From the perusal of the above it is quite evident that the above notification in general prohibits the importation through Nepal, the goods of third country origin. Foreign Exchange managementAct, 1999 (FEMA) is *"An Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderlydevelopment and maintenance of foreign exchange market in India."* From the above it is quite evident that FEMA is a specialized act, dealing specifically with Foreign Exchange. Section 47 of the FEMA reads as follows:- *"47. Power to make regulations.—*

(1) The Reserve Bank may, by notification, make regulations to carry out the provisions of this Act and the rules made thereunder.

(2) Without prejudice to the generality of the foregoing power, such regulations may provide for,—

(a) ...

(b) ...

(c) ...

(d) the limit up to which any person may possess foreign currency or foreign coins under clause (a) of section 9;

(e) the class of persons and the limit up to which foreign currency account may be held or operated under clause (b) of section 9;

(f) the limit up to which foreign exchange acquired may be exempted under clause (d) of section 9;

(g) the limit up to which foreign exchange acquired may be retained under clause (e) of section 9;

(ga) export, import or holding of currency or currency notes;

(h) *any other matter which is required to be, or may be, specified.*

In exercise of the powers conferred by clause (g) of sub-section *(3)* of Section 6, subsection (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999), Reserve Bankhas made Foreign Exchange Management (Export and Import of Currency) Regulations, 2015. The said regulations provide as follows:

"6. Import of foreign exchange into India:-

A person may -

(a) *send into India without limit foreign exchange in any form other than currency notes, bank notes and travellers cheques;*

(b) *bring into India from any place outside India without limit foreign exchange (other than unissued notes),*

provided that bringing of foreign exchange into India underclause (b) shall be subject to the condition that such person makes, on arrival in India, a declaration to the Custom authorities in Currency Declaration Form (CDF) annexed to theseRegulations;

provided further that it shall not be necessary to makesuch declaration where the aggregate value of the foreign exchange in the form of currency notes, bank notes or traveler's cheques brought in by such person at any one time does not exceed US$10,000 (US Dollars ten thousands) or its equivalent and/or the aggregate value of ***foreign currency notes broughtin by such person at any one time does not exceed US$ 5,000 (US Dollars five thousands) or its equivalent.***

8. Export and import of currency to or from Nepal and Bhutan:- Notwithstanding anything contained in these regulations, a person may –

(1) take or send out of India to Nepal or Bhutan, currency notes of Government of India and Reserve Bank of India notes (other than notes of denominations of above Rs.100 in either case), provided that an individual travelling from India to Nepal or Bhutan can carry Reserve Bank of India notes of Mahatma Gandhi (new) Series of denominations Rs.200/- and/or Rs.500/- up to a total limit of Rs.25,000;

(2) bring into India from Nepal or Bhutan, currency notes of Government of India and Reserve Bank of India notes (other than notes of denominations of above Rs.100 in either case);

(3) take out of India to Nepal or Bhutan, or bring into India fromNepal or Bhutan, currency notes being the currency of Nepal or Bhutan.

10. Reserve Bank's power to restrict export or import of currency: -

Notwithstanding anything contained in these regulations, theReserve Bank, may, in public interest and in consultation withthe Central Government, restrict the amount of Indian currency notes of Government of India and/or of Reserve Bank, and/or foreign currency, on case-to-case

basis, that a person may bringinto or take outside India and prescribe such conditions as it may deem necessary."

Though Regulation 8, specifically provides for the manner in which Indian, Nepalese and Bhutanese Currency is to be dealt, the said section is totally silent about Other Foreign Currencies and which are to be dealt as per the provisions of Regulation 6 and 10. In view of these specific provisions which have been made in regards to Foreign Currency, the reliance placed by the Commissioner (Appeal) on a general notification No.09/1996-Cus (NT) for holding the currencies to be absolutely prohibited as perthis notification is not justified. The import and possession of these should have been dealt in accordance with the provisionsof the above regulations read with the Circulars issued by the Reserve bank of India from time to time. It is settled law that "generalia specialibus non derogant ". In case of Santhosh Maize& Industries Ltd. [2023 SCC OnLine SC 764.], Hon'ble Supreme Court has observed:

"24. Law is well settled that if in any statutory rule or statutory notification two expressions are used - one in general words and the other in special terms - under the rules of interpretation, it has to be understood that the special terms were not meant tobe included in the general expression; alternatively, it can besaid that where a statute contains both a general provision as well as a specific provision, the latter must prevail."

4.7 Thus I do not find any merits in the findings recorded by the Commissioner (Appeals) as the possession of foreign currency in India is governed by the provision of the FEMA and the RBI Circulars issued from time to time. Original Authority hasstated as above has referred to the RBI Circular No.45/2015- 16[(1)/6(R)] dated 04.02.2016 provides the permissible limit forimport of foreign exchange into India and the on the basis ofthat he has concluded that seized foreign currency is liable for confiscation but needs to be given an option for redemption.

4.8 The Regulation 6 and RBI Circular referred above do permit the importation of the Foreign Currency, the said importation is subject to restrictions to the extent that the appellant was required to make declaration of the Currencywhich he carries if the same is in excess of US$ 5000/- or equivalent. Appellant has failed to make any such declaration, and hence these currencies have been imported in contraventionof the provisions of Regulation 6 read with RBI Circular and haveto be held confiscable under Section 111 (d) holding the same tobe prohibited.

4.9 Thus in respect of the currency which is above the value ofUS $ 5,000/- or equivalent needs to be confiscated by theAuthorities. As importation of such currencies has been made without any declaration to the Customs or any authority the same will be prohibited and would be liable for absolute confiscation under section 111(d) of Customs Act.

4.10 As the total value of seized Foreign Currency imported in one go exceeds the value of US$ 5000/- the entire currency becomes liable for confiscation. However, currency up to US $ 5,000 (US Dollars Five Thousand only) should have been allowedfor redemption under section 125 (2) of the Customs Act.

4.11 Counsel for the appellant has relied upon the decision as follows:-

I. Commissioner of Customs vs. Rajinder Nirula 2017 (346) E.L.T. 9 (Bom.).

II. T. Soundrarajan vs. Commissioner of Customs, Chennai2008 (221) E.L.T. 258 (Tri.-Chennai).

Both the cases are in respect of the persons who were trying to get the foreign currency exported out of India, hence are distinguishable from the present case which is of importation of currency.

4.12 The case for my consideration is the case of importation of the foreign currency without filing proper declaration to the authorities. Such currencies which are imported in violation of the various provisions of FEMA and other directive of RBI are meant for illegal activities including terror financing in the country and needs to be dealt with severely. I am of the view that the currencies which are in total violation of the RBI Circularshould be absolutely confiscated whereas which falls within the permissible limits as per the RBI Circular be allowed on payment of redemption fine. Appellant have already paid redemption fine of Rs.1.5 lakhs (Rupees One Lac Fifty Thousand only).Accordingly, I allow the foreign currency up to the total value of US $ 5,000 (US Dollars Five Thousand only) to be redeemed to the appellant against the above redemption fine. The remaining seized foreign currency is ordered to be absolutely confiscated.

4.13 There is no serious challenge by either side to the quantum of penalty imposed on the appellant for his act of omission and commission leading to confiscation of foreign currency. Though I find the penalty imposed by the original authority to be low. I am not interfering with the order of lower authority as Revenue has never challenged the same.

5.1 In view of the above, impugned order is partially modified as stated above. Appeal is partially allowed in above terms.

5.2 Miscellaneous application is also disposed of.

(Operative part of the order pronounced in open court)

(SANJIV SRIVASTAVA)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,COURT NO. I

EXCISE APPEAL NO. 51157 OF 2020

[Arising out of the Order-in-Original No. 01-COMMR.-DDN-2020 dated 27/01/2020 passed by Commissioner, Central GST & Central Excise, Dehradun(Uttarakhand).]

M/s Agarwal Aluminiums, **…Appellant**
C-27/196A, Jagatganj,Varanasi (U.P.).

Versus

Commissioner, Central GST & Excise, Commissionerate : **…RespondentCentral**
Dehradun.

APPEARANCE:

Shri R.M. Saxena, Advocate for the appellant.
Shri Rakesh Agarwal, Authorized Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51171/2023

DATE OF HEARING : 31.07.2023DATE OF DECISION: 12.09.2023

P.V. SUBBA RAO

M/s Agarwal Aluminium[1] filed this appeal to assail the order-in-original[2] dated 27.01.2020. The short issue to be decided is whether the appellant was entitled to the benefit of area based exemption Notification No. 50/2003-CE dated 10.06.2003 or not. It is undisputed that one of the conditions for availing the benefit of this notification was that the factory should have commenced "commercial production on or before 31.03.2010". The appellant claimed the benefit of this notification. A show cause notice[3] dated 16.07.2015 was issuedto the appellant after detailed investigation which showed to the Revenue that the appellant had, in fact, not commenced commercial production before 31.03.2010. The demand was confirmed by the Commissioner by order dated 22.07.2016 which, on assessee's appeal, was remanded to Original Authority by this Tribunal's order dated 07.11.2017 in view of some contradictory facts mentioned in that order. Thereafter, the impugned order was passed on 27.01.2020 by the Commissioner in the denovo proceedings. The operative part of this order is as follows :-

"(1) I hereby deny the benefit of Central Excise duty exemption under Notification No. 50/2003-CE dated 10.06.2003 to M/s Agrawal Aluminiums, B-171, Phase – I, ESIP, Sitarganj, Udham Singh Nagar, Uttarakhand.

(2) I hereby confirm the demand of Central Excise duty amounting to Rs. 4,44,30,161/- (Rupees Four Crore Forty Four Lac Thirty Thousand One Hundred Sixty One only) against M/s Agrawal Aluminiums, B-171, Phase – I, ESIP, Sitarganj, Udham Singh Nagar,Uttarakhand for the period April'2010 to March'2015 under Section 11A (4) of Central Excise Act, 1944.

(3) I hereby demand interest as per applicable rates on theabove confirmed demand of duty under Section 11AA of Central Excise Act'1944.

(4) I hereby impose a penalty of Rs. 4,44,30,161/- (Rupees FourCrore Forty Four Lac Thirty Thousand One Hundred Sixty One only) against M/s Agrawal Aluminiums, B-171, Phase – I, ESIP, Sitarganj,Udham Singh Nagar, Uttarakhand, under Section 11AC of Central Excise Act, 1944, read with Rule 25 of the Central Excise Rules, 2002".

2. Aggrieved, the appellant filed this appeal on the followinggrounds :-

(i) The unit was established and was functioning before thesunset date and aluminium sections were sold on an invoice dated 31.03.2010. Therefore, the exemption cannot be denied to the appellant. The declaration under the exemption notification was filed by the Department on 29.03.2010 and, therefore, it is incorrect to say that the production has not "commenced by that date" ;

(ii) The exemption was denied by the impugned order on incorrect emphasis. Even before the main furnace was installed. The appellant had two small karahai type furnaces fitted in earth build in-house (moose furnaces) which were functional and the appellant was manufacturing goods ;

(iii) The SCN was issued after more than 4 years in the beginning of the investigation and, therefore, is notsustainable ;

(iv) The demand of duty, interest and imposition of penalty are, therefore, incorrect and the appeal may be allowed and the impugned order may be set aside with consequential relief.

3. On behalf of the learned Authorized Representative for theDepartment made the following submissions :-

(i) The intimation under the exemption Notification dated 29.03.2010 was submitted to the office of the Deputy Commissioner on 30.03.2010 and the office of the Superintendent on 31.03.2010. A perusal of this letter shows that against the column "date on which option exercised" the appellant recorded "from the date ofstart of commercial production (shall be intimated separately)". This shows that until 31.03.2010, the appellant had not begun commercial production by 31.03.2010 ;

(ii) The industrial furnace was purchased by the appellant by invoice dated 26.03.2010 from the supplier in Himachal Pradesh and as can be evidenced from the stamp on the invoice. It entered the State of Uttarakhand where the appellant is located only on 29.03.2010. It is extremely difficult to bring the furnaceto the factory, commission it, make all electricconnections on the same day and start commercial production also on the same day as claimed by the appellant ;

(iii) As reported in paragraph 15.4 of the impugned order, the appellant had a closing balance of the raw material aluminium scrap of 13,319 kg. on 29.03.2010. On 31.03.2010 the appellant had a closing stock of 13,183.09 kg. It shows that the appellant had consumed only 136.31 kg. of scrap between 29.03.2010 and 31.03.2010. It is impossible for the appellant to have

manufactured 430.20 kg. of final product namely aluminium sections with merely 136.31 kg. of scrap.

(iv) The goods which were manufactured by the appellant were aluminium sections, which are produced by extrusion. They are manufactured by putting the aluminium ingots through the process of extrusion, i.e., by heating ingots and pushing them through a die with specific cross sectional profile. It is impossible that aluminium sections emerge out of the Karahai furnace itself. There is nothing on record to show that the appellant had the infrastructure to extrude aluminium sections by 31.03.2020 ;

(v) As per the standard input/out norms notified by the DGFT to manufacture 1 kg. of aluminium extruded products 1.05 kg. of aluminium scrap is required. The consumption of aluminium scrap as per the record is only one-third of the final product manufactured ;

(vi) For any factory or the furnace to work, one needs to have an electrical connection. Records of the electricity authority show that the appellant had not consumedany power before April, 2010. Although the appellant claimed that it had hired DG sets prior to getting the electricity connection, no evidence in support of this claim has been submitted ;

(vii) In view of the above, appeal may dismissed.

4. We have gone through the records of the case andconsidered the submissions by both sides.

5. The short point to be decided is if, based on the facts and records which are available, it can be inferred that the appellant had commenced commercial production prior to 31.03.2010 and, therefore, was entitled to the benefit of the exemptionnotification or not.

6. The case of the Revenue is that the appellant had purchased an industrial furnace with accessories from M/s Macro Engineers, Himachal Pradesh under invoice dated 26.03.2010. This consignment crossed the border into Uttarakhand only on 29.03.2010 and therefore it could not have been brought into thefactors, installed, commissioned, tested and productioncommenced by 31.03.2010. According to the appellant, it hadtwo small karahai type furnaces called as moose furnaces inwhich aluminium scrap was molted and ingots were produced prior to this date. It is also the case of the appellant that the industrial furnace was brought in and installed and used prior to 31.03.2010 and the first invoice for final product was issued on 31.03.2010. An intimation was served upon the Deputy Commissioner of Central Excise and the Range Superintendent of letter dated 29.03.2010.

7. We have carefully gone through the intimation dated 29.03.2010 issued by the appellant. It states, inter-alia “with reference to the above notification, it is kindly informed to you that we are going to start commercial production from the last week of March”. This is followed by the details of the raw materials and final products which the appellant would use and manufacture. The products to be manufactured included aluminium ingots, billets, bars and rods, hollow profiles and tubesand pipes. In other words it included some cast products, such asingots and billets and some extrusion products, such as, tubes, pipes, bars and rods. The date on which the option shall be exercised is indicated as “from the date of start of commercial production (shall be intimated separately)”. Since this letter was served upon the Deputy Commissioner on 30.03.2010 and on theRange superintendent on 31.03.2010, it is evident that the appellant had not begun commercial production until 31.03.2010 nor was it able to indicate by then the date on which the commercial production would begin. Therefore, the appellant mentioned that the date will be intimated separately. For this reason itself, the invoice dated 31.03.2010 issued by the appellant for aluminium sections does not appear to be correct or pertain to products manufactured by it. Further, the industrial furnace acquired for manufacturing aluminium ingots from scrap itself was purchased by invoice dated 26.03.2010 and it crossed into the State of Uttarakhand on 29.03.2010. We find it unthinkable that such an industrial furnace with accessories would have reached the factory on the same date and would have been installed, commissioned, tested, trials completed and commercial production also completed and the first invoice for commercially produced goods could have been raised on 31.03.2010 i.e. within two

days.

8. We also find strong force in the argument of the learned Authorized Representative for the Revenue that under this invoice dated 31.03.2010 aluminium sections were sold which are extrusion products and there was no equipment for extrusion in the factory. Records show, as has been indicated in paragraph
15.4 of the impugned order, that Shri Ravi Agarwal of the appellant was asked as to how it could have produced 430.2 kg. of aluminium sections within two days by consuming a mere on 136.31 kg. of scrap, he claimed that records will be suppliedlater, but never did so. In the absence of any contrary evidence we accept Revenue's contention that it was impossible for appellant to have produced 430 kg. of sections by consuming 136kg. of aluminium scrap. Therefore, on the facts of the case weare not convinced that any commercial production was commenced on or before 31.03.2010.

9. It also needs to be noted that when the officers of the Preventive Wing visited the factory months later, on 22.10.2010 and a panchnama was drawn and it was found that the furnace ofthe factory was still under installation and hydraulic mechanismof furnace and electrical panels were not installed the furnacewas also not connected to the electrical line. Therefore, it is highly doubtful that the appellant had, as it claimed installed the electrical furnace on two days between 29.03.2010 and 31.03.2010 and also completed the production.

10. It needs to be pointed out that the electricity consumption as per the electricity authorities was nil prior to April, 2010 and we find it hard to believe that the production could have taken place without any electricity at all. The appellant claimed that it had a diesel generator set for a few days, but was unable to provide any evidence to support its claim.

11. The last submission of the appellant was that it was manufacturing products in the moose furnaces, which were essentially karahais with fire under them. We are not convinced that those furnaces would have been able to produce ingots on such a large scale and certainly they could not have extruded andproduced aluminium extruded products, such as, aluminium sections for which the first invoice dated 31.03.2010 was issued.

12. In view of the above, we find that the impugned order is correct and proper and calls for no interference. The impugned order is upheld and the appeal is dismissed.
(Order pronounced in open court on 12/09/2023.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH
EXCISE APPEAL NO. 50419 OF 2019

(Arising out of Order-in-Appeal No. 1361-63 (CRM)CE/JDR/2018 dated 17.12.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jodhpur)

Commissioner, CGST & Central Excise, **…Appellant**
Jodhpur

versus

M/s. Prem Mehandi Center, **…Respondent**
Vill. Vopari, marwar Junction,Distt. Pali, Rajasthan

WITH

Excise Stay Application No. 50207 of 2019(on behalf of the appellant)

AND

Excise Cross Objection No. 50315 of 2019(on behalf of the respondent)

AND

EXCISE APPEAL NO. 50420 OF 2019

(Arising out of Order-in-Appeal No. 1361-63 (CRM)CE/JDR/2018 dated 17.12.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jodhpur)

Commissioner, CGST & Central Excise, **…Appellant**
Jodhpur

versus

M/s. Prem Mehandi Center, **…Respondent**
275-276, Kalab Kala Road, Dholi MagiChoraha, Kalakot, Raipur,

Disstt. Pali, Rajasthan

WITH

Excise Stay Application No. 50208 of 2019(on behalf of the appellant)

AND

Excise Cross Objection No. 50316 of 2019(on behalf of the respondent)

APPEARANCE:

Shri Rakesh Agarwal, Authorised Representative for the Appellant

Shri Rupesh Kumar and Shri Jitin Singhal, Advocates of the Respondent

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

Date of Hearing: 21.08.2023Date of Decision: 15.09.2023

FINAL ORDER No. 51297-51298/2023

JUSTICE DILIP GUPTA:

These two appeals have been filed by the department to assail theorder dated 17.12.2018 passed by the Commissioner (Appeals) to the extent it holds that M/s. Prem Mehandi Center, Rajasthan [1] would be entitled to refund of excise duty paid on Henna Powder and Henna Pastein terms of the Notification No. 11/2017 C.E. (NT) dated 24.04.2017[2] issued under section 11C of the Central Excise Act 1944 [3] giving retrospective exemption to Henna Powder and Henna Paste from levy ofexcise duty for the period from 01.10.2007 to 01.03.2013. The respondent has also filed Cross Objections in the two appeals filed bythe department.

2. The respondent is engaged in the manufacture of Henna Powder and Henna Paste. It believed that these two products manufactured byit would fall under Chapter 14 of the Central Excise Tariff Act, 1985[4] attracting nil rate of duty. The department, however, believed these two products would fall under Chapter 33 of the Excise Tariff Act, attracting excise duty at the rate of 12%. The respondent paid duty of excise for the period from January 2012 to February 2013 under protest.

3. Subsequently, the Notification was issued under section 11C of the Excise Act directing that the whole of the duty of excise payable under section 3 of the Excise Act on Henna Powder and Henna Paste falling under Chapter 33 of the First Schedule to the Excise Tariff Act would not be levied during period commencing 01.01.2007 to 01.03.2013. As the respondent had claimed refund of the excise duty, itwould be appropriate to reproduce this Notification which is as follows:

—Notification: 11/2017-C.E. (N.T.) Dated April 24,2017

Heena Powder and Paste - Exemption under Section11C for period from 1-1-2007 to 1-3-2013

Whereas the Central Government is satisfied that according to a practice that was generally prevalent regarding levy of duty of excise (including non-levy thereof) under section 3 of the Central Excise Act, 1944 (1of 1944), (hereinafter referred to as the said Act), on Heena Powder and Paste falling under Chapter 33 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the said goods), was not being levied according to the said practice, during the period commencing on the 1st day of January, 2007 and ending with the 1st day of March, 2013;

2. **Now, therefore, in exercise of the powers conferred by section 11C of the said Act, the Central Government hereby directs that the whole of the duty of excise payable under section 3 of the said Act on the said goods but for the said practice, shall not be required to be paid in respect of the said goods on which the said duty of excise was notlevied during the period aforesaid in accordance with the said practice.‖**

(emphasis supplied)

4. Pursuant to the issuance of the aforesaid Notification, the respondent claimed refund of central excise duty paid on Henna Powder and Henna Paste during the period 01.04.2011 to 31.03.2013 by filing an application on 15.12.2017.

5. However, two show cause notices, each dated 09.03.2018, were issued to the respondent seeking to deny the refund of a certain portion of the amount claimed as refund. The relevant portion of the show cause notice 09.03.2018, which is the subject matter of Excise Appeal No. 50419 of 2019, is reproduced below:

"4. Whereas, in view of the above referred notification,M/s. Prem Mehandi Centre, Khasra No. 678/2, Desuri Road, Village- Vopari, Marwar Junction has claimed refundto central excise duty so paid on Heena Powder and Paste during the period 01.01.2012 to 28.02.2013.

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6. Whereas, on perusal of the invoices submitted by the assesse, it is noticed that they have not collected central excise duty from their buyers and the invoices indicate total price of goods arrived after deduction amount of central excise duty. Thus, it is clear that the duty incidence has not been passed on by the assessee. The detail of the invoices are as under:
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7. On perusal of the above table, the total of Excise duty including Cesses paid under protest comes to Rs. 1,47,87,105/-, whereas the assessee has filed Refund claim of Rs. 1,45,92,582/-.
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9. Whereas, out of the refund claim of Rs. 1,45,92,582/-, the assessee has paid Rs. 1,15,84,142/- (Duty- Rs. 1,12,01,685/- + Cess-Rs.3,82,457/-) through GAR-7 challans during the said period and remaining Rs. 30,08,440/- paid through Cenvat account.

10. Whereas, it appears that the assessee is only eligible for refund of central excise duty amounting to Rs. 1,12,01,685/- paid through PLA and remaining amount i.e Rs. 33,90,897/- (Rs. 30,08,440 paid through CENVAT+Rs.3,82,457/- Cess paid in cash) is not liable to be refunded to them. Because after issuance of Notification No. 11/2017-CE(NT) dated 24.04.2017, the assessee got exemption of paying central excise duty on Henna Powder and Paste from 01.01.2007 to 01.03.2013, means no dutyis payable for the period on Henna Powder and Paste and when duty is not there, they were not eligible to avail cenvat credit also during the period on Henna Powder and Paste.

11. Now, therefore, M/s. Prem Mehandi Center, Khasra No. 678/2, Desuri Road, Vill-Vopari, Marwar Junction, Distt-Pali **is hereby called upon to show cause and explain** to the Assistant Commissioner, Central Goods & Service Tax Division-D, having his office at Ground Floor, TDM Office Campus, BSNL, Mahavir Nagar, Pali-306401 (Rajasthan), **within 7 days from thedate of receipt of this notice as to why the refund claim of Rs. 33,90,897/- out of Rs. 1,45,92,582/- filed by them should not be rejected for the reasons stated herein above.‖ (emphasis supplied)**

6. The relevant portion of the second cause notice dated 09.03.2018,which is the subject matter of Excise Appeal No. 50420 of 2019, is reproduced below:
"4. Whereas, in view of the above referred notification,M/s. Prem Mehandi Centre, Raipur has claimed refund to central excise duty so paid on Heena cone/Paste duringthe period 01.04.2011 to 31.03.2013.

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6. Whereas, on perusal of the invoices submitted by the assesse, it is noticed that they have not collected central excise duty from their buyers and the invoices indicate total price of goods arrived after deducting amount of central excise duty. Thus, it is clear that the duty incidence has not been passed on by the assesse.The detail of the invoices are as under:

9. Whereas, out of the refund claim of Rs. 1,49,10,667/-, the assessee has paid Rs. Rs. 91,82,242/- (Duty- Rs. 89,14,798/- + Cess Rs.2,67,444/-) throughGAR-7 challans during the said period and remaining Rs. 57,28,425/- paid through Cenvat account.

10. Whereas, it appears that the assessee is only eligible for refund of central excise duty amounting to Rs. 89,14,798/- paid through PLA and remaining amount i.e Rs. 59,95,869/- (Rs. 57,28,425/- paid through CENVAT+Rs. 2,67,444/-Cess paid in cash) is not liable to be refunded to them. Because after issuance of Notification No. 11/2017-CE(NT) dated 24.04.2017, the assessee got exemption of paying central excise duty on Henna cone/Paste from 01.01.2007 to 01.03.2013, meansno duty is payable for the period on Henna Powder and Paste and when duty is not there, they were not eligible toavail cenvat credit also during the period on Henna Powder

and Paste.

11. Now, therefore, M/s. Prem Mehandi Center, 275-276, Kalab Kala Road, Dholi Magi Choraha, Kalakot, Raipur, Disstt. Pali, **is hereby called upon to show cause and explain** to the Assistant Commissioner, Central Goods & Service Tax Division-D, having his office at Ground Floor, TDM Office Campus, BSNL, Mahavir Nagar, Pali-306401 (Rajasthan), **within 7 days from thedate of receipt of this notice as to why the refund claim of Rs. 59,95,869/- out of Rs. 1,49,10,667/- filed by them should not be rejected for the reasons stated herein above.‖**

7. Thereafter, an Addendum dated 20.06.2018 to the show cause notice dated 09.03.2018 was issued by the department. The relevant portion of this Addendum, which is the subject matter of Excise Appeal No. 50419 of 2019, is reproduced below:

"3. On the basis of first proviso to the Section 11C (2) of the Central Excise Act, 1944 any refund rising out of Section 11 (C) (1) of the Central Excise Act, 1944 shall be filled within six months from the date of such Notificationin the form refer in the sub-section 1 of the Section 11B ofthe Central Excise Act, 1944. **Therefore, the specific provision as contained in proviso to Section 11C(2) of the Central Excise Act, 1944 has overriding effect on time limit of one year provided in sub-section 1 of the Section 11B of the Central Excise Act, 1944. Therefore, where refund has been arising out of exemption under Section 11C of the Central Excise Act, 1944, the refund has to be filed within six months from the date of such Notification. In this case, the notification was issued on 24.04.2017 and the refund claim was required to be filled on orbefore 23.10.2017, whereas the refund claim was filed on 15.12.2017 and is time barred.**

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A. ISSUE REGARDING UNJUST ENRICHMENT

1. During the course of examination of the invoices forwarded along with the claim and draft OIO it is observed that the assessee was paying C.Ex. duty on the MRP declared. On verification of invoice, it appears that they had not charged C.Ex. duty from their immediate buyer i.e., their dealer and wholesaler, however the product was ultimately sold on MRP to the ultimate customer. **The MRP was cum duty price, constituted C.Ex. duty also and thus duty had been passed on to the ultimate consumer** and thus the concept of unjust enrichment taken place."

(emphasis supplied)

8. A similar Addendum dated 20.06.2018 to the show cause notice dated 09.03.2018 was issued by the department, which is the subject matter of Excise Appeal No. 50420 of 2019.

9. The Assistant Commissioner, by order dated 31.07.2018, rejected the refund claims holding that they were time barred under section 11C and the burden of central excise duty had also been passed by the respondent.

10. Feeling aggrieved, the respondent filed appeals before the Commissioner (Appeals) and by a common order dated 17.12.2018 both the appeals were allowed holding that the respondent was eligible to therefund of the duty of excise paid on Henna Powder and Henna Paste in terms of the Notification. The relevant portions of the order passed by the Commissioner (Appeals) are reproduced below:

"2. Brief facts of the case are that the appellants are registered under Central Excise and had filed a refund claims under the provisions of Section 11B of CEA, 1944 for the period from 01.04.2011 to 31.03.2013 for the dutypaid under protest. As per Notification No. 11/2017-CE(N.T.) dated 24.04.2017 issued under Section 11C, retrospective exemption to the duty on HeenaPowder/paste from levy of excise duty was given during the period from 01.10.2007 to 01.03.2013. Thus, the appellants filed the applications for refund of duty paid on Heena Powder/Paste „under protest".

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5.4.1 **Regarding rejection of refund claim on theground of time bar, the allegation is that they were required to file refund claim within the period of six months from the date of retrospective exemption notification issued under Section 11C of the CEA, 1944. I find that every refund claim filed under Central Excise Laws is governed by the provisions ofSection 11B of the Central Excise Act, 1944.**

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I find that the issue regarding levy of central excise duty on Heena powder/Heena paste was sub-judice and the appeal of appellant was pending before the Tribunal. The Hon'ble Delhi Tribunal vide FINAL ORDER NO. A/54095/2017-EX[DB] **dated**

31.05.2017 has allowed the appeal of the appellant by extending the benefit of retrospective exemption notification issued under Section 11C of the CEA, 1994. I find that since the matter pertaining to retrospective exemption notification was sub-judice, the provisions contained in explanation (ec) to section 11B of the CEA, 1944 would prevail and hence, the refund claim filed by the appellant on 15.12.2017 is well within the time limit, of one year as prescribed under section 11B of the CEA, 1944.

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5.4.3 I find that the adjudicating authority has beenplaced erroneous reliance on the decision given in thecase of M/s Redington India Ltd. Vs Commissioner ofCustoms, Chennai reported in 2011-TIOL-863-CESTAT- MAD]. On other hand **I rely on recent decision givenby the Hon'ble Hyderabad Tribunal in the case of HYDERABAD POWER INSTALLATIONS (P) LTD. VERSUS C.C.E., C. & S.T., HYDERABAD-II (supra) wherein it has been held that since there is conflict in the time limit prescribed by the provisions ofsection 11C and section 11B, the provision of section 11B would prevail by applying the legal principle of harmonious construction.** I find that the said decision is the latest one, I therefore hold that the benefit of the said decision should be extended to the appellant and the refund claims should not be denied on the ground of time bar issue to the appellants.

5.5 **Now I am going to decide the issues of unjustenrichment raised in addendums one by one.**

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5.5.6 xxxxxxxxxxxxx. In this case, buyer and seller relationship has not been established and no evidences have come forward to prove that no incidence of duty has been passed on. I find that the allegation that they have not submitted any evidence with respect to proving that the incidence of duty burden is borne by them is not sustainable as they have enclosed invoices clearlydeducting the duty amount and CA Certificate. **As such, I find that the principle of unjust enrichment is not applicable.**

(emphasis supplied)

11. Shri Rakesh Agarwal, learned authorised representative appearingfor the department made the following submissions:

(i) The Addendums to the show cause notices wereissued prior to adjudication and were considered by the respondent in its defence and also by the adjudicating authority;

(ii) Refund is time barred in terms of the provisions for filing refund under the proviso to section 11C (2);

(iii) Refund was not claimed as a consequential reliefgranted by the Tribunal by the Final Order dated 31.05.2017;

(iv) Refund is not payable on account of unjust enrichment as nothing contrary was pointed out to disprove that duty of excise had not been passed to end customer; and

(v) The excise duty has not been shown as „receivables" in the balance sheet.

12. Shri Rupesh Kumar learned counsel for the respondent assisted byShri Jitin Singhal, made the following submissions:

(i) The two Addendums issued to the two show cause notices contain substantial allegations that were not part of the show cause notices and, therefore, deserve to be ignored. In support of this contention, learned counsel placed reliance upon the decisions ofthe Tribunal in **Wipro Information Technology** vs. **Commr. of C. Ex., Bangalore**[5] and **JMC Projects (India) Ltd. vs. Commr. of Service Tax, Ahmedabad**[6];

(ii) The time limit of six months to file the refund claim from the date of issuance of the exemption notification would not be applicable, as every refund claim filed under the Excise Act is governed by the time limit provided under section 11 B;

(iii) Where duty of excise becomes refundable as a consequence of a judgment, the time limit of one year prescribed under clause (ec) of Explanation (B) of section 11B would be applicable. In the present case, the matter pertaining to retrospective exemption Notification was pending before theTribunal;

(iv) Non-mentioning of the Final Order in the refund claim cannot be made a reason to apply the time limit of six months contemplated under section 11C;

(v) In any view of the matter, if there is a contradiction in the time limit specified in section 11C and section 11B, the time limit contemplated under section 11B would be applicable; and

(vi) To support the contention of the respondent that theburden of excise duty had not been passed to the buyers, a certificate issued by the chartered accountant was enclosed. This conclusively proves that the burden had not been passed. The department is, therefore, not justified in asserting that the respondent had failed to prove that theburden of duty had not been passed.

13. The submissions advanced by the learned authorised representative appearing for the department and the learned counsel appearing for the respondent have been considered.

14. In order to appreciate the contentions, it would be appropriate to reproduce the relevant provisions of section 11B and section 11C.

15. Section 11B deals with refund of duty and interest and is as follows:

"**Section 11B. Claim for refund of duty and interest,if any, paid on such duty.—**

(1) **Any person claiming refund of any duty ofexcise and interest,** if any, paid on such duty **may make an application for refund of such duty andinterest,** if any, paid on such duty to the AssistantCommissioner of Central Excise or Deputy Commissioner of Central Excise **before the expiry of one year from the relevant date** in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise 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 onsuch duty had not been passed on by him to any other person:

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(2) If, on receipt of any such application,the Assistant Commissioner of Central Excise or DeputyCommissioner of Central Excise is satisfied that thewhole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise and interest, if any, paid on such duty as determined bythe Assistant Commissioner of Central Excise or DeputyCommissioner of Central Excise under the foregoingprovisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to—

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or directionof the Appellate Tribunal of any Court in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

Explanation.—For the purposes of this section,—xxxxxxxxxxx

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
(B) **—relevant date‖** means,—

(ec) in case where the duty becomes refundableas a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunalor any court, the date of such judgment, decree, order or direction;

(emphasis supplied)

16. Section 11C deals with a situation where duty of excise not levied or short-levied as a result of general practice is not to be recovered and it is as follows:

Section 11C. Power not to recover duty of excise notlevied or short-levied as a result of general practice.- (1) **Notwithstanding anythingcontained in this Act, if the Central Government is satisfied**—

(a) that a practice was, or is, generally prevalent regarding levy of duty of excise including non-levy thereofon any excisable goods; and
(b) that such goods were, or are, liable—

(i) to duty of excise, in cases where according to the said practice the duty was not, or is not being, levied, or
(ii) to a higher amount of duty of excise than whatwas, or is being, levied, according to the said practice,
then, **the Central Government may, by notification in the Official Gazette, direct that the whole of theduty of excise payable on such goods, or, as the case may be, the duty of excise in excess of that payable on such goods, but for the said practice, shall not be required to be paid in respect of the goods on which the duty of excise was not, or is not being, levied, or was, or is being, short-levied, in accordance with the said practice.**

(2) Where any notification under sub-section

(1) in respect of any goods has been issued, the whole of the duty of excise paid on such goods or, as the case may be, the duty of excise paid in excess of that payable on such goods, which would not have been paid if the said notification had been in force, shall be dealt with in accordance with the provisions of sub-section (2) of section 11B:
Provided that the person claiming the refund ofsuch duty or, as the case may be, excess duty, makes an application in this behalf to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, in the form referredto in sub-section (1) of section 11B, before the expiry of six months from the date of issue of thesaid notification.

17. The show cause notice dated 09.03.2018 that was issued to the respondent, after referring to the provisions of section 11C, mentions in paragraph 4 that it is because of the aforesaid Notification dated 24.04.2017 that the respondent claimed refund of central excise duty paid on Henna Powder and Henna Paste during the period from 01.01.2012 to 28.02.2014.
18. It is also not disputed by the learned counsel appearing for the respondent that the application for refund of excise duty was filed by the respondent under section 11C.
19. Section 11C (1) (b) provides that the Central Government may,by Notification in the Official Gazette direct that the whole of duty of excise payable on excisable goods shall not be required to be paid. Sub-section (2) of section 11C provides that where any Notification under sub-section (1) in respect of any goods has been issued, the whole of the duty of excise paid on such good which would not have been paid if the said Notification had been inforce, shall be dealt with in accordance with the provisions of sub-section (2) of section 11B. The proviso, however, stipulates that the person claiming the refund of such duty should make an application in the form referred to in sub-section (1) of section 11B before the expiry of six months from the date of issue ofthe said Notification.
20. In terms of the provisions of section 11C (1), the Notification was issued by the Central

Government and it is pursuant to the said Notification that the respondent claimed refund of central excise duty paid on Henna Powder and Henna Paste during the period 01.04.2011 to 31.03.2013. The proviso to sub-section (2) of section 11C provides that the person claiming refund has to make an application in the form referred to in sub-section (1) of section 11B before the expiry of six months from the date of issue of the said Notification.

21. Sub-section (1) of section 11B provides that any person claiming refund of any duty of excise with interest may make an application for refund of such duty and interest before the expiry of one year from the relevant date **in such form and manner as may be prescribed**.

22. It is clear that the proviso to sub-section (2) of section 11C only refers to the form contemplated in sub-section (1) of section 11B and not to the time period prescribed in sub-section (1) of section 11B. The time limit for making the application is provided in the proviso to sub- section (2) of section 11C and it provides that the application for refund has to be made before the expiry of the six months from the date of issue of the Notification. It would, therefore, not be correct to even suggest that merely because the proviso to sub-section (2) of section 11C makes reference to the form prescribed in sub-section (1) ofsection 11B, the time limit of one year prescribed in sub-section (1) of section 11B would apply. There can be no manner of doubt that the application for refund, pursuant to a Notification issued under section 11C (1) has to be made within six months from the date of the issue of the Notification in the form referred to sub-section (1) of section 11B.

23. In the present case, admittedly the application was not made within six months from the date of issue of the Notification.

24. The Commissioner (Appeals) has, however, made a general observation that every refund claim filed under the Central Excise Laws has to be governed by the provisions of section 11B of the Excise Act and though the Notification does provide that every claim has to be necessarily filed before the expiry of six months from the date of issueof the Notification, but in view of Explanation (B)(ec) to section 11B, thetime limit of six months provided in section 11C would not be applicable if the duty becomes refundable as a consequence of a judgment, decree, order or direction of an Appellate Authority, Appellate Tribunal or any Court in view of the decision of the Tribunal in **Hyderabad Power Installations (P) Ltd.** vs. **C.C.E., C & ST, Hyderabad-II**[7]. To apply the aforesaid decision of the Tribunal to the facts of the case, the Commissioner (Appeals) observed that the matter relating to levy of central excise duty on Henna Powder and Henna Paste was sub-judice since the appeal of the appellant was pending before the Tribunal and it is only on 31.05.2017 that the appeal was allowed extending the benefitof the Notification issued under section 11C. Thus, according to the Commissioner (Appeals), Explanation (B)(ec) to section 11B would come to the aid of the respondent and since the refund claim was filed on 15.12.2017 within a period of one year contemplated under section 11B of the Excise Act, it would be maintainable.

25. Learned authorized representative appearing for the department submitted that not only was the application required to be filed within six months from the date of issue of the Notification, but even otherwisethe refund claimed filed by the respondent was as a consequence of the issuance of the Notification issued by the Central Government and not because duty became refundable as a consequence of a judgment, decree, order or direction of the Appellate Authority or Appellate Tribunal or any Court.

26. Learned counsel for the respondent supported the view expressed by the Commissioner (Appeals) and submitted that in view of theaforesaid decision of the Tribunal in **Hyderabad Power Installations**, the Commissioner (Appeals) committed no error in holding that the application for refund should have been filed within one year.

27. The submission advanced by the learned authorized representative appearing for the department has force.

28. In the first instance, as is clear from the proviso to sub-section (2)of section 11C, the application for refund of duty has to be filed within six months from the date of issue of the said Notification. The only requirement is that it should be filed in the format prescribed in section 11B(1). As discussed above, the time limit of one year prescribed in section 11B(1) would not be applicable as the proviso to section 11 C(2)specifically provides that the application for refund has to be made before the expiry of six months from the date of issue of the Notification. When a time period is prescribed in section 11C, there is norequirement of referring to the time period prescribed in section 11B. The Commissioner (Appeals) has given no reason as to why the time period of one year prescribed in section 11B would be applicable in the present case except a

bald observation that „every refund claim filed under Central Excise Laws is governed by the provision of section 11B". No reason has been given by the Commissioner (Appeals) for discardingthe time limit of six months prescribed under the proviso to section 11C(2). Infact, the observation made by the Commissioner (Appeals) would render the time limit prescribed under the proviso to section 11C

(2) otiose.

29. Even otherwise, Explanation (B) (ec) to section 11B would not be applicable to the facts of the present case. The decision of the Tribunal, which has been relied by the learned counsel for the respondent and theCommissioner (Appeals), was rendered in an appeal filed by the appellant against the order dated 18.11.2013 confirming the demand of duty on Henna Powder and Henna Paste for the earlier period. Itappears that during the pendency of the appeal, the Notification was issued by the Central Government exempting excise duty on Henna Powder and Henna Paste for the period commencing 01.01.2007 upto 01.03.2013. The Tribunal noticed that since the disputed period in the appeal that was pending was from 01.08.2008 to 01.11.2011, thedispute would be covered by the Notification and, therefore, the appeal was allowed.

30. The respondent claimed benefit of the Notification and not the decision dated 31.05.2017 of the Tribunal and in any case, the respondent could not have claimed benefit of the said decision for filing the refund claim because this decision does not decide the issue on merits but merely refers to the Notification for granting relief. The respondent had correctly filed the refund application as a consequence of issuance of the Notification and the said application was required tobe filed within six months from the date of the issue of the Notification. Explanation (B)(ec) of section 11B cannot, therefore, come to the aid of the respondent. The Commissioner (Appeals) clearly committed an errorin holding that because of Explanation (B)(ec) to section 11B, therespondent could file the application within a period of one year.

31. Learned counsel for the respondent also submitted that two Addendums issued to the two show cause notices contain substantial allegations that were not even part of the show cause notices and, therefore, should be ignored and if this be so, the contention of the department that the refund application should have been filed within sixmonths from the date of issue of the Notification would not sustain sincethis was not even an allegation in the show cause notices. To support this contention, learned counsel for the respondent placed reliance uponthe decisions of the Tribunal in **Wipro Information** and **JMC Projects**.

32. It is not possible to accept the contention advanced by the learnedcounsel for the respondent.

33. **Black's Law Dictionary, 9th Edition** defines Addendum to mean „something to be added, esp. to a document; a supplement".

34. **The Law Lexicon Dictionary, 3rd Edition** defines Addendum to mean „a thing that is added or is to be added".

35. It is true that the two show cause notices that were issued to the respondent did not state that the refund applications were liable to be rejected for the reason that they were not filed within six months from the date of issue of the notification, but the Addendums that were subsequently issued did specifically allege that the refund applications were time barred because they were filed after the expiry of six months from the date of issue of the Notification. The Addendum, as noticed above, was issued to add something to the already issued show cause notices. The show cause notices did mention the issuance of the Notification and also the date on which the refund applications were filed. The notices also specifically mention that it is because of the said Notification that the respondent claimed refund of central excise duty paid on Henna Powder and Henna Paste. The Addendums are based on the facts mentioned in the show cause notices and had only called upon the respondent to show cause as to why the refund application should not be rejected as it was filed beyond the time prescribed under the proviso to section 11C (2).

36. Learned counsel for the respondent placed reliance uponparagraph 10 of the decision of the Tribunal in **Wipro Information**. The said paragraph is reproduced below:

"10. On consideration of the submissions made, we are of the considered opinion that the appellants are required to succeed in the matter both on merits as well as on timebar in respect of demands raised beyond the period of six months. As can be noticed from the initial show

cause notice issued on 10-7-1984, the demand was raised to theextent of Rs. 6,45,898.96 and in that it was clearly allegedthat the appellants had effected clearance of peripherals valued at Rs. 43,65,993/- from their factory without bearing a separate gate pass and without paying central excise duty. By addendum, dated 7-3-1985 the department consciously gave up invocation of Rules 9, 49,52A, 53 and 173F of the Central Excise Rules including theprovisions of Rule 173Q. Initially demand was also raised to Rs. 7,90,757.04. This amended show cause notice raised fresh ground by which it was stated that the appellants had been manufacturing computer peripheral devices falling under Tariff Item 33DD and had supplied the main peripherals as add-ons to the computer systems manufactured and cleared by the appellants without including the value of these peripherals in the assessable value of computer and without paying relevant central excise duty thereon. From the terms of both the show cause notices it is clear that the department was fully aware of the fact of appellants clearing peripherals for the computer. The addendum to the show cause notice has given up invocation of various rules including the rule pertaining to imposition of penalty. Each show cause notice should comprise of one set of facts leading to the controversy about one such clearance and demand made therein. By addendum, the department had chosen to giveup invocation of the provisions of various rules, thus changing the colour and complexion of the allegation and adding new facts and amending the show cause notice. Therefore, it has to be held that amended show cause notice is not in the nature of mere addendum nor in the form of clarification. Addendum dated 7-3-1985 istherefore, a fresh show cause notice with new facts raised therein and therefore, the demands for the period from 1- 3-1984 to 18-4-1984 covered by show cause notice dated 10-7-1984 is clearly beyond the period of six months and the same is hit by time bar. Further the department had full knowledge about the appellants clearing peripherals. Detailed floor plan showing the old and new buildings and the area earmarked for manufacturing activities were submitted to the department vide their letter dated 25/28 January 1984, which has been acknowledged by the Superintendent and the facts pertaining to clearance of peripherals had been indicated in this correspondence and the subsequent correspondence which is there on the record. Therefore, the facts relating to clearance of peripherals had been within the knowledge of the department and therefore, it cannot be said that therewas suppression of facts in the matter on the part of the appellants."

37. It would be seen that what weighed with the Tribunal in the aforesaid decision was the fact that the Addendum changed the factual aspects contained in the show cause notice, namely that the appellant had been manufacturing computer peripheral devices falling under a particular tariff item without including the value of these peripherals in the assessable value of computer and without paying relevant central excise duty but by Addendum the department had chosen to give up theinvocation of the provisions of various rules which changed the colour and complexion.

38. In **JMC Projects**, the Tribunal observed as follows:

"6.1 In view of the above clarification the view taken by the Adjudicating authority is not correct that appellant wasnot entitled to revise the classification to „Works Contract Services". The first show cause notice dated 22-10-2008 and its corrigendum dated 29-9-2009, were mainly targeted to deny the benefit of Composition Scheme to theappellant and to determine the taxable value as per Rule 2A of the Service Tax (Determination of Value) Rules, 2006 read with Section 67 of the Finance Act, 1994. The provisions of Rule 2A and Composition Scheme deal only with the Works Contract Service under Section 65(105)(zzzza). There was thus no doubt in the authority issuing show cause notice dated 22-10-2008 and its corrigendum dated 29-9-2009 that the classification of theservices being dealt was „Works Contract Services" with effect from 1-7-2006. This fact was confirmed by C.B.E. &

C. by issuing circular dated 24-8-2010. Therefore,demanding a duty of Rs. 20,53,91.319 on „Commercial or Industrial Construction Services"/"Construction of Complex Services" and denying the benefit of Notification No. 1/2006-S.T., dated 1-3-2006 is totally a new and different ground than what was being taken in the original show cause notice dated 22-10-2008, where classification of theservice provided was not doubted at all. The judgments relied upon by the Revenue that the changes proposed were only mathematical corrections or facts available at the time of issue of show cause notice dated 22-10-2008, are thus not applicable to the facts of the

present proceedings. The Addendum dated 29-9-2009 and its further corrigendum dated 17-5-2010, therefore, fails as the same has changed the entire basis of the first show cause notice dated 22-10-2008. Having said that it isfurther observed that Addendum dated 14-12-2009 hasnot been issued in suppression of the first show cause notice dated 22-10-2008, therefore the first show cause notice dated 22-10-2008 and its corrigendum dated 29-9- 2009 survive."

39. This decision also does not support the case of the respondent for the reason that the dispute regarding classification of the service was raised in the Addendum which was not raised in the show cause notice.

40. As noticed above, in the present case the factual position had not changed and the Addendums had called upon the respondent to explain why the refund application should not be rejected as being barred by time on the facts stated in the show cause notice. The aforesaid two decisions rendered in **Wipro Information** and **JMC Projects** would, therefore, not help the respondent.

41. Even otherwise, the time limit provided in section 11C(2) of six months is mandatory in nature and no refund could have been allowed ifthe application was not filed within six months from the date of issue of the Notification. It has been found that the time limit of one year prescribed in section 11B would not be applicable in the present case. Itwas imperative for the respondent to have filed the application for refund within the time period prescribed in the proviso to section 11C (2). The Addendums merely call upon the respondent to show cause as to why the refund applications should not be rejected as they were not filed within the aforesaid time limit. The contention of the learnedcounsel for the respondent that the Addendums should be ignored, therefore, cannot be accepted.

42. The refund applications filed by the respondent on 15.12.2017 pursuant to the issuance of the Notification dated 24.04.2017 was, therefore, liable to be rejected for the reason that it was not filed within the period of six months from the date of issue of the Notification as specified in the proviso to sub-section (2) of section 11C. The Commissioner (Appeals), therefore, committed an error in grantingrelief to the respondent.

43. In this view of the matter, it would not be necessary to examine whether the refund application was also hit by the bar of unjust enrichment.

44. Thus, for all the reasons stated above, the order dated 17.12.2018 passed by the Commissioner (Appeals) deserves to be set aside and is set aside. Excise Appeal No. 50419 of 2019 and Excise Appeal No. 50420 of 2019 filed by the department, therefore, deserveto be allowed and are allowed. The respondent would not be entitled to refund of the excise duty as the refund application was not filed within the time limit prescribed in the proviso to section 11C(2). The two CrossObjections filed by the respondent deserve to be rejected and arerejected. The stay applications filed by the appellant have been rendered infructuous and are rejected.

(Order Pronounced on **15.09.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

JB, Shreya

(P.V. SUBBA RAO)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI
PRINCIPAL BENCH - COURT NO. 1

Excise Condonation of Delay Application No. 50074 of 2023

In

Defect Diary No. 50049 of 2023

Rajeev Agnihotri …… Appellant
Director, M/s Socrus Pharmaceuticals Ltd. Plot no. 252, Sector -1,

Pithampur,

Dhar, MP- 454775

VERSUS

Principal Commissioner, CGST- Indore..... Respondent
Manik Bagh Palace, Post Box no. 10, Indore, M.P. 452001

APPEARANCE:

Ms. Jwariya Kainaat, Advocate for the Appellant
Shri Rakesh Kumar, Authorized Representative of the Department
CORAM :

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Defect Miscellaneous Order No. 241/2023

DATE OF HEARING: OCTOBER 13, 2023

JUSTICE DILIP GUPTA:

This appeal was filed on 12.01.2023 by Shri Rajeev Agnihotri[1], Director of M/s Socrus Pharmaceuticals Ltd.[2] to assail that part of the order dated 23.06.2016 passed by the Principal Commissioner that imposes a penalty of Rs. 25 lakhs upon him. It needs to be noticed that the appellant was noticee no. 2; notice no.1 being M/s Socrus Pharmaceuticals Ltd.[2]

2. The aforesaid order dated 23.03.2016 passed by the Principal Commissioner directs for recovery of CENVAT Credit wrongly availed [1] The appellant. by the Company with interest and penalty. The Company filed an appeal before the Tribunal on 30.06.2016 to assail this order and it is stated that it is the present appellant who signed the appeal and the Vakalatnama. This appeal filed by the Company is said to be pending.

3. In the application filed by the appellant in the present appeal for condoning the delay of about 6 years, it has been stated:
"(i) That the appellant received the impugned Order-in-Original No.25/PR.Commr/CEX/IND/2015-16 dt.23.03.2016 passed by the Pr. Commissioner Central Excise, Indore. The said Order-in- Original was received by the appellant on 30.03.2016.
(ii) That the appellant was Director of M/s Pharmaceuticals Ltd., against whom the demand was confirmed and penalty of Rs.25,00,000/- was imposed upon the appellant.

(iii) That M/s Socrus Pharmaceuticals Ltd. filed appeal against the said impugned Order-in-Original before this Hon'ble Tribunal, bearing No. E/52120/2016 (DB) which is pending for disposal. The appellant being Director of the Company signed the said appeal. He was under the

impression that he has signed the appeal of the Company hence no need to file separate appeal and both the appellants will be covered by the appeal of the Company.

(iv) That the appellant was not advised to file separate appeal and due to the reason stated above he did not file separate appeal and delay of Six years and approximately four and half months occurred.

(v) That now the appellant is advised that separate appeal should be filed by the appellant. Hence, this application for condonation of delay.

(vi) That the appellant has a very good case on merits and have full hope of success in appeal.
(vii) That delay in filing of appeal is not intentional but due to the reason stated above. If the delay is not condoned it would cause irreparable loss to the appellant."

4. The Company is engaged in the manufacture of medicaments and the appellant is the Director of this Company. To control the operations on day to day working of the Company, he was also controlling the activities of the paying duties, including availment of CENVAT Credit. During the investigation, it was found that capital goods CENVAT invoices involving CENVAT credit of Rs. 2,62,11,773/- were found not to be issued by concerned dealers and manufacturers and therefore, it appeared that the Company had fraudulently taken CENVAT Credit on forged invoices.

5. When the appellant is the Director of the Company and he had signed the appeal filed by the Company, there is no good reason as to why the appellant should not have taken proper steps at the relevant time to file the present appeal to assail the imposition of penalty imposed upon him. In the delay condonation application it has been stated that the appellant was under an impression that since he signed the appeal of the Company, there was no need to file a separate appeal and it is only when the appellant has been advised that a separate appeal should be filed, that steps were taken to file the appeal. A general and a casual statement has been made, for it does not even indicate the date on which the appellant was advised that a separate appeal should be filed. The delay that has occurred is of about 6 years and 6 months. Such a huge delay cannot be explained by merely stating that when the appellant was advised that a separate appeal should be filed, the present appeal was filed.

6. In any case, as a Director of the Company, the appellant cannot claim ignorance of the fact that a separate appeal was required to be filed by him to assail the imposition of penalty.

7. Though it is correct that each day's delay is not required to be explained, but when the delay is of more than 6 years it was imperative for the appellant to explain circumstances to the satisfaction of the Tribunal that he was prevented by sufficient cause from filing the appeal within the stipulated time.

8. There is, therefore, no good reason to condone the delay. The application is, accordingly, rejected.

(Order dictated in the open court)

(JUSTICE DILIP GUPTA)

PRESIDENT

(P.V. SUBBA RAO) MEMBER (TECHNICAL)

Diksha

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI. PRINCIPAL BENCH – COURT NO.III

Excise Appeal No.50333 of 2021

(Arising out of Order-in-Appeal No.DDN/EXCUS/000/APP/42/2020-21 dated 08.07.2020 passedby the Commissioner (Appeals), Central Goods & Service Tax, Dehradun)

M/s. R.N. Alloys, **Appellant**
Plot E-48, Industrial Area,Bahadrabad, Haridwar, Uttarakhand-249 408.

Versus

Commissioner of Central Goods & **Respondent**
Service Tax,
E-Block, Nehru Colony, Haridwar Road, Dehradun,Uttarakhand-248 001.

APPEARANCE:

Shri Alok Arora, Advocate for the assessees.
Shri Rakesh Agarwal, Authorised Representative for the Revenue.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL) HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No.51509/2023

DATE OF HEARING:09.08.2023DATE OF DECISION:06.11.2023

BINU TAMTA:

Challenging the Order-in-Appeal No.DDN/EXCUS/000/APP/42/ 2020-21 dated 08.07.2020 passed by the Commissioner (Appeals), the appellant has filed the present appeal.

2. The brief facts of the case are that the appellant is engaged in themanufacture of Aluminium Alloy Die Cast Components falling under heading number 7616000 of the Central Excise Tariff Act, 1985. The process of manufacture involved was Die Casting of Components from Aluminium Metal followed by finishing through machines. An Audit of the records of the appellant for the period February, 2015 to March, 2016 was conducted and it was found that the appellant had manufactured Aluminium Die Cast Components Engine part on job workbasis for M/s Rockman Industries Ltd. and took job work charges @ Rs
11 or 11.60% and paid service tax thereon. The Revenue was of the view that the process of conversion of Metal into Engine Components involved excisable goods and this manufacture/production of goodsdoes not constitute a taxable service as defined under the Finance Act, 1994 because such manufacture or production falls under the Negative List as defined under section 66 D (f) of the Finance Act, 1994 and, therefore, the service tax paid by the appellant was not applicable onthe job work charges.

3. In order to avail the exemption from payment of duty under job work Notification No. 214/1986–CE dated 25.03.1986, the goods manufactured at the end of principal

manufacturer using the goods manufactured by the appellant were required to undergo payment of duty or if such goods are sold as such the duty must be paid on such goods. The principal manufacturer - M/s Rockman Industries Ltd. were availing area exemption under Notification No. 50/2003 – CE dated 10.06.20003 and, therefore, were not paying central excise duty ontheir final products. Since the principal manufacturer was exemptedfrom payment of duty under the area exemption notification, the conditions for grant of exemption under the job work notification were not fulfilled and, therefore, the job worker, i.e., the appellant has to be treated as the actual manufacturer of the goods and was liable to pay excise duty on the goods so manufactured by them. On verification of the cenvat records of the appellant, it was found that they had availed cenvat credit against the debit notes, which is not a valid document as per Rule 9 of the Central Excise Rules, 2002 (hereinafter referred to as CER, 2002) to issue invoices for availing cenvat credit and they were issued by various parties, which were not registered.

4. Accordingly, show cause notice dated 28.04.2017 was issued to theappellant on two counts :

(i) the demand of duty to the extent of Rs 35,15,228/ on account of non-payment of duty in capacity of job worker alongwith interest and penalty.

(ii) demand of Rs 6,75,737/ on account of improper availment of cenvat credit in respect of goods returned by un-registered or exempted customers, who issued the debit notes along with interest and penalty.

5. The adjudicating authority vide order dated 19.07.2018 confirmed the demand under both the counts in terms of the show cause notice. Being aggrieved, the appellant filed an appeal, however, the Commissioner (Appeals) by the impugned order dismissed the sameand affirmed the order-in-original. The appellant has now filed the instant appeal before this Tribunal.

6. We have heard Mr. Aalok Arora, the learned Counsel for the appellant and also Shri Rakesh Agarwal, the Authorised Representative for the Revenue and have perused the records of the case.

7. The learned Counsel for the appellant submitted that the liabilityto pay duty was on the principal manufacturer i.e. M/s RockmanIndustries Ltd since the raw material was sent by them on job work challan. It was also their submission that the process carried out by the appellant does not emerge into marketable goods as the goods were unfinished Aluminium Casting and hence, no duty was payable thereon. The learned Counsel had also taken the plea of revenue neutral situation by submitting that even if goods were liable to duty, cenvat credit on raw material and capital goods would be available to them andduty liability on value addition would be equal to service tax paid in cash. They relied on the decision of the Rajasthan High Court and alsoof this Tribunal to say that cenvat credit is permissible on the basis of debit notes. Lastly, according to them extended period of limitation cannot be invoked as there is no suppression on their part.

8. The Revenue relied on the findings of the Authorities below and according to them from the process involved, it is clear that theappellant was manufacturing Pressure Die Component from Aluminium, which amounts to manufacture and were, therefore, liable to pay exciseduty. They also referred to the non-compliance of the condition of the job work exemption notification in the present case and in support thereof relied on the decisions laying down the principles for construction of exemption notification. On the issue of cenvat credit, the learned Authorised Representative for the Revenue referred to the findings that the debit notes are not the specified document as per Rule9, therefore, no benefit of cenvat credit can be allowed to the appellant.

9. The following two issues arise for our consideration :

"(i) whether the process of conversion of metal into Engine Components carried out by the appellant amounts to manufacture and if so whether he is entitle to avail exemption frompayment of duty under the job work Notification No. 214/86-CE dated 25.3.1986.

(ii) whether the appellant can avail cenvat credit on the basis of debit notes which are not the prescribed document under Rule 9 of the CCR, 2004."

10. The first issue, which needs to be considered is whether the process involved in the job work contract with M/s Rockman amounts to manufacture. We find that M/s Rockman in terms of the contract supplied the raw material, i. e., Aluminium Ingots to the appellant, who processed them by using specific moulds and dies supplied by M/s. Rockman, whereby the product Aluminium Die Casting Componentswere produced. The term 'manufacture' has been defined in Section 2
(f) of the Central Excise Act,1944 as under :

"2 (f) "manufacture" includes any process--

(i) incidental or ancillary to the completion of a manufactured product;
(ii) which is specified in relation to any goods inthe Section or Chapter notes of the Schedule tothe Central Excise Tariff Act, 1985 as amounting tomanufacture, (5 of 1986). and the word"manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture ofexcisable, goods, but also any person who engagesin their production or manufacture on his own account;]"

It is a settled principle of law as interpreted in catena of decisions that the definition of the term 'manufacture' is an inclusive definition and has to be given wider import, so any person who is engaged in any activity as specified in the clauses of section 2(f) would fall in the category of a manufacturer and would be liable to pay the excise duty unless exempted. We are therefore of the opinion that the activity carried out by the appellant who happens to be a job worker amountsto manufacture, more particularly when it says that the word 'manufacture' shall also include any person, who engages in their production or manufacture on his own account. We find it relevant to take note of the factual situation as noted by the Adjudicating Authority that they were involved in two types of transactions:-
"I- Firstly, to make pressure die components and sell it on payment of central excise duty to the customers, namely M/s Havells India Pvt. Ltd., M/sOnkar Engine & Generator (P) Ltd etc. after availing cenvat facility provided under the CCR, 2004.
II- Secondly, they were also manufacturing pressure die components from Aluminium supplied by M/s Rockman on job work basis."

Taking into account the above two types of transactions, it is sufficient to hold that the process undertaken by the appellant amounts to manufacture and that is why he was paying excise duty when he was selling the same product to other companies. This also nullifies the contention of the appellant that the goods manufactured are notmarketable just because they are unfinished. In fact, the Larger Benchin **Thermax Babcock & Wilcox Ltd V Commissioner of C.EX., Pune, 2018 (364) ELT 945**,decided the issue whether the job worker was liable to pay duty on intermediate manufacture of parts of boiler against the party.

11. Having come to the conclusion that the Die Casting of Components from Aluminium after finishing through machines results in manufacture, the necessary corollary will be that the appellant is liable to pay excise duty and not service tax. The provisions of section 66D ofthe Finance Act, 1994 provides for negative list and says :
"66D The negative list shall comprise of the following services :

(a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere—

(i) services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government;
(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or anairport;
(iii) transport of goods or passengers; or
(iv) *[any service]* ,[support service], other than services covered under clauses (i) to (*iii*)above, provided to business entities;

(b) services by the Reserve Bank of India;

(c) services by a foreign diplomatic mission locatedin India;
(d) ……
(e) Trading of goods;
(f) Services by way of carrying out any process amounting to manufacture or production of goods excluding alcoholicliquor for human consumption;"

Thus, from careful reading of Section 66 D(f) of the Finance Act, 1994, there is no ambiguity that the statute does not envisage levy of servicetax on any process amounting to manufacture or production of goods. Consequently, we hold that the payment of service tax by the appellant on the job charges collected on Die Casting of Components from Aluminium Metal was totally unwarranted and against the spirit of the law as quoted above. In fact, the appellant was required to pay central excise duty on the said activity which amounts to manufacture and was not required to pay service tax.

12. To consider the plea taken by the appellant that the liability to pay the excise duty was on the principal manufacturer, i.e. M/s Rockman, who supplied the raw material etc. and they being the job worker, were exempted from payment of duty under the NotificationNo. 214/ 86-CE dated 25.3.1986. We have no issue that Notification No214/86 grants exemption to job workers from payment of duty, however, the same is subject to the condition of filing of the undertaking by the principle manufacturer. The relevant provisions of the said notification are as under :

"Specified goods manufactured in a factory as a jobworker and used in the manufacture of final products

In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts goods specified incolumn (1) of the Table hereto annexed (hereinafter referred to as the said goods) manufactured in afactory as a job work and :-

(a) used in relation to the manufacture of final products, specified in column (2) of the said Table,

(i) on which duty of excise is leviable in whole or in part; or

(ii) for removal to a unit in a free trade zone or to a hundred per cent. export-oriented undertaking or to a unit in an Electronic Hardware Technology Park or Software Technology Parks or for supply to the United Nations or an international organization fortheir official use or for supply to projects funded by them, on which exemption of dutyis available under notification of the Government of India in the Ministry of Finance(Department of Revenue), No. 108/95-Central Excises, dated the 28th August, 1995, or

(iii) for removal under bond for export, or

(b) cleared as such from the factory of the supplier of raw materials or semi-finished goods -

(i) on payment of duty for home consumption (onwhich duty of excise is leviable whether

inwhole or in part); or

(ii) without payment of duty under bond for export; or

(iii) without payment of duty to a unit in a free trade zone or to a hundred per cent. export-oriented undertaking or to a unit in an Electronic Hardware Technology Park or Software Technology Parks or supplied to the United Nations or an international organizationfor their official use or supplied to projectsfunded by them, on which exemption of dutyis available under notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 108/95-Central Excises, dated the 28th August, 1995"], from the whole of the duty of excise leviable thereon, which is specified in the schedule to the Central Excise Tariff Act, 1985 (5 of 1986)

(2) The exemption contained in this notification shall beapplicable only to the said goods in respect of which :-

(i) the supplier of the raw material or semi- finished goods gives an undertaking to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] having jurisdiction over the factory of the job worker that the said goods shall be -

(a) used in or in relation to the manufacture ofthe final products in his factory; or

(b) removed from his factory without payment of duty
(i) under bond for export; or -

(ii) to a unit in a free trade zone or to a hundred per cent. export-oriented undertaking or to a unit in an Electronic Hardware Technology Park or Software Technology Parks or suppliedto the United Nations or an international organization for their official use or supplied toprojects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance(Department of Revenue), No. 108/95-Central Excises, dated the 28th August, 1995; or".

(c) removed on payment of duty for homeconsumption from his factory, or

(d) used in the manufacture of goods of the description specified in column (1) of the table hereto annexed by another job worker for further used in any of the manner provided in clause (a), (b) and (c) as above.

(ii) the said supplier produces evidence that the said goods have been used or removed in the manner prescribed above; and

(iii) the said supplier undertakes the responsibilities of discharging the liabilities in respect of Central Excise Duty leviable on thefinal products.

Explanation I. - For the purposes of this notification, the expression "job work" means processing or workingupon of raw materials or semi-finished goods suppliedto the job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of an article or any operation which is essential for the aforesaid process.

Explanation II shall be omitted. (vide Notification No. 33/2000-C.E., dated 31-3-2000)

Descriptionof Input	Descriptionof finalproduct
(1)	**(2)**

All goods falling underthe First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other thanhigh speed diesel oil and motor spirit, commonly known aspetrol.

All goods falling under the First Schedule to the Central Excise Tariff Act,1985 (5 of 1986), otherthan the following, namely
:-

(i) matches;

(ii) fabrics of cotton or man-made fibres fallingunder Chapter 52, Chapter 54 or Chapter 55 of theFirst Schedule to the said Act;

(iii) fabrics of cotton or man-made fibres falling under Heading Nos. 58.01, 58.02,
58.06 (other thangoods falling under sub-heading No.5806.20), 60.01 or
60.02 (other thangoods falling under sub-heading No.6002.10) of the First Schedule to the said Act."

The Notification No 214/86 has been the subject matter of interpretation in various decisions of the Tribunal as well as of the Supreme Court. The condition of submitting an undertaking by the principal manufacturer or the supplier of the raw material as provided inthe notification has been held to be a substantive condition and not merely a procedural one for the reason that it shifts the burden of the tax liability from the job worker to the supplier of raw materials or semi-finished goods. It has also been held that the above procedure set out in the notification is a pre-requisite and it being the mandate of law that unless such an undertaking is given, the benefit of exemption notification shall not be attracted and the job worker only is liable to discharge the duty liability at the time of clearance of the said goods from the premises of the job worker, **Kartar Rolling Mills Vs. CCE 2006 (197) ELT 151 (SC)**. We are not multiplying the decisions taking such a view, which is settled over the period and has been consistently followed, however, we would like to refer the decisions of the Larger Bench in the case of **Thermax Babcock & Wilcox Ltd V Commissioner of C.EX., Pune, 2018 (364) ELT 945**, which has not been challenged by the party and has been followed by the Tribunal in alatest decision in **Commissioner, Central Excise & CGST, Jodhpur-1 V Khemani Metal Industries Pvt. Ltd, Excise Appeal No. 51328of 2019 dated 30.06.2013** observing that the Larger Bench decision has set the controversy at rest. The non-compliance of the said condition of the Notification No 214/86 by the principal manufacturer has resulted into duty liability upon the job worker. Relevant paragraphof the decision of the Larger Bench is quoted hereunder
:

"**7.6** The job worker being the manufacturer of goods is liable to pay duty on goods manufactured byhim albeit on job work. The ownership of the goods isimmaterial for the purpose of levy of duty and thus any person who has undertaken the activity of manufacture is liable to pay duty. In order to savethe job worker from payment of duty the principal manufacturer has to own the liability to pay such duty. It is only by virtue of the Notification No. 214/86-C.E., dated 25-3-1986 that the liability of thejob worker to pay duty is transferred to the principal manufacturer who undertakes to pay duty.

7.7 The intention of enactment of Notification (supra) was to shift the liability of payment of duty from job worker to the principal manufacturer under certain conditions as provided in the said notification.There is no blanket machinery provisions in the Central Excise law under which the liability to pay duty is transferred from the job work manufacturerto another person i.e. principal manufacturer. However when the principal manufacturer does not own up the liability to pay duty on finished goods,the provision of Notification No. 214/86-C.E., dated 25-3-1986 does not apply. In that case, it is the ultimate manufacturer i.e. the job worker who has to pay the duty. Following the procedure and conditions of the Notification (supra) only by the principal manufacturer, the job worker would be saved from payment of duty on goods manufactured by him."

13. We may now consider whether in the facts of the present case, the appellant is entitled to the benefit of the exemption notification. The principal manufacturer- M/s Rockman issued challan under Rule 4 (5)
(a) of the CCR, 2004 for the purpose of delivery of the material at the factory premises of the appellant for undertaking job work of complete manufacturing. The agreement between the appellant with M/s. Rockman Industries for manufacture of goods on job work basis, particularly Clause 6 says :
"6-Rockman will give raw material ADC-12 and bop(sleev rear and anchor pin rear) on 57 F4 to RN Alloys for production on job work basis. Shot rate will be 22/- and die will be run on 420 ton machine. Rockman payment terms will be 45 days after received of material."

Thus, the principal manufacturer - M/s Rockman supplied the raw material/inputs to the job worker, the appellant herein, as per the challan under Rule 4 (5) (a) of CCR, 2004. If the appellant had to avail the benefit of the exemption from payment of duty under the notification, then it was incumbent upon them to ensure that the principal manufacturer gives an undertaking in terms of the notification that the said goods shall be removed on payment of duty for home consumption from his factory, which they failed to do. There is no dispute that the principal manufacturer had neither given any such undertaking nor paid the excise duty. Consequently, the appellant cannot escape the liability to pay the excise duty on the goods manufactured by them on job work basis.
14 Since we have decided the issue of excisability against the appellant, we would now consider whether the levy of interest and the penalty is maintainable in the present case. The appellant has deliberately indulged in evading the duty liability in as much as he has been paying the excise duty in respect of the supply of the same goods to other customers, which shows that the appellant is aware of the dutyliability. On the one hand, the appellant has been taking shelter under the exemption notification to say that the liability to pay the excise duty is on the principal manufacturer but, on the other hand, he is avoiding the conditions under the Notification, whereby he would be eligible to seek exemption. The appellant cannot be allowed to pick and choose what is beneficial to him and discard the conditions specified. That the ingredients of willful suppression of facts so as to avoid the payment of central excise duty exists. The Authorities below are justified in imposing penalty under the provisions of Section 11 AC of the Act, relying on the decision of the Apex Court in the case of **Chairman, SEBI Vs. Shriram Mutual Fund – 2006 5 SCC 361** that *mens rea* is not an essential element for imposing penalty. Further, in view of the law laid down in **Union of India Vs. Rajasthan Spinning and Weaving Mills – 2009 (238) ELT 3 (SC)** that once the ingredients to attract the provisions of Section 11 AC are attracted, the discretion to quantify the amount of penalty ends and in view thereof, the Adjudicating Authority has rightly imposed the penalty equal to the duty amount. Similarly, interest under Section 11AA has also been rightly imposed as the appellant knowingly and deliberately evaded payment of excise duty.

15. The second issue as to whether the appellant is entitled to take cenvat credit on the strength of debit notes, which is not the document prescribed under Rule 9(1) of the CCR, 2004 to avail the cenvat credit,is no longer *res-integra* and has been decided by the High Court of Rajasthan in the case of **Commissioner of Central Excise, Jaipur -1 Vs. Bharti Hexacom Ltd, 2018 (360) ELT 515.** The Division Bench decided the issue after considering the long line of decisions, where same issue was considered and decided infavour of the party and against the Revenue. The various decisions as cited are:-

1. **Karur KCP Packaging Pvt. Ltd.,vs.Commissioner -2009 (16) STR 609 (Tribunal).**

2. **Commissioner vs. Grasim Industries Ltd.,2011 (24) STR 691 (Tribunal).**

3. **VSL Steels Ltd., vs. Commissioner2013 (295) ELT 725 (Tribunal)**

4. **Supreme Industries Ltd., vs. Commissioner2014-TIOL-115-CESTAT-MUM.**

5. **Jaquar & Co. v. Commissioner -2015 (39) STR 273 (Tribunal)**

6. **Aditya Polysack Pvt. Ltd., vs. Commissioner - 2015-TIOL-996-CESTAT-Delhi**

7. Emmes Metal Pvt. Ltd., vs. Commissioner-Appeal No. E/1015 of 2011, decided on 09.03.2016

8. Commissioner vs. Nav Bharat Metallic Oxide Industries Pvt. Ltd., - Order of CESTAT- Ahmedabad

9. Mahanagar Gas Ltd., vs. Commissioner
-Order of CESTAT-Mumbai.

All the above decisions in clear terms have laid down the principle thatcenvat credit can be allowed on the basis of the debit note if they contain the information as required under Rule 4A of Service Tax Rules, 1994. In fact, the observations of the Tribunal in the case of **Grasim Industries Ltd** (supra) is to the effect that if the debit notes contain all the details, which are required to be mentioned in the invoice and except for its name, it can be treated as an invoice and cenvat credit can be allowed on the basis of the said debit note. Similarly, in the case of **Navbharat Metallic Oxide Industries**(Supra), this Tribunal reiterated the principle that a debit note could also belong to thecategory of invoice, where all the prescribed details are available and further, the Revenue has not been able to bring on record as to what are the standard elements of an invoice or bill or challan, which are lacking in the case of debit note. The Mumbai Bench in **Mahanagar Gas Ltd.** (supra) has also held that debit note is at par with the documents prescribed under Rule 9(1) of CCR, 2004 and, therefore, held that the debit note containing all the details as required under Rule9 (2) of CCR, 2004 is a valid document for the purpose of taking cenvat credit. In **VSL Steels LTD** (Supra), the Tribunal took the view that one should not look at the title of the document but should rather see the contents thereof to determine its status.

16. The learned Counsel for the appellant has also relied on a latest decision of the Ahmedabad Bench in **Kevin Process Technology Pvt Ltd V Commissioner of C EX., Ahmedabad 2021 (378) ELT 441,** wherein the Tribunal relying on **Bharti Hexacom (supra)** has held thatas per Rule 9 of CCR, 2004 not only invoice or bill of entry but any other document can also be valid document for availing credit and debit note containing all the details as required to be mentioned in cenvatabledocuments.

17. We are fully bound by the law laid down in these decisions and particularly the decision of the Rajasthan High Court in **Bharti Hexacom (supra)**, which seems to have been accepted by the Revenue as no appeal seems to have been filed challenging the same.In the light of the law laid-down, we may now examine the facts of the present case. The learned Counsel for the appellant had filed the supplementary paper book on 3rd June 2022, where at Serial No.4, he has annexed the copies of the debit notes along with the chart showing the details of the debit notes. On perusal of the debit notes, we find that they contain all the particulars and details, as are required to be mentioned in the invoice to avail the cenvat credit. Consequently, the appellant is entitled to claim the cenvat credit and the Authorities belowhave erred in denying the same. Both the Adjudicating Authority as well as the Appellate Authority have rejected the claim for cenvat credit on the ground that the debit notes were not a proper document as prescribed under Rule 9 of CCR, 2004 for availing cenvat credit and, therefore, did not examine the particulars given therein in terms of Rule4A of Service Tax Rules. Though the law has been well settled by the earlier decisions as early as in the year 2009 and subsequently, thereafter and finally by the Rajasthan High Court in the case of **Bharti Hexacom**(supra), which was much earlier in time on 15.11.2017, whereas the order by the Adjudicating Authority was passed on 19.7.2018 and by the Appellate Authority on 8.7.2020, however, both the Authorities failed to take note of the law as enunciated by the Tribunal and later affirmed by the Rajasthan High Court by which they were bound. In the case of **Pharmalab Process Equipments Pvt Ltd Vs. Commissioner 2009 (16) STR 94, Ahmedabad Bench** had observed:

"Since it is not clear as to whether the same documents which were produced before me were produced before the Assistant Commissioner ornot, the matter has to go back to the Assistant Commissioner who shall go through the documents, verify whether service has beenreceived and whether all the particulars asrequired under the Rules are available in the debit notes and adjudicate the matter afresh.

If documents contain details required under Rule
98 (sic) [9(2) of CENVAT Credit Rules, benefit of Service Tax Credit may be extended."

Similarly, in the case of **Shri Cement Limited versus commissioner of Central Excise 2013 (29) STR 77,** the Principle Bench of the Tribunal while allowing the Appeal of the party observed :

" 6. At the interest of revenue, if the adjudicating authority so chooses he may sendcopies of debit note relied by Assessee to the concerned jurisdictional officer for verifyingwhether the service tax realised by those debit notes have gone into the treasury."

18. Considering the above two decisions of this Tribunal, we could have remanded the matter to the Adjudicating Authority, however, in the facts of the present case, when the Department has not raised any objection to the debit notes in any respect, it would be a futileexercise. The documents, i.e., debit notes produced are self- explanatory as to the details, which are required under Rule 4A of theST Rules and, therefore, unnecessarily dragging the party all the way again to the litigation is not justifiable, moreso when the departmental authorities had adopted a very callous attitude in not considering even the contents of the documents in the light of the decisions of the Tribunal. Hence the demand of Rs 6,75,737/- along with interest and penalty is not sustainable.

(b) The appellant has raised the issue of revenue neutrality referring toa latest decision of this Tribunal in **M/s Parvatiya Plywood Pvt. Ltd. Vs. Commissioner of Customs, Central Excise and Service Tax, Meerut-II – Final Order Nos.51158-51167/2022 dated 08.12.2022,** where the explanation added in section 4(1) after clause of the Act (w.e.f.) 14.05.2003 was considered to say that where excise duty have not been collected separately by the manufacturer-seller, the price charged shall be treated as cum-duty, excluding the sales tax and other taxes, if any actually paid. We therefore, remandthe matter to the Adjudicating Authority to re-compute the duty liability in terms thereof and determine the actual duty liability of the appellant.

19. The period in dispute is from February 2015 to March 2016. Since the show Cause Notice has been issued on 28.4.2017, the delay as pointed out by the Department is of merely two months, i.e. February and March, which also, in the facts of the case, as discussed above, are covered by virtue of the extended period of limitation.

20. In view of our discussion above, we are of the view that the appellant is liable to pay the excise duty as determined along with interest and penalty. On the other issue, we hold that the appellant is entitled to claim the cenvat credit on the basis of debit notes and, therefore, the interest under section 11 AA of Central Excise Act and penalty under Rule 15 (3) CCR, 2004 read with section 11 AC of the Actare not leviable thereon.

21. The Appeal is, partly allowed in the above terms and the matter isremanded to the Adjudicating Authority for the purpose of re- computation only.

[Order pronounced on 6.11.2023]

(Binu Tamta)Member
(Judicial)

(P. V. Subba Rao)Member
(Technical)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI
PRINCIPAL BENCH, COURT NO. 1

EXCISE APPEAL NO. 50804 OF 2019
[Arising out of Order-in-Original No. DDN-EXCUS-000-COM-04-2019 dated 06.02.2019 passed by the Commissioner, Central GST Commissioenrate- Dehradun]

RAI BAHADUR NARAIN SINGH SUGARMILLS LTD **Appellant**
P O Laksar, Distt. Haridwar (Uttrakhand)
(ii) Aalok Arora, Advocate82- Mission Compound,
Saharanpur (UP)

Vs.

COMMISSIONER OF CENTRAL GST, DEHRADUN **Respondent**

Commissioner Central GST DehradunE-Block, Nehru Colony, Dehradun (Uttrakhand)

Appearance:
Present for the Appellant : Shri Aalok Arora, Advocate Present for the Respondent: Shri Rakesh Agarwal, Authorised Representative

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51568 /2023

Date of Hearing : 14/11/2023Date of Decision: 29/11/2023

P V SUBBA RAO:

M/s. Rai Bahadur Narain Sugar Mills Ltd.[1] filed this appeal to assail the de-novo Order in Original dated 6.02.2019passed by the Commissioner of Central Goods and Services Tax, Dehradun after the matter was remanded to him by this Tribunal's Final Order No. 50084/2018 dated 5.01.2018.

2. The appellant is a Sugar Mill located in Haridwar, Uttarakhand and factories located in this area were entitled to area based exemption notification no. 50/2003-CE dated 10.6.2003 which exempted the excisable goods manufactured by the factories in this area from the whole of the duty. The appellant claimed the benefit of this exemption which wasavailable up to 2.11.2014.

3. The appellant further expanded its capacity by adding a distillery unit in the same premises. It needs to be pointed out that a by-product of sugar industry is molasses which the sugar factories either sell or, if they have a distillery unit, distillit into alcohol. This alcohol (known as rectified spirit in pure form) can be sold for human consumption in which case it is chargeable to State Excise duty and no central excise duty is chargeable. It can also be denatured (by adding some denaturants) making it unfit for human consumption and sold for industrial use. Denatured alcohol is subject to Central Excise Duty (and not state Excise duty as it is not included in the List II (State List) of the Seventh Schedule of the Constitution).

4. The appellant availed the Capital Goods CENVAT Credit on the capital goods used in setting up the distillery plant during the period of exemption. It also availed CENVAT credit on the input services used in setting up the distillery unit. The undisputed legal position is that if the final products are exempted, no CENVAT credit on the inputs, input services or capital goods can be availed.

5. According to the Revenue, the appellant, having opted for full exemption under area-based exemption notification no.50/2003, cannot also avail the CENVAT credit on the Capital Goods and input services used in setting up the distillery unit which is also part of the same factory. According to the appellant, the distillery unit is a separate unit and it had paid Central Excise Duty on the denatured alcohol and Carbon-di- oxide produced in the distillery unit and therefore, it wasentitled to the CENVAT credit.

6. In the first round of litigation, the matter was remanded by the Tribunal to the original authority by Final Order dated 5.01.2018, the relevant portions of which are as follows:

6. The admitted facts are that the appellants were availing area-based exemption for the sugar factory. They have put up additional facility as a distillery, adjacent to thesaid sugar factory. They did not take separate Central Excise registration for the said distillery. It would appear that the appellant are praying that not taking separateregistration under Central Excise alone should not result in denial of CENAVT credit on capital goods and input service which are otherwise eligible when used for dutiable final products. We have perused certain sample ERI 1 Returnsfor the relevant period. It is clear that the appellants did discharge duty on carbon-di-oxide and denatured spirit cleared from the distillery during 2014. **It is not clear as to how such duty payment was accepted/assessed when the revenue contends that the assessee is one license holder and availing the area-based exemptionfor such license. In other words, if the unit is one andthe same as contended by the Revenue, the products which are otherwise eligible for exemption under the said notification are to be cleared without payment ofduty. It is not tenable to hold that some products can avail area-based exemption and others need not availarea-based exemption. Admittedly, the lower authorities recorded that various products manufactured in the distillery unit are not excluded from the area-based exemption. Hence, we find the contradiction in the approach by the Revenue while denying the credit on capital goods and inputservices which were admittedly used in setting up and further manufacture in distillery unit. This aspectrequires a fresh consideration based on the analyses made above**.

7. In view of the above, we note that the impugned order as it stands cannot be sustained. The issue relating to the recognition of distillery unit and sugar unit as separateentities for the purpose of Central Excise and Cenvat Credit Rules requires a fresh consideration. The appellant shall be provided adequate opportunity to submit their side of the case. The Original Authority shall decide the case aftertaking into account all the legal submissions made by the appellant.

The appeal is allowed by way of remand.

Thus, the order of this Tribunal in the first round of litigation is that if the unit is one and the same, it is nottenable to say that the appellant can claim benefit of the exemption on some goods and not on others. However, since itwas evident from the ER1 Returns that the appellant had paid central excise duty on the denatured alcohol and CO_2 manufactured in the distillery unit and cleared during the relevant period, it was not clear as to how such duty was assessed or accepted by the department. Thus, it was felt that there was a contradiction in the order of the adjudicatingauthority and therefore, the matter was remanded for a fresh adjudication and that is how the impugned order was passed.

7. The operative part of the impugned order is as follows:

ORDER

(i) I hold that the distillery unit cannot be considered as a separate unit and has to be treated as expansion of existing sugar unit under the Central Excise Law.

(ii) I confirm the demand of Cenvat credit amounting to Rs.2,64,78,494/- (23195678 + 3282816), inclusive of Ed. Cess & S&H Ed. Cess, i.e. Rupees Two Crore Sixty Four Lakhs Seventy Eight Thousand Four Hundred Ninety Four only availed irregularly, on ineligible capital goods/input services, under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A(1) of the Act against M/s Rai Bahadur Narain Singh Sugar Mills Ltd., Laxar, Roorkee, District: Haridwar;

(iii) I confirm the demand of Rs. 4,57,436/- (Rupees Four LakhFifty Seven Thousand Four Hundred Thirty Six only), required to be reversed under Rule 6(3A) of the CCR, and the same is to be recovered under Rule 14 of the CCR readwith Section 11A(1) of the Act

(iv) I confirm recovery of interest as per applicable rates on thedemand confirmed at (ii) and (iii) above under Rule 14 of the CCR read with Section 11AA of Central Excise Act, 1944;

(v) I impose penalty of Rs. 26,47,849/-(Rupees Twenty Six Lakhs Forty Seven Thousand Eight Hundred Forty Nineonly) under Rule 15(1) of the CCR read with Section 11AC(1)(a) of the Act, 1944 upon the party. The penalty would stand reduced to twenty five percent i.e to Rs.6,61,962/- (Rupees Six Lakhs Sixty One Thousand Nine Hundred Sixty Two only) in terms of Section 11AC(1)(b) ofthe Act if the reduced penalty, along with the demand confirmed at (ii) & (iii) above and interest confirmed at (iv)above, too is deposited within thirty days from the date of service of this order.

The aforesaid dues shall be paid forthwith."

Submissions on behalf of the appellant

8. On behalf of the appellant, learned counsel made thefollowing submissions:

(i) The appellant established separate distillery factoryfro which separate licences were granted by variousState/Central Government departments/ authorities.
(ii) The distillery factory has a separate boundary, therefore, distinct from sugar factory.
(iii) It had obtained separate licences/registrations under the Factory Act and Labour departments.
(iv) The transfer of molasses from the sugar factory to the distillery unit requires permission of the State Excise department.
(v) When submitting a declaration to avail the benefit of the exemption notification no. 50/2003-CE, the appellant had not mentioned the denatured alcohol and CO_2 in it and therefore, these two goods were out of the scope of the notification. They were chargeable to excise duty and therefore, CENVAT credit on the capital goods and the input services used in setting up the plant were correctly availed by the appellant.
(vi) It had discharged excise duty on the scrap generated in the fabrication of capital goods in the distillery unit and therefore, CENVAT credit on the capitalgoods must be available to it.
(vii) The credit of Rs. 32,82,816/- on input services was sought to be denied as per notification no. 21.2014-CE (NT) which restricted availment of CENVAT credit to six months from the date of invoice. However, thisnotification came into force only from 1 September 2014 and it is a well settled legal position that it will not apply to invoices issued prior to this date. Reliance is placed on:

a) Neon News Pvt. Ltd. Vs CCE &ST Agra[2]

b) CCE, Allahabad vs Ram Swarup Electricals Ltd.[3]

c) Global Ceramics Pvt. Ltd. vs Principal Commissionerof CE, Delhi I[4]

(viii) There is demand of Rs. 4,57,436/- on account of alleged short reversal of CENVAT Credit under Rule 6(3A) for December 2014 (after the exemption period ended in November 2014). This was a duplication as it was already included in the demand of Rs. 32, 82,816/-.

(ix) The demand was time-barred as the department was aware that it was paying duty on denatured alcohol and Carbon-di-oxide as was evident from its ERI returns.

(x) The appeal may be allowed and the impugnedorder set aside with consequential relief to the appellant.

Submissions on behalf of the Revenue

9. Learned authorized representative for the Revenue vehemently supported the impugned order and asserted that there is no reason to interfere with it. He made the following submissions:

(i) Undisputedly, the appellant added the distillery unit to its own sugar factory and had not set up a new unit.

(ii) It was located in the same premises of the sugar factory.

(iii) The appellant had not applied for a separate registration and it was operating under the same CentralExcise Registration as the sugar factory.

(iv) The appellant was also filing a single ERI Return foreach period covering both the sugar factory and thedistillery.

(v) There is no case, whatsoever, to say that the distillery was a separate unit. It was an additional plant within the sugar factory.

(vi) The contention of the appellant that it had to obtain separate permissions, licences or registration fromthe other Central/State Government authorities for the distillery unit makes no difference to the fact that it was part of the same unit. The permissions or licences by various other authorities are as per the requirements of the respective laws. For instance, the distillery produces alcohol which can be fit for human consumption or denatured and hence unfit for human consumption. Ifthe alcohol is manufactured for human consumption, it falls under the purview of State Excise and it is subjectto various checks and controls by the State Excise Authorities. Such controls do not apply to the sugar plant. Therefore, even if the distillery is in the sugar factory itself, necessary permissions have to be obtainedfrom the State Excise Authorities.

(vii) Similarly, for pollution control, labour laws, etc. concerned authorities permissions will be required as perthe respective laws.

(viii) None of these other laws nor the permissions / licences/ registrations granted under them by the authorities determine the applicability of the exemption notification to the excisable goods manufactured in the unit.

(ix) The impugned order is correct and proper and calls for no interference. It may be upheld and the appeal may be dismissed.

10. We have considered the submissions made by both sidesand perused the records of the case.

11. In the first round of litigation, this Tribunal held that it was not tenable to hold that some products can avail area- based exemption and others need not avail area-based exemption. However, since the appellant had, evidently paid duty on the CO_2 and denatured alcohol which were manufactured in the distillery unit, it was felt that there was a contradiction in the order and felt that the issue relating to therecognition of distillery unit and sugar unit as separate entities for the purpose of Central Excise and Cenvat Credit Rules requires a fresh consideration and remanded the matter.

12. Thus, the only issue to be decided is insofar as the Central Excise and CENVAT credit is concerned, whether the sugar factory and the distillery unit were two units or one unit.If they were one unit, it needs to be seen as to how such duty payment was accepted/assessed

when the revenue contends that the assessee is one license holder and availing the area- based exemption for such license.

13. On the first issue as to whether they were two units or one, the undisputed facts are that the appellant had taken a single registration for the Sugar factory and had not taken a separate registration for the distillery. The distillery itself was set up in the same premises. The appellant had also filed a single Excise Return for each period covering both the sugar factory and the distillery.

14. The appellant's contention is that since it had obtained various permissions from the State Excise, Labour laws, Pollution Control, etc. for the distillery unit, it should be treated as a separate unit. In our considered opinion, the treatment of a unit depends on the laws which apply. For instance, if a manufacturer has several factories located acrossthe countries and has its head office in Mumbai, under the Income Tax Act, it will have a single Permanent Account Number and it will be assessed to corporate tax as one entityin Mumbai. On the other hand, every individual manufacturing facility across the country will have a separate central excise registration and will be assessed separately. Pollution control regulations will apply to each individual manufacturing facility, effluent treatment plant, etc. In short, various facilities of the company are treated as separate units under some laws and as one by some other laws and the concerned agencies deal with them accordingly. Merely because a separate licence was issued by the State Excise, Pollution Control, etc. for thedistillery does not make it a different unit under the Central Excise. In this case, the appellant had obtained a single Central Excise Registration for the sugar factory and set up thedistillery plant within its premises. Further, it also filed single returns with the excise department covering both the sugar plant and the distillery. **We, therefore, find that the sugar factory and the distillery are one unit as far as theCentral Excise is concerned. Central Excise Act, Rules and notifications should be applied accordingly.**

15. It has already been held by this Tribunal whileremanding the matter that ***it is not tenable to hold that some products can avail area-based exemption and others need not avail area-based exemption***. Once the appellant had opted for the area-based exemption notification, it is not open for it to say that it will not avail the benefit for some goods manufactured and will avail the benefit for other goods. Learned counsel for the appellant submitted that it had not mentioned the products of the distillery (denatured alcohol and CO_2 in the declaration filed to avail the benefit of the exemption notification. As the exemption notification is not confined to only such products as were mentioned in the declaration but was available to all the goods manufactured in the unit including the new products manufactured after the declaration and those manufactured using newer plants and machinery installed in the unit, the exemption was available tothe denatured alcohol and CO_2.

16. While remanding the matter, this Tribunal also remarked '*Itis not clear as to how such duty payment was accepted/assessed when the revenue contends that the assessee is one license holder and availing the area-based exemption for such license.* Learned authorized representative submits that the appellant, like any other assessee, operates under self-assessment and has wrongly paid duty on denatured alcohol and CO_2. Duty was not assessed by the department. It is also not accepted. In fact, there is no methodof accepting the duty. The assessee deposits the duty through a challan by itself and reflects it in its returns. If the assessee paid duty when it was exempted, it could claim refund.

17. On going through the concerned Central Excise provisions, we find that all assessees are required to self- assess and pay duty. If duty is paid in excess of what is due orpaid when it is not due, the assessee can claim refund. Thereis no mechanism to refund *suo moto* the duty paid under the Central Excise law. There is also a mechanism of issuing a Show Cause Notice under section 11A to ***recover duty not levied, not paid, short levied, short paid or erroneously refunded.*** There is no provision to issue a notice under section 11A for any other purpose. For instance, if duty is paid where one is not to be paid, there is no provision to issue a show cause notice calling upon the assessee as to why the excess duty paid should not be refunded. If duty is short paid, a show cause notice can be issued by the officers and if it is paid in excess, the assessee has to file a refund claim.

18. For all these reasons, we find that the denatured alcohol and CO2 manufactured by the distillery were fully exempted from duty and therefore, no CENVAT credit of capital goods used in setting up the plant could be availed by the appellant.

19. CENVAT credit of Rs. 32,82,816/- on input services was sought to be denied as per

notification no. 21/2014-CE (NT) which restricted availment of CENVAT credit to six months fromthe date of invoice. However, this notification came into force only from September, 01 2014. According to the appellant the invoices were issued prior to this date but it availed the CENVAT credit thereafter. If it be so, as per the settled legal position the appellant is entitled to CENVAT credit on all suchof these invoices which were issued prior to September, 01 2014.

20. Regarding the third proposal of demand of Rs. 4,57,436/- on account of alleged short reversal of CENVAT Credit under Rule 6(3A) for December 2014 (after the exemption period ended in November, 2014), the appellant claimed that there is a duplication as it is already included in the demand of Rs. 32,82,816/-. Since we have held that the appellant is entitled to the benefit of CENVAT credit of Rs. 32, 82,816/- on all such invoices which were issued prior to 1 September, 2014 and according to the appellant all the invoices were issued prior to this date, there cannot be any duplication. The demand of Rs. 4,57,436/- needs to be upheld.

21. The appellant also contended that the demand was time-barred. We find that the show cause notice was issued on 4.01.2016 during which period the normal period of limitation was one year from the relevant date, i.e., the date on which the return is filed and if no return is filed, the last date on which the return has to be filed. Extended period of limitation was not invoked in the show cause notice or in the impugned order. Even the penalty under section 11AC was imposed as applicable to cases other than fraud, collusion, wilful misstatement or suppression of facts. The appellant received capital goods between 26.03.2013 and 2.11.2014 but availed CENVAT credit in December, 2014. The return for December, 2014 would have been filed in January, 2015 and the show cause notice was issued on January 04, 2016 within one year. We, therefore, find no force in the submission of the learned counsel that the show cause notice was time barred.

22. In view of the above, we find that impugned order needsto be modified to the extent of setting aside the denial of CENVAT credit on input services to the extent of Rs. 32,82,816/- for taking credit after six months from the invoice as there is no violation of notification no. 21/2004-CE (NT)
consequent interest and reducing penalty under section 11ACto this extent. We uphold the rest of the demand.

23. The appeal is partly allowed and the impugned order ismodified to the extent indicated above.

[Order pronounced on **29.11.2023**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. IV

Excise Appeal No. 50305 of 2021

(Arising out of Order-in-Original No. JOD-EXCUS-000-COM-0017-20-21 dated 05.08.2020 passed by the Commissioner of Central Goods and Service Tax & Central Excise, Jodhpur)

M/s Total Oil India Private Limited **Appellant**
Singhari, Rohat, Distt. Pali,Rajasthan – 306 421

VERSUS

Commissioner of Central Excise, Jaipur-II **Respondent**

AND

Excise Appeal No. 50554 of 2022
(Arising out of Order-in-Appeal No. 182(CRM)CE/JDR/2021 dated 11.08.2021passed by the Commissioner (Appeals), Central Excise & CGST, Jodhpur)

M/s Total Energies Marketing India Pvt. Ltd. **Appellant**
(Formerly known as Total Oil India Pvt. Ltd.)Rohat Jalore Road, Rohat, Distt.

Pali – 306421 (Rajasthan)

VERSUS

Commissioner (Appeals), Central Excise & CGST, Jodhpur **Respondent**

APPEARANCE:

Shri Manoj Chauhan, Chartered Accountant for the Appellant

Shri Rakesh Agarwal, Authorized Representative for the Respondent

CORAM :

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL) HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 24.08.2023 Date of Decision: 30.11.2023

FINAL ORDER NOs. 51572-51573/2023

HEMAMBIKA R. PRIYA

The present two appeals have been filed by M/s Total OilIndia Pvt. Ltd. and M/s Total Energies Marketing India Pvt. Ltd.

(hereinafter referred to as the appellant 1 and 2 respectively) to assail two orders viz., Order-in-Original No. JOD-EXCUS-000-COM- 0017-20-21 dated 05.08.2020 wherein Rs 4,41,29,475/- (for the period Sept 2012- Nov 2012) of CENVAT credit was ordered to recovered, along with interest and penalty of Rs. 15,00,000/- was imposed on appellant 1 vide the Order-in-Appeal No.182(CRM)CE/JDR/2021 dated 11.08.2021, wherein the appellant 2 the Commissioner (Appeals) remanded the matter back to theoriginal adjudicating authority for re-adjudication.

2. The brief facts of the two appeals before us are that the appellant is engaged in the manufacture of Bitumen Emulsion and preparation of Polymer Modified Bitumen (PMB) falling under Chapter 27 of the Central Excise Tariff Act, 1985. The records of the appellant were scrutinised by Anti Evasion Branch of Central Excise, Jaipur-II Commissionerate. During the investigation, it wasalleged that the appellant has availed excess Cenvat credit as per the provisions of Rule 6 of Cenvat Credit Rules, 2004. The appellant reversed the said credit amounting to Rs. 2,67,06,656/- under protest. Subsequently, the appellants were issued show cause notice dated 01.10.2013 demanding reversal of credit of Rs. 7,14,73,212/- under Rule 6 of CCR, 2004 for the period September 2012 to June 2013. The demand raised by the said show cause notice was confirmed vide order-in-original dated 09.10.2014 against which the appellant filed an appeal before the Tribunal.The said Appeal No. E/50367/2015 was disposed vide order dated 27.10.2017, vide which the Tribunal remanded the matter for the purpose of verification of figures. On merits, the Tribunal held that the appellant had properly availed Cenvat credit. Pursuant to the remand proceedings, the demand of Cenvat credit was revised to Rs. 4,41,29,475/- along with penalty of Rs. 15,00,000/- and interest of Rs. 27,02,518/- totalling to Rs. 42,02,518/- for period September 2012 to June 2013 was confirmed vide the Order-in- Original dated 05.08.2020. The appellant reversed/deposited amount of Rs. 5,52,79,359/-. Thereafter, the appellant filed a refund claim of Rs. 1,11,49,884/- (5,52,79,359 – 4,41,29,475) on 15.09.2020. The said amount was included in amount paid by the appellant under protest. The said refund claim was allowed by the adjudicating authority vide order dated 30.12.2020, though anamount of Rs. 42,02,518/- was appropriated on account of interest and penalty payable pursuant to the order dated 05.08.2020. The refund for the balance amount of Rs. 69,47,336/- was granted.

3. The refund order dated 30.12.2020 was challenged by department before Commissioner (Appeals), on the ground that adjudicating authority had not verified whether the refund was clear from principle of unjust enrichment. However, the Commissioner (Appeals) vide order-in-appeal dated 01.08.2021 allowed the appeal by way of remand to verify whether the said principle has been satisfied by the appellant. The present appeal No. E/50554/2022 is filed by the appellant against the order passed by the Commissioner (Appeals) dated 01.08.2021 allowing theappeal filed by the department against order-in-original dated 30.12.2020.

4. We will now take up the first appeal against Order-in-Original No. JOD-EXCUS-000-COM-0017-20-21 dated 05.08.2020 wherein Rs 4,41,29,475/- (for the period Sept 2012- Nov 2012) of CENVAT credit was ordered to recovered, along with interest and penalty of Rs. 15,00,000/- was imposed.

5. The Learned Counsel submitted that the Hon‘ble Tribunal had only remanded matter to verify whether duty has been paid on PMBand not remanded to verify that the appellant had availed lesser Cenvat credit than duty paid on exempted product and hence order in original is beyond the direction of Tribunal. Learned counsel further submitted that Tribunal in para 6 relying on the judgment of**Creative Enterprises – 2009 (235) ELT 755 (Guj.)** which was upheld by the Hon‘ble Supreme Court in **Creative Enterprises – 2009 (243) ELT A120 (SC)** has held that for the period September 2012 to November 2012 (inadvertently mentioned November 2013), it is on record that the appellant has paid the duty on the product PMB in spite of the fact that the Apex has held that it has not been manufactured. It is settled position of law thatonce duty has been paid it is to be considered as reversal of Cenvatcredit availed. Tribunal had merely reproduced the relevant extractof **Creative Enterprises** (supra) and Tribunal has nowhere stated that Commissioner has to verify that the appellant had availed lesser Cenvat credit than duty paid on exempted product. Therefore, it is evident from the above that Tribunal has merely remanded the matter to the adjudicating authority only to verify whether the appellant had paid duty on the PMB goods removed during the period September 2012 – November 2012. The Commissioner‘s order

that the duty paid was higher than the credit taken and there is no accumulation of credit due to is beyond the direction of Tribunal since the Tribunal had not remanded thematter to verify whether the appellant had availed lesser Cenvat credit than the duty paid on the exempted product. Therefore, it is evident that findings of the Commissioner in de novo proceedings are outside the directions of the Tribunal with which the Commissioner has bound to follow. The learned Counsel relied on the following judgements:

i. **M/s Vandana Enterprises –2020-TIOL-1238-CESTAT-All,**

ii. **M/s Engineering Professional Co. Pvt. Ltd. Vs. the Deputy Commissioner of Income Tax Circle 1(1)(1)of Gujarat High Court vide Appeal No. R/SPECIAL CIVIL APPLICATION NO. 1997 of 2019.**

6. The learned Counsel also submitted that the Cenvat credit denied to the appellant during the period September 2012 to November 2012 as under:

Sr. No.	**Credit pertaining to**	**Amount of credit disallowed**
1.	Inputs	52,57,688/-
2.	Input Services	1,11,99,084*
3.	**Total**	**1,64,56,772**

*M/s TVBIPL had availed credit of Rs. 1,31,01,660/- on input services based on challan prepared by ISD and proportionate denial of credit is Rs. 1,11,99,084)

He contended that the Cenvat credit amounting to Rs. 52,57,688/- pertained to the input procured during the period September 2012
– November 2012. He also submitted that in the present case, the appellant had paid duty of Rs. 60,89,453/- during the same period whereas the credit denied to the appellant on inputs is Rs. 52,57,668/- as indicated in the table under:

Sr. No.	**Sept.2012 to Nov. 2012**	**Cenvat credit denied on**			**Total credit taken**	**Duty paid**
		Bitumen	**FurnanceOil**	**Gilsosnite**		
1	**TOTAL**	**49,83,844**	**2,12,085**	**61,759**	**52,57,688**	**60,89,453**

6.1 The learned Counsel further submitted that the appellant had paid duty by utilizing the credit, as was evident from the following table:-

Sr. No.	**Month**	**Duty paid through as per ER-1 returns (referpoint no. 4 & 5 of respective ER-1 returns)**		
		CENVAT	**PLA**	**TOTAL**
1.	September 12	18,07,710/-	0	18,07,710/-
2.	October 12	27,16,989/-	0	27,16,989/-
3.	November 12	15,64,754/-	0	15,64,754/-
4.	**Total**	**60,89,453/-**	**0**	**60,89,453/-**

6.2 The Cenvat credit amounting to Rs. 1,31,01,660/- availed in month of September 2012 pertained to service tax paid on input service. He submitted that during September 2012, M/s TVBIPL had availed credit of Rs. 1,31,01,660/- on input services based on challan prepared by ISD i.e. M/s TVBIPL vide 9 ISD distribution challans. During the period April 08 to March 11, M/s TVBIPL was only engaged in manufacturing of Bitumen Emulsion and had cleared these goods by preparing excise invoice and on payment of duty,

as is evident from ER-I returns filed for the said period. The Ld Counsel contended that the credit is required to be reversedonly when the said credit is used in processing of PMB. In this case, the input services have not been utilized in the manufactureof PMB cleared during September 12 to June 2013 since they were input services received during the period April 2008 to March 2011.Therefore, he submitted that credit of Rs. 1,11,99,084/- on input services is not required to be reversed. These input services were used in manufacture of Bitumen Emulsion on which duty is paid by the appellant.

6.3. In view of the above submission, the learned Counsel contended that eligibility of the credit shall be determined as on thedate when the services were received and the fact that it is distributed subsequently is not relevant. Thus, the credit availed on input services during month of September 2012 is to be excluded for the purpose of computing the amount of credit to be reversed. He relied on the judgment of **M/s Surya Food and Agro Ltd. – 2020-TIOL-1004-CESTAT-ALL.**wherein it was held that when Cenvat credit is availed and the same is utilized for payment of central excise duty on the goods which were not attracting excise duty, under such circumstances such Cenvat credit cannot be recovered. He further contended that the department had accepted the payment of excise duty and had not disputed the same during the period September 2012 to November 2012. Therefore, the appellant had appropriately discharged the duty and hence department at the later stage cannot take stand that the appellant is required to reverse the credit since the productwas exempted. The ld counsel relied on the judgement of **M/s R.K.Packaging – 2019 (3) TMI 1500 – CESTAT MUMBAI** wherein it was held that the issue is no more res integra and stand decided in the case of **The Commissioner of Central Excise, Pune Vs. Ajinkya Enterprises – 2012 (7) TMI 141 – BOMBAY HIGH COURT),** wherein it was held that once the duty on final products has been accepted by the department, Cenvat credit availed need not be reversed even if the activity does not amount to manufacture.

7. The learned Counsel submitted that no interest was payable by the appellant as the appellant had not utilised the credit. He relied on Rule 14 of the Cenvat Credit Rules, 2004 after 1.04.2012 which reads as under:

―Recovery of CENVAT credit wrongly taken orerroneously refunded. — Where the CENVAT credit has been taken and utilized wrongly or has beenerroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of output service and the provisions of section 11A of the Excise Act or section 73 and 75 of the Finance Act shall apply mutatis mutandis for effecting such recoveries. He contended that the words _taken and utilized‘ were substituted for words _taken or utilized‘. Thus, for levy of interest, both the conditions that the _credit shall be taken‘ and _credit shall be utilized‘ is required to be satisfied. In this case, the appellant had not utilized the credit in as much as the closing balance was alwaysgreater than the amount of Cenvat credit to be reversed. As regards the penalty, the learned Counsel submitted that the penalty is leviable when the person takes or utilized the credit wrongly or in contravention of any of the provisions of this rule. In this case, the appellant had neither taken the credit wrongly or utilized the credit wrongly. The Cenvat credit was legitimately available to the appellant. The credit was also not utilized for any other purpose not permitted under Rule 3(4) of Cenvat CreditRules. In view of this, he submitted that Rule 15(1) is not liable to be attracted.

8. The Learned Authorised Representative reiterated the findings of the Commissioner in the impugned order. He contended that the appellant had availed higher CENVAT credit as comparedto the duty paid in the corresponding period. He submitted that theappellant cannot be allowed to kill it credit for a product which isnot excisable and does not amount to manufacture. Therefore, the Commissioner was correct in confirming the demand of Rs. 1,64,56,772/- for the period September 2012 to November 2012.As regards the contention that credit availed by them in July 2013 for the month of October, 2012 of M/s TVBIPL, he submitted that the same is not verified.

9. We now take up the arguments in respect of the Appeal E/50554/2022 against the order in appeal no. 182/(CRM)CE/JDR/2021 dated 11.8.2021 wherein theCommissioner (Appeals) remanded the matter to the adjudicating authority.

10. The learned counsel submitted that the review order as well as the impugned order was beyond the scope of the show cause notice. The counsel contended that the appellants were issuedshow cause notice dated 02.12.2020 after the filing of the refund claim, which had been issued only on the grounds as to why the amount of penalty and interest

confirmed vide order dated 05.08.2020 should not be appropriated against the refund claim. There is no allegation on the aspect of the principle of unjust enrichment. Accordingly, the learned counsel contended that the review order as well as order-in-appeal is beyond the scope of show cause notice and is liable to be set aside on this ground alone. Herelied upon following judgements:

(i) Brindavan Beverages (P) Ltd. – 2007 (213) ELT487 (SC).

(ii) Precision Rubber Industries (P) Ltd. – 2016 (334)ELT 577 (SC).

(iii) Reliance Ports and Terminals Ltd. – 2016 (334)ELT 630 (Guj.).

11. The learned Counsel contended that the appellant vide their letter dated 31.07.2013, had clearly indicated that said amount hadbeen paid under protest after utilising Cenvat credit available in its Cenvat register. The refund amount claimed by the appellant is a part of the aforesaid reversal entry. Therefore, the learned counselsubmitted that the refund claim by appellant is of an amount paid under protest during investigation was from the appellant's pocket. The learned counsel relied on following judgements wherein it is held that payment under investigation and under protest do not attract the principles of unjust enrichment.

(i) Eveready Industries India Ltd. – 2017 (357)ELT 11 (All.)

(ii) M/s Pricol Ltd. – 2015 (3) TMI 735 – MadrasHigh Court.

(iii) M/s Universal Speciality Chemicals Pvt. Ltd. –2015 (1) TMI 127-CESTAT Mumbai.

12. The learned Counsel further submitted that the appellant had accounted the payment made under protest under the head ―othercurrent asset‖ in Schedule-14 of the Balance Sheet, which substantiates the fact that the appellant had not recovered this amount from any other person. He relied on following judgements wherein it is held that amount deposited with the department if shown in balance sheet as ―receivable‖ then principle of unjust enrichment is not applicable.

(i) Andhra Pradesh Granite (Midwest) Private Limited – 2020 (3) TMI 370-CESTAT-Hyderabad.

(ii) M/s BMW India Private Limited – 2021 (3) TMI 214 – CESTAT-Chennai.

(iii) M/s Ceat Limited – 2020 (10) TMI 471 – CESTAT-Mumbai.

(iv) Ericsson India Pvt. Ltd. – 2016 (332) ELT 697(Del.).

(v) Savita Oil Technologies Ltd. – 2017 (358) ELT 331(Tri.-Mumbai).

(vi) Shree Krishna Nylon Pvt. Ltd. – 2015 (327) ELT626 (Tri.-Mumbai)

(vii) Larsen & Toubro Ltd. – 2015 (330) ELT 749 (Tri.-Mumbai)

13. The learned Counsel went on to submit that the Commissioner (Appeals) had not given any finding to their submissions made in writing or hearing. The learned counsel further contended that the Commissioner (Appeals) had remanded the order, whereas the Section 35A of the Central Excise Act, 1944 had been amended with effect from 11.07.2001 whereby the Commissioner (Appeals) is power to remand case had been withdrawn. In this contest, the counsel relied on the Supreme Court judgment in the case of **M/s MIL India – 2007 (210) ELT**

188 (SC) and the same has also been confirmed by the Board's Circular dated 18.02.2010. In view of the above, he submitted thatthe order passed by the Commissioner (Appeals) is beyond Section 35A of the Central Excise Act, 1944 and thus is liable to be set aside on the said ground alone.

14. The learned Authorised Representative reiterated the findings of Commissioner (Appeals). He submitted that the Commissioner (Appeals) had no option other than to remand the case in view of the peculiar facts and circumstances of the instant case. The learned Authorised Representative drew attention to use of the words —incidence of such duty.....| and submitted that the said words meant the burden of duty. Section 27(1) of the Act talks of the incidence of duty being passed on and not the duty as such being passed on to another person. He submitted that the expression —incidence of such duty‖ in relation to it being passed onto another person would take it within its ambit not only thepassing of the duty directly to another person but also cases where the incidence is passed on indirectly. This would be a case where the duty paid on raw material is added to the price of the finished goods which are sold in which case the burden or the incidence of the duty on the raw material would stand passed on to the purchaser of the finished product. It would follow from the above that when the whole or part of the duty which is incurred on the import of the raw material is passed on to another person then an application for refund of such duty would not be allowed under Section 27(1) of the Act. The learned Authorised Representative submitted that in all three categories of cases, it is the assessee who has to prove the fundamental factor that the incidence of tax isnot —passed on| to the consumer or third party and that he suffered a loss or injury. The learned Authorised Representative went on to submit that the presumption is that the tax payer has passed onthe liability to the consumer (or third party), though it is open to him to rebut the said presumption. The matter is exclusively withinthe knowledge of the tax payer, whether the price of the goods included the _duty' element also and/or also as to whether he has passed on the liability since he is in possession of all relevant details. The department is not be in a position to have an in depth analysis in the innumerable cases to ascertain and find out whetherthe tax payer has passed on the liability. The matter being within the exclusive knowledge of the tax payer, the burden of proving that the liability has not been passed on squarely lies on him.

15. The learned Authorised Representative contended thatSection 35A(3) of the Act, as amended, confers powers on the Commissioner (Appeals) to annul the order-in-original and also to pass just and proper order. There may be circumstances where only just and proper order could be to remand the matter for fresh adjudication. Hence, the learned AR contended that the power to remand the matter back in appropriate cases is inbuilt in Section 35A(3) of the Central Excise Act, 1944.

16. We have heard the rival contentions. We will now consider the arguments in each appeal individually.

17. In order to appreciate the arguments with regard to the first appeal, we need to go through the order of remand of the Tribunal.The relevant para is reproduced hereinafter: —8. After hearing the rival submissions, it appears that the appellant is in a position to satisfy the DeputyCommissioner on the requirements of Rule 10(3). Whenit is so, then we set aside the impugned order and remand the matter to the adjudicating authority todecide the issue denovo, but by providing an opportunity of hearing to the appellant in accordance with law.

9. The third issue of the present appeal is pertaining to the demand raised by the revenue by taking the view that since the product PMB is not a manufactured product, no setback credit would be admissible on the inputs and input services used in the production of such goods. It is on record that the appellant has already reversed an amount equal to 6% of the value of PMB asstipulated under Rule 6(3). On perusal of Rule 6(3) it is either the requirement of paying and amount @6% of the value of exempted goods has been stipulated to take care of the situation when common inputs areused in the manufacture of dutiable as well as exempted goods. In the present case, there is a distinction in as much as the Apex Court has held that the product PMB does not amount to manufacture. But keeping in mind the fact that the stipulation in Rule6(3) is a mechanism to expunge a part of the credit which is attributable to the goods which do not suffer duty, the adjudicating authority's view that the entire credit

taken should be expunged is perverse. It is also seen that an Explanation–1 has been inserted in Rule 6 to the effect that for the purpose of this rule, ‗exempted goods' shall include non-excisable goods cleared from the factory for a consideration.

10. By following the requirement of Rule 6(3) the appellant has already paid an amount @6% of price of PMB which in our view suffices. We are of the view that there is no justification for demanding reversal of the entire credit taken. Since the matter is being remanded, the adjudicating authority is also directed toverify the amount actually reversed and to requantify the overall demand, if any. He will also decide the issueof penalty accordingly.

18. From the above, it is clear that the Tribunal had remanded the matter for the limited purpose of satisfying the Deputy Commissioner on the requirements of Rule 10(3) and as also to quantify the demand after considering the appellant's payment ofan amount @ 6% of the price of PMB. In this context, we note that the adjudicating authority has not given the benefit of the duty paidat the time of removal of PMB amounting to Rs.60,89,453/-. We note that there is no dispute that the appellant had paid the duty ofRs.60,89,453/- which has not been objected to by the Department during the relevant time. Therefore, the appellant cannot be deniedthe adjustment of this duty paid against the amount liable to be reversed. It has been submitted before us that the credit availed during the period September – 2012 to November – 2012 is less than the duty paid. During the said period, the appellant hadavailed credit on inputs amounting to Rs.52,57,688/- and the remaining credit of Rs.1,31,01,660/- had been availed on ISDinvoices issued by the head office of the appellant in May 2011 for distributing the credit for the period October – 2008 to March – 2011. We find that the department has not disputed the paymentof this duty at the relevant time and neither have they demanded the reversal of CENVAT credit. In view of the same, we hold thatthe Commissioner had erred in denying the adjustment of
₹60,89,453/- against the demand for the period September 2012 to November 2012.

19. As regards the penalty imposed on the appellant, we find that that the adjudicating authority has held that the appellant has not properly assessed their credit reversal, irrespective of *mensrea*, they are liable for penalty. We are unable to accept this finding of the adjudicating authority. We note that the appellant were regularly availing credit and paying duty on the final product, even after it was held that the said process did not amount to manufacture. The department did not raise any dispute or the fact that the appellant was choosing to pay the duty on a product, not exigible to excise duty. In such a scenario, it is not established thatthere was any intention of the appellant to evade duty or avail inadmissible credit. Therefore, no case has been made out by the adjudicating authority for levying penalty on the appellant, the same is set aside.

20. We now take up the second appeal for consideration. We notethat initially the show cause was issued for appropriation of the refund amount against the penalty and interest confirmed by order dated 05.08.2020. However, the Commissioner (Appeals) has remanded the matter back to the original authority to examine the claim from the point of view of unjust enrichment. As per the facts of this case we find that the appellant vide their letter dated 31.07.2013 had clearly indicated that the said amount had been paid after utilising CENVAT credit under protest. It is also broughtto our notice that the amount so deposited is recorded under the head –other current asset in Schedule 14 of the Balance Sheet. This substantiates the contention of the appellant that they had notrecovered this amount from the buyer of the product or any other person. We find that in several decisions, it has been held that the principal unjust enrichment does not apply to cases where duty hasbeen paid to protest. In this regard to find that in the case **Commissioner of Central Excise Vs. Pricol Ltd. [2015 (39) STR 190(Mad)],** the High Court of Madras held as follows:

–The first question of law, which is raised, relates to the plea of unjust enrichment and much emphasis is laid on the decision of the Supreme Court in *Mafatlal Industries* case [1997 (89) E.L.T. 247 (S.C.)]. Relevant portion of the order passed by the SupremeCourt in *Mafatlal Industries* case (supra) has been extracted in the grounds (b) and (c). There is no dispute with regard to the proposition of law as laid down by the Supreme Court. In the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at thetime of investigation, as has been recorded in the original proceedings itself. In this regard, it has to benoticed that it has been the consistent view taken bythe Courts that any

amount, that is deposited duringthe pendency of adjudication proceedings or investigation is in the nature of deposit made under protest and, therefore, the principles of unjust enrichment does not apply. The above said view has been reiterated by the High Court of Bombay in*Suvidhe Ltd.* v. *Union of India* - 1996 (82) E.L.T. 177(Bom.), and by the Gujarat High Court in *Commissioner of Customs* v. *Mahalaxmi Exports* - 2010 (258) E.L.T. 217 (Guj.), which has been followed in various cases in *Summerking Electricals (P) Ltd.* v. *CEGAT* - 1998 (102) E.L.T. 522 (All.),

Parle International Ltd. v. *Union of India* - 2001

(127) E.L.T. 329 (Guj.) and *Commissioner of CentralExcise, Chennai* v. *Calcutta Chemical Company Ltd.* -2001 (133) E.L.T. 278 (Mad.) and the said view has also been maintained by the Supreme Court in *Unionof India* v. *Suvidhe Ltd.* - 1997 (94) E.L.T. A159 (S.C.). There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the *first substantialquestion of law against the Revenue and in favour ofthe assessee*.

21. In view of the above discussions, we hold that unjust enrichment does not apply to the refund claim in the impugned appeal. On this basis alone we set-aside the impugned order.

22. Consequent to the discussions above, we decide the appeals in the following manner:

i. We allow the adjustment of the duty Rs.60,89,453/- against the demand for the period September 2012 to November 2012. The remaining demand is upheld.

ii. The penalty of Rs.15,00,000/- imposed on the appellantis set aside

iii. Unjust enrichment will not apply to refund claim where duty was paid under protest. Hence the refund isallowed.

The order in original no. JOD-EXCUS-000-COM-0017-20-21 is modified to the extent indicated above. Accordingly, we partially allow the Appeal No. 50305 of 2021. We set aside the Order in Appeal No. 182(CRM)CE/JDR/2021 dated 11.08.2021 and allow theAppeal No. 50554 of 2022.

(Pronounced in open Court on 30.11.2023)

(Dr. Rachna Gupta)Member (Judicial)

(Hemambika R. Priya)Member (Technical)

RM

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

DEFECT DIARY NO. 50617/2023

(Arising out of Order-in-Original No. 42/2022-CE dated 14.06.2022 passed by Additional Director General (Adjudication), Directorate General of GST Intelligence (Adjudication Cell), New Delhi – 110 066.)

M/s. Forward Minerals & Metals Pvt. Ltd. ….Appellant
205, Ajeet Bhawan, 4697/6, Ansari Road, Daryaganj,Delhi – 110 002.

Versus

Directorate General of GST Intelligence, …Respondent
(Adjudication Cell),
West Block – VIII, Wing – 6,2nd Floor, R.K. Puram,

New Delhi – 110 066.

APPEARANCE:

Shri Mayank Sharma, Advocate for the Appellant

Shri Rakesh Agarwal, Authorized Representative for the Department.

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DEFECT MISCELLANEOUS ORDER NO. 285/2023

DATE OF HEARING/DECISION: November 15, 2023

JUSTICE DILIP GUPTA

The appeal was filed in the office on March 28, 2023 without making the statutory pre-deposit contemplated under section 35F of the Central Excise Act, 1944[1].

[1] **Excise Act**

2. Accordingly, notices were sent to the appellant to make the pre-deposit. Initially when the matter was taken up, learned counsel for the appellant stated that there was some difficulty experienced by the appellant in making the pre-deposit on the portal of the department. On October 03, 2023 when the matter was last listed, the learned authorized representative appearing forthe department informed, on instructions that the representativeof the appellant had contacted the department and the correct procedure for making the pre-deposit was informed, but the appellant did not adopt the procedure. In such circumstances, the bench on October 03, 2023 adjourned the matter to November 15,2023 and gave last opportunity to the appellant to make the pre- deposit by adopting the correct procedure.

3. The correct procedure has also been notified for making the pre-deposit on the website of the Tribunal.

4. Today, Shri Mayank Sharma, learned counsel for the appellant has made a general statement that the appellant is still facing a problem in making the pre-deposit. He has, however, not been able to précisely point out the problem that was faced by the appellant. In fact, no application has been filed by the appellant and only a general statement has been made. It clearly transpires that the appellant was never genuinely interested in making the pre-deposit.

5. Section 35F of the Central Excise Act deals with deposit of a certain percentage of duty demanded or penalty imposed before filing appeal. It provides that the Tribunal shall not entertain any appeal unless the appellant has deposited 7.5% or 10% of the duty demanded or penalty imposed.

6. The Supreme Court in **Narayan Chandra Ghosh** vs. **UCO Bank and Others[2],** examined the provisions contained in section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 relating to pre depositin order to avail the remedy of appeal. The provisions are similar tothe provisions of section 35F of the Central Excise Act. The Supreme Court emphasised that when a Statue confers a right to appeal, conditions can be imposed for exercising of such a rightand unless the condition precedent for filing appeal is fulfilled, the appeal cannot be entertained. The Supreme Court, therefore, held that deposit under the second proviso to section 18(1) of the Act, being a condition precedent for preferring an appeal, the Appellate Tribunal erred in law in entertaining the appeal. The Supreme Court also held that the Appellate Tribunal could not have granted waiver of pre-deposit beyond the provisions of the Act. The relevant portion of the judgment of the Supreme Court is reproduced below:

"7. **Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the rightconferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less.** However, under the third proviso to the sub section, the Appellate Tribunal has the power to reduce theamount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to in the second proviso. **Thus, there is an absolute bar to entertainment of an appealunder Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity.**

8. It is well-settled that when a Statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind theobject of the Act, the conditions hedged in the said proviso cannot be said to be onerous. **Thus, we hold that the requirement of pre-deposit under**

sub-section (1) of Section 18 of the Act ismandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the Statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement.

9. The argument of learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, appeal could be entertained by the Appellate Tribunal without insisting on pre-deposit, is equally fallacious. Under the second proviso to sub- section (1) of Section 18 of the Act the amount of fifty per cent, which is required to be deposited by the borrower, is computed either with reference to the debt due from him as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less. Obviously, where the amount of debt is yet to be determined by the Debts Recovery Tribunal, the borrower, while preferring appeal, would be liable to deposit fifty per cent of the debt due from him as claimed by the secured creditors. **Therefore, the condition of pre-deposit being mandatory, a complete waiver of deposit by the appellant with the Appellate Tribunal, was beyond the provisions of the Act, as is evident from the second andthird provisos to the said Section.** At best, the Appellate Tribunal could have, after recording the reasons, reduced the amount of deposit of fifty per cent to an amount not less than twenty-five per cent of the debt referred to in the second proviso. **We are convinced that the order of the Appellate Tribunal, entertaining appellant's appeal without insisting on pre- deposit was clearly unsustainable and, therefore, thedecision of the High Court in setting aside the same cannot be flawed."**

7. The principles laid down in the aforesaid decision of theSupreme Court in **Narayan Chandra Ghosh** were reiterated by the Supreme Court in **Kotak Mahindra Bank Pvt. Limited** vs. **Ambuj A.Kasiwal & Ors.**[3]

8. In this connection, it will also be appropriate to refer to a decision of the Delhi High Court in **Dish TV India Limited** vs. **Union of India & Ors.**[4]**,** wherein the requirement of pre-deposit under section 129E of the Customs Act, 1962, which is pari-materia to section 35F of the Central Excise Act, came up for consideration. The High Court held that when the Statue itself has provided wavier of pre-deposit to the extent of 90% or 92.5% of the duty amount and has made it mandatory to deposit 7.5% or 10% of duty amount, as the case may be, the Courts cannot waivethis requirement of deposit. The observations of the Delhi High Court are as follows:

"7. Previously, prior to amendments of the statue, applications for wavier of the pre-deposit were being preferred. Several litigations have travelled up to the Hon'ble Supreme Court upon such applications for waiver of pre-deposit.

10. **In view of the aforesaid statutory provisions of the Act, it appears that the statue has now effected wavier of pre-deposit to the extent of 90% or 92.5% of the dutyamount and has made it mandatory to deposit 7.5% or 10%of the duty amount, as the case may be. It ought to be kept in mind that the relief is granted by the law itself. Courts cannot be more charitable than the law. When the provisions of the law are explicitly clear or where the provisions of law are absolutely unambiguous, such type of pre-deposits cannot be waived by the courts.**

13. In view of the amendment in the Act, especially Section129E thereof, there is no question whatsoever of the waiver of pre-deposit. As stated hereinabove, the statue itself has waived 90%

3. Civil Appeal No. 539 of 2021 decided on 16.02.20214. W.P. (C) 4960 of 2020 decided on 06.08.2020or 92.5% of the duty amount, as the case may be, assessed by theauthorities under the Customs Act, 1962. **The petitioner- assessee has to deposit only 7.5% or 10% (as the case maybe) of the duty assessed. Thus, there is no question offurther waiver of**

the amount which is required to be deposited under Section 129E of the Customs Act, 1962."

9. As the mandatory requirement has not been satisfied, the Bench is left with no option but to dismiss the appeal. The appeal is, accordingly, dismissed.

(Dictated and pronounced in open court.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAXAPPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH, COURT NO. I

Excise Appeal No. 51111 of 2019

[Arising out of the Order-in-Original No. 03-05/PR. COMMR./CEX/BPL-1/2019 dated 01/03/2019 passed by The Principal Commissioner CGST & Central Excise, Bhopal.]

M/s H.L. Passey Engineering Pvt. Ltd. **Appellant**
72-A, Industrial Area, Bhopal (M.P.) – 462 023.

VERSUS

Principal Commissioner, **Respondent**
Central Goods Service Tax & Central Excise
48, Administrative Area, Arera Hills, Hoshangabad Road Zone – II, Bhopal (Madhya Pradesh) – 462 011.

APPEARANCE

Shri J.M. Sharma, Consultant and Ms. Pooja Agarwal, C.A. – for the appellant.

Shri V.B. Jain, Authorized Representative (DR) – for the Respondent.

WITH

Excise Appeal No. 51302 of 2019

[Arising out of the Order-in-Original No. 03-05/PR. COMMR./CEX/BPL-1/2019 dated 01/03/2019 passed by The Principal Commissioner CGST & Central Excise, Bhopal.]

Principal Commissioner, **Appellant**
Central Goods Service Tax & Central Excise
48, Administrative Area, Arera Hills, Hoshangabad Road Zone – II, Bhopal (Madhya Pradesh) – 462 011.

VERSUS

M/s H.L. Passey Engineering Pvt. Ltd. **Respondent**
72-A, Industrial Area, Bhopal (M.P.) – 462 023.

APPEARANCE

Shri V.B. Jain, Authorized Representative (DR) – for the appellant.

Shri J.M. Sharma, Consultant and Ms. Pooja Agarwal, C.A. – for theRespondent.

CORAM : **HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENTHON'BLE SHRI C.L. MAHAR, MEMBER (TECHNICAL)**

FINAL ORDER NO. 50718/2020

DATE OF HEARING : 24/01/2020.DATE OF DECISION : 14/07/2020.

C.L. MAHAR :-

The brief facts of the matter are that the appellant M/s H.L.Passey Engineering Pvt. Ltd. is engaged in undertaking work of fabrication of steel structures in the factory and erection of the same at the site as per the purchase orders received by them from various oil companies for supply of canopy for various petrolpumps. The articles of Iron fabricated by the appellant are classifiable under the Chapter Heading No. 73089070 of theCentral Excise Tariff Act, 1985. The appellant before undertaking manufacture of canopy, first visits the petrol pump site andprepares a detailed design as per specifications provided by the oil companies and then accordingly manufactures certain structures and assemblies for erection of the complete canopy at the site of the petrol pump. The canopy which is manufactured bythe appellant contains not only the components fabricated at the factory site but certain other bought items also and cleared from the factory in knocked down condition through trucks for further erection, welding and affixing of the same to earth is done at the site.

2. It has been the contention of the Department that the appellant had cleared the canopies in knocked down condition comprising of certain structural parts manufactured at the factoryand certain bought out items and the canopies were sent for assembly and erection at the site of the petrol pumps of various oil companies. It has been the contention of the department that all parts of the canopy system presented together at the customers site were integral part of the entire canopy systemand together constituted the term ―pre-fabricated canopy‖ supplied by the appellant to their buyers. It has further been added that so called bought out items were not accessories but integral components of the canopy without which the identity of the canopy cannot be acquired and the canopy cannot be assembled and erected at site.

3. Accordingly, the Department has issued three show cause notices details of which are given here below, primarily on following grounds :-

(i) That the pre-fabricated canopies supplied by the appellant to oil companies have a composite item in their contract for supply of canopies/structures and the subsequent erection of same at site. The department is of the view that the transaction valueof the pre-fabricated canopies/structures should be taken by deducting the cost of erection, installation and commissioning of these canopies. Thus the goodscleared have not been valued as per the provisions ofCentral Excise Valuation Rules, 2000. In the subsequent show cause notices except the show cause notice dated 21 December 2015, it has also been contended that benefit of the exemption Notification No. 8/1996-CE dated 23 July 1996 and Notification No. 12/2012-CE dated 17 March 2012has wrongly been availed by the appellant;

(ii) The appellant has availed Cenvat credit on all the inputs which have gone in manufacture of both dutiable as well as non-dutiable goods. However, no separate account for receipt, consumption andinventory have been maintained and, therefore, the appellant has been asked to reverse the Cenvat creditas per the provisions of Rule 6 (3) (1) of the Cenvat Credit Rules, 2004.

4. In total three show cause notices came to be issued. The detail are given here below :-

Sl. No.	SCN No. & Date	Period	Amount Central Excise duty(Rs.)	Involved An am ount	Cenvat credit (Rs.)

				under Rule 6 (3) (Rs.)	
1.	23/COMMR/CEX/ADJ/ BPL-1/2015 dated	April, 2010 to	4,21,80,793/-	1,86,20,036/-	35,01,685/-
	28/04/2015	20th February 2015			
2.	03/PR. COMMR/CEX/ ADJ/BPL-1/2016 dated 02/02/2016	21st Feb, 2015 to 30th Nov 2015	1,28,73,845/-	78,67,799/-	---
3.	21/COMMR/CEX/ADJ/ BPL-1/2016 dated30/12/2016	1st Dec, 2015 to 31st Oct 2016	2,08,91,880/-	61,12,920/-	---

5. These show cause notices were adjudicated at the firststage of adjudication vide following order-in-originals :-

Sl. No.	Order-in-Original No.& Date	Period	Amount Central Excise duty confirmed (Rs.)	Involved Amount under Rule 6 (3) confirmed(Rs.)	Demand dropped & allowed Cenvat credit (Rs.)
1.	24/PR. COMMR/CEX/ ADJ/BPL-1/2015 dated 21/12/2015	April, 2010 to 24th February 2015	4,21,80,793/-	1,86,20,036/-	35,01,685/-
2.	01/PC/CEX/ADJ/BPL-1/2017 dated 31/01/2017	21st Feb, 2015 to 30th Nov 2015	1,28,73,845/-	78,67,799/-	---
3.	12/COMMR/CEX/ADJ/ BPL-1/2018 dated 27/04/2018	1st Dec, 2015 to	2,08,91,880/-	61,12,920/-	---

		31st Oct 2016			

6. The appellant had come before this Tribunal in the first round of the litigation and the Tribunal by its final order dated 7 May 2018 and final order dated 13 July 2018 remanded the matter for a fresh adjudication. The observations made by the Tribunal in the final orders, are as follows :-

Final Order dated 07/05/2018 :-

–3. After hearing both the parties and on perusal of record, it appears that up to August 2014, the appellant had paid only theduty on Canopy fabricated but after 1.9.2014, the appellant has claimed exemption.

4. During the course of arguments, the ld. Counsel was unable to tell the reason why the exemption was claimed after 1.9.2014. Inthese circumstances, we set aside the impugned order and remand the matter to the original authority to decide the issue de novo but by providing the reasonable opportunity to the appellant.

5. The second grievance of the appellant is pertaining to theCenvat credit.

6. After hearing both the parties and on perusal of record, it appears that para 15 of the impugned order, the adjudicatingauthority has observed that :

–Copy of trial balance as on 30.11.2012 was submitted to audit and the same is on records. This very clearly showsthat they are maintaining separate accounts for differentactivities and are quite aware of the provisions of CENVATCredit Rules, 2004‖.

7. On the other hand, in para 29.6, the adjudicating authorityobserved that:

–The appellant had opted not to maintain separate account of inputs in respect of the two categories of clearances, wouldbe liable to pay the amount in terms of Rule 6(3)(b) and there can be no other interpretation on the admitted facts as above.‖

8. From the above, it appears that the adjudicating authorityhas taken the conflicting views where it is stated in one para that accounts were maintained and another para that accounts were not maintained. When it is so then we set aside the impugned order in this regard and remand the matter to the adjudicating authority to decide the issue de novo but after providing reasonable opportunity to the appellant, with the liberty to file fresh evidence, as per law‖.

9. In the result, impugned order is set aside and both theappeals are allowed by way of remand‖.

Final Order dated 13/07/2018 :-

–3. From the preceding order of this Tribunal in appellant‘s own case being Final Order No. 51718-51719/2018 dated 7th May 2018, this Tribunal found that there is conflict in the facts as recorded in the order-in-original impugned in the earlier appeal of the assessee. Accordingly, the matter was remanded with direction to the adjudicating authority to decide the issue de-novo after providing reasonable opportunity of hearing to the appellant with liberty to filefresh evidence, as per law. As the issue in this appeal in similar to the issue in the precedent appeal, which have already been disposed of by way of remand, we deem it just and proper to allow this appeal by way of remand to the adjudicating authority. We further direct appellant – assessee to file the representation in replyto the show cause notice within a

period of 60 days from the date ofreceipt of the copy of this order and then to appear before the adjudicating authority and seek opportunity of hearing. The learned Counsel for the appellant – assessee undertakes that they will not seek unnecessary adjournment in the matter and cooperate in the adjudication proceedings. Accordingly this appeal is allowed by way of remand.‖

7. In view of the above directions of this Tribunal, the matter was taken up by the Commissioner for adjudication and vide his order-in-original dated 01/03/2019 decided the matter afresh.
The operative portion of the above-mentioned order-in-original isreproduced below :-

"A. In respect of the Show cause Notice No. 23/COMMR/CEX/ADJ/BPL-I/2015 dated 28.04.2015

(i) I confirm that the pre-fabricated canopy structural [Tariff Heading 73089010) manufactured in the factory (off site fabrication) are not entitled for exemption provided under Notification No. 8/96—C.E., dated 23-7-1996 to Notification No. 12/2012-C.E., dated 17-3~2012;

(ii) I confirm the demand of Central Excise Duty amounting toRs. 59,33,969/- [Rupees Fifty Nine lakh Thirty Three Thousand NineHundred Sixty Nine only) (including Cess) out of total demand ofRs. 6,08,01,009/- for the period April' 2010 to 2041 Feb 2015 as proposed in the notice and is ordered to be recovered from the noticee under Section 1 1A(1) of the Central Excise Act, 1944. The noticee is directed to pay the same forthwith.

(iii) I confirm the demand of interest at appropriate rate, on the amount at Sr. No. A(i) above, from the relevant date till the date of actual payment of Central Excise duty, under Section 11AA of the Central Excise Act, 1944. The noticee is directed to pay the same forthwith.

(iv) I impose a penalty of Rs. 59,33,969/- (Rupees Fifty Nine lakhThirty Three Thousand Nine Hundred Sixty Nine only) on Noticee under Section 11AC of the Act readwith Rule 25 of the CentralExcise Rules, 2002. The noticee is directed to pay the same forthwith.

As per proviso to Section 11 AC (l)(a)of Central Excise Act 1944, thenoticee is also given an option to avail the opportunity of reduced penalty as under :

if duty as determined above and interest payable thereon under section 11AA is paid within 30 days of the date of communication of this order, the amount of penalty shall be equal to 25% of the penalty so imposed shall be payable, provided that such reduced penalty is also paid within 30 days of the date of communication of such order.

(v) The demand of Cenvat credit amounting to Rs 1,86,20,036/— (Rs. One Crore Eighty Six Lakhs Twenty Thousand Thirty Six only), being unsustainable, is dropped.

B. In respect of the Show cause Notice No. 03 I Pr. Commr. / CEXI ADJ /BPL-I/2016 dated 02.02.2016

(i) I confirm that the pre-fabricated canopy structural (Tariff Heading 73089010) manufactured in the factory (off site fabrication) are not entitled for exemption provided under Notification No. 8/96-C.E., dated 23-_?-1996 to Notification No.12/2012-C.E., dated 17-3-2012;
(ii) I confirm the demand of Central Excise Duty amounting to Rs. 70,55,671 /- (Rupees Seventy lakh Fifty Five Thousand Six Hundred Seventy One only) (including Cess) out of total demand of Rs. 2,07,41,644/- for the period 21— Feb 2015 to Nov' 2015 as proposed in the notice and is ordered to be recovered from the noticee under Section l1A(1) of the Central

Excise Act, 1944. The noticee is directed to pay the same forthwith.

(iii) I confrm the demand of interest at appropriate rate, on the amount at Sr. No. B(i) above, from the relevant date till the date of actual payment of Central Excise duty, under Section IIAA of the Central Excise Act, 1944. The noticee is directed to pay the same forthwith.

(iv) I impose a penalty of Rs. 7O,55,671/- (Rupees Seventy lakh Fifty Five Thousand Six Hundred Seventy One only) on Noticeeunder Section IIAC of the Act read with Rule 25 of the Central Excise Rules, 2002. The noticee is directed to pay the S8l1'lCforthwith.

As per proviso to Section 11 AC (1](a)of Central Excise Act 1944,the noticee is also given an option to avail the opportunity ofreduced penalty as under :

if duty as determined above and interest payable thereon under section IIAA is paid within 30 days of the date of communication of this order, the amount of penalty shall be equal to 25% of the penalty so imposed shall be payable, provided that such reduced penalty is also paid within 30 days of the date of communication of such order.

(v) The demand of Cenvat credit amounting to Rs 78,67,'799/- (Rs. Seventy Eight Lakhs Sixty Seven Thousand Seven Hundred Ninety Nine only], being unsustainable, is dropped.

C. In respect of the Show cause Notice No. 21/commr/CEX/BPL-I/2016 dated 30.12.2016

(i) I confirm that the pre-fabricated canopy structural (Tariff Heading 73089010) manufactured in the factory (off site fabrication) are not entitled for exemption provided under Notification No. 8/96-C.E., dated 23-7-1996 to Notification No. 12/2012-C.E., dated 17-3-2012;

(ii) I confirm the demand of Central Excise Duty amounting to Rs. 93,85,640 /- (Rupees Ninety Three Lakh Eighty Five Thousand Six Hundred Forty only) (including Cess) out of the total demand of Rs.2,70,04,800/- for the period Dec‘2015 to Oct‘2016 as proposedin the notice and is ordered to be recovered from the noticee under Section 11A(l) of the Central Excise Act, 1944. The noticee isdirected to pay the same forthwith.

(iii) I confirm the demand of interest at appropriate rate, on the amount at Sr. No.C (i) above, from the relevant date till the date of actual payment of Central Excise duty, under Section IIAA of the Central Excise Act, I944. The noticee is directed to pay the same forthwith.

(iv) I impose a penalty of Rs. 93,85,640/- (Rupees Ninety Three Lakh Eighty Five Thousand Six Hundred Forty only] on Noticee under Section 11AC of the Act readwith Rule 25 of the CentralExcise Rules, 2002. The noticee is directed to pay the same forthwith.

As per proviso to Section 11-AC (l)(a)of Central Excise Act 1944,the noticee is also given an option to avail the opportunity ofreduced penalty as under :

if duty as determined above and interest payable thereon under section 11AA is paid within 30 days of the date of communication ofthis order, the amount of penalty shall be equal to 25% of the penalty so imposed shall be payable, provided that such reduced penalty is also paid within 30 days of the date of communication of such order.

(v) The demand of Cenvat credit amounting to Rs 61,12,920/- [Rs. Sixty One Lakhs Twelve Thousand Nine Hundred Twenty only], being unsustainable, is dropped.

8. It can be seen from the above orders that the centralexcise duty has been confirmed by the Adjudicating Authority by denying the benefit of Notification No. 8/1996-CE dated 23 July 1996 and Notification No. 12/2012-CE dated 17 March 2012 tothe appellant. However, the demand of the reversal of the Cenvatcredit under Rule 6 (3) (1) of the Cenvat Credit Rules, 2004 has been dropped by the Adjudicating Authority.

9. Learned Advocate contended that benefit of the NotificationNo. 12/2012-CE was available to the appellant as fabrication works undertaken at the site have specifically been exempted from levy of central excise duty. The learned Advocate has taken us to the contents of the notification and the clarifications issued by the CBEC on the same and has claimed that as per theclarification issued by the CBEC vide Circular No. 1036/224/2016-CX. dated 06 July 2016, the fabrication work undertaken at the factory premises (away from site) amounts to work done at site which makes them entitled for exemption Notification No. 12/2012 in terms of the conditions of the exemption notification and as per terms of contract entered by them with various oil companies.

10. We have also heard learned Departmental Representative who has vehemently supported the impugned order-in-original.

11. Before proceeding in the matter, it will be relevant to havea glance at the relevant provisions of the notification which have been claimed by the appellant for availing exemption from the central excise duty :-

–Notification No. 3/2005-C.E. dated 24/02/2005

64.	7308	All goods fabricated at site of work for use in construction work at such site	Ni l

Notification No. 12/2012-CE dated 17/03/2012

206	7305 or 7308	All goods fabricated at site of work for use in construction work at such site	Nil	-

12. It can be seen that the above notification was primarily for construction activity undertaken at site under variousinfrastructure projects such as roads, flyovers, bridges etc. The appellant is having an independent manufacturing unit at Bhopal where the appellant is carrying out fabrication and manufacturingactivity. The pre-fabricated structures classifiable under Central Excise Tariff Heading 73089010 are being taken in the CKD/SKD condition to different locations all over India. Manufacturing is theprimary work undertaken at the factory of the appellant and the pre-fabricated structures are only erected, installed and commissioned at the site of the various petrol pumps. So far as applicability of the Notification No. 12/2012-CE is concerned, the construction work of a road or flyover is being primarily undertaken at the site and only some components, blocks are manufactured by the contractor at different site. In that case the benefit of the Notification No. 12/2012-CE is available. However, in case of the appellant, the primary activity is of manufacturing and fabrication and then only goods are being taken for assembly, erection or commissioning at a given petrol pump. We are of the view that by no stretch of imagination, the benefit of Notification No. 12/2012-CE can be extended to a manufacturing activity which is being undertaken at a factory and thereafter the fully manufactured pre-fabricated structures are taken in theform of the CKD/SKD condition for installation at the given site.

13. In view of above, we find no force in the arguments advanced by the learned Advocate for allowing them the benefitof Notification No. 12/2012-CE dated 17/03/2012 as well as previous Notification No. 3/2005-CE dated 24/02/2005.Accordingly, we find that there is no merit in the appeal of the appellant.

14. So far as the appeal filed by the Department is concerned, the only ground on which the appeal has been filed by theDepartment is that the Adjudicating Authority erred in holding that there is no allegation in the show cause notice that the assessee/respondent was also availing Cenvat credit on the goods used for exempted goods. It has further been submitted that the Adjudicating Authority was wrong in holding that the figures/amounts/description mentioned in the trial balance forthe relevant period do not show the amount of the Cenvat credit availed by the assessee/respondent on purchases of raw materialused in exempted goods. It has also been contended by the Department that Cenvat credit availed by the assessee/ respondent was available only for the list containing invoice numbers and date, amount of Cenvat credit availed on inputs produced before audit officers and, therefore, it was wrong on the part of the Adjudicating Authority to hold that separate records/accounts were maintained by the respondent/assessee. This was a substantial amount of demand has been dropped.

15. It is seen that the Adjudicating Authority has gone in detail on this subject and in paragraph 57 of the impugned order has discussed in the financial statement of the company and it is onlyafter a meticulous perusal of the trial balance and other financial details that the Adjudicating Authority reached conclusion that the respondent/assessee had maintained a separate record with regard to inputs which have gone in the manufacture of non- taxable goods/services. The Department has not adduced any concrete evidence to contradict the findings given by the Adjudicating Authority. There is, therefore, no substance in the appeal filed by the Department.

16. Thus, the appeal filed by the Department is dismissed.

17. In view of above findings, both the appeals filed by theappellant as well as by the Department are dismissed.

(Order pronounced in open court on 14/07/2020.)

(Justice Dilip Gupta)
President

(C.L. Mahar)Member (Technical)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH, COURT NO. 1

EXCISE APPEAL NO. 51375 OF 2018

[Arising out of Order-in-Original No. JAI-EXCUS-000-COM-24-17 dated 30.11.2017 passed by the Commissioner of CGST and Central Excise, Jaipur]

M/S DINESH IRRIGATION PVT LTD **Appellant**
86-B, and 86-B-II Industrial Area, Jhotwara, Jaipur

Vs.

COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX, CENTRAL EXCISE- JAIPUR **Respondent**

NCRB, Statue Circle, C-Scheme Jaipur

Appearance:

Present for the Appellant : Shri Jatin Mahajan, Advocate Present for the Respondent: Shri Rakesh Agarwal, Authorised Representative

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50003/2024

Date of Hearing : 19/10/2023 Date of Decision: 03/01/2024

P V SUBBA RAO

M/s. Dinesh Irrigation Pvt. Ltd. Jaipur[1] filed this appeal to assail the Order-in-Original dated 30.11.2017[2] passed by the Commissioner of CGST & Central Excise, Jaipur.

2. A Show Cause Notice[3] dated 30.5.2012 was issued to the appellant, which was initially decided by the Commissioner by Order dated 30.1.2014 and on appeal, this Tribunal by Final Order dated 26.5.2017 remanded the matter to the Commissioner with some directions. Thereupon, the impugned order was passed. Aggrieved, the appellant filed this appeal.

3. We have heard Shri Jatin Mahajan, learned counsel for the appellant and Shri Rakesh Agarwal, learned authorised representative for the Revenue and perused the records.

4. The appellant manufactures PVC pipes, HDPE Coils and Sprinkler irrigation systems and some of its goods were exempted and others were dutiable. Its records for the period April 2007 to March 2009 were audited and based on the audit objection, the SCN was issued which culminated in the impugned order. An amount of Rs. 1,21,20,085 was demanded in the impugned order, being 10% of the value of the exempted goods cleared by the appellant under Rule 6(3) of the Cenvat Credit Rules, 2004[4] on the ground that the appellant had failed to maintain separate records of the inputs and input services used in the manufacture of dutiable and exempted products.

5. According to the appellant, it had, indeed maintained such records. The only point of dispute is CENVAT credit of Rs. 1,74,190/- on the Service Tax paid on the insurance services

which it could not vivisect into the dutiable and exempted products as insurance was a common service. Learned counsel for the appellant submits that to be on the safe side, the appellant reversed this entire amount of CENVAT credit of Rs. 1,74,190/- which it had taken on the service tax paid on insurance services.

6. Learned authorised representative supports the impugned order.

7. Having considered both sides, we find that once the disputed CENVAT credit on the insurance service which was used both for dutiable and exempted goods has been reversed, nothing survives in the demand which is the assailed in this appeal because the case of the Revenue is that the appellant had taken CENVAT credit on common input services and had not maintained separate accounts and this credit has already been reversed.

8. In view of the above, the appeal is allowed and the impugned order is set aside with consequential relief, if any, to the appellant.

[Order pronounced on **03.01.2024**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

EXCISE CONDONATION OF DELAY APPLICATION NO. 50658 OF 2023

IN

EXCISE DEFECT DIARY NO. 51455 OF 2023

(Arising out of Order-in-Appeal No. 6-8/CE/DLH/2023 dated 09.01.2023 passed by the Commissioner (Appeals-I) Central Goods & Service Tax, Delhi)

Progressive Alloys (India) Pvt. Ltd. **....** **Appellant**
307, Express Tower

Azadpur Commercial Complex DELHI – 110 033

VERSUS

Commissioner of Central Goods & Service Tax **……** **Respondent**
CR Building, IP Estate NEW DELHI – 110 002

APPEARANCE:

Shri Rajat Mishra, Advocate for the Appellant

Shri Rakesh Agarwal, Authorised Representative of the Respondent

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

MISC. ORDER NO. 02/2024

DATE OF HEARING/DECISION : January 01, 2024

JUSTICE DILIP GUPTA :

This appeal is directed against the order dated January 09, 2023, which the appellant claims was served on February 11, 2023. Though the appeal should have been filed before May 10, 2023, but it was filed only on July 11, 2023 with a delay of sixty days.

2. Learned counsel for the applicant has stressed upon the averments made in the delay condonation application.

3. Shri Rakesh Agarwal, learned authorized representative appearing for the Department has submitted that proper explanation for the delay has not been given and, therefore, the application should have been rejected.

4. The delay condonation application states that the mother-in-law of the learned counsel who had to file the appeal was hospitalized from May 04 to May 19, 2023. If that be so, the appeal could still have been filed soon after May 19, 2023, but it was filed on July 11, 2023. The delay after May 19, 2023 has also not been explained in the application. However, taking into account the facts and circumstances of the case and in the interest of justice, we condone the delay but on imposing a cost of Rs. 2,000/- (Rupees Two Thousand only) upon the applicant, which the applicant shall deposit within a period of four weeks from today in the Prime Minister's CARES Fund.

5. The matter may now be listed before the Bench with the office report on **February 05, 2024**.

(Dictated & pronounced in open court)

(JUSTICE DILIP GUPTA)

PRESIDENT

(HEMAMBIKA R. PRIYA) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 52756 of 2019

(Arising out of Order-in-Appeal No. 108/Central Tax/Appl-II/Delhi/2018 dated 15.11.2019 passed by the Commissioner of Central Tax, Appeals-II, Delhi)

Principal Commissioner of Central

Goods & Service Tax, New Delhi ..…Appellant

3rd Floor, EIL (Annexe Building), Bhikaji Cama Place,Delhi- South Commissionerate , New Delhi- 110066

VERSUS

M/s. Som Global Zarda Pvt. Ltd. .....Respondent
Plot No. B-101, Naraina Industrial Area,Phase-I, New Delhi-110028

APPEARANCE:

Shri Sanjay Kumar Singh, Authorized Representative of the DepartmentNone for the Respondent

CORAM :

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION: August 21, 2023

FINAL ORDER NO. 51138/2023

JUSTICE DILIP GUPTA

The order dated November 15, 2019 passed by the Commissioner of Central Tax (Appeals-II), Delhi[1] holding that though National Calamity Contingent Duty[2] is leviable on tobacco products during the Goods and Service Tax regime, but in view of the Notification dated June 30, 2017 and judgments of the Supreme Court in **Bajaj Auto Limited** vs. **Union of India & Ors.**[3] and **HeroMotocorp Ltd** vs. **CCECU**[4], the said duty would be exempted on the tobacco products. The refund claimed by the appellant has, accordingly, been allowed.

2. Case has been called out but no one has appeared on behalf ofthe respondent though Shri Sanjay Kumar Singh, learned authorizedrepresentative appearing for the department has appeared. The ordersheet reveals that despite service of notice upon the respondent, the respondent has not been appearing on the last previous occasions. It is, therefore, considered appropriate to decide this appeal on merits.

3. Section 136 of the Finance Act, 2001 provides for imposition ofNCCD. It is reproduced

below:

"**136. National Calamity Contingent Duty.** – (1) In the case of goods specified in the Seventh Schedule, being goods manufactured or produced, there shall be levied and collectedfor the purposes of the Union, by surcharge, a duty of excise, tobe called the National Calamity Contingent Duty (hereinafter referred to as the National Calamity Duty), at the rates specified in the said Schedule;

(2) The National Calamity Duty chargeable on the goods specified in the Seventh Schedule shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force;

4. The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating torefunds and exemptions from duties and imposition of penalty, shall, as far as may be, apply in relation to the levy andcollection of the National Calamity Duty leviable under thissection in respect of the goods specified in the Seventh Schedule as they apply in relation to the levy and collection of the duties of excise on such goods under that Act or those rules,as the case may be."

5. The respondent initially deposited NCCD for the months of March 2018 and April 2018, but did not pay NCCD from May 2018 onwards believing that it was not payable. However, the jurisdictional Superintendent, by a letter dated 18.03.2019, requested the respondent to deposit NCCD. The respondent submitted that it was not required to deposit NCCD but it also deposited the amount under protest for the months from May 2018 to March 2019. The respondent also deposited interest on the delayed payment of NCCD. The amount of NCCD paid for March and April 2018 is Rs. 67,01,613/- while an amount of Rs. 3,88,47,392/- was paid towards NCCD for the months of May 2018 to March 2019.

6. Subsequently, in view of the judgment of the Supreme Court in **Bajaj Auto**, the respondent claimed refund of the amount of NCCD paid with interest.

7. The adjudicating authority found that the refund claimed for the months of March and April 2018 was barred by limitation and forthe remaining refund claim, held that the respondent would not be entitled to refund, since the NCCD was payable.

8. Feeling aggrieved, the respondent filed an appeal before the Commissioner (Appeals) which appeal has been allowed in part by the impugned order in view of the decision of the Supreme Court in **Bajaj Auto.**

9. The Commissioner (Appeals) has placed reliance upon this decision of the Supreme Court in **Bajaj Auto** rendered by twoHon'ble Judges, but learned authorized representative appearing for the department has submitted that in view of the subsequent decision of the Supreme Court in **M/s. Unicorn Industries** vs. **Union of India**[5] decided by a Bench of three Hon'ble Judges, NCCD would be leviable under the GST Regime. The Supreme Court, in **Unicorn** examined this matter at length and the relevantparagraphs are reproduced below:

"23. The submission raised on behalf of appellant is that the duty and cess in the nature of excise duty cannot be realized, particularly in view of the provisions in the Finance Acts of 2001, 2004 and 2007 relating to refund and exemption, which have made applicable, the provisions of the Act of 1944 and theRules made thereunder relating to exemption. **As such, inview of the decisions of Division Bench of this Court in SDNutrients Private Limited (supra) and Bajaj Auto Limited (supra), the decision of the High Court deserves to be setaside**.

10. **In Bajaj Auto Limited (supra), a Division Bench of thisCourt considered the question of liability towards NCCD, education cess and secondary and higher education cess on manufacturing establishment which is exempted from payment of central excise duty under the Act of 1944**. Thematter arose from the State of Uttarakhand; an Office Memorandum dated 7-1-2003 was issued, by which 100 percent outright excise duty exemption for ten years was granted from the date of commencement of the commercial production. Notification dated 10-6-2003 issued under Section 5A has been reproduced in the decision mentioned above.

11. The Division Bench of this Court has rendered both the above decisions. **The most unfortunate part is that thebinding decision of Larger Bench consisting of three- Judges of this Court in Union of India v. Modi. Rubber Limited**[6]**, dealing with the similar issue, was not placed for consideration before this Court when the abovementioned decisions came to be rendered**.

33. The assessee Modi Rubber Limited (supra) claimed that in view of the notification dated 1-8-1974, assessee was exemptedfrom payment not only in respect of basic excise duty levied under the Central Excises and Salt Act, 1944, but also in respectof special duty of excise levied under the relevant Finance Acts, because the language used in the notification was not restrictiveand it referred generally to 'duty of excise' without any qualification, therefore, it covered all duties of excise whether levied under the Central Excises and Salt Act, 1944 or under any other Central enactments. The dispute pertained to the period from November, 1979 to October, 1982.

35. The question arose for consideration before this Court as to what is the real import of the expression 'duty of excise' in the notifications dated 1-8-1974 and 1-3-1981 and whether it includes the duties of excise leviable not only under the Central Excises and Salt Act, 1944, but also under any other enactment.

40. Notification dated 9-9-2003 issued in the present case makes it clear that exemption was granted under Section 5A of the Act of 1944, concerning additional duties under the Act of 1957 and additional duties o excise under the Act of 1978. It was questioned on the ground that it provided for limited exemption only under the Acts referred to therein. There is no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have included other duties also. The notification couldnot have contemplated the inclusion of education cess andsecondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the duty of excise. The duty on NCCD, education cess and secondary and higher education cess are in the nature of additional excise duty and it would not mean that exemption notification dated 9-9-2003

covers them particularly when there is no reference to thenotification issued under the Finance Act, 2001. There was no question of granting exemption related to cess was not in vogueat the relevant time imposed later on vide Section 91 of the Act of 2004 and Section 126 of the Act of 2007. The provisions of Act of 1944 and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the sourceof power to exempt the NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. **The High Court was right in relying upon the decision of three-Judge Bench of this Court in Modi Rubber Limited (supra), which has been followed by another three-Judge Bench of this Court in Rita Textiles Private Limited (supra)**.

42. **The decision of Larger Bench is binding on the Smaller Bench** has been held by this Court in several decisionssuch as Mahanagar Railway Vendors' Union v. Union of India & Ors.[7], State of Maharashtra & Ors. V. Mana Adim Jamat Mandal[8]and State of Uttar Pradesh & Ors. V. Ajay Kumar Sharma & Ors.[9], The decision rendered in ignorance of a binding precedent and/or ignorance of a provision has been held to be per incuriam in Subhash Chandra & Ors. v. Delhi Subordinate Services Selection Board & Ors.[10], , Dashrath Rupsingh Rathod v. State of Maharashtra[11], and Central Board of Dawoodi Bohra Community & Ors. v. State of Maharashtra & Ors.[12]. It was held

that a smaller bench could not disagree with the view taken bya Larger Bench.

43. **Thus, it is clear that before the Division Bench deciding SRD Nutrients Private Limited and Baja AutoLimited (supra), the previous binding decisions of three- Judge Bench in Modi Rubber (supra) and Rita Textiles Private Limited (supra) were not placed for consideration**. Thus, the decisions in SRD Nutrients Private Limited and Bajaj Auto Limited (supra) are clearly per incuriam. **The decisions in Modi Rubber (supra) and Rita Textiles** Private Limited (supra) are **binding on us being of Coordinate Bench, and we respectfully follow them**. We did not find any ground to take a different view."

12. As the decision of the Commissioner (Appeals) is based solely on the decision rendered by the Supreme Court in **Bajaj Auto,**which decision as noticed above, has been held to be per incuriam and the Supreme Court has held that simply because one kind of duty is

exempted, other kinds of duties automatically fall cannot be accepted. Therefore, NCCD shall continue to be levied despite the Notification exempting the payment of excise duty.

13. The impugned order dated November 15, 2019 passed by the Commissioner (Appeals), therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

EXCISE APPEAL NO. 52882 OF 2019
(Arising out of Order in Appeal No. 255 (CRM)/CE/JPR/2019 dated 11.09.2019 passed by Commissioner (Appeals) Central Excise & Central Goods, Service Tax, Jaipur)

M/s. Honda Motorcycle And Scooter **...Appellant**

India Private Limited
Plot No. 2 (D), 2 (E), 2 (F) And 2 (G),

Tapukara, Industrial Area, Bhiwadi Alwar

Versus

Commissioner of Central Excise,

Goods, Service Tax, Alwar ..... Respondent

A Block Surya Nagar Alwar, Rajasthan-301001

APPEARANCE:

Shri D. K. Rana and Shri Akshay Agarwal, Advocates for the appellantShri Bhagwat Dyal, Authorized Representative for the Respondent

Coram:
HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)

HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 18.12.2023DATE OF DECISION: 07.03.2024

FINAL ORDER NO 55123/2024DR. RACHNA GUPTA

The appellant is engaged in the manufacture of Motor Cycle, Scooters and parts thereof and is also availing cenvat credit of duty paid in terms of Cenvat Credit Rules, 2004 (hereinafter referred as CCR, 2004). During the test check of the records of the appellant by the Audit Team, Jaipur, it was noticed that the appellant has availed the input service credit on service tax paid on Inland Haulage Charges/Transport Charges on the basis of invoices issued to M/sTiger Logistic India, during the period 2016-2017 for an amount of Rs. 87,88,542/-. The Department alleged that the appellant is not eligible to avail said service tax credit and proposed the same to be inadmissible to the appellant. Similar, ineligibility of the said credit was alleged for the period from 2013 to 2016 and also for the period 2017-2018 upto June 2017. Resultantly, vide Show Cause Notice No. 827 dated 02.05.2018, Cenvat Credit of Rs. 1,79,61,711/- during the period from 2013-14 to 2017-18 (upto June 2017) was proposed tobe recovered from the appellant alongwith the interest and the proportionate penalties. The said proposal was confirmed initially vide the order-in-original No. 20/18-19 dated 31.10.2018. The appeal against the said order has been rejected vide Order-in-Appeal No. 255/19 dated 11.09.2019. Still being aggrieved, the appellant is before this Tribunal.

2. We have heard Shri D. K. Rana and Shri Akshay Agarwal,Advocates for the appellant and Shri Bhagwat Dyal, Authorized Representative for the Department.

3. Learned Counsel for the appellant has mentioned that the appellant clears the manufactured goods in the domestic as well as in the export market. The export goods are cleared with the term of delivery as free on board (FOB). The invoices raised by the appellant on overseas customers evidences the said term of deliveries. Thus, itis clear that the appellant

gets inland haulage charges fortransportation of export goods from inland container freight station (ICD) to sea port of loading and avails the credit of service tax paidon said Inland haulage charges.

4. While impressing upon the definition of Input Service which are eligible for availment of cenvat credit, as defined under Rule 2(l) of CCR, 2004, Learned Counsel for the appellant has mentioned that to qualify as an input service, the service under consideration must fall within meaning clause or inclusive clause and it should be outside the exclusion clause of the definition under Rule 2(l) of CCR, 2004.Decision of Larger Bench of this Tribunal in the case of **ABB Ltd. vs. CCE, reported as 2009 (15) STR 23 (Tri.-LB.)** is relied upon to impress that the assessee shall be entitled to credit if it satisfies from the above clauses except the exclusion clause. It is further mentioned that the expression 'in relation to' is broad expression which pre supposes the existence of another subject matter. It is an expression of expansion decision of Hon'ble Supreme Court in the case of **System's Ltd. Vs. Union of India 1988 (36) ELT 201 (S.C.)** has been relied upon.

5. Learned Counsel further mentioned that the Revenue has confirmed the demand of cenvat credit on the basis that the impugned service i.e. services of transporting the goods from ICD Garhi Harsaru (Haryana) to Sea Port (Pipavav), are the servicesavailed beyond the place of removal. It is mentioned that the Sea Port of export is the place of removal, hence, ICD Garhi Harsaru is wrongly held to be the place of removal. The definition of place of removal sub-clause 3 thereof relates to any other place from where the goods are sold, after they are cleared from the factory. It is submitted that the transfer of property in goods forms an essential element of sale i.e. the transfer of interest of seller in the goods tothe buyers, hence the phrase 'to be sold' when is used in relation to aplace, refers to the place where the transfer of property of goods occurred. It is submitted that since it is port of shipment which is the place of removal, hence transportation charges till the port of shipment (Pipavav) are the charges for the services upto the place of removal entitling appellant to take credit of service tax paid on those services. Learned Counsel has relied upon various Circulars issued by the Department i.e. the Master Circular No. 97/8/2007-ST dated23.08.2007 clarifying the points where the sale of good is to be considered to has been undertaken and Circular No. 988/12/2014-CX dated 20.10.2014 clarifying that the place where the sale takes place is the place of removal.

6. It is further submitted that the delivery/export of the goods in the case in hand was on FOB basis. The guidelines issued by international chambers of commerce (Incoterms) were issued in 1936to standardise and harmonize trade taking place across international borders. As per the Incoterms term 'FOB' indicates that it is the seller's responsibilities to bear all costs for transporting the goods till the port of export and as well as to clear the goods for export. Since exporter exercise the right of disposal of goods till delivery across the ships at the named port of despatch, the said port becomes the place of removal even in terms of incoterms FOB.

Learned Counsel has also relied upon the decisions of thisTribunal in the case of **Unitech vs. CCE reported as 2018 (4) TMI 760 (Tri. All.)** and **Tinplate Company of India Limited vs. CCE & ST, 2020 (12) TMI 846-CESTAT Kolkata** vide which the cenvat credit on GTA Service on transportation for export of goods from the factory gate to the port of export was held available, the port ofexport being the place of removal.

7. The demand in question is otherwise mentioned to be entirely revenue neutral. Finally, it is submitted that there is no suppression of facts as the case has been made out from the appellant's own document extended period has wrongly invoked while issuing the impugned show cause notice. The decision of Hon'ble Supreme Courtin the case of **Padmini Products vs. CCE reported as 1989 (43) ELT 195 (SC)** has been relied upon. With the submissions, the orderunder challenger is prayed to be set-aside and the appeal is prayed tobe allowed.

8. Learned Authorized Representative has submitted that the Inland Haulage Charges means the transportation charges from inland container freight station to sea port of loading or vice versa. If Cargo freight station is away from sea port of loading, the shipper completes customs formalities at such container freight station and arranges to move cargo to port of loading either by rail or road. Theseservices are utilised after granting Let Export hence shall not be covered under of Rule 2(1) of the CENVAT Credit Rules, 2004 according to which the input service credit is admissible only up to place of removal. But in the present case, the place of removal is ICD Garhi Harsaru where the Let Export order was issued. Therefore, the CENVAT Credit availed by the Assessee on such charges incurred beyond ICD Garhi Harsaru are not admissible to appellants.

9. It is further submitted that once there is no dispute regarding the fact that let export order was issued at ICD Garhi Harsaru.Resultantly, there appears no infirmity in the findings in Para 5.3.1 of the order under challenge. Learned Authorized Representative has also relied upon Circular No. 999/6/2015-CX dated 28.02.2015, para 6 has clarified that in the case of clearance of goods for export by manufacturer exporter, shipping bill is filed by the manufacturer- exporter and goods are handed over to the shipping line. After let export order is issued, it is the responsibility of the shipping line to ship the goods to the foreign buyer with the exporter having no control over the goods. Hence, in such situation, the transfer ofproperty in goods to be exported occurs at the port where the shipping bill is filed by the manufacturer exporter. In the presentcase, the said place is ICD Garhi harsaru. Hence, the inland haulage charges beyond the said port are the charges beyond the place of removal which are not towards the input services. We therefore hold that the appellant is rightly denied the eligibility to avail and utilize the cenvat credit of service tax paid on said inland haulage charges. Impressing upon, no infirmity in the impugned order under challenge,the appeal is prayed to be dismissed.

10. Having heard the rival contentions, we observe that the question to be adjudicated in the impugned appeal is as follows:-

Whether the cenvat credit on service tax paid in respect of Inland haulage charges is covered under the definition of Input Service or not?

Foremost, we need to know the definition of 'Input Service', thedefinition reads as follows:-

"Rule 2(1): "Input Service" means any service,-

(i) used by a provider of taxable service for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and includes services used in relation to modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking. credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

11. The definition also has an exclusion clause but apparently the activity in question does not fall under the said exclusion clause.

"The definition of input service is expressed in the form of 'means' and includes'. Means' part of the definition contains, inter alia, service used by the manufacturer whether directly or indirectly or in relation to the manufacture of final products and clearance of final products from the place of removal. This definition, of course, is worded to include variety of services used not only for, but inrelation to manufacture of final products and also for clearance of final products up to the place of removal. The term "activities relating to business" has been further elaborated by giving examples, terming them as "such as". These examples are

"accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security". Finally, the list also includes inward transportation of inputs or capital goods, and outward transportationup to the place of removal. Thus, the term "input service" is restricted to include inward transportation of inputs or capital goods,and outward transportation up to "place of removal".”
Rule 3 of Cenvat Credit Rules, 2004 allows a provider of taxable service to take cenvat credit of duties/taxes specified therein, Sub- Rule 1(A) (ii) of said Rule 3 says that provider of output service shall be allowed to take credit of any input service received by the providerof output services. A conjoint reading of these provisions, makes it clear that activity of transportation of goods for export is an input service provided it is availed upto the place of removal and that the service tax paid for transportation of goods upto the place of removal entitles the eligibility of availing cenvat credit there upon.

12. In view of these observations, the meaning of place of removal acquires importance to adjudicate the issue framed above. Place of removal has not been defined in Cenvat Credit Rules however Section

4 (3) (C) of Central Excise Act, 1944 defines ‘place of removal’.

However, Rule 2(t) of Credit Rules allowed import of definition of the terms under Excise Act for interpretation of the terms employed inthe Credit Rules. Section 4(3) (c) of Excise Act defines the term placeof removal as follows:-
"place of removal means-

(i) a factory or any other place or premises of production or manufacture of the excisable goods;
(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory from where such goods are removed”

13. Though, subsequent to 11.07.2014, Rule 2(qa) clause of credit rules also define place of removal but the said definition is verbatimof above definition. No doubt, the appellant has relied upon the provisions of Sale of Goods Act, specifically, section 19 of the said Actto impress upon that the place of sale is also the place of removal. Various decisions have also been relied upon to show that the shipping port is the place where the responsibility of the exporter withrespect to the goods to be exported comes to an end and as such the shipping port where is issued the out of charge order/Let export orderbecomes the place of removal. However, we observe that in the present case, the distinguished admitted fact is that the Let Export order is issued at ICD Garhi harsaru. The let export order is a document which the customs department issues after the complete set of formalities being complied with by the exporter including filing of shipping bill alongwith all the requisite documents and the inspection and verification is also done by the customs department. After let export order, the goods are being handed over by thecustoms department to the customs handling agent or the clearing or forwarding agents.

14. Though the exporter always need not to appoint the CHA or the clearing and forwarding agent and can fulfill all the formalities on his own but the another peculiar admitted fact of the present case is that the goods were agreed to be exported on FOB basis. FOB in shipping terms indicate who owns the goods during transit and who pays for the shipping associated fees and other freight charges. There is nothing on record to show that the appellant as manufacturer- exporter has incurred the expenditure till the time the goods are put on the vessel at the Gateway Port. Hence, we hold that the decisions relied upon by the appellant are not applicable to the given set of circumstances where admittedly the Bill of lading was filled at the freight port, the container depot (ICD) and Let Export order was also issued at said ICD, Garhi Harsaru. Once the let export order isgranted, the goods become the responsibility of the shipper acting on behalf of the person abroad for whom the goods are being exported. We observe that the findings in the order under challenge are also as follows:-

"5.3.1 I observe that the Inland Haulage Charges means the transportation charges which are being charged for transportationof cargo between the Inland Container Freight Station to Sea Portof Loading or vice versa. If the said Freight Station is away fromSea Port of Loading, the shipper uses to complete customs formalities at such Container Freight Station and uses to arrange to move cargo to port of loading either by rail or road. I further find that these services utilised by the Assessee after granting Let Export Order of the cargo. I find that as per provisions of Rule 2(1) of the CENVAT Credit Rules, 2004, the input service is admissible up to the place of removal only. However, in the instant case, the place ofremoval is port on which Let Export granted but not the Port where goods were loaded on vessel. It is port of Let Export, where ownership of cargo transferred from the exporter (to say the Assessee in the instant case) to the buyer."

As the appellant had also impressed upon the concept of the sale, we observe that the said aspect has already been decided by the **Hon'ble Apex Court in the case of Ispat Industries Ltd. reported as 2015 (10) TMI 613 (SC),** the Hon'ble Apex Court in the said case has examined as under:-

"As has been seen in the present case all prices were "ex-works", like the facts in Escorts JCB's case. Goods were cleared from the factory on payment of the appropriate sales tax by the assessee itself, thereby indicating that it had sold the goods manufactured by it at the factory gate. Sales were made against Letters of Credit and bank discounting facilities, sometimes in advance. Invoices were prepared only at the factory directly in the name of the customer in which the name of the Insurance Company as well as the number of the transit Insurance Policy were mentioned. Above all, excise invoices were prepared at the time of the goods leaving the factory in the name and address of the customers of the respondent. When the goods were handed over to the transporter, the respondent had no right to the disposal of the goods nor did it reserve such rights inasmuch as title had already passed to its customer. On facts, therefore, it is clear that Roofit's judgment is wholly distinguishable. Similarly in Commissioner Central Excise, Mumbai-III v. M/s. Emco Ltd, this Court re-stated its decision in the Roofit Industries' case but remanded the case to the Tribunal to determine whether on facts the factory gate of the assessee wasthe place of removal of excisable goods. This case again is wholly distinguishable on facts on the same lines as the Roofit Industries case".

14. Though the appellant has relied upon the Board Circular of 2007and 2014 but both the circulars are prior to impugned decision inIspat Industries Ltd. (supra) case otherwise also both these circulars stands superseded by the other circular of 2015 as relied upon by the department and of 2018 as has been issued subsequent to the decision in **Ispat Industries Ltd. (supra).**

Decision relied upon by the appellant are not applicable to the get given set of facts and circumstances as these are based on the Circular which have no bearing in light of the decision of Hon'ble Supreme Court in **Ispat Industries Ltd. (supra).** Also for the reason that there is no evidence produced by the appellant that the appellant continued possession even after the Let Export Order asthat of inspection or of handling of goods in any other manner.However, **Ispat Industries Ltd.** decisions falsifies there criterias also.

15. With these observation, we hold that the Inland haulage charges from ICD Garhi Harsaru to shipping port, Pepavav were the charges for the service received beyond the place of removal, hence, the appellant has rightly been disallowed the availment of cenvat credit thereupon. Finding no infirmity in the order under challenge, the same is hereby upheld. As a consequence the appeal is hereby dismissed.

[Pronounced in the open Court on 07.03.2024]

(DR. RACHNA GUPTA)MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI
PRINCIPAL BENCH, COURT NO. 1

EXCISE APPEAL NO. 51058 OF 2021

[Arising out of Order-in-Original No. 18-21/COMMR/DDN/2020 dated 08.05.2020 passed by the Commissioner, Central Goods and Service Tax, Dehradun]

THE DIVISIONAL FOREST OFFICER **Appellant**
Narendra Nagar Forest Division, Near
Kailash Gate,
Muni-ki-Reti, Rishikesh Tehri
Garhwal

VERSUS

COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX, DEHRADUN **Respondent**
Commissionerate, E Block Nehru
Colony, Dehradun

WITH

EXCISE APPEAL NO. 51059 OF 2021

[Arising out of Order-in-Original No. 18-21/COMMR/DDN/2020 dated 08.05.2020 passed by the Commissioner, Central Goods and Service Tax, Dehradun]

THE DIVISIONAL FOREST OFFICER **Appellant**
Narendra Nagar Forest Division, Near
Kailash Gate,
Muni-ki-Reti, Rishikesh Tehri
Garhwal

VERSUS

COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX, DEHRADUN **Respondent**
Commissionerate, E Block Nehru
Colony, Dehradun

WITH

EXCISE APPEAL NO. 51060 OF 2021

[Arising out of Order-in-Original No. 18-21/COMMR/DDN/2020 dated 08.05.2020 passed by the Commissioner, Central Goods and Service Tax, Dehradun]

THE DIVISIONAL FOREST OFFICER **Appellant**
Narendra Nagar Forest Division, Near
Kailash Gate,
Muni-ki-Reti, Rishikesh Tehri
Garhwal

VERSUS

COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX, DEHRADUN **Respondent**
Commissionerate, E Block Nehru
Colony, Dehradun

AND

EXCISE APPEAL NO. 51061 OF 2021

[Arising out of Order-in-Original No. 18-21/COMMR/DDN/2020 dated 08.05.2020 passed by the Commissioner, Central Goods and Service Tax, Dehradun]

THE DIVISIONAL FOREST OFFICER **Appellant**
Narendra Nagar Forest Division, Near
Kailash Gate,
Muni-ki-Reti, Rishikesh Tehri
Garhwal

VERSUS

COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX, DEHRADUN **Respondent**
Commissionerate, E Block Nehru
Colony, Dehradun

Appearance:

Present for the Appellant : None

Present for the Respondent: Shri Bhagwat Dayal, Authorised Representative

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Final Order Nos. 55115-55118 /2024

Date of Hearing/Decision: 27/02/2024 JUSTICE DILIP GUPTA

1. The aforesaid four appeals filed by the Divisional Forest Officer, Tehri Garhwal seek the quashing of the order dated 08.05.2020 passed by the Commissioner Central Goods and Service Tax, Commissionerate, Dehradun[1] adjudicating four show cause notices dated 19.09.2008, 14.05.2013, 28.10.2013 and 21.08.2014
covering the period from June, 2006 to October, 2006 and May, 2012 to February, 2014. The Commissioner has, by the impugned order, confirmed the demand of central excise duty amounting to Rs. 4.82 crores with interest and penalty.

2. The appellants, who are Divisional Forest Officers in the Government of Uttarakhand, collected Raw Pine Resin[2] from pine trees through contract labour and sold the same to processing units by public

auction. It needs to be noted that Exemption Notification No. 24/2005 exempted Resin manufactured without the aid of power from payment of duty, but by a Notification dated 01.03.2006 the said exemption given to Resin manufactured without the aid of power was withdrawn. The appellant thereafter obtained registration and paid central excise duty.

3. However, two buyers filed Writ Petitions in the Uttarakhand High Court challenging the levy of excise duty. These petitions were dismissed by judgment dated 18.09.2006. Feeling aggrieved, the Writ Petitioners filed Civil Appeal No. 497 of 2008 and Civil Appeal No. 498 of 2008 before the Supreme Court and in view of the statement made by the learned counsel appearing for the parties, the Supreme Court remitted the matter to the High Court for a fresh consideration.

4. Pursuant to the aforesaid order of the Supreme Court, a learned Judge of the Uttarakhand High Court allowed the Writ Petitions by a detailed judgment dated 02.08.2011. The department filed Special Appeals before the Division Bench of the Uttarakhand High Court. The Special Appeals were initially admitted and the judgment of the learned Judge of the Uttarakhand High Court was stayed. The Uttarakhand High Court ultimately allowed the Special Appeals and the relevant observations of the High Court are as follows:

"120. For the reasons aforementioned, we declare that extraction of Oleo Resin from Pine trees, by the Forest Department of the Government of Uttarakhand, involves human endeavor and an elaborate and well laid down procedure being followed. Such extraction would amount to "production" of goods on which Central Excise Duty, under Section 3(1)(a) of the Excise Act, can be levied. The order, under Appeal, in Special Appeal Nos. 227 of 2011, 236 of 2013, 237 of 2013, 275 of 2013 and 276 of

2013, are set aside, and all the Special Appeals are allowed. Consequently, Special Appeal No. 354 of 2013, whereby refund of the Excise Duty, paid by the Forest Department to the appellants, is claimed as refund by the respondent-writ petitioners, is dismissed. However, in the circumstances, without costs."

5. The Commissioner, while adjudicating the four show cause notices, took notice of the judgment dated 10.07.2019 passed by the Uttarakhand High Court while deciding the Special Appeals and observed that once the taxability of Resin produced by the appellant and sold by it has been settled, the demand of excise duty has to be confirmed. The Commissioner rejected the contention raised by the appellant that they should not be directed to pay excise duty as they had not collected excise duty from the parties in view of the judgment of a learned Judge of the Uttarakhand High Court. The Commissioner also imposed penalty and demanded interest.

6. The case has been called out but no one has appeared on behalf of the appellant. Shri Bhagwat Dayal, learned authorised representative appearing for the department has, however, made submissions.

7. The grounds raised in the Memo of Appeal have been perused and the submissions made by the learned authorised representative appearing for the department have also been considered.

8. The three basic issues that have been raised by the appellants are as follows:

"(a) Whether an assessee can be made to bear the brunt of duty with interest due to change in order of the High Court or not?

(b) Whether the appellant is required to discharge the burden of duty with interest on clearance of Resin, effected during the period under dispute, because the High Court has now held that the activity pertaining to extraction of Resin from pine trees is production of goods exigible to central Excise Duty?

(c) Whether the appellant is liable for penalties also in such a situation, wherein the appellant has been dragged because of the divergent verdicts of High Court and there is no fault of the appellant?"

9. It has been stated in paragraph 2.5 of the Memo of Appeal that the appellant has been dragged into a situation where huge demands of central excise duty with interest and penalty have been confirmed "just because the appellant followed the verdict of the Hon'ble High Court".

10. As is clear from the statement of facts contained in the Memo of Appeals, once the Notification dated 01.03.2006 was issued withdrawing the exemption earlier granted to manufacture Resin without the aid of power from central excise duty, the appellant obtained registration and paid central excise duty. However, Writ Petitions were filed by two buyers before the Uttarakhand High Court challenging the levy of central excise duty on Resin, which Writ Petitions were dismissed by the Uttarakhand High Court by judgment dated 18.09.2006, but in view of the statement made by the learned counsel

appearing for both the parties before the Supreme Court, the matter was remitted to the High Court to decide the Writ Petitions afresh. A learned Judge of the Uttarakhand High Court, by judgment dated 02.08.2011, allowed the Writ Petitions but the Government preferred Special Appeals which were initially admitted and the operation of the judgment passed by the learned Judge was also stayed. The Special Appeals were ultimately allowed by judgment dated 10.07.2019.

11. The contention of the appellant raised in the Memo of Appeal is that they had stopped collecting central excise duty because of the order passed by a learned Judge of the Uttarakhand High Court on 02.08.2011 and so the appellant should not be asked to pay excise duty. As noted above, Special Appeals were filed by the department and judgment of the learned Judge was stayed. There is, therefore, no reason as to why the appellants should have stopped collecting the excise duty. Ultimately the Special Appeals were also allowed. In any case, the appellant had obtained registration and was paying central excise duty as it believed that excise duty was payable when the exemption notification was withdrawn.

12. The High Court merely interpreted the provisions of law and it cannot be urged by the appellant that because of the judgment of the learned Judge allowing the Writ Petitions it was not obliged to collect central excise duty. This position is very clear from the judgment of the Supreme Court in **Asstt. Commr., Income Tax, Rajkot v**s. **Saurashtra Kutch Stock Exchange Ltd.[3] a**nd the relevant paragraphs are reproduced below**:**

"42. In our judgment, it is also well-settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a 'new rule' but to maintain and expound the 'old one'. **In other words, judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.**

43. Salmond in his well-known work states;

"(T) he theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are res judicatae or accounts that have been settled in the meantime."

13. In this view of the matter when it has been settled that central excise duty would be leviable as Resin is produced, there is no reason to interfere with the impugned orders passed by the Commissioner. The four appeals are, accordingly, dismissed.

(Dictated and pronounced in open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

NEW DELHI.

PRINCIPAL BENCH - COURT NO.III

Excise Appeal No.51185 of 2022 (DB)

(Arising out of Order-in-Original No.20/2021 dated 12.10.2021 passed by theAdditional Director General (Adjudication), New Delhi)

M/s. Suncity Synthetics Ltd. **Appellant**
F-5 (B,C,D), IInd Phase, Boranada,Jodhpur, Rajasthan-342 021.

VERSUS

The Additonal Director General (Adjudication), **Respondent**
DRI-New Delhi

West Block VIII, Wing-6, 2nd Floor,

R.K. Puram,

New Delhi-110 066.

APPEARANCE:

Shri Jitin Singhal, Advocate for the appellant

Shri Rakesh Agarwal , Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)
FINAL ORDER NO.55132/2024
DATE OF HEARING: 05.03.2024DATE OF DECISION: 12.03.2024

BINU TAMTA:

1. Challenge in this appeal is to the Order-in-Original No.

No.20/2021-CE dated 12.10.2021, whereby the Additional Director General (Adjudication) restricted the demand of excise duty for thenormal period and dropped the demand for the extended period of limitation.

2. The appellant is engaged in the manufacture of Polyester Stample Fibre (PSF) and Nylon Staple Fibre (NSF) classified under Chapter Heading 55032000 and 55031900 respectively of first schedule of Central Excise Tariff Act, 1985. On the basis ofintelligence, that appellant is wrongly availing the benefit of Notification No.08/2014-CE dated 11.07.2014 on their final productby using popcorn which is made from textile waste as raw material whereas the conditions notified is that goods should be made from plastic waste, search proceeding was carried out on 29.05.2017 at the factory premises of the appellant.

3. Based on the investigation conducted by the Department, a show cause notice dated 06.02.2019 was issued to the appellant asto why central excise duty of Rs.6,83,12,348/- should not be demanded for the period July, 2014 to June, 2017 by denying the benefit of Notification No.08/2014-CE dated 11.07.2014.

4. The learned Adjudicating Authority vide its impugned order dated 12.10.2021 on merits

denied the benefit of the Notification, however, held that extended period of limitation cannot be invokedand therefore restricted the demand for the normal period oflimitation (January, 2017 to June, 2017) and dropped the demand for the period (July, 2014 to December 2016). Hence, the present appeal has been filed by the appellant before this Tribunal against the confirmation of demand towards central excise duty of Rs.1,67,20,988/- along with interest and penalty.

5. Shri Jitin Singhal, Advocate appearing for the appellant has submitted that the procurement of yarn waste from the textile industry is actually a plastic waste as it contains Polyethylene Terephthalate**,** which has multiple uses from drinking bottles to textile. It is his contention that the appellant does not use 'Popcorn' as raw material and it is a by-product arising during the manufacturing, which gets consumed during the manufacturing of the finished goods. In the synopsis filed, the learned Counsel has stated that the spinning waste and draw line waste of PSF plant is being agglomerated in agglomerator machine and the outcome of this process is termed as 'Popcorn', which is further used in the manufacturing of the PSF. According to the Counsel, Polyethylene Terephthalate can be made both into fibre and plastic and, therefore used in the production of the synthetic fibres in the textile industry and also for bottle production. He further submittedthat the word 'plastic' used in the notification is not specific but isof general use and therefore, the term 'plastic waste' means waste that contains Polyethylene Terephthalate. Thus yarn/textile wasteis plastic waste under the notification. Learned Counsel also submitted that the substantive benefit cannot be denied on account of procedural lapse by the appellant. Challenge has also been made to the levy of interest and penalty.

6. Learned Authorised Representative for the Revenue reiterated the findings of the Adjudicating Authority and relied on the decision of the Supreme Court in **Commissioner of Customs(Import), Mumbai Vs. Dilip Kumar and Company and Others - 2018 (361) ELT 577 (SC)** and **State of Gujarat Vs. Arcelor Mittal Nippon Steel India Ltd. – (2022) 6 SCC 459** to say thatthe notification granting the benefit of concessional rate of duty is subject to the conditions, which has to be strictly complied with and no word can be added or subtracted in the contents of the notification. Since in the present case, the appellant has not complied with the conditions specified in the notification, he is not eligible to avail the benefit of the concessional rate of duty and hence, the appeal needs to be rejected.

7. Heard both the sides. The short question, for our consideration is whether the appellant has complied with the conditions specified in the exemption Notification No. 08/2014-CE dated 11.07.2014 so as to be entitle to the benefit of the concessional rate of duty prescribed therein. Notification No. 08/2014-CE dated 11.07.2014 inserted Entry no.70A whereby Polyester Staple Fibre or Polyester Filament Yarn manufactured from Plastic Scrap or Plastic Waste including waste Polyethylene Terephthalate (PET) bottles were eligible for payment of central excise duty at the concessional rate of 2% ad-volorem without Cenvat credit and at 6% ad-valorem with availing Cenvat credit. The relevant entry of the notification is quoted below:

"70A	54 or 55	Polyester StapleFibre or Polyester Filament yarnmanufactured from plasticscrap or plastic waste including waste
		polyethylene terephthalate bottles";

The wordings of the notification are absolutely clear, simple and unambiguous. It specifically restricts the benefit of concessional rate of duty to only those Polyester Staple Fibre or PolyesterFilament Yarn which are manufactured from plastic scrap or waste including waste Polyethylene Terephthalate bottles. Needless to say that law on the interpretation of the exemption notification is settled by the Apex Court that the exemption notification has to be construed strictly and there is no scope for adding or subtracting any word in the notification. The Constitution Bench in the case of **Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar and Company and Others**

(supra) considering the entire case law on the interpretation of exemption notification concluded that:-

"41. After thoroughly examining the various precedents some of which were cited before us andafter giving our anxious consideration, we wouldbe more than justified to conclude and also compelled to hold that every taxing statuteincluding, charging, computation and exemptionclause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity ina charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State.

52. To sum up, we answer the reference holding as under -

(1) Exemption notification should be interpreted strictly; the burden of proving applicability wouldbe on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation,the benefit of such ambiguity cannot be claimed bythe subject/assessee and it must be interpreted in favour of the revenue."

8. In the case of **State of Gujarat vs Arcelor Mittal Nippon Steel India Ltd. (Supra)**, the Supreme Court reiterated the principles in the following words :

"14.1 While the exemption notification should be liberally construed, beneficiary must fall within the ambit of the exemption and fulfill the conditions thereof. In case such conditions are not fulfilled, the issue of application of the notification does not arise.

14.2 It is settled law that the notification has tobe read as a whole. If any of the conditions laid down in the notification is not fulfilled, the party is not entitled to the benefit of that notification. An exception and/or an exempting provision in a taxing statute should be construed strictly and it isnot open to the court to ignore the conditions prescribed in industrial policy and the exemption notifications.

14.3 The exemption notification should be strictly construed and given meaning according to legislative intendment. The Statutory provisionsproviding for exemption have to be interpreted in the light of the words employed in them and there cannot be any addition or subtraction from the statutory provisions.

14.4 As per the law laid down by this Court in catena of decisions, in the taxing statute, it is the plain language of the provision that has to bepreferred, where language is plain and is capable of determining defined meaning. Strict interpretation to the provision is to be accorded to each case on hand. Purposive interpretation can begiven only when there is an ambiguity in the statutory provision or it alleges to absurd results, which is so not found in the present case.**"**

9. We may now examine whether the appellant has complied with the conditions specified in the notification as referred above. We find that as per the allegations made in the show cause notice and as admitted by Shri Suresh Kawar Jain, Managing Director of the appellant in his statement dated 14.12.2017, it is correct that the appellant had been using textile yarn waste to manufacture 'Popcorn', which is manufactured from different types of waste including yarn waste and is a recycled product. The Adjudicating Authority dealt in detail the manufacturing processing of the 'Popcorn' and held as under:-

"25.3 In view of the foregoing discussion,the conclusion that can be drawn is that popcorn is manufactured from mechanical and chemical processing of different types of waste viz. waste of plastic, yarn waste and textile waste and in this manufacturing process polymers are broken down resulting in a product that is the primary form of PET. Thus, the product 'Popcorn' is a primary form of a single thermoplastic material i.e. polyethylene Terephthalate (PET). Since 'Popcorn' does not qualify as plastic waste and scrap the benefit of the notification ibid is not admissible as the said notification allow only plastic waste and scrap as the inputs, including waste PET bottles to be used for manufacture of PSF. Textile yarn waste/'Popcorn' is not permissible as input foravailing concessional rate of duty under the notification ibid. Thus I find that the contention of the notice that 'Popcorn' used to manufacture PSF is nothing but plastic waste does not have feet in view of

discussions above and accordingly, I reject the contention.”

10. Other contention by the appellant is that they are entitled to the benefit of the notification in respect of the clearances where they have used PET bottles as raw materials. In this regard, we find that in the statement of Shri Sanjay Pathak, General Manager of the appellant and Shri Suresh Kawar Jain, they admitted the purchase of polyester yarn waste of polyester monofilament yarn from M/s. J. Filament, Surat and purchase of waste of POY lumps from M/s. Laxmi Enterprises and admitted that this is a textile waste. Though the statement on behalf of the appellant is that they have used only a very small quantity of textile waste, however, we are of the opinion that the conditions specified in the exemption notification gets violated and makes the appellant ineligible to claim the concessional rate of duty under the notification.

11. As noted above, the notification specifically provides for plastic scrap or plastic waste including waste Polyethylene Terephthalate bottles and even the minimum quantity of textile yarn used by the appellant cannot be included in the specification under the notification. The Adjudicating Authority is right in observing that the moment any other waste or primary material is used which does not fall in the description of out of the scrap/plastic wasre/PET bottles, the assessee ggoes out of the purview of the said notification.

12. Considering the principle of law that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession, we are of the view that the appellant has failed to substantiate the same. Also, if exemption is available on complying with certain conditions, the said conditions have to be complied with and as per the discussion above, it cannot be said that the appellant has complied with the mandatory conditions of the notification. We also reject the contention of the learned Counsel that the terms ‘plastic waste’ in the notification is not specific but is of general nature. The wordings of the condition provided in the notification are absolutely clear and unambiguous and leaves no manner of doubt.

13. We find that on point of limitation, the Adjudicating Authorityhad confirmed the demand only to the normal period as there was no suppression of facts or mis-statement on the part of the appellant and consequently, the mandatory penalty under Section 11 AC(1)(c) of the Act was held to be not leviable. The penalty waslimited only under Section 11 AC(1)(a) for contravention of the provisions of the Act as they cleared the excisable goods without payment of appropriate central excise duty and failed to discharge the duty accordingly. We find no reason to interfere with the penalty of Rs.5,00,000/- imposed on the appellant.

14. The liability to pay interest under Section 11AA of the Act on the central excise duty amounting to Rs.1,67,20,988/- being mandatory and automatic by operation of law is upheld.

15. We do not find any strong and compelling reasons to differ from the impugned order, which deserves to be upheld. The appeal, is accordingly dismissed.

[Order pronounced on 12th March, 2024]

Ckp.

(Binu Tamta)Member (Judicial)

(Hemambika R.Priya)Member (Technical)

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Customs, Excise & Service Tax Appellate TribunalWest Zonal Bench at Ahmedabad

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 11901 of 2014 –DB

Excise (Misc.) Application No. 10180 of 2023

(Arising out of OIA-RJT-EXCUS-000-APP-714-13-14 dated 18/02/2014 passed by Commissioner of Central Excise - RAJKOT)

Ruchi Soya Industries Ltd ..... Appellant
Survey No. 217/2,

Village : Mithirohar, Gandhidham,Kutch, Gujarat

VERSUS

C.C.E. & S.T.-Rajkot.....Respondent
Central Excise Bhavan,

Race Course Ring Road..... Income Tax Office,

Rajkot, Gujarat - 360001

APPEARANCE:

Shri Anand Nainawati & Shri Ambarish Pandey, Advocates for the AppellantShri Prabhat K Rameshwaram, Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L MAHAR

Final Order No. A/ 12253 /2023

RAMESH NAIR

DATE OF HEARING: 03.07.2023DATE OF DECISION: 11.10.2023

The issue involved in the present case on merit is that whether the appellant is entitled for the refund claim over and above the percentage by which restriction was imposed vide amendment Notification No 16/2008- CE (NT) dated 27.03.2008 and amendment Notification No . 33/2008 – CE dated 10.06.2008 amending the original Notification No 39/2001 –CE dated 31.07.2001. The appellant filed the present refund in the light of Hon’ble Gujarat High Court judgment in the case of SAL STEEL vs. UOI reported at 2010 (260) ELT 184 (Guj.) whereby the aforesaid notifications were quashedas ultra vires and same was declared as bad in law. The appellant also filed the miscellaneous application for change of name.

2. Shri Anand Nainawati, Learned Counsel along with Shri AmbarishPandey, Learned Advocate appearing on behalf of the appellant submits that since the refund claim was rejected on the ground of time bar, the matter maybe sent back for verifying the facts and for reconsidering the aspect of limitation.

3. Shri Prabhat K. Rameshwaram, Learned Commissioner (AR) appearingon behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that though earlier the Hon'ble Gujarat High Court decided the matter in favour of the assessee by holding the NotificationNos. 16/2008- CE dated 27.03.2008 and 33/2008- CE dated 10.06.2008 asultra vires but the said judgment of Hon'ble Gujarat High Court was challenged before the Hon'ble Supreme Court in the case of UOI vs. VVF Ltd – 2020 (372) ELT 495 (SC) wherein the validity if Notification Nos. 16/2008-CE dated 27.03.2008 and 33/2008- CE dated 10.06.2008 was upheld and accordingly set aside the order of various High Courts on this issue. The relevant para of the judgment in the case of VVF Ltd (Supra) is reproduced below:-

"16. *Under the circumstances, the respective High Courts have committed a grave error in quashing and setting aside the subsequent notifications/industrial policies impugned before the respective High Courts on the ground that they are hit by the doctrine of promissory estoppel and that they are retrospective and not retroactive. Consequently, all these appeals are ALLOWED. The impugnedJudgments and Orders passed by the respective High Courts, which are impugned in the present appeals, quashing and setting aside the subsequent notifications/industrial policies impugned in the respective writ petitions before the respective High Courts, are hereby quashed and set aside. Consequently, the original writ petitions filed by the respective original writ petitioners before the respective High Courts challenging the respective subsequent notifications/industrial policies stand dismissed and for the reasons stated hereinabove, the challenge to the respective subsequent notifications/industrial policies impugned before the respective High Courts FAIL. However, it is CLARIFIED that the present judgment shall not affect the amount of excise duty alreadyrefunded, meaning thereby, the cases in which the excise duty is alreadyrefunded prior to the subsequent notifications/industrial policies impugned before the respective High Court, they are not to be reopened.However, it is further CLARIFIED that the pending refund applications shall be decided as per the subsequent notifications/industrial policies which were impugned before the respective High Courts and they shallbe decided in accordance with the law and on merits and as per the subsequent notifications/industrial policies impugned before the respective High Courts. All these appeals stand disposed of accordingly.NO COSTS."*

4.1 In our view in the aforesaid Apex Court Judgment in the case of VVF Ltd, the appellant are not entitled for the refund rejected by the original authority and upheld by the learned Commissioner (Appeals). Therefore, thepresent appeal deserves to be dismissed on the above ground itself without going into the other issues such as time bar, limitation etc.

4.2 As regard the miscellaneous application, the appellant's name stands changed from 'Ruchi Soya Industry Ltd' to ' Patanjali Foods Ltd".

5. Accordingly, we uphold the impugned order and dismiss the appeal.

Miscellaneous application is also disposed of in the above terms.

(Pronounced in the open court on 11.10.2023)

RAMESH NAIRMEMBER (JUDICIAL)

C.L MAHARMEMBER (TECHNICAL)

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Customs, Excise & Service Tax Appellate Tribunal West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO. 2

Excise Appeal No. 919 of 2012-SM

(Arising out of OIO-19/COMMR/AKG/AHD-II/2012 Dated- 28/09/2012 passed by Commissioner of Central Excise-AHMEDABAD-II)

Karimbhai Nanjibhai Shah .....Appellant
Prop. Hakikat Auto Industries, Rajkot-bhavnagar Highway Road, Chavand, AMRELI

GUJARAT

VERSUS

C.C.E.-Ahmedabad-ii .....Respondent
Custom House.....First Floor,

Old High Court Road, Navrangpura, Ahmedabad, Gujarat-380009

APPEARANCE:

Shri. Vipul Khandhar, Chartered Accountant for the Appellant Shri. P Ganesan, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

Final Order No. A/ 12362 /2023

DATE OF HEARING:25.10.2023 DATE OF DECISION:27.10.2023

C. L. MAHAR

The brief facts of the matter are that the intelligent agency of the department detected that certain manufacturers of "Chhakkdo Rickshaw" were evading payment of Central Excise Duties by suppressing their production and making clandestine clearances. After detailed investigations, a show cause notices was issued to M/s Shree. Rajshakti Automobiles, Ahmedabad where under the present appellant was also made liable for penalty under Rule 26 of the Central Excise Rules, 2002 for certain omissions and commissions will laid to evasion of Central Excise duty. The matter got adjudicated by impugned Order-In-Original dated 03.10.2012 where under Central Excise Duty amounting to Rs. 2,48,83,940/- was confirmed against M/s Shree. Rajshakti Automobiles, Ahmedabad and apart from imposition of penalty and penalties to another persons, a penalty of Rs. 1,00,000/- has also been imposed on the present appellant under Rule 26 of the Central Excise Rules, 2002. The appellant is before me against the above mentioned penalty of Rs. 1,00,000/-.

2. I have heard both the sides. The Learned Advocate appearing for the appellant has stated that main noticee in the matter M/s Shree. Rajshakti Automobiles, Ahmedabad have already settled the dispute under SVLDRS Scheme. It has also been mentioned that Rule 26 of the Central Excise Rules, 2002 has wrongly been invoked by the adjudicating authority for imposition of penalty against the appellant. It has been contended that only role of the appellant was to provide his registration of ARAI-Pune for getting the vehicle registered with RTO, as the manufacture of the vehicles were not having the required registration under Automotive

Research Association of India (ARAI-Pune) (which is mandatory as per Rule 126 of Central Motor Vehicles Rules (CMVR), 1989). It has further been contended that for imposition of penalty under Rule, 26 of the Central Excise Rules, 2002, the person need to be engaged in a acquiring possession non-duty paid goods or he should be concerned with transportation, removing, depositing, keeping, concealing, selling or purchasing of any excisable goods which he knows or have reason to believe that same are liable for confiscation under Central Excise act. It has been the contention that since the appellant has not engaged in any of these activities and therefore the learned adjudicating authority should not have imposed penalty upon him under Rule 26 of the Central Excise Rules, 2002. The learned Advocate has also submitted that following case law in his favour as follows:-

- APPLE SPONGE AND POWER LTD. VS.COMMISSIONER OF SERVICE TAX, AUDIT-I-2018 (362) E.L.T 894 (Tri.- Mumbai)
- HOMAG INDIA PVT. LTD. VS. COMMR, OF C. EX., S.T. & BANGALORE- II-2017 (357) E.L.T 1194 (Tri.-Bang.)

2.1. I have also heard the learned departmental representative. Having heard both the sides, I find that appellant was having a registration with Automotive Research Association of India (ARAI-Pune) for production of vehicles in name of his firm namely Hakikat Auto Industries, Rajkot- Bhavnagar Highway Road, Chanvand, Amreli. He was also aware that manufacturer of the "Chhakkdo Rickshaw" cannot get their product registered with the RTO without ARAI certificate/registration. The appellant have facilitated registration of the "Chhakkdo Rickshaw" manufactured by M/s Shree Rajshakti Automobiles, Ahmedabad by providing his ARAI registration and thus facilitating sale and sale of "Chhakkdo Rickshaw" which was cleared without payment of Central Excise Duty. I reproduce role the appellant which has been elicitation by adjudicating authority with regard to the appellant.

"43.5 Shri Karim Nanjibhai Shah, proprietor of M / s Hakikat Auto Inds, Amreli, had received 54 vehicles illicitly manufactured and cleared by the main noticee. It was clarified by him that he had received these vehicles from the main noticee and delivered the same to Shri Prakash Somaiya for the purpose of financing and onward delivery to ultimate customers. He has confessed that the said vehicles were received from the manufacturer without the cover of any Central Excise invoice evidencing payment of duties and delivered to Shri Prakash Somaiya for the purpose of financing and delivery to the ultimate customers. Moreover, 03 fake Central Excise invoices were recovered from the premises of M / s Esspee Finance, Rajkot, during the course of panchnama on 06.10.09. Both, Shri Karim Nanjibhai Shah, proprietor of M / s Hakikat Auto Inds, and Shri Prakash Somaiya, proprietor of M/s Esspee Finance, Rajkot, were very much aware about the procedure to be followed, however, they knowingly connived with the main noticee to receive the goods [54 vehicles] illicitly without the cover of Cenvat Invoice evidencing payment of duties. Moreover, recovery of 03 fake Centrai Excise invoices from the premises of M/s Esspee Finance clearly indicates that they every reason to believe that the goods cleared without payment of duties and on fake invoices, were liable for confiscation. They acquired possession of, or were concerned in transporting, removing, depositing, keeping, concealing seling or purchasing and dealt with the excisable goods, which were liable to confiscation. The ratio of the cases cited are not applicable inasmuch as in the case of Associated Plastics & Rayond [2007 (215) ELT 309] and M / s Carpenter Classic Exim (2006 (200) ELT 593] relates to imposition of personal penalty on emplyees under the Customs Act and in the case of Vinod Kumar (2006 (199) ELT 705, penalty was held to be not sustainable in view of the fact that intention to evade payment of Central Excise duty was not mentioned in the order. In the present case, the role played by Shri Karim N.Shah in evasion of the excisable goods has been clearly brought out. Therefore, I hold that both, Shri Karim Nanjibhai Shah, proprietor of M/s Hakikat Auto Inds, Amreli, and Shri Prakash Somaiya, proprietor of M / s Esspee Finance, Rajkot, are liable for personal penalty under Rule 26 of the said Rules."

3. Before proceeding further, it will be proper to have a look of the provision of Rule 26 of the Central Excise Rules, 2002 which is reproduced here below:-

Penalty for certain "Rule 26 Offences *- "[(1)Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or rupees [1][two thousand rupees,] whichever is greater.]*

[3][Provided that where any proceeding for the person liable to pay duty have been concluded under clause (a) or clause (d) of sub-section (1) of section 11AC of the Act in respect of duty, interest and penalty, all proceedings in respect of penalty against other persons, if any, in the said proceedings shall also be deemed to be concluded.]

[(2) Any person, who issues-

(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or

(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made there under like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater.]"

3.1 From the facts of the matter and as per the provision of the Rule 26 of the Central Excise Rules, 2002, it can easily be inferred that the appellant though may not have physically handle the transportation, sale, purchase of "Chhakkdo Rickshaw" which was cleared without payment of the duty. However, he was fully aware that same are getting cleared without proper invoices and the manufactures of the "Chhakkdo Rickshaw" were not having required ARAI registration. The appellant has conscientious by provider his ARAI registration to the manufacturer/ buyers of non-duty paid Rickshaw for getting the same registered with RTO. Thus he has dealt with non-duty offending good in "any other manner". Thus, I am of the view that he has facilitated the clearance of excisable goods without the payment of duty which ultimately resulted into evasion of the Central Excise Duty by manufacturer of "Chhakkdo Rickshaw". The case laws which have been relied upon by the learned advocate are based on different facts altogether and therefore I consider that the same are not relevant in the present matter.

4. Accordingly, I hold that appeal is without any merit and I set aside the same.

5. Appeal is accordingly dismissed.

(Pronounced in the open court on 27.10.2023)

PRACHI

(C. L. MAHAR) MEMBER (TECHNICAL)

Back

Customs, Excise & Service Tax Appellate TribunalWest Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO. 2

Excise Appeal No. 11227 of 2014-DB
(Arising out of OIO-SUR-EXCUS-002-COM-048-13-14 Dated- 26/12/2013 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-II)

Birla Cellulosic.....Appellant
Birladham, Village : Kharach, Kosamba R S,Bharuch, Gujarat

VERSUS

C.C.E. & S.T.-Surat-ii .....Respondent
New C.Ex Building....Opp. Gandhi Baug,

Chowk Bazar, Surat,Gujarat-395001

WITH

Excise Appeal No. 11713 of 2014-DB
(Arising out of OIO-SUR-EXCUS-002-COM-075-13-14 Dated- 29/01/2014 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-II)

Birla Cellulosic.....Appellant
Birla Dham, Village : Kharach, Kosamba,BHARUCH, GUJARAT

VERSUS

C.C.E. & S.T.-Surat-ii .....Respondent
New C.Ex Building....Opp. Gandhi Baug,

Chowk Bazar, Surat,Gujarat-395001

APPEARANCE:

Shri. Anand Nainawati & Shri. Ishan Bhatt, Advocates for the AppellantShri. Rajesh Nathan Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

Final Order No. A/ 12583-12584 /2023

DATE OF HEARING:13.07.2023DATE OF DECISION:10.11.2023

C.L. MAHAR

Brief facts of the matter are that the appellant had procured and un- refined "Sulphur" from M/s. Reliance industries Ltd a 100% EOU unit at, Jamnagar and from M/s. Grasim Industries Ltd. of a 100 % EOU, Nagda whoin turn has procured the same from M/s. Reliance Industries Ltd, a 100% EOU. The appellant have also procured "Petroleum Cock" (Non-Calcined) from Reliance Industries Ltd. a 100% EOU, Jamnagar. M/s. Reliance Industries Ltd. a 100% EOU, Jamnagar who is the supplier of above mentioned inputs had paid duties in terms of Serial No. 2 of Notification No. 23/2003-CE dated 31st March, 2003 under Section 3 of the Central ExciseAct 1944. As per the department, the appellant was required to avail CENVAT credit on the procurement of the said products as per formula givenunder sub Rule 7 of Rule 3 of CENVAT Credit Rules, 2004.

2. It has been the contention of the department that the basic customs duty rate which was to be adopted for calculation of the admissible CENVAT credit as per the provisions of Rule 3(7)(a) of the Cenvat Credit Rules, 2004 in the given formula should have been the actual rate of the basic customs duty. The department is of the view that the appellant has taken basic custom duty at higher rate than what has actually been paid by the raw material supplier of a 100% EOU namely M/s. Reliance Industries Ltd.

3. The second issue pertains to the fact that Cenvat credit of the CVD which has been taken in the prescribed formula and Rule 3 (7) (a) of Cenvat Credit Rules, 2004by the assessee also included the elements of Education Cess and Secondary Education Cess in it. The department has not been in agreement on their aspect. The department has issued a show causenotice date 15.06.2012 demanding reversal of the Cenvat credit amounting to Rs. 86,09,185/- on the above mentioned issued The amount which was reversed by the appellant at the time of visit of the audit party was also demanded to be appropriated as per the provisions of Section 11 A(1) of theCentral Excise Act 1994 read of Rule 14 of the Cenvat credit Rules, 2004.The matter was adjudicated vide Order-In-Original No. 23/Commr./Surat-II-2013 dated 06.02.2013 where in the above mentioned amount of the Cenvatcredit was disallowed and the credit which were reversed by the appellant at the time of audit has been appropriated towards the demand. The appellants are before us against the above mentioned impugned Order-In-Original dated 29.01.2014

4. In the meanwhile, the appellant has taken back (re-credited) the amount of 82,38,315/- as Cenvat credit out of the above mentioned amount of 86,09,185/- suo-motto vide Entry No. 30009130 dated 07.02.2012 and intimated the same to the Jurisdictional Superintendent Range-4 of Division-
3 vide there letter dated 05.03.2012. The department feeling aggrieved of re-credit to the Cenvat credit issued another show cause notice dated29.01.2013 asking them as to why the Suo-motto credits availed by the appellant should not be recovered from them as per the provisions of Section 11 A (1) of the Central Excise Act, 1944 read with the Rule 14 of Cenvat Credit Rules,2004. The matter was adjudicated by the impugned Order-In-Original No. SUR-EXCUS-002-COM-075-13-14 dated 29.01.2014wherein, the learned adjudicating authority disallwed Cenvat Credit of Rs. 82,38,350/- taken as refund by way of suo-motto re-credit.. The above mention Order-In-Original is also under challenged before us in one of these appeals also.

5. The basic contention in the entire issue here is, whether rate of basic customs duty is to be taken as full or normal rate of basic customs duty for the purpose of the formula provided under Rule 3(7)(a) of the Cenvat Credit Rules, 2004 or the basic Customs Duty is to be taken it 50% of normal rate as provided in the Customs exemption notification.

6. Whether the rate of CVD would include the 2% Primary Education Cessand 1% of Secondary and Higher Education Cess of Central Excise; whether

the 3rd times Cess on gross amounts of duties of excise paid as per SerialNo. 2 of the table to the Notification No. 23/2003-CE dated 31.03.2003 weredirectly admissible as Cenvat credit in full quantum without making any reference to the formula provided under Rule 3(7)(a) of the Cenvat Credit Rules, 2004. The Central Excise Authorities are of the view that as per the provisions of Rule3(7)(a) of the Cenvat Credit Rules, 2004, rate of basic customs duty to be taken in the formula provided under Rule 3 (7)(A) of the Cenvat Credit Rules, 2004 is to be taken 50%, of normal rate of Basic Customs Duty, at the same time 2% Primary Education Cess and 1%Secondary and Higher Education Cess should not to be taken into consideration for the purpose of the CVD. At the same time 3rd time Cess of 2% of Primary Education Cess and 1% of Secondary and Higher EducationCess paid by the supplier (a 100% EOU) in the gross amount of Central Excise Duty paid by it under Serial No.2 of the table to the Notification No. 23/2003-CE dated 31st March 2003 were not admissible to the appellants as Cenvat credits.

7. The learned advocate appearing for the appellant submitted that the expression Basic Customs Duties (BCD) appearing in the formula provides inRule 3(7)(a) of the Cenvat Credit Rules,2004 means the normal, a full rate of Basic Customs Duty and not 50% of Basic Customs Duty as paid by the supplier a 100% EOU, in terms of Serial No.2 of the table in the Notification No. 23/2023-CE dated 31st March 2003. If it is required by the legislature that BCD would mean 50% of the normal rate of the Basic Customs Duty; inthat case the expression BCD should have incorporated in the formula as 50% of the BCD for effective rate of BCD.

8. Learned Advocate for the appellant was further argued that disallowingof Cenvat Credit of 2 % of Primary Education Cess and 1% of Secondary andEducation Cess of Central Excise Duty called as third time Cess paid by a 100% EOU on the gross amount of the Central Excise Duty paid by such EOU in terms of the Serial No. 2 of table to the Notification No. 23/2003-CE dated 31 March, 2003 is unjustified as the Central Excise Duty would not only be the amount equivalent to the Excise Duty but also the amount equivalent to the Cess on such duty. It has been the submission of the learned advocate that the restriction under sub Rule 2 of Rule 3 of CENVAT Credit Rules, 2004 are worded in such a way that only to restrict the creditof Basic Customs Duty. However, the actual amount of the Central Excise Duty and Cesses which are paid on such Excise Duty need to be allowed for taking credit as per Cenvat Credit Rules, 2004. It is further been mentioned that there is a plethora of judgments of this Tribunal wherein it has beenheld that the Cenvat Credit of 2% of Primary Education Cess and 1% of Secondary and Education Cess also called as third time Cesses are allowable as per the provision of Cenvat Credit Rules, 2004. The learned Advocate has relied upon the following decisions to support his argument in this regard.

- 2008-TIOL-226-CESTAT-MUM EMCURE PHARMACEUTICALS LTD. VERSUS C.C.E., PUNE.

- 2008-TIOL-2305-CESTAT-BANG SHREYA PETS PVT. LTD. VERSUS C.C. &C.E., HYDERABAD-IV.

- 2010-TIOL-810-CESTAT-BANG TYCHE INDUSTRIES LTD. KAKINADA(A.P.) VERSUS C.C.E., VISAKHAPATNAM.

9. With regard, Suo moto re-crediting of the debited amount. The learnedadvocate has submitted that, it is settled question of law that and if Cenvat Credit debited by a Central Excise assessee wrongly or on the ill-advice of any Central Excise Officer, same can be re-credited by the assessee on his own. In this regard, the learned advocate has relied upon following decisions in support of his arguments.

- 2005 (187) E.L.T. 266 (Tri.-Del.) HIND SPINNERS C.C.E., BHOPALVERSUS

- 2005 (190) E.L.T. 406 (Tri.-Mumbai) GUJARAT ALKALIES & CHEMICALSLTD. VERSUS C.C.E., VADODARA.

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- 2006 (203) E.L.T. 133 (Tri.-Mumbai) VEENA DIECASTERS & ENGINEERS PVT. LTD. VERSUS C.C.E., THANE-I.

- 2007 (210) E.L.T. 406 (Tri.-Mumbai), C.C. &C.E., RAJKOT VERSUS INTRICAST PVT. LTD.

- 2007 (218) E.L.T. 98 (Tri.-Ahmd.) C.C.E., &C., SURAT-II VERSUSRADHA KRISHNA SYNTHETICS PVT. LTD.

- 2008 (224) E.L.T. 333 (Tri.-Bang.) SOLARIS CHEMTECH LTD. VERSUSC.C.E., MANGALORE.

- 2008 (228) E.L.T. 561 (Tri.-Ahmd.) SHREE VALSAD S.K. UDYOGMANDLI LTD. VERSUS C.C.E., & C., DAMAN.

- 2008 (231) E.L.T. 154 (Tri.-Ahmd.) VERSUS LARK WIRES & INFOTECHLTD.

- C.C.E., & C., VADODARA-II. 2013 (291) E.L.T. 399 (Tri.-Ahmd.) BODAL CHEMICALS LTD. VERSUS C.C.E., AHMEDABAD-I.

9.1 It has further been submitted that period of demanded pertains to 08.07.2007 to 31.01.2009 in this case audit of the appellant took place in February, 2009 while the show cause notice has been issued on 15.06.2012 invoking the extended time period under Section 11A Central Excise Act, 1944 read with Rule 148 Cenvat Credit Rules, 2004. The appellant has regularly reflected the amount of Cenvat Credit taken by them in E.R-1 returns and E.R-6 returns. There has been no suppression of facts or willful mis-statement on the part of the appellant, therefore, invoking of extended time proviso is not legally not sustainable.

10. We have also heard Shri. Rajesh Nathan, Assistant Commissioner(AR), who has reiterated the findings given in the impugned Order-In-Original.

11. Having heard both the sides before preceding further in the matter, it will be relevant to mention here that the period of demand in this case pertains to the period from 08.07.2007 to 31st January, 2009. It will be proper to have a look at the relevant provisions of the Cenvat Credit Rules, 2004 as existed at relevant time. The relevant Rule is reproduced here below:-

"RULE 3. CENVAT credit - *(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of –*

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;
(ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;
(iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);
(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);
(v) the National Calamity Contingent duty leviable under section136 of the Finance Act, 2001 (14 of 2001);
(vi) the Education Cess on excisable goods leviable under section 91 read with section 93

of the Finance (No.2) Act, 2004 (23 of 2004);

[(via) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007):]

(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) (vi) and (via));

(vila) the additional duty leviable under sub-section (5) of section 3 ofthe Customs Tariff Act

***Provided** that a provider of taxable service shall not be eligible to take credit of such additional duty;]*

(viii) the additional duty of excise, leviable under section 157 of theFinance Act, 2003 (32 of 2003);

(ix) the service tax leviable under section 66 of the Finance Act;

(x) the Education Cess on taxable services leviable under section 91read with section 95 of the Finance (No. 2) Act, 2004 (23 of 2004); and

(xa) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007(22 of 2007); and]

[(xi) the additional duty of excise leviable under 7[section 85 of Finance Act, 2005 (18 of 2005)]-1 paid on-

(i) any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service on or after the 10th day of September, 2004;and

(ii) any input service received by the manufacturer of finalproduct or by the provider of output services on or after the 10th day of September, 2004, including the said duties, or tax, or cess paid on any input or input service, as the case may be, used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 214/86 - Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number GS.R.547(E), dated the 25th March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final product, on or after the 10th day of September, 2004.

***Explanation**. - For the removal of doubts it is clarified that the manufacturer of the final products and the provider of output serviceshall be allowed CENVAT credit of additional duty leviable under section 3of the Customs Tariff Act on goods falling under heading 9801 of the FirstSchedule to the Customs Tariff Act. "*

***"RULE 3*(7)** Notwithstanding anything contained in sub-rule (1) and sub-rule (4), -

(a) CENVAT credit in respect of inputs or capital goods produced or manufactured, by a hundred per cent. export-oriented undertaking or by a unit in an Electronic Hardware Technology Park or in a Software Technology Park other than a unit which pays excise duty levied under section 3 of the Excise Act readwith serial numbers 3, 5, 6 and 7 of notification No. 23/2003- Central Excise, dated the 31st March, 2003, [G.S.R. 266(E),dated the 31st March, 2003] and used in the manufacture of the final products or in providing an output service, in any other placein India, in case the unit pays excise duty under section 3 of the Excise Act read with serial number 2 of the notification No.23/2003- Central Excise, dated the 31st March, 2003, [G.S.R. 266(E), dated the 31st March, 2003), shall be admissible equivalent to the amount calculated in the following mannernamely:-

Fifty per cent. of [X multiplied by I(1 + BCD / 100) multiplied by (CVD/100)]], where BCD and CVD denote ad valoremrates, in per cent, of basic customs duty and additional dutyof customs leviable on the inputs or the capital goods respectively and X denotes the assessable value.

[**Provided** that the CENVAT credit in respect of inputs and capital goods cleared on or after 1st March, 2006 from an export oriented undertaking or by a unit in Electronic Hardware

Technology Park or in a Software Technology Park, as the case may be, on which such unit pays excise duty under section 3 of the Excise Act number 2 of the notification no. 23/2003 Central Excise dated 2003 IG.S. R * 0.266(E) . the 31st March, 2003] shall be equal to X multiplied by [[1 + BCD / 400]] multiplied by (CVD / 100)]."

11.1 It can be seen from the provisions of Rule 3(7) (a) as reproduced above that the Cenvat Credit Rules, provides that incase of rawmaterial/inputs are being procured from a 100% EOU. The eligible amount of Cenvat Credit on such purchases is to be calculated as per the provisions of Rules, 3 (7)(a). We take note of the fact that the formula which have been provided under rule 7 of rule 3 of the Cenvat Credit Rules, 2004 only provides that the relevant Basic Customs Duty it does not mention about the effective rate of the Customs duty that is to say for calculation of the Cenvat Credit which is to be availed by the purchaser of the inputs. The buyer of the impacts has to apply in the provided formula the normal rate of Basic Customs Duty. We are of the view therefore that we find no wrong in the way, the Cenvat Credit has been availed by the appellant.

12. With regard to whether the 2% Primary Education Cess and 1%Secondary Education Cess of Central Excise are allowable for the purpose of inclusion in CVD for calculating Cenvat Credit. In this regard, we are of the view that since both Primary Education Cess and Secondary Education Cess are being paid as a component of the Central Excise and therefore their no bar under Cenvat Credit Rules, 2004, it the relevant time for not allowing thecredit of such Cess, which have been paid as part of Central Excise Duty under Section 3(1) of the Customs Tariff Act, 1975 integral component of theCVD (countervailing duty). This Tribunal in case of Jai Corp Ltd. Vs. C.C.E reported under 2015 (317) ELT 489 (T) has examined this issue in detail andhas found that for calculating of admissible Cenvat Credit under Rule 3 (7)
(A) of Cenvat Credit Rule, 2004. The elements of Education Cess and Higher Education Cess need to be included for deciding the component of the CVD paid by a 100% EOU. The relevant portion of above mentioned order are been reproduced here.

4. Heard both sides and perused the case records. The issue involved in the present appeal is as to what will be the admissible credit on inputs which are received by the appellant from 100% EOU's under Notification 23/2003-C.E., dated 31-3-2013. It is the case of the appellant that for theinputs received under Sr. No. 1 of table to Notification No. 23/2003-C.E. full credit will be admissible including the cesses paid. In this regard it is relevant to reproduce Para 7.1 and 8 of case law *Iscon Surgicals Limited*
v. *CCE, Jaipur* (supra) where it is held that when duty is paid by 100% EOU under Sr. No. 1 of the table to Notification No. 23/2003-C.E. then fullcredit will be admissible, the same are reproduced below :-

"7.1 Though the excise duty payable on DTA clearances of a 100% EOU paying duty under S. No. 2 of the table to the Notification No. 23/2003-C.E., has basic Customs duty component also, the Cenvat credit available is confined only to the component comprising of Additional Customs duty (also called countervailing duty). Therefore on this basis, it can be said that though Rule 3(7)(a) does not mention any formula restricting, the credit, when the inputs received from a 100% EOU have suffered duty under S. No. 1 of the table to the Notification No. 23/2003-C.E., i.e. duty paid on the goods is basic customs duty plus Additional Customs duty plus sp. additional customs duty, if any, payable, plus Education Cess and S & H Cess payable under Section 93 of Finance Act, 2004 & Section 138 of Finance Act, 2007 respectively, the Cenvat credit available would be confined only to the Additional Customs duty plus sp. additional customs duty if payable plus education and S & H cess.

8. In these cases, the Appellant's plea is that the duty on the inputs has been paid under S. No. 1 of the table to the Notification No. 23/2003-C.E. If this is correct, they have correctly taken the Cenvat credit of Additional Customs duty component and education and S & H cess. However, if the inputs received from the 100% EOU have suffered duty in terms of S. No. 2 of the table to Notification No. 23/2003-C.E., the Cenvat credit entitlement would be as per the formulas prescribed in Rule 3(7)(a). Since no finding has been given on the Appellant's plea that the inputs received from the 100% EOU had suffered duty in terms of S. No. 1 of the table to the

Notification No. 23/2003-C.E., this plea is required to be examined for which this matter would have to be remanded."

It is observed from the representative copies of the invoices produced both by the appellant and the Revenue that in some invoices duty is paid under Sr. No. 1 of table to Notification 23/2003-C.E. On these invoices where duty is paid under Sr. No. 1 of table to Notification 23/2003-C.E. entire credit of CVD, including cesses will thus be admissible to theappellant.

4.1 Regarding admissibility of CENVAT credit on Education Cess and Secondary Higher Education Cess for the period prior to 7-9-2009 the following view was taken as held by this bench in the case of *CCE, Daman*
v. *PVN Fabrics* (supra) :-

"5. As can be seen from the Rule, the second proviso providing credit of the full amount of CENVAT credit of Excise duty paid in respect of clearances made under Notification No. 23/2003-C.E.,dated 31-3-2003 and also allowing the full education cess paid was introduced with effect from 7-9-2009 and at the time when the Tribunal considered the issue in the case of *Emcure Pharmaceuticals Ltd.*, this proviso was not there. It was the ld. AR's submission that the fact that legislature chose to introduce a proviso and specifically provide for credit of education cess paid shows that the CENVAT credit of education cess paid prior to 7-9-2009 was not admissible. It is his submission that if the intention of the legislature was to allow the CENVAT credit of education cess prior to 7-9-2009, there was no need to amend the rule since the decision in the case of *Emcure Pharmaceuticals Ltd.* was already available and a view hadalready been taken that credit would be admissible. He further relied upon the decision in the case of *Bansal Wire Industries Ltd.* - 2011 (269) E.L.T. 145 (S.C.), *Madura Coats Ltd.* - 2003 (161) E.L.T. 812 (Tri.-Chennai), *Central Board of Dawoodi BohraCommunity* - 2010 (254) E.L.T. 196 (S.C.). He relied upon the decision in the case of *Madura Coats* to submit that right to education cess as CENVAT credit was created on 7-9-2009 and therefore it cannot be said to be clarificatory since it is a substantive right and therefore the same would not be admissible prior to that date. He relies upon the decision in the case of *Bansal Wire industries Ltd*. to submit that rule or notification should not be interpreted in such a manner that rulewould become redundant. The fact that the legislature chose to introduce the rule subsequently, would show that the benefitwas not available earlier and if the decision in the case of*Emcure Pharmaceuticals Ltd.* is followed, it is rendering subsequent amendment of the rule by the legislature redundant.He also relies upon the decision in the case of *Central Board of Dawoodi Bohra Community* to submit that the decision in the case of *Emcure Pharmaceuticals Ltd.* is to be held as *per incuriam* since it is clear that the decision of the Tribunal rendered the amended rule redundant and further it also shows that *Emcure Pharmaceuticals Ltd.* has not considered the statutory provisions properly.

6. Learned Counsel for the respondents would submit that the settled law is that any decision by a judicial forum should not render the existing law or statutory provision redundant, but notthe amendment or provision which is brought out in statutebook on a subsequent date. He submits that the legislature would have introduced the provisions as a clarificatory one so that unnecessary litigation and confusion are avoided and it would not necessarily mean that prior to that date, the benefit was not available. He also submits that it is necessary to examine the decision in the case of *Emcure Pharmaceuticals Ltd*.without taking amendment into account to see its correctness and not taking the amendment made subsequently into consideration to consider previous decision.

7. I find myself in agreement with the submissions made by Id. Counsel for the respondents. Since the amended provisions of the rules were not there, it cannot be said that the decision in the case of *Emcure Pharmaceuticals Ltd*. is *per incuriam* because in the light of subsequent amendment, the benefitbecame available. What is required to be considered is whether the Tribunal is required to follow the decision in the case of *Emcure Pharmaceuticals Ltd.* or not. In my opinion, the ld. AR has not been able to make out a case on this issue. The decisionof the Tribunal in the case of *Madura Coats Ltd*., the issuebefore the Tribunal was whether the

Notification No. 28/2001-
C.E. which was issued after long time after issue of Notification No. 82/92-C.E., expanding the benefit can be said to haveretrospective effect. A view was taken that substantive right which was subsequently created, cannot be said to be clarificatory in nature to have a retrospective effect. In thiscase, that is not the issue before me. Even before the amendment was introduced, the Tribunal had already taken a view that education cess paid in full has to be allowed as CENVAT credit. It has nothing to do with the amendment. There is neither a request from the assessee nor is the issue beforeme as to whether the benefit of amendment made with effect from 7-9-2009, can be extended for the earlier period. The question before me is whether I am required to follow theearlier Tribunal's decisions or not. Therefore, this decision is not clearly applicable.

8. As regards the decision of Hon'ble Supreme Court in the caseof *Bansai Wire Industries Ltd.*, the decision was cited to submit that it is a settled principle of law that the words used in Section, Rule, or Notification should not be rendered redundant and should be given effect to. A decision which has been rendered prior to the amendment and if the legislature bringsout an amendment subsequently, it cannot be said that the decision of the Tribunal rendered prior to that date will become invalid because it extended the benefit which was extended subsequently by amendment. This decision would apply only when a decision of the Tribunal or a Court rendered existing provisions in Notification/Rule/Section redundant. Therefore, this decision is also not applicable to the facts of this case. As regards treating the decision of the Tribunal *per incuriam*, the question does not arise in this case because the decision in the case of *Emcure Pharmaceuticals Ltd.* had considered the statutory provisions in detail and had come to a conclusion andit cannot be said that there were decisions of a higher judicial forum or a provision of law or relevant facts which have been ignored or not considered, despite having been submitted. In such a situation, the decision cannot be said to be *per incuriam* especially when the statute was amended subsequently. Thus, I find that none of the decisions cited by the ld. AR can be appliedto the facts of this case.

9. I have already observed earlier that there is no disputeabout the applicability of the decision in the case of *Emcure Pharmaceuticals Ltd.* to the facts of this case. Under these circumstances, respectfully following the decision in the case of *Emcure Pharmaceuticals Ltd*., the appeal filed by the Revenue isrejected and the cross objection filed by the respondent alsogets disposed of."

5. In view of the above settled position of law Cenvat credit of Cesses was admissible before the amendment also. So far as calculation ofadmissible Cenvat credit, as per formula prescribed under Rule 3(7)(a) of the Cenvat Credit Rules, 2004 is concerned, appellant argued that elements of Education Cess and SHE Cess has to be considered as a part of CVD only. Appellant has relied upon the case laws of *Shri Venketeshwara Precision Components* v. *CCE, Chennai* (supra) and *CCE, Chennai* v. *Jumbo Bags Limited* (supra). In view of these case laws relied upon by the appellant this issue is no more *res integra* as per Para 6 ofthe case law *CCE, Chennai* v. *Jumbo Bags Limited* (supra) :-

"6. As regards the cases where the duty has been paid by the suppliers availing exemption under Sr. No. 2 of the Table under Notification No. 23/2003-C.E., dated 31-3-2003, the restriction under the proviso to Rule 3(7) of the Cenvat Credit Rules, 2004 comes into play as the period involved in this case is between June, 2007 to December, 2008. As has been argued by the learned advocate, there is no dispute that the restriction placed under sub-rule 7(3) is intended to prohibit a manufacturer from taking credit of that portion of the duty which is equivalent to the Basic Customs Duty. This provision is required so as not to give any undue advantage in respect of any supplies from the EOUs since in the case of imported goods, there is no provision for taking credit of the Basic Customs Duty paid on the imported inputs. As regards the Additional Duty of Customs, which islevied under Section 3 of the Customs Tariff Act, 1975, the same is equal to duty of excise including cess, which is also levied and collected as duty of excise, and hence credit is available underthe main provisions under Rule 3(1) of the Cenvat Credit Rules, 2004 in respect of imported goods as well as in respect ofindigenously produced goods. In the case of goods produced by EOUs, which are Units within the territory of India, the intentionis

to charge excise duty equivalent to the Customs Duty leviable on such goods, if imported. The calculation of such excise duty includes Basic Customs Duty as well as Additional Customs Duty.In turn, the Additional Customs Duty includes the excise duty as well as cess on excise duty. The formula provided under Rule3(7) of the Cenvat Credit Rules, uses an expression "CVD" butthe same is defined to be the "Additional Duty of Customs". Hence, the expression would include not only the amount equivalent to the excise duty but also the amount equivalent to the cess on such excise duty. Since the restriction under the saidsub-rule (7) is worded in such a ways to restrict credit of Basic Customs Duty but allow credit of Additional Customs duty, the appellants are within their rights to take credit of an amount equivalent to the Additional Customs Duty inclusive of exciseduty as well as the amount of cess on such excise duty. I also note that there is no restriction on taking credit of cess in the Cenvat Credit Rules, 2004 although there is a restriction regarding utilization of various credits. On the other hand, Rule 3(1) does allow taking of credit of cess specifically. I also find that in the case *Emcure Pharmaceutical* cited supra, credit ofcess has been allowed though entirely for different reasons."

In view of the above while calculating admissible CENVAT credit under Rule 3(7)(a) of Cenvat Credit Rules, 2004, appellant has correctly factored Education Cess and Higher Education Cess as CVD paid.

5.1 However, in Para 6.5, 6.7 and D of the appeal memorandum appellant has admitted that for the period 1-3-2008 to 31-7-2008 the duty on inputs received was reduced from 16% to 14% as per budget 2008-09 whereas they calculated admissible credit by taking duty at the rate of 16%. That the above wrong calculation lead to excess credit of Rs.3,91,212/- and that any demand beyond Rs. 3,91,212/- is not maintainable. In view of the above submission demand of Rs. 3,91,212/- is required to be paid by the appellant along with interest.

6. Appellant has also argued that the manner of taking CENVAT credit ofinputs received from 100% EOU was complicated and contentious. That different views were being expressed on the issue, therefore, extended period can not be invoked and there is no case for imposing penalties. Itis observed from the case laws relied upon by the appellant that the issueof taking CENVAT credit on inputs received from 100% EOU under Notification No. 23/2003-C.E. and method of calculating admissible credit as per Rule 3(7)(a) formula was disputed, therefore, no intention toevade payment of duty can be attributed on the part of the appellant. Accordingly, it is held that extended period is not applicable to the presentfacts and circumstances of case. Accordingly, penalties can also not be imposed upon the appellant."

13. We find that demand in this case is clearly hit by time limit provided under Section 11A of the Central Excise Act, 1944, we take note of the fact that the appellant has been filing regular E.R-1 and E.R-6 returns intimatingthe amount of Cenvat Credit availed by them. At the same time credit has taken place in February, 200. The impugned show cause notice has been issued on 15.06.2012. We find that there is not element of suppression or mis-statement with an intent to evade duty. We are therefore of view that show cause notice is hit by time limit provided under Section 11A of Central Excise Act, 1944 13.1 In view of above, we allow that appeal on this issue with regard to merits and on time bar basis.

14. With regard to the question of Suo moto re-credit of Cenvat Credit. Wefind that the appellant initially admitting that they have availed CenvatCredit wrongly in violation of the provisions of the Rule 3(7) (A) has debited the demanded amount on their own from there the statutory balances in the statutory records. We find that it was wrong on the part of the appellant to suo moto re-credit the amount when the matter was still pending for adjudication. In this regard, we find that Larger bench of this Tribunal in case of BDH INDUSTRIES LTD Vs. Commissioner of Central Excise (Appeal) ,Mumbai-I has held as follow:-

"12. We find that there is no provision under Central Excise Act andRules allowing *suo moto* taking of credit or refund without sanction by theproper officer. The appellant's contention

that refund in respect of duty paid twice cannot be considered as refund of duty and is only the accounting error does not appeal to us as the debit entry made in the accounts is towards payment of duty only and therefore refund of these amounts has to be considered as refund of duty only. The PLA accountand the credit accounts are required to be submitted to the department and any correction carried therein, need to have department's sanction. We also note that the law relating to refund has been fully analysed bythe Apex Court in the case of *Mafatlal Industries* (cited supra) which makes it very clear that all types of refund claim be there of excess duty paid or otherwise are to be filed under Section 11B and have to pass the proof of not passing on the incidence of duty to others. The recentdecisions of Hon'ble Supreme Court in the case of *Sahakari Khand Udyog and Others* clearly laid down that all refunds have to pass through doctrine of unjust enrichment, even if it is not so expressly provided for inthe statute. From these decisions it clearly emerges that all types of refund have to be filed under Section 11B of the Central Excise Act and no *suo moto* refund can be taken unless and until the department is satisfied that the incidence of duty has not been passed on.

13. In view of above, we answer the reference made to us by holdingthat all types of refund have to be filed under Central Excise Act andRules made thereunder and no *suo moto* credit of the duty paid in excess may be taken by the assessee. The matter is now sent back to the referral bench for passing appropriate orders on the appeal before it."

15. In view of above, we find it wrong on the part of appellant to have re- credited debited amount of the Cenvat Credit on their own and therefore their appeal on this account is being rejected. In view of above we hold that the demand of wrong availment of the Cenvat Credit under formula provided as per Rule 3(7) (A) of Cenvat Credit Rules, 2004 is concerned. We find that the impugned Order-In-Original is without any merit and therefore we set aside the same and appeal in this regard is allowed. The appeal pertaining tothe suo moto re-credit of the Cenvat Credit is concerned an explained in preceding para, same is dismissed.

16. The appeals are decides in the above manner.

Pronounced in the open court on 10.11.2023)

(RAMESH NAIR)MEMBER (JUDICIAL)

PRACHI

(C. L. MAHAR)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALWEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 02

Excise Appeal No. 11687 of 2014-SM

[Arising Out Of OIA-AHM-EXCUS-003-APP-001-14-15 Dated- 04/04/2014 Passed By Commissioner of Central Excise-AHMEDABAD-III]

Hitachi Life And Solution India Ltd **…..Appellant**
Ashima Complex, Karannagar,

Kadi Kalol Road, Kadi, Mehsana, Gujarat

VERSUS

C.C.E. & S.T.-Ahmedabad-iii **…..Respondent**
Custom House... 2nd Floor,

Opp. Old Gujarat High Court, Navrangpura,Ahmedabad, Gujarat-380009

APPEARANCE:

Shri. S.J. Vyas, Advocate for the Appellant

Shri. Anand Kumar, Superintendent (Authorized Representative) for the Appellant

CORAM: HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

FINAL ORDER NO. A/ 12091 /2023

DATE OF HEARING:01.09.2023
DATE OF DECISION:21.09.2023

The issue involved in this case relates to unjust enrichment, theappellant during the period 10.05.2012 to 14.05.2012 claimed having paid Excise Duty, sought refund from the department as abatement percentage permitted on their product under Notification No. 26/2012 dated 10.05.2012 was varied from 25% to 35%. During the impugned period, the appellant cleared their product i.e. Air Conditioner at old rate of abatement, therefore,on coming to know of their mistakes filed refund claim of Rs. 15,23,922/-. On being asked to show that there was no unjust enrichment, as perpresumption available in Section 12B of the Central Excise Act, 1944, the appellant relied upon the Chartered Accountant's Certificate dated 29.10.2012 which reads as follows:-

"Further, it is on the part of the assessee to prove that the incidence of Central Excise duty has not been passed on to ultimate customer as per the provision of section 11B of the CEA,. The Chartered Accountants M/s S R Batlibol & Associates vide their certificate dated 29.10.2012 stated that the excess excise duty of Rs 15,23,922/- is shown as advance account as per un-audited books of accounts as on June 30, 2012; that the excess duty has been recorded in the books of accounts as debit under the ledger account namely, "Central Receivable" and has not been debited to "Cost of goods sold" under the statement of profit and loss for the quarter ended on June 30, 2012.

The said assessee except the above certificate, failed to submit the documentary evidence that they have not recovered the ultimate duty from their customers to whom the said goods have been sold from their depot and also failed to prove that the duty burden has not been passed to the ultimate customers."

2. The learned Commissioner (Appeals) while dealing with the matter gave the following findings:-

8.3 I find that appellant has contested that their claim was restricted to those cases where the goods were not sold, but were transferred todepot/godown and duty shown on the invoice was not recovered from any person in the absence of sale and at the same time, the duty claimed as refund was specifically shown as receivable in the books of account and certificate of Chartered Accountant to that effect was produced.

8.5 In my opinion appellants' contention would have been worth consideration, if the appellant have provided the documents evidence to prove that the disputed goods cleared during the period 10/5 / 2012 to 14/5 / 2012 were in their possession. I find that during the remand proceedings also they have not produced such documents before theadjudicating authority resulting in to rejection of their claim. So far as the Chartered Accountant's certificate produced is concerned, I hereby mention the excerpts of Sub-Para-D of Para - I, that:-

"we have been informed by the management that the above excise duty has not been directly or indirectly passed on to the customers. We have relied upon such representation from the management and have not undertaken any procedure on the same".

Plain reading of said excerpts of the certificate, it can be concluded that such certificate cannot be treated proper as the auditors have simply relied the representation from the management and have not undertaken any procedure on the same."

2.1 In short, he rejected the claim for lack of evidence and on the basis of various lacunae as pointed out by the Commissioner (Appeals) in its order. Appellants aggrieved by the order, have filed the present appeal.

3. The Learned Advocate, inter alia, emphasized that rejection of refund was improper and that certificate given by Chartered Accountant based on their books of accounts and given by an expert was an acceptable documentary evidence and goods for which refund was claimed were those which were not sold but were transferred to depot/godown of the appellant for onwards sale that the duty shown on the invoice was not recovered from any other person and in the absence of sale, they had shown duty claim as refund specifically as receivable in the books of account and certificate of theChartered Accountant has also shown the same. Also as the lower authorities held that goods were sold on MRP assessment basis, the duty element that specifically passed on as the MRP would include the element of Excise Duty. The appellant contended that this is nothing but lack of appreciation of MRP being used as basis for valuation and the goods actually being sold or sale price of transaction value. In the present instance, the goods on which refund was claimed were those which were not sold and the same were lying in the depot and therefore no burden or incidence of tax was actually passed to any other customers.

4. The Learned AR relies upon the finding of Commissioner (Appeals) andalso relied additionally upon the decision of "Apnacar.Com Pvt. Ltd. VsCommissioner of Central Tax Bangaluru South Commissionerate as reported in 2021 (55) GSTL 166 (Tri.-Bang.) to indicate that Chartered Accountant Certificate if issued at the request of the appellant cannot be considered as conclusive proof to decide any other issues.

5. Considered, the rival submissions. This Court has gone through the records as are available on the file. The appellant have contended that consequent upon abatement being varied vide

Notification No. 26/2012dated 10.05.2012, they could not clear the goods from factory by claiming higher abatement due to oversight and goods were cleared by them to their depot and not to the ultimate consumer as on the date of filing refund which *inter alia,* was rejected on the ground of unjust-enrichment and lack of sufficient evidence. They claimed that they have not varied price as was prevailing prior to abatement percentage having been raised by the aforesaid notification and therefore the duty in effect was not extra charged from the customers. They have also sought to place reliance on the C.A certificate as above.

5.1 While considering the rival submissions, this Court finds that as pointed out by the Learned Commissioner (Appeals) the language of the CA certificate leaves much to be desired. And therefore for reasons stated he has correctly rejected the same. However, under Section 4A of the Central Excise Act, 1944 which deals with the valuation of excisable goods with reference to Retail Sales Price, in Section 4A(3) following has been provided:-

Section 4A(3):- *"The Central Government may, for the purposes of allowing any abatement under sub-section 2, take into account the amount of duty of excise, sales tax and other taxes, if any, payable on such goods."*

5.2 It is thus clear that variance in the rate of abatement just does not happen due to variance of Excise Duty only but also because of variance of other taxes that might have moved intandem with the rate of abatement. Infact percentage of abatement is likely to go up as per Section 4A(3) only when taxes have already been raised. It is thus clear that unless and until exact components of Excise duty varied as well as other taxes includingstate levies varied while computing abatement is known, it cannot be stated by a party categorically that it paid which tax in excess, specially when somestate levies are meant for wholesalers and retailers. It is thus clear that in MRP based assessment, refund of non claim of abatement cannot be purely treated as a refund of excise duty paid in excess only as per Section 11B. In the proceedings before this Court, such information as to what all taxes went into working of abatement is woefully lacking. Party has also not produced the same by procuring the same under R.T.I or otherwise. Further, there is nothing on record from the party as to what happened beyond depot and whether apart from itself, all retailers and wholesaler paid higher tax which was the component of higher abatement or whether consumer was less charged by reducing M.R.P, by way of a discount. Since the fixing of MRP hasrepercussions even under legislations like Legal Metrology Act and change of such MRP once goods are cleared from the end of manufacture, is not easyto change. Therefore, it cannot be agreed upon as mentioned by the appellant on the basis of the evidence made available that they having cleared the goods did not charge the price as per abatement claimed by them from ultimate consumer and also that excess abatement was only on account of excess excise duty, which they alone will have borne the brunt of in case of their above oversight. The onus which is upon the party as per presumption of Section 12B is therefore not discharged. However, it isdesirable that department too while working out abatement as per Section 4A(3) should exhibit transparency in its working to indicate what all taxes and to what extent have been taken in to consideration or at least should liberally provide such information to concerned parties.

6. Zhis Court therefore finds no merit in appeal and rejects the same.

(Pronounced in the open Court on 21.09.2023)

SOMESH ARORA)MEMBER (JUDICIAL)

Prachi

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABADREGIONAL BENCH - COURT NO. 3 **EXCISE**
Appeal No. 11578 of 2016-DB

[Arising out of Order-in-Original/Appeal No CCESA-VAD-APP-II-MM-10-2016-17 dated 26.04.2016 passed by Commissioner of Central Excise, Customs and Service Tax- VADODARA-II]

Prafful Overseas Pvt Limited ..... Appellant
Plot No. 9C, GIDC, Panoli, SURATGUJARAT

VERSUS

Commissioner of Central Excise & ST, Vadodara-ii ..... Respondent
1st Floor, Room No.101, New Central Excise Building,Vadodara, Gujarat-390023

APPEARANCE :

None for the Appellant

Shri Rajesh R. Kurup, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 09.08.2023DATE OF DECISION: 12.09.2023

FINAL ORDER NO. 12007/2023RAMESH NAIR :

The issue involved in the present case is whether the appellant is entitled for refund of Education Cess and Secondary and Higher Education Cess paid against CVD portion of customs duty.

2. Shri S. Suryanarayanan, learned Counsel vide his letter dated 07.08.2023 submitted that identical case of the appellant Company has beendecided vide this bench Order No. A/10536-10538/2022, accordingly he requested that this appeal be decided on merits.

3. Shri Rajesh R. Kurup, learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that the issue is no longer res-integra and in the appellant's own case vide order dated 20.05.2022 decided the matter against the appellantwhich may be followed in the present appeal also.

4. Heard both the sides and perused the record. We find that theidentical issue in the appellant's own case has been decided vide order No. A/10536-10538/2022 dated 20.05.2022. The order is reproduced below:-

4. I have carefully considered the submissions made by both the sides and perused the records. I find that the only ground for claim of refund of the appellant is that the period of taking credit as beyond the normal period. Therefore, the recovery of the same is not sustainable on time bar consequently they are entitled for the refund. The appellant have strongly relied upon the decision of Nirma Ltd (supra) wherein thedemand for the extended period was set aside. I find that in the present case it is not a case of demand but the appellant have paid the amount of Cenvat credit accepting theirmistake that the Cenvat credit in respect of CVD of the custom duty is not admissible. This issue was raised by the audit and consequently the appellant have paid the amount. It is pertinent to note that the issue of non availability of the Cenvat credit has been decided by this Tribunal in the case of Nirma P. Ltd and ors Vs. 2018(361) ELT 136 (Tri.- Ahmd). As per this judgment the appellant was not entitled for Cenvat credit. Therefore as per the merit

of the case the appellant was not entitled for the Cenvat credit. Accordingly, they have reversed the credit. It is also important to note that in the present case there is no demand involved the issue of extended period can be decided only in case of demand not in the case of the refund. The refund needs to be decided only on the merit whether the appellant was entitled for Cenvat credit or otherwise. Thedemand notice issued under Section 11A which prescribes the time limit which is notthe case hear. Therefore, the decision of the tribunal in the case of Nirma Ltd. relied upon by the appellant is of no help to the appellant for the reason that the same relatedto demand of recovery of wrongly availed the Cenvat credit. Whereas in the present case appellant have filed the refund claim and the refund was rightly decided on the merit that whether the appellant is entitled for Cenvat credit or not.

5. Accordingly, I do not find any infirmity in impugned order rejecting the refund.Considering merit of the case. Hence, the impugned orders are upheld and appeals are dismissed.**"**

6. In view of the above decision of this Tribunal in the appellant's own case on the identical issue, the issue is settled against the appellant. Accordingly following the decision of this Tribunal, we are of the view thatthe impugned order is correct and legal hence the same is sustainable. The appeal filed by the appellant is dismissed.

(*Pronounced in the open court on* 12.09.2023)

(Ramesh Nair)Member (Judicial)

C L Mahar)Member (Technical)

KL

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABADREGIONAL BENCH - COURT NO. 3 **EXCISE**
Appeal No. 10594 of 2020-DB

[Arising out of Order-in-Original/Appeal No CCESA-SRT-APPEAL-PS-634-2019-20 dated 11.03.2020 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

Pgp Glass Private Limited …. Appellant
ONGC Road, Tarsali Village, KosambaSurat, Surat, Gujarat-394120

VERSUS

Commissioner of Central Excise & ST, Surat-I ..... Respondent
New Building, Opp. Gandhi Baug, Chowk Bazar, Surat, Gujarat-395001

WITH

EXCISE Appeal No. 10598 of 2020-DB

[Arising out of Order-in-Original/Appeal No CCESA-SRT-APPEAL-PS-634-2019-20 dated 11.03.2020 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

Pgp Glass Private Limited …. Appellant
Ongc Road, Tarsali Village, KosambaSurat, Surat, Gujarat-394120

VERSUS

Commissioner of Central Excise & ST, Surat-I ..... Respondent
New Building, Opp. Gandhi Baug, Chowk Bazar, Surat, Gujarat-395001

APPEARANCE :

Shri Mehul Jivani & Shri SS Gupta, Chartered Accountants for the AppellantShri Rajesh K Agarwal, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 05.04.2023DATE OF DECISION: 23.08.2023

FINAL ORDER NO. 11739-11740/2023C.L. MAHAR :

The brief facts of the case are that appellant is engaged in the manufacture of glass bottles falling under Central Excise Chapter heading 70109000. During the course of audit of the office record of appellant, it hasbeen observed by the audit party that during 2014-15 to 2016-17, the appellant has recovered an amount of Rs. 7,43,61,147/- from their customers as mould charges. The appellant while manufacturing empty glass bottles and vials, as per requirement of the customers they getdeveloped various types of moulds and the amount of development of such moulds has been collected by the appellant from their customers as mould charges. It has been the contention of the department that amount so collected by the appellant from their customers as mould charges is an additional consideration and should form part of the transaction value, as per Section 4 of Central Excise Act, 1944 for the purpose of discharging Central Excise liability. After due enquiries, following two show causenotices as well as the orders-in-appeal have been issued to the appellant:-

Appeal No.	OIA No.	Period	Duty Demand in Rs.
E/10594/2020-DB	CCESA-SRT (APPEAL) PS-634/2019-20 Dated 26.02.2020	F.Y. 2014-15, 2015-16, 2016-17	89,37,902/-
E/10598/2020-DB		April 2017 to June 2017	12,15,760/-
	Total		**1,01,53,662/-**

Thus, the sole issue on which the Revenue has confirmed the demand holding that amount of the charges recovered by the appellant towards the value of moulds should have been added in the transaction value of the glass bottles supplied by the appellant to their customers the mould charges recovered from the buyers of bottles after clearances are, an additional consideration following back to the appellant as per Section 4 of the Central Excise Act, 1944 read with Rule 6 of Central Excise (Determination of Price of Excisable Goods) Rules, 2000.

2. Learned Chartered Accountant Shri Mehul Jivani appearing on behalf ofthe appellant has primarily contended that mould charges recovered by the appellant in respect of goods exported and thereby even if the duty beenpaid by the appellant on such charges, the same would have got refunded tothem. It has also been contended by them that excise duty applicable on domestic supplies has already been paid by them and the required evidence with regard to payment of duty on the supplies made to the domestic customers have already been produced by the appellant before the original adjudicating authority.

3. It is further contended by the learned Chartered Accountant that since the duty of excise leviable on the additional consideration collected from their customers as mould charges has already been deposited by them and the show cause notice in this case only demanding excise duty with regard to mould charges recovered by them from their foreign customers on the quantities of the bottles exported by them. It has been the contention of the learned Chartered Accountant that since the goods have been exported by them they would have paid Central Excise duty on the same even if proportionate mould charges would have got included in the value of exported goods. It has further been submitted that the appellant would have cleared goods on LUT or payment of duty or which would have been otherwise got refunded to them. In this way, the situation is absolutely Revenue neutral and there is no loss of Revenue to the government in this regard. Thus, it has been emphasized by the appellant that there is Revenue neutral and therefore, the impugned order-in-appeal is without anymerit. Learned Chartered Accountant has relied upon the following judgments to support his arguments:-

(a) Tytan Organics Pvt. Limited - 2018 (362) E.L.T. 280 (Tri. -Mumbai)

(b) M/s Ultratech Cements Limited - 2015 (10) TMI 1058 CESTATCHENNAI

(c) Sterlite Industries (India) Limited - 2012 (2) TMI 575 BOMBAYHIGH COURT

(d) V.E. Commercial Vehicles Limited - 2018 (15) G.S.T.L. 291 (Tri.Del.)

(e) V.E. Commercial Vehicles Limited - 2019 (31) G.S.T.L. 396 (S.C.)

(f) Felis Leo Engg. Pvt. Limited - 2017 (348) E.L.T. 681 (Tri. -Mumbai)

(g) Texyard International - 2015 (40) S.T.R. 322 (Tri. - Chennai)

(h) Indeos ABS Limited - 2010 (254) E.L.T. 628 (Guj.)

4. learned Chartered Accountant has also argued that the entire demand is barred by limitation as the first show cause notice was issued to them on 25.04.2019, demanding excise duty for the period 2014-15 to 2016-17 and since the entire demand is beyond the period of one year and there is no allegation of malafide intention or suppression of facts to evade payment of duty and therefore, extended period of five years is not applicable in their case. Since the goods have actually been exported, excise duty otherwise not leviable on the exported goods, the Adjudicating Authority should have dropped the show cause notice. Learned Chartered Accountant has also contended that there is no ground of levy of penalty under Section 11AC of Central Excise Act, 1944.

5. We have also heard Shri Rajesh K Agarwal, learned DR who hasreiterated the findings given in the order-in-appeal as well as in order-in- original.

6. Having heard both the sides, we find that the only question which needs to be decided by us is "whether the charges of moulds separately recovered by the appellant from their customers, amount flowing of additional consideration to the appellant and should have formed part of transaction value for levy of excise duty or not. Before proceeding further, itwill be relevant to have a look at the Section 4 of Central Excise Act, 1944 and Rule 6 of Central Excise (Determination of Price of Excisable Goods) Rules, 2000:-

"Section 4 in the Central Excise Act, 1944

4. Valuation of excisable goods for purposes of charging of duty of excise.—

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall—

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Explanation.—For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for thegoods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods."

"RULE 6. Where the excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.

Provided that where price is not the sole consideration for sale of such excisable goods and they are sold by the assessee at a price less than manufacturing cost and profit, and no additional consideration is flowing directly or indirectly from the buyer to suchassessee, the value of such goods shall be deemed to be the transaction value.] ***Explanation 1*** - For removal of doubts, it is hereby clarified that the value, apportioned as appropriate, of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable, shall be treated to be the amount of money value

of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely : -

(i) value of materials, components, parts and similar items relatable to such goods;

(ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;

(iii) value of material consumed, including packaging materials, in the production of such goods;

(iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods.

Explanation 2. - Where an assessee receives any advance payment from the buyer against delivery of any excisable goods, no notional interest on such advance shall be added to the value unless the Central Excise Officer has evidence to the effect that the advance received has influenced the fixation of the price of the goods by way of charging a lesser price from or by offering a special discount to the buyer who has made the advance deposit."

From the above legal provision of Section 4 of Central Excise Act, 1944 readwith Rule 6 of Central Excise (Determination of Price of Excisable Goods)Rules, 2000, it can be seen that the value of tools, dies, moulds, drawingsetc. used in production of excisable goods need to form the part ofassessable value. In this case, there is no denying the fact that appellanthas been collecting mould charges from the buyers of his product andtherefore we hold that the amount of mould charges collected by theappellant forms an additional consideration flowing through the appellantand therefore the same need to be included in the assessable value ofexcisable goods.

The only argument the Learned Chartered Accountant has taken is that since the goods have been exported they will get a refund of additional duty which would have been paid at the amount of mould charges, included in the assessable value. In this regard we are of the opinion that as per the provision of Central Excise law, the excisable goods first need to be assessed as per provisions of the Section 4 of Central Excise Act, 1944 read with Rule 6 of Central Excise (Determination of Price of Excisable Goods) Rules, 2000. It is irrelevant whether the goods have been cleared for domestic use for the export purpose. The legally provided scheme of assessment of the goods needs to be followed while clearing the goods even if they are meant for export.

7. In view of above we hold that the mould charges recovered from the buyers need to be included in the assessable value and therefore, we do not find any legal lacunae in the impugned order-in-original and thus, there is nomerit in the appeals. The appeals are dismissed.

(Pronounced in the open court on 23.08.2023*)*

(Ramesh Nair)Member (Judicial)

(C L Mahar)Member (Technical)

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Customs, Excise & Service Tax Appellate TribunalWest Zonal Bench at Ahmedabad

REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 12544 of 2014 - DB

(Arising out of OIA-RJT-EXCUS-000-APP-38-39-14-15 dated 13/05/2014 passed by Commissioner of Central Excise-RAJKOT)

……..Appellant

Sonic Chain Pvt Ltd
Radhika, Bhaktinagar Society Marg-2, Near Bhaktinagar Circle, Rajkot, Gujarat

VERSUS

C.C.E. & S.T.-Rajkot.....Respondent
Central Excise Bhavan,

Race Course Ring Road..... Income Tax Office,

Rajkot, Gujarat – 360001

WITH

Excise Appeal No. 12545 of 2014 - DB

(Arising out of OIA-RJT-EXCUS-000-APP-38-39-14-15 dated 13/05/2014 passed by Commissioner of Central Excise-RAJKOT)

……..Appellant

Arvindbhai M Limbasiya
Director Of M/s, Sonic Chain Pvt Ltd,
Radhika, Bhaktinagar Society Marg-2, Near Bhaktinagar Circle, Rajkot, Gujarat

VERSUS

C.C.E. & S.T.-Rajkot.....Respondent
Central Excise Bhavan,

Race Course Ring Road..... Income Tax Office,

Rajkot, Gujarat - 360001

APPEARANCE:

Shri R.Subramanya, Advocate for the Appellant

Shri Ajay Kumar Samota, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIRHON'BLE MEMBER (TECHNICAL), MR. C.L. MAHAR

Final Order No. A/ 11788 - 11789 /2023

DATE OF HEARING: 24.04.2023DATE OF DECISION: 24.08.2023

RAMESH NAIR

The issue involved in the present case is that whether the appellant is eligible for SSI exemption Notification No. 08/2003- CE dated 01.03.2003. When they affixed the brand name on their goods i.e. bracelet for wrist watch of another person namely Timex, Titan and Sonata which belongs to M/STimex Groups India Ltd. and M/S Titan Industries Ltd.

2. Shri R. Subramanya, learned counsel appearing on behalf of the appellantsubmits that even though the appellant are manufacturing the bracelet for wrist watches under the brand name of Timex, Titan and Sonata which belongsto other person but the bracelet manufactured and supplied by them is as a part of wrist watches to be used by the brand name owner. Therefore, in viewof Para 4(a) of the said notification, the appellant is eligible for exemption. Heplaced reliance on the following judgments:-

- 2018 (2) TMI 825 SC-RDB Textiles Ltd vs CCE
- 2015 (4) TMI 353 SC - Vir Rubber Products P Ltd vs CCE
- 2015 (10) TMI 2149 SC CCE vs Otto Bilz (India) Pvt Ltd
- 2019 (365) ELT 570 (Tri-All) -Central Press Pvt Ltd vs CCE
- 2018 (364) ELT 248 (Tri-Del) – R.A Somani & Jindal Sanitary Works vs CCE
- 2010 (12) TMI 25 SC CCE vs Ace Auto Comp Ltd
- 2009 (1) TMI 501 - Gujarat High Court CCE vs Jai Prakash Motwani

3 Shri Ajay Kumar Samota, Learned Superintendent (AR) appearingon behalf of the revenue reiterates the finding of the impugned order. He submits that, firstly, the bracelet is not a component or part of any machineryor equipment or appliances and secondly, the appellant have not followed theprocedure which is required for the purpose of clearance of branded component or parts of any machinery or equipment or appliances, therefore,the appellant is not entitled for the exemption in respect of branded goods asprovided under Para 4(a) of Notification No.08/2023-CE. He submits that sincethe appellant's product was affixed admittedly with the brand name of other person i.e. Timex, Titan and Sonata, they are not eligible for SSI exemption.

4. We have carefully considered the submission made by both sides and perused the records. We find that the short issue to be decided is that whetherthe goods namely bracelet manufactured by the appellant bearing the brand name of customer i.e. Timex, Titan and Sonata is eligible for exemptionNotification No 08/2003 –CE. The relevant para 3 and 4 of Notification is reproduced below:-

"3. For the purposes of determining the aggregate value of clearances for home consumption, the following clearances shall not be taken into account, namely : -

(a) clearances bearing the brand name or trade name of another person, which are ineligible for the grant of this exemption in terms ofparagraph 4;

(b) clearances of the specified goods which are used as inputs for further manufacture of any specified goods within the factory of production of the specified goods;

(c) clearances of strips of plastics used within the factory of production for weaving of fabrics or for manufacture of sacks or bagsmade of polymers of ethylene or propylene.

4. The exemption contained in this notification shall not apply to specified goods bearing a brand name or trade name, whether registered or not, of another person, except in the

following cases :-

(a) where the specified goods, being in the nature of components or parts of any machinery or equipment or appliances, are cleared for use as original equipment in the manufacture of the said machinery or equipment or appliances by following the procedure laid down in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 :

Provided that manufacturers, whose aggregate value of clearances ofthe specified goods for use as original equipment does not exceed rupees one hundred lakhs in the financial year 2002-2003 as calculated in the manner specified in paragraph 1, may submit a declaration regarding such use instead of following the procedure laiddown in the said Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001;

(b) where the specified goods bear a brand name or trade name of

(i) the Khadi and Village Industries Commission; or

(ii) a State Khadi and Village Industry Board; or

(iii) the National Small Industries Corporation; or

(iv) a State Small Industries Development Corporation; or

(v) a State Small Industries Corporation;

(c) where the specified goods are manufactured in a factory located in arural area."

4.1 From the above Para 4 it can be seen that the exemption Notification shall not apply to specified goods bearing the brand name ortrade name that were registered or not of another person. In the present case there is no dispute that the goods namely bracelet manufactured by the appellant bears the brand name namely Timex, Titan and Sonata which are owned by another person namely M/s. Timex Groups India Ltd and M/s. Titan Industry Limited, therefore, the appellant in terms of para 4 is not eligible for exemption Notification No. 08/2003 –CE. However, there is an exception provided in the notification under clause (a) of para 4 according towhich if the goods is in the nature of component or part of any machineryor equipment or appliances and the same is cleared as original equipment in manufacture of the said machinery or equipment or appliances by followingthe procedure laid down in the Central Excise (Removal of Goods atConcessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 than even though the goods bears the brand name or trade name of anotherperson, the same shall be eligible for exemption. As per the facts of the present case, in our view firstly the bracelet cannot be said tobe a component or part of wrist watches to be used as original equipmentin the manufacture of wrist watches. Secondly, it is an admitted fact that for supply of branded bracelets the procedure laid down in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of ExcisableGoods) Rules, 2001 has not been complied with. Hence, the condition for exception provided for branded goods for extending SSI exemption 08/2003-CE has not been complied with. Therefore, in our considered view, the appellant is not entitled for SSI exemption Notification No. 08/2003- CE.

4.2 We also note that as per para 4 (a) the exception for branded goods was provided consciously for those cases where the goods are manufactured as a part and component of any machinery or equipment or appliances whichare to be used only in the manufacture of said machinery or equipment or appliances. In other words those goods are not sold in the market as such under the brand name of another person. In the present case the bracelet ofwrist watches are also sold as such. Therefore, in absence of following the procedure laid down in the Central Excise (Removal of Goods at ConcessionalRate of Duty for Manufacture of Excisable Goods) Rules, 2001 it cannot be ascertained that the bracelet supplied by the appellant are used in the manufacture of wrist watches. Therefore in the peculiar facts of the present case the appellant are not eligible for exemption Notification No. 8/2003 – CE

4.3 As regard the judgments relied upon by the appellant, in the case of RDB Textile Ltd, it is a case of affixing the logo of the buyer on the jute bagswhich is a packaging material. However in the present case the goods braceletitself is a finished product, therefore, the facts are different.

4.4 In the case of Vir Rubber Products Pvt Ltd the issue involved isaltogether different from the issue of the present case. In the case of Vir Rubber the issue was whether the admittedly goods bearing brand name of automobile manufacturer cleared should be included in the aggregate value for the purpose of allowing the exemption notification to their branded goods i.e. VIR Rubber. In this case the goods manufactured bearing brand name such as HM, PAL, KH admittedly not eligible for SSI exemption and the valueof the same should not be added in the aggregate clearances value which is the eligibility criteria for allowing the exemption, rather that case supports thecontention of the revenue that the appellant manufacture brand name of another person are not eligible for SSI exemption. Therefore, the ratio of theSupreme Court decision in the case of Vir Rubber is not applicable in the factsof the present case.

4.5 In the case of Otto Bilz (India) Pvt Ltd, the goods bearing the brand name of a foreign company were extended benefit of SSI exemption on the ground that the foreign company has assigned the brand name BILZ in favourof the assessee. In that case once the brand name is assigned, the assignee becomes the owner, then it cannot be said that theassessee is using the brand name of another person. Therefore, the ratio of judgment in the Otto Bilz case is also not applicable. Similarly, all the other cases have different facts from the facts of the present case. The ratio of thosejudgments cannot be made applicable in the present case.

5. As per the discussion and finding given here in above, we are of the considered view that the appellant is not eligible for SSI exemption NotificationNo. 08/2003- CE.

6. As regard the penalty imposed on co- appellant Shri Arvindbhai M Limbasiya, We find that the issue is of pure interpretation of notification and the goods have been cleared under the cover of invoices to organizedcompanies. Therefore, there is no mala fide intention of any individual. Accordingly, in the facts and circumstances of the case, the penalty imposed on Shri Arvindbhai M Limbasiya under Rule 26 is not sustainable. Hence, penalty is set aside.

7. As a result, the appeal of Sonic Chain Pvt Ltd is dismissed and appeal filed by Shri Arvindbhai M Limbasiya is allowed.

(Pronounced in the open court on 24.08.2023)

RAMESH NAIRMEMBER (JUDICIAL)

C.L.MAHARMEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABADREGIONAL BENCH - COURT NO. 3 **EXCISE**
Appeal No. 10992 of 2013-SM

[Arising out of Order-in-Original/Appeal No SRP-228-VAPI-2012-13 dated 21.01.2013 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-VAPI]

Universal Comfort Products Limited …. Appellant
Having Its Registered Office At 277/4,School Falia, DADRA

U T OF DADRA & NAGAR HAVELI

VERSUS

Commissioner of Central Excise & ST, Vapi.....Respondent
4th Floor, Adharsh Dham Building,

Opp. Town Police Station, Vapi-Daman Road,Vapi, Gujarat-396191

APPEARANCE :

None for the Appellant

Shri Anand Kumar, Superintendent (AR) for the Revenue.

CORAM: HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)

DATE OF HEARING /DECISION: 30.08.2023

FINAL ORDER NO. 11831/2023

SOMESH ARORA :

None appeared for the appellant. The matter has been coming up on the board and this is the fifth time, therefore is taken up for disposal on merits.

2. Heard the learned AR. It is the view of the department that in the instant case, matter relates to supplies made to SEZ by DTA unit, speciallyto SEZ developers, the Cenvat credit was sought to be denied to the supplier under Rule 6 (6) of the Cenvat Credit Rules, 2004 on the ground that during the material time no exemption was available to the appellant and they were required to reverse the credit to the extent the supplies made to SEZ developers. To emphasize the issue as well as the view of the department, Para 8 to 18 of the impugned order are highlighted. The same is reproduced below:-

"8. In this regard, I observe that prior to 31.12.2008, in terms of the said Rule 6(6)(1) of Cenvat Credit Rules, 2004, "the provisions of sub-rules (2), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are cleared to a unit in a SEZ." This Rule was further amended vide Notification No. 50/2008-CE(N.T.) dated 31.12.2008, The Notification is reproduced herein below-

Notification No. 50/2008-Central Excise (N.T.)

New Delhi the 31 December, 2008

G.SR. (E)- In exercise of the powers conferred by section 37 of the Central Excise Act 1944 (1 of 1944) and section 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the followingrules further to amend the CENVAT Credit Rules, 2004, namely:

(1) (1) These rules may be called the CENVAT Credit (Third Amendment) Rules,2008

(2) They shall come into force on the date of their publication in the OfficialGazette.

2. In the CENVAT Credit Rules, 2004, in rule 6, in sub-rule (6), for clause (1), the following clause shall be substituted, namely:-

"(i) cleared to a unit in a special economic zone or to a developer of a specialeconomic zone for their authorized operations, or "

3. A plain reading of the above Notification clearly shows that the notification would come into force on the date of their publication in the official Gazette. The date of their publication is 31.12.2008. Adopting the principles of plain reading and strict interpretation of statute by plain words, the benefit envisaged in the said Rule 6(6) of Cenvat Credit Rules, 2004 would be extended to supplies to SEZ Developer only from 31.12.2008 and not retrospectively as contended by the appellant. The appellant has relied upon the case of Sujana Metal products Ltd 2011 (273) ELT 112 [Tri-Bangalore), wherein the Hon'ble Tribunal has held that amendment carried out by Notification No. 50/2008- CE (NT) dated 31.12.2008 was clarificatory in nature andapplies with effect from 10.09.2004. The case of Sujana Metals relied upon the caseof WPIL Ltd 2005 (181) E.LT. 359 (S.C.), Indian Tobacco Association 2005 (187) ELT162 (SC) and Zile Singh Vs State of Haryana 2004 (8) SCC 1 and the SEZ Act and some Circulars (relating to SEZ and export) to hold the said amendment to be of retrospective in nature.

4. I find that in the case of WPIL Limited, the notification was held to be retrospective in nature because in that case it was the consistent policy of the Government of exempting parts of power driven pumps utilized by the factory withinthe factory premises vide notification, however while consolidating several notifications and issuing composite Notification No. 46/94-CE dated 11.03.1994, the said item got omitted though exemption in respect of said item which was operative earlier was neither withdrawn nor revoked. The policy remained as it was and in view of demand being made by the Department, a representation was made by the industries and on being satisfied, the Central Government issued a clarificatory Notification No. 95/94-CE dated 25.04.1994. It was not a new notification granting exemption for the first time in respect of parts of power driven pumps to be used in the factory for manufacture of pumps but clarified the position and made the position explicit which was implicit. In that context, the notification 95/94-CE was held to be clarificatory. Whereas in this case, SEZ developer was never included in the said exclusion clause of Rule 6(6) prior to 31.12.2008. In the case of Indian Tobacco Association (supra), the question of interpretation of word 'substitution' appearing in the amendment of a notification extending the scope / benefit of DEPB to various additional port/ICD was involved. In the facts of that case, initially under the DEPB scheme, Inland container port was not included in list of ports of registration. On representation from association of exporters, name of one such port substituted' in the notification. It was held that the substitution would have retrospective effect from date of original notification on the ground mainly that (i) it was not stated expressly to be prospective (i) only an obvious mistake was corrected without recourse to facility in the notification of permission from any other port and
(ii) the substituted port was otherwise eligible for benefit and all along had been granted duty exemption. In the case of Zile Singh (supra) also the effect of an amendment in the Haryana Municipal Act, 1973 by Act No. 15 of 1994 whereby the word "after" was by the word "upto" was considered by the Hon'ble Court and heldto be retrospective in nature. The ratio of these cases is not applicable to the case in hand being involving a distinguishable facts and circumstances. In this case, theamendment in the said notification 50/2008-CEINT) has been brought in the Statute itself by bringing SEZ developers within the ambit of Rule 6(6)ü) ibid, which was not eligible to the benefit otherwise before, unlike in the cases of WPIL Ltd, Indian Tobacco and Zile Singh. It is admitted fact that SEZ developer is clearly distinct from SEZ unit under SEZ Act and Rules also. Moreover, unlike in those cases, the amendingnotification No. 50/2008-CENT) which brought SEZ developer also within the ambit of Rule 6(6)) ibid specifically spelt out in para (1) thereof that the amendment shall haveprospective effect only.

5. I do not find any merit in the arguments of the appellant regarding clarificatory nature of the said amendment. I find that a substantive amendment has been made in the legal provision vide notification no. 50/2008- CEINT) dated 31.12.2008 by providing the benefit of Rule 6(6) to supplies made to SEZ developers by addition in Rule 6(6)(i). The facts and background of the present case is clearly distinguishable. Moreover, the wordings and the date of effect provided in para 1 of the said notification no. 50/2008-CE(NT) clearly restrict its application only with effect from 31.12.2008 and therefore it cannot be held to be retrospectively applicable.

6. Regarding the intent of the legislature derived by the Hon'ble Tribunal in Sujana Metal case on the basis of CBEC circulars also appear misplaced as the same does not support the case of the appellant. It is settled law that the intention of the legislature has to be understood from the wordings used in the legislation. In a plethora of decisions of the Hon'ble Supreme Court and various High Courts it is categorically held that any statutory amendment of substantive nature in the absence of any intention to the contrary, will have only prospective effect. I rely uponthe cases of M/s Jay Mahakali Rolling Mills - 2007 (215) ELT 11 (SC), Spice telecom 2006 (203) ELT 538 (SC), Union of India v. Ganesh Das Bhojraj - 2000 (116) E.LT. 431 (S.C.), M/s L & T Limited - 2000 (119) ELT 51 (T-LB), Mahindra & Mahindra Limited - 2007 (211) ELT 481 (T-Mum) and M/s Doon Institute of Information & Technology P Limited- 2008 (12) STR 459 (T-Del) to hold that the Notification No. 50/2008-CE (NT)is neither clarificatory nor retrospective and accordingly reject the plea of the appellant on this score. In the case of L&T Ltd 2000 (119) ELT 51 (T-LB), similar amendment was made in the erstwhile Central Excise Rules, 1994 [Modvat Credit Rules] vide a notification in 1992 to allow credit in respect of goods cleared to FTZ or EOU in terms of Rule 57C. The Tribunal held the said amending notification to be prospective in nature. The ratio of that case is squarely applicable to the case in hand. In the present case, the Central Government, in exercise of the powers conferred by Section 37 of the Central Excise and Salt Act, 1994, amended Rule 6(6) by issuing Notification No. 50/2008-CE(NT) dated 31.12.2008 and declared that this amendment shall come into force on the date of its publication in the Official Gazette. I accordingly reject the plea of the appellant.

7. Further to find the intention of the legislature in this regard, I place reliance upon the Circular dated 03/04/2008 issued by the ADG(EP), Govt. of India which clarified without any ambiguity that cenvat credit is not available for inputs used in the finished product supplied to developer of SEZ in terms of 6(6) of CENVAT Credit Rules, 2004. A step further, Government issued a Notification 3/2011-CE(NT) dated 01.03.2011 vide which Sub Rule (6A) was inserted into Rule 6 of CCR to provide that "The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the taxable services are provided, without payment of service tax, to a Unit in a Special Economic Zone or to a Developer of a Special Economic Zone for their authorised operations". Subsequently, the said Notification No. 3/2011-CE(NT) was given retrospective effect w.e.f. 10.02.2006 vide retrospective amendment through Section144 of Finance Act, 2012 and Schedule VIII thereto. These provisions are reproduced herein below:-

"144. (1) In the CENVAT Credit Rules, 2004, made by the Central Government in exercise of the powers conferred by section 37 of the Central Excise Act, 1944, (1 of 1944) sub-rule (64) of rule 6 as inserted by clause (ix) of rule 5 of the CENVAT Credit (Amendment) Rules, 2011, published in the Official Gazette vide notification of the Government of India in the Ministry of Finance (Department of Revenue) number G.SR. 134(E), dated the 1" March, 2011 shall stand amended and shall be deemed to have been amended retrospectively, in the manner specified in column (2) of the Eighth Schedule, on and from the date specified in column (3) of that Schedule, against the rulespecified in column (1) of that Schedule"

(2) Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, any action taken or anything done or purported to have been taken or done, on and from the 10th day of February,2006, relating to the provisions as amended by sub-section (1), shall be deemed to be and deemed always to have been, for all purposes, as validly and effectively taken or done as if the amendments made by sub-section (1) had been in force at all material times.

(3) For the purpose of sub-section (1), the Central Government shall have and shall be deemed to have the power to make rules with retrospective effect as if the Central Government had the power to make rules under section 37 of the Central Excise Act 1944, (1 of 1944) retrospectively, at all material times."

THE EIGHTH SCHEDULE
(see Section 144)

Provisions of CENVAT Credit Rules, 2004 to be amended	Amendment	eriod of effect of amendment
(1)	(2)	(3)
Sub Sub-rule (6A) of rule 6of the CENVAT CreditRules, 2004 as inserted by CENVAT Credit	In the CENVAT Credit Rules, 2004, in rule 6, after sub-rule (6), the following sub-rule shall be inserted with	From 10th February, 2006 to 28th February, 2011
(Amendment) Rules, 2011vide notification number G.S.R. 134(E), dated the 1st March, 2011 [3/2011- Central Excise (N.T.).dated the 1st March, 2011.	effect from the 10th day of R. February, 2006, namely:- "(6A) The provisions of sub- rules (1), (2), (3) and (4) shall not be applicable in case the taxable servicesare provided, without payment of service tax, to a Unit in a Special Economic Zone or to a Developer of a Special Economic Zone for their authori sedoperations."	

8. The above retrospective amendment carried out to provide the benefit of Rule 6(6A) of CCR w.e.f. 10.02.2006 to the supplies made to SEZ developer clearly indicates the intent of the legislature to restrict the retrospective operation in respect of service tax credit only and not to the input credit as argued by the appellant in absence of any similar amendment or clarification issued by the department in respect of notification no. 50/2008-CE(NT). These facts can only leadto the obvious conclusion that the said Notification 50/2008-CE(NT) has not been accorded any retrospective effect. It may be noted that the above Circular dated 03/04/2008 of ADG(EP) and Section 144 of Finance Act, 2012 [giving retrospective amendment to notification No. 3/2011- CE(NT)] were not available before the Hon'ble Tribunal while deciding the case of Surana Metal, relied upon by the appellant. These two crucial facts could have definitely led to a different decision in the case of Surana Metal (supra). In view of several judgments of Hon'ble Supreme Court, Larger Bench of the Tribunal holding the said kind of amendment as prospective in nature and the above Circular and retrospective amendment etc, I beg to differ from the decision in the case of Surana Metal and hold that the Notification No. 50/2008-CE(NT) dated 31.12.2008 being prospective in nature would apply w.e.f. 31.12.2008 only. Moreover, in the case of Surya Roshini Ltd (supra) the case of Surana Metal case was also contradicted. Consequently, the supply made to SEZ developer cannot get the benefit of exclusion under Rule 6(6) of CCR prior to 31.12.2008. Accordingly, I hold that the demand raised in the impugned order is sustainable on merits.

9. The appellant has alternatively contended that their case is covered under clause (v) of Rule 6(6) of CCR as the supply to SEZ developer constitutes export under bond. The main point of contention of the appellant rest on the issue whether or not the supply to SEZ developers would be construed as EXPORT (more particularly as physical export of goods to a place outside India). I rely upon the decision of Honourable High Court of Gujarat in the case of M/s ESSAR Steel Limited vs. UOI reported in 2010(249) E.L.T. 03 (GUJ -HC), wherein the context of the term "export" contained in Customs Act vis-à-vis SEZ Act has been clarified. As per the verdict in Para 41.3.1. and 41.3.2. of the judgment, "The term "export" having been defined in the Customs Act, 1962, for the purpose of that Act, there is no question adopting or applying the meaning of the said term under another enactment for any purpose of levying duty underCustom Act, 1962 In other words, a definition given under an Act cannot be displaced by a definition of the same term given in another enactment, more so, when the provisions of the first Act are being invoked. Even in the absenceof a definition of the term in the subject statute, a definition contained in another statute cannot be adopted since a word may mean different things depending the setting and context."

"The movement of goods from Domestic Tariff area to the Special Economic has been treated as export by a legal fiction created under the SEZ Act, 2005. A legal Zone fiction is to be restricted to the statute which created it."

The said decision of the Hon'ble High Court has also been upheld by the Hon'ble Supreme Court as reported at 2010 (255) ELT A115 (SC). Similarly, Hon'ble Karnataka High Court in the case of M/s Shyamaraju & Co. India P Ltd 2010 (256) ELT 193 (Kar) and in M/s Biocon Limited - 2011 (267) ELT 28 (Kar) also held that the definition of 'export' under SEZ Act cannot be adopted for the purpose of Customs Act. Moreover, in the case of CCE, Thane-1 V/s The Tiger Steel Engineering (I) Pvt. Ltd. 12010-TIOL- 1256-CESTAT-MUM] the term 'export' has been further clarified regarding supply of goods to SEZ, it held in Para 11 as follows:-

……"However, the question arises as to whether such supply of goods to SEZ units was an 'export. At no time was the term 'export defined under the Central Excise Act or any Rules framed there under. The definition of "export" given under the Customs Act has been traditionally adopted for purposes of the Central Excise Act and Rules there under. Therefore, in the absence of a definition of 'export under the Central Excise Act, the Central Excise Rules or the CENVAT Credit Rules 2004, we hold that for purposes of the CENVAT CreditRules, 2004, one should look for its definition given under the Customs Act. The fictionalized definition of 'export' under Section 2(m) (i) of SEZ Act cannot be looked for as it purports only to make the SEZ unit an exporter In other words, the term 'export used in Rule 5 of the CENVAT Credit Rules, 2004 stands for export, which is 'physical export out of the country, envisaged underthe Customs Act. We take this view because, as we have already indicated, anybody other than SEZ unit cannot be allowed to claim any benefit under the SEZ Act/Rules."

10. The ratio of the judgments is squarely applicable to the instant case. Moreover, the clearances from the DTA to a 100% EOU are also deemed as export under Foreign Trade Policy and DTA Unit is entitled to all benefits from duty against said supplies to 100% EOU. However, still the supplies made to 100% EOU have been specifically excluded from the application of Rule 6(1) to 6(4) ibid. This clearly reveals the intention of the legislature in allowing credit on inputs used in the manufactureof goods cleared to SEZ, EOU, STP, FTZ, EHTP etc. but not in respect of the same if cleared to SEZ developers prior to 31 12.2008. The definition of 'export' contained in Section 2(m) of SEZ Act, 2005 has to be treated applicable only in relation to the issues relating to SEZ Act and Rules made thereunder and the same cannot be applied to Cenvat Credit Rules, 2004, unless it is expressly mentioned in both the enactments. Neither I find any stipulation in the Cenvat Credit Rules, 2004 nor is there any argument from the appellant to hold that the provisions of SEZ Act shall be applicable to Cenvat Credit Rules, 2004. The Cenvat Credit Rules, 2004 is a separate piece of legislation made by the Legislature under Central Excise Act, 1944 with a specific purpose to allow credit of duty/tax paid on the input or input services to remove cascading effect and laid specific condition for availing the benefit of the same with their wisdom. Though Rule 18 and 19 of Central Excise Rules, 2002 have been made

applicable to supplies of goods to SEZ units for the purpose of rebate videCircular No. 06/2010-Cus. dated 19.03.2010 and 29/2006-Cus dated 27.12.2006 by the Government with specific and restrictive purpose only. The same cannot be madeapplicable to the cases falling under the ambit of a different statute altogetherhaving different provisions and purpose of their enactment. Moreover, no such clarification treating supplies of goods to SEZ developer as 'export' under Cenvat Credit Rules, 2004 has been brought by the appellant in their favour for consideration. In absence of which and in view of the findings of the Hon'ble High Court of Gujarat in the case of Essar Steel Ltd supra, the contention that the supply ofgoods to SEZ developers amounts to 'export' (physical export) of goods under bond as covered under clause (v) of Rule 6(6) of CCR, 2004 is liable to be rejected.

11. I also find that if the contention of the appellant is accepted for the sake of argument, there was absolutely no need to specify clearances of goods to SEZ unit or 100% EOU or STP or EHTP in clauses (i) to (ii) of the said sub-rule as the clearances to 100% EOU, STP or EHTP are also deemed as export for the purposes of Foreign Trade Policy. The very existence of specific and separate exclusion provided in the said clauses (i) to (i) of Rule 616) ibid by the Legislature confirms the intent of the legislature to allow Cenvat credit facility in respect of restricted nature oftransactions as envisaged therein. The rule makers in their wisdom have specifically and additionally included these obviously considering their distinguishable identities from that of physical export i.e. covered under clause (v) ibid. It is settled law that in case of any ambiguity in the statute, the intent of the legislature shall have to be looked into. I find that there is no ambiguity in the provisions of Rule 6(6) of Cerivat credit Rules as it covered both clearances for export under bond and clearances to SEZ unit or EOU as two different categories in the same rule. This also. identifies the intent of the legislature to provide exemption from the application of Rule 6(1) to6(4) of CCR, 2004 to the clearances to SEZ unit specifically to distinguish it from the clearances for export under bond. Had there been the intent of legislature to consider supplies to SEZ, EOU or EHTP/STP as same or similar to physical export under bond, as contended by the appellant, there was no necessity of specifying them separately under the said clauses (i) to (i) ibid. In the absence of such specific provision it cannot be deemed that the goods cleared to SEZ units/developers would be treated as export under bond. I find that the appellant is trying to read something which is not provided in the statute. This is not permissible while interpreting a statute as per settled law. I place reliance on the following cases:

(i) In the case of Dharmandra Textile Processors vs. Union of India reported in 12008
(231) ELT.3 (S.C.)], the Apex Court held that :-

……"it is a well settled principle in law that the court cannot read anything intoa statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent".

(ii) The above views have been expressed by the Honourable Supreme Court in the case of Novopan India Ltd vs. CCE. reported in (1994(73) ELT.769 (S.C.). holding that ;

"a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle thatin a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification"

(iii) Further, in case of CCE vs. Sunder Steels Ltd., reported in [2005(181) ELT. 154 (SC.)) the Apex Court has also held that :

"the Notification has to be interpreted on its wording No words, not used in the notification can be added"

(iv) Also, the Supreme Court in the case of Rajasthan Spg. & Wvg Mills vs. CCE reported in [1995 (77) ELT.474 (SC)) observed that :

"since it was a case of exemption from day, there was no question of any liberal Construction to extend the term and scope of the notification as such exemption notification must be strictly construed and the assessee should bring himself squarely within the ambit of the notification to which no extended meaning can be given to At the items by enlarging the scope of exemption granted by the notification".

12. In view of the above Apex Court's decisions, the interpretations have to be restricted only to the words of the statute and notification. Hence, the credit facility extended under the Notification No.50/2008-CE to clearances to SEZ Developers which were not specifically mentioned in the said rule prior to 31.12.2008 is applicable only wef. 31.12.2008. Hence the argument of the appellant that the supplies to SEZ developer are export under bond and therefore covered under clause

(v) ibid does not have any force and is therefore liable to be rejected. Therefore, I find that the denial of Cenvat credit availed in respect of supply without payment of duty to the SEZ Developers prior to 31.12.2008 is legally maintainable. I accordingly do not find any infirmity in the impugned order.**"**

13. It is thus clear from the forgoing discussion that Notification No. 50/2008-CE (NT) specifically provided benefit to SEZ, came into existence only on 31.12.2008 and there was no way having its retrospective application. Other issues regarding export and all have also been elaborated by Commissioner (Appeals).

3. In view of above forgoing, this Court finds no merit in the appeal. Accordingly, the order of the Commissioner (Appeals) is upheld. The appeal is dismissed.

(Dictated and pronounced in the open court)

(Somesh Arora)Member (Judicial)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABADREGIONAL BENCH - COURT NO. 3 **EXCISE**
Appeal No. 13189 of 2013-SM

[Arising out of Order-in-Original/Appeal No 127-2013-AHD-II-CE-AK-COMMR-A-AHD dated

20.06.2013 passed by Commissioner of Central Excise-AHMEDABAD-I(Appeal)]

Sagar Rolling Mills Pvt Limited …. Appellant
357, Gvmm Ind. Estate, Odhav,AHMEDABAD, GUJARAT-382414

VERSUS

Commissioner of Central Excise & ST, Ahmedabad-ii
.....Respondent
Custom House..... First Floor, Old High Court Road,

Navrangpura, Ahmedabad, Gujarat-380009

WITH

EXCISE Appeal No. 13190 of 2013-SM

[Arising out of Order-in-Original/Appeal No 134-2013-AHD-II-CE-AK-COMMR-A-AHD dated01.07.2013 passed by Commissioner of Central Excise-AHMEDABAD-I(Appeal)]

Udaya Udhyog …. Appellant
253, Gujarat Vepari Mahamandal, Odhav, AHMEDABAD, GUJARAT-382415

VERSUS

Commissioner of Central Excise & ST, Ahmedabad-ii
.....Respondent
Custom House., First Floor, Old High Court Road,Navrangpura, Ahmedabad, Gujarat-380009

APPEARANCE :

None for the Appellant

Shri Himanshu P Shrimali, Superintendent (AR) for the Revenue.

CORAM: HON'BLE SOMESH ARORA, MEMBER (JUDICIAL)

DATE OF HEARING/ DECISION: 30.08.2023

FINAL ORDER NO. 11829-11830/2023

SOMESH ARORA :

The matter has been coming up number of times and pertains to the year 2013. There have been at least six listings prior to this date in the matter therefore, the appeals are taken up for decision on merits. The issueinvolved in the present matter is abatement of duty under compounded levy scheme pertaining to cold rolling iron and steel machines. The appellants, for the part of the period had no operations on certain machines and the same remained idle or dismantled in the factory. The department has denied the abatement of duty under Notification No. 17/2007-CE dated 01.03.2007 and as per Para 8, the Commissioner (Appeals) has confirmed the duty without abatement as claimed by the appellant. The Commissioner (Appeals) confirmed department's stand that Central Excise duty has been correctly demanded on cold rolling machines.

2. As pointed out by the learned AR, the issue is no more *res-integra* andhas been decided in the case *SS Strips Pvt. Limited vs. CCE, Ahmedabad-II*in order No. A/11629-11630/2018 dated 01.08.2018 by the Division Bench of CESTAT Ahmedabad. Para 4.2 to 4.4 being relevant is reproducedbelow:-

"4.2 In the instant case notification No. 17/07, gives an option of concessional ratesof duty subject to certain conditions. The opening para of the said notification clearly prescribes that the assessee shall have an option to pay duty of excise on the cold rollingmachines "installed" for cold rolling. The two key words in the sentence are "option" and "installed". It is also to be noted that the entire scheme of thing does not providefor any exemption if assessee chooses to close some machines or to not operate some machines. The scheme only prescribes that the duty shall be paid on the number of machines "installed" in the factory. The notification also exempts the assessee from the operation of rule 8 of the Central Excise Rules. 2002. Rule 8 of the Central Excise Rule, 2002.

4.3. From the above it is apparent that the appellant have consciously opted for a scheme which does not envisage any concession in respect of machines which is installed in the factory but is not used. Para 6 and 8 of the Notification prescribed on the condition in respect to new factory/close factories resuming number of factories ceasingto work or reverting to normal procedure. There is no procedure in the notification or the scheme regarding non use of installed machines.

4.4 Having chosen the option of availing the concession on the basis of number of machines installed, the appellants cannot now claim that the benefit of machines which they have declared to have not been used during certain period. **"**

3. In view of the foregoing and the decision of the Division Bench of CESTAT Ahmedabad, this Court is inclined to dismiss the appeals. Both the appeals are dismissed.

(Dictated and pronounced in the open court)

Somesh Arora)Member (Judicial)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALWEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 02

EXCISE Appeal No. 13824 of 2013-SM

[Arising out of Order-in-Original/Appeal No SUR-EXCUS-001-APP-375-13-14 dated 11.10.2013 passed by Commissioner of Central Excise, Customs and Service Tax- SURAT-I(Appeal)]

Special Prints Ltd **...Appellant**

Tulsi Krupa Arcade,

Puna-Kumbharia Road, Dumbhal,Surat,

Gujarat

VERSUS

C.C.E. & S.T.-Surat-i **...Respondent**

New Building...Opp. Gandhi Baug,Chowk Bazar,

Surat,

Gujarat-395001

APPEARANCE:

None for the Appellant

Shri. Anand Kumar, Superintendent (Authorized Representative) for theRespondent

CORAM: HON'BLE MEMBER (JUDICIAL), SOMESH ARORA

FINAL ORDER NO.A / 11841 /2023

DATE OF HEARING:31.08.2023
DATE OF DECISION: 31.08.2023

SOMESH ARORA

When the matter was called, none appeared for the party, though the matter has come up on board 8 times earlier, and pertains to year 2013. Theshort issue involved in the matter is that there were certain refunds due to theappellant and same had been adjusted by the department against dues confirmed in adjudication in another matter by the authorities below despite matter being agitated in Hon'ble Gujarat High Court, but stated to be without stay against such confirmed dues. In course of this order, the Learned Commissioner (Appeals) has relied on the decision of M/s. Tisco Ltd., reportedin 1990 (50) ELT 78, as well as the decision of Hon'ble Supreme Court as

reported in 1994 (73) ELT 519 (S.C) in the matter of Collector of Customs Vs.Krishana Sales (p) Ltd., (Bom) to arrive at the ruling that the confirmed demand even not stayed can be adjusted against sums due to the party. Therelevant para of the order is reproduced below:

"(iii) On legal research I find a decision of the Tribunal ofCalcutta in case of M/s. Tisco Ltd. reported in 1990 (50)
E.L.T. 78, wherein it was decided that the proper officer (here the Assistant Commissioner), is empowered torealize the sums to the Government, by adjustment with the amount refundable in the case under dispute. Hon'bleHigh Court affirmed that, so long as the original order hasnot been set aside by the concern authorities, in the absence of stay order, the proper office has justified in realization of outstanding arrears of revenue as per law.

(iv) Further, I rely on the contents of para 6 of the judgement and decision of Hon'ble Supreme Court of Indiain case of Collector of Customs, Bombay Vs. Krishna Sales
(P) Ltd. reported in 1994 (73) E.L.T. 519 (SC), wherein itwas held that, a confirmed demand remains an order in operation till it is stayed. As is well known that mere preferment of appeal itself does not operate as a stay or suspension of the Order appealed against. And in the subject case, there is huge amount of confirmed outstanding Govt. dues (i.e.Rs. 35.68 Crores) pending forrecovery from the appellant in a old case vide 0.1.0 No. 18/MP/2007 dated 30.04.2007. Though the case is now pending before Hon'ble High Court of Gujarat, no stay hasbeen granted in favour of the appellant. Therefore, actiontaken by the adjudication authority for recovery of sums due to Government by adjustment from the amount of refund sanctioned to the appellant vide impugned Order is proper.

(v) As per the Board Circular No. 967/1/2013-CX., dated01.01.2013, recovery proceedings shall be initiated by theproper officer on the issue of order by the Tribunal, if no stay of the High Court is in operation against a confirmeddemand. Therefore, recovery proceeding initiated by the Assistant Commissioner as per Section 11 of the Central Excise Act, 1944 and said Board Circular is correct and asper law."

1.2 In view of above this court finds this order of Commissioner (Appeals)is proper in the absence of any stay having been granted against the demand confirmed and being agitated at present before the Hon'ble High Court ofGujarat.

2. Appeal is accordingly dismissed.

(Dictated & Pronounced in the open Court)

(SOMESH ARORA)MEMBER (JUDICIAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL, BANGALORE

REGIONAL BENCH - COURT NO. 2

Excise Appeal No. 20287 of 2021

[Arising out of Order-in-Appeal No. MYS-EXCUS-000-APP-MSC-099-2020-21 dated 13/01/2021 passed by the Commissioner of Central Tax (Appeals) Mysore]

DLM Pvt. Ltd.
Plot No. 347-D1 & D2, KIADB
Electronic City, HebbalIndustrial Area Mysuru – 570 009 **…… Appellant(s)**

VERSUS

Commissioner of Central TaxMysuru
No. S1 & S2, Vinaya MargaSiddhartha Nagar
Mysuru - 570 011

…… Respondent(s)

APPEARANCE:

Mr. Vageesh Hegde, CA for the Appellant
Mr. P. Saravana Perumal, AR for the Respondent

CORAM:

HON'BLE MR. PULLELA NAGESWARA RAO, MEMBER(TECHNICAL)

Final Order No. 20906 / 2023

Date of Hearing: 20/04/2023Date of Decision: 18/08/2023

PER: PULLELA NAGESWARA RAO

M/s CYIENT DLM Pvt. Ltd., the appellant is engaged in the manufacture of Printed Circuit Boards falling under chapter Heading 8534 of the CETA, 1985. They were availing the benefit of Notification No.12/2012-CE dated 17.03.2012 (Sl.No.309) for clearing the PCBAs for medical equipment to various customers without payment of duty.

2. Audit of the appellant was conducted and it was found that the appellants were not maintaining separate accounts inrespect of inputs used in manufacture of finished goods (PCBAs) as per CENVAT Credit Rules, 2004. On pointing bythe Audit they have reversed an amount of Rs. 4,08,748/- (Rupees Four Lakhs Eight Thousand Seven Hundred and FortyEight only) being 6% of the exempted goods in terms of Rule 6(3)(i) of Cenvat Credit Rules, 2004, before the issue of the show-cause notice. Further, the Audit found that the appellant had also availed cenvat credit of service tax ofRs. 2,81,659/- (Rupees Two Lakhs Eighty One Thousand Six Hundred and Fifty Nine only) on bills dated July 2014 and August 2014 (Rs. 1,26,693/-) and bills dated after 1st September 2014 (Rs. 1,54,966/-). A time limit of 6(six) months for availing the cenvat credit was introduced w.e.f 01.09.2014 vide Notification No.21/2014-CE (NT) dated11.07.2014.

3. A show-cause was issued to the appellant with regard to the above issues raised by the audit. The adjudicating authority confirmed the demand of duty of Rs. 4,08,748/- (Rupees Four Lakhs Eight Thousand Seven Hundred and Forty Eight only) being 6% of the value of exempted goods cleared without payment of duty and imposed equal penalty and the demand of interest was set aside as sufficient balance in cenvat account is available. However, the issue of limitation was rejected. As regards the demand of Rs. 2,81,659/- (Rupees Two Lakhs Eighty One Thousand Six Hundred and Fifty Nine only) on the irregularly availed cenvat credit after 6(six) months the demand was confirmed with interest and penalty of 50% was imposed.

4. Aggrieved by the above the appellant has filed anappeal before Commissioner (Appeals). The Commissioner (Appeals) confirmed the demand of Rs.4,08,748/- (Rupees Four Lakhs Eight Thousand Seven Hundred and Forty Eight only) and imposed equal penalty. However, the issue of limitation was rejected. As regards the availment of Cenvat Credit of Rs.2,81,659/- (Rupees Two Lakhs Eighty One Thousand Six Hundred and Fifty Nine only) availed during December 2015, Commissioner (Appeals) has confirmed the total demand amount with interest for the period prior to17th March 2012 and imposed 50% penalty.

5. Aggrieved by the above order, appellant filed an appealbefore Hon'ble CESTAT. The Tribunal vide Final Order No. 20121/2019 dated 28.01.2019 held that out of the demand ofRs. 4,08,748/- (Rupees Four Lakhs Eight Thousand Seven Hundred and Forty Eight only) an amount of Rs.2,58,144/- (Rupees Two Lakhs Fifty Eight Thousand One Hundred and Forty Four only) was hit by limitation and demand of Rs.1,50,604/- (Rupees One Lakh Fifty Thousand Six Hundred and Four only) was upheld. As regards availment of cenvat credit the Tribunal held that credit of Rs. 1,26,693/- (Rupees One Lakh Twenty Six Thousand Six Hundred and Ninety Threeonly) is eligible and Rs.1,54,966/- (Rupees One Lakh Fifty Four Thousand Nine Hundred and Sixty Six only) is held to beineligible and demand of interest was set aside.

6. Consequent to the Hon'ble CESTAT order dated 28.01.2019, a refund application was filed on 26.02.2020. The adjudicating authority rejected the refund claim of Rs.2,58,144/- (Rupees Two Lakhs Fifty Eight Thousand One Hundred and Forty Four only) as time-barred as the refund claim was filed after one year of CESTAT order. However, he has sanctioned the refund of Rs.1,26,693/- (Rupees One Lakh Twenty Six Thousand Six Hundred and Ninety Three only) asit was paid under protest. However, he has adjusted the penalty amount of Rs. 77,483/-, (Rupees Seventy Seven Thousand Four Hundred and Eighty Three only) being 50% of Rs. 1,54,966/- (Rupee One Lakh Fifty Four Thousand Nine Hundred and Sixty Six only). On appeal against this order, Commissioner (Appeals) confirmed the Order-in- Original.

7. Aggrieved by the order of Commissioner (Appeals) the appellant has filed this appeal.

8. The appellant in the appeal filed submitted that the impugned Order-in-Original

it is mentioned that cenvat credit of Rs. 2,58,144/- (Rupees Two Lakhs Fifty Eight Thousand One Hundred and Forty Four only) was paid voluntarily without registering any protest. However, they have reversedthe credit consequent to the audit finding and were contesting the said findings on the ground of limitation throughout the adjudication and appeal proceedings. When a demand is contested by filing an appeal or contesting the show-cause notice, the payment made amounts to payment made under protest and separate letter registering protest is notnecessary. The appellant further submits that in theadjudication of the show-cause notice the adjudicating authority has mentioned that in reply to the show-causenotice the ground of limitation was taken up. Further the first appellate authority in the first round of litigation has mentioned in the order that the appeal memorandum *inter alia* contains the issue of limitation raised by the appellant. Hence, in the first round of litigation, issue of limitation has been raised by them and hence, the rejection of refund ofRs. 2,58,144/- (Rupees Two Lakhs Fifty Eight Thousand One Hundred and Forty Four only) on the ground that the appellant has not paid that amount under protest is incorrect and it amounts to not adhering to Tribunal's judgment or ignoring, which is bad in law. The appellant further submits that filing of or contesting the adjudication order is sufficient and this act itself shall be deemed as payment under protest. In this regard, the appellant submitted the following case- laws:

(i) Mafatlal Industries Ltd. Vs. U.O.I=1997 (89) E.L.T. 247 (SC)

(ii) Ashok Shetty & Associates C.A Vs. Commissioner of C. Ex., Mangalore=2017 (4) GSTL 53 (Tri.-Bang.)

(iii) Manik Machinery Mafs. Pvt. Ltd. Vs. Commissionerof C. Ex., Mumbai=2003 (157) E.L.T. 439 (Tri.-Mum.)

(iv) Commissioner of C.Ex., Nagpur Vs. AbhideepChemicals Pvt. Ltd. = 2002 (143) E.L.T 70 (Tri.-Mum.)

(v) Surbhi Enterprise Vs. Commissioner of C. Ex., Ahmedabad=2007 (210) E.L.T. 588 (Tri.-Ahmd.)

(vi) Commissioner of Central Excise, Chennai-II Vs.

Rane Brake Linings Ltd. =2003 (158) E.L.T. 840 (Tri.-Chennai)

(vii) Fluidomat Ltd. Vs. Commissioner of Central Excise,Indore =2002 (139) E.L.T. 82 (Tri.-Del.)

(viii) Jayanta Glass Industries Pvt. Ltd. Vs. CCE,Calcutta-III=2008 (223) E.L.T. 607 (Tri.-Kol.)

(ix) I.T.C. Ltd. Vs. CCE, Patna = 2003 (155) E.L.T. 115(Tri.)

(x) Shree Ram Food Industries Vs. Union of India =2003 (152) E.L.T. 285 (Guj.-HC)

8.1. The appellant further submits that the Revenue has cited the decision of the Hon'ble Apex Court in Mafatlal Industries Ltd. (supra) which was rendered in respect ofSection 11B of the Central Excise Act, 1944 prior to amendment inserted w.e.f 11/05/2007. Hence, it is not applicable in the present case. Appellant further submits that any amount paid during pendency of dispute amounts topre-deposit under Section 35F of Central Excise Act, 1944and hence, the refund claim of the appellant is covered bythis Circular F. No. 275/37/2K-CX.8A dated 02/01/2002, wherein it is mentioned that refund of pre-deposit does not require a claim under Section 11B of Central Excise Act, 1944and a simple letter would suffice. The appellant further submits that the Commissioner (Appeals) relied upon sub- section 5 of Section 11B explanation B (ec) thereto andupheld the rejection of refund claim on the ground that the refund claim was filed after one year from the date of Hon'bleCESTAT's Final Order dated 28/01/2019 and has notconsidered that any payment made under protest as mentioned in Section 11B (1), *ibid.*

9. As regards the proposal to adjust penalty against sanctioned refund in the Order-in-Original, it is averred that Hon'ble CESTAT granted waiver of interest only and not penalty in respect of invoices dated beyond September 2014. The appellant cites the case-law in the case of *Commissioner of Central Excise and Service Tax, Bangalore Vs. Bill Forge Pvt. Ltd. – 2012 (279) E.L.T. 209 (Kar.)* wherein it is held as under:

"4. Aggrieved by the said order of the Commissioner, the assessee preferred an appeal to the Tribunal. TheTribunal on reappreciation of the entire material on record held that when the assessee had wrongly taken the credit to the extent of Rs. 98,77,446-00 in their cenvat account without receipt of capital goods in June 2007 and the same was reversed in September 2007, there is no dispute that the assessee had not utilized the said credit except to the extent of Rs. 11,691-00 towards education cess. The material on record does not give rise to a conclusion that the assessee had taken irregular credit with an intention to avoid payment of duty. Therefore they held that imposition of penalty is unsustainable and accordingly set aside the said portion of the order. In so far as payment of interest is concerned, they relied on the judgment of the Punjab and Haryana High Court in the case of C.C.E., Delhi v. Maruthi Udyog Ltd. [2007 (214) E.L.T. 173 (P & H)] [2007 (214) E.L.T. A50 (sic)]

and held that as the assessee had only made an entry in the records and actually not taken or utilized such credit, the question of payment of any interest would not arise. Therefore, the levy of interest wasalso set aside. Aggrieved by the said order, the Revenue is in appeal."

9.1. The appellant submits that the Honb'le CESTAT's decision is based on the decision of Hon'ble High Court of Karnataka in the case of Bill Forge, wherein the penalty was dropped at the Tribunal stage and thereafter the Department went in appeal to the Hon'ble High Court, which rejected the appeal. Since the appeal before the High Court is not with regard to penalty, therefore, in their case as well the penalty imposed in the first round of litigation is considered to have been dropped.

10. Heard the learned counsel for the appellant and learned authorized representative for the Revenue.

11. The learned authorized representative filed written submissions during the hearing wherein he has submitted that it is clear from Section 11B (5)(B) (ec), which reads as under:

"(ec) in case where the duty becomes refundableas a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any Court, the date of such judgment, decree, order or direction"

Therefore, in this case the appellant had filed a refund application on 28/02/2020 but that is after one year from the date of Hon'ble CESTAT's Order dated 28/01/2019. Hence, the rejection of refund on this ground is legally tenable. As regards the adjustment of an amount of Rs. 77,483/- (Rupees Seventy Seven Thousand Four Hundred and Eighty Three only) towards penalty from the sanctioned refund amount is tenable as the adjudicating authority has held that the Hon'ble CESTAT has not set aside the imposition of penalty. Hence, the adjudicating authority was right in adjusting the penalty amount.

12. I have considered the submissions of the learned counsel and the Learned AR and perused the records.

13. I find that the issues for decision are;

a) Whether the duty amount paid by the appellant through reversal of cenvat credit and thereafter disputing/contesting the same on grounds of limitation can be construed as payment under protest?

b) Whether the Commissioner (Appeals) is right in confirmingthe order of the adjudicating authority that the refund claim is time barred as it is filed after one year from the order of Hon'ble CESTAT Final Order No. 20121/2019 dated 28.01.2019?

c) Whether the adjustment of the penalty amount from the sanctioned refund amount by the adjudicating authority is legally tenable?

14. The appellant avers that the time limit does not apply intheir case as the payment of the duty amount through reversal of Cenvat Credit was disputed/ contested from the show-cause stage, hence it was paid under protest, and therefore the time limit under Section 11B does not apply. I find that the appellant on being pointed out by the audit has agreed and paid the duty amount. Thereafter, after the issue of the show-cause notice they have contested the demand on the ground of limitation, the same cannot be considered as payment under protest.

15. I find that the appellant has filed the refund claim afterone year after the Hon'ble CESTAT Final Order No.20121/2019, the relevant date for filing the refund in such cases is as per Section 11B(5) Explanation (B) (ec) of Central Excise Act, 1944, which mentions that the relevant date for filing the refund is the date of order of the Appellate Tribunal, however in this case the refund claim has been filedafter one year of the Tribunal's order, hence it was held to be time-barred.

16. As regards the adjustment of the proportionate penaltyimposed and adjusted by the adjudicating authority. I find that the Commissioner (Appeals) has held that the Hon'ble Tribunal's has not passed any order as regards the penalty onthe ineligible cenvat credit availed by the appellant. Theappellant submits that the Hon'ble Tribunal has followed the decision in the case of Bill Forge of the Hon'ble High Court of Karnataka and interest only has been set aside, hence the Hon'ble Tribunal has not passed any order as regards the penalty. I find that proportionate penalty amount is payable as there was wrong availment of Cenvat credit. Therefore the imposition and adjustment of the penalty amount from the sanctioned refund amount is maintainable.

17. In view of the above discussion the appeal is not maintainable and hence the same is dismissed.

(Order pronounced in Open Court on 18/08/2023)

…pr/iss

(PULLELA NAGESWARA RAO)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 1665 of 2011

(Arising out of Order-in-Appeal No.29/2011 dated17.3.2011 passed by the Commissioner of Central Excise (Appeals), Mangalore.)

Elvina Pharmaceuticals Ltd.
P.B. Road,Kotur Dharwad. Appellant(s)

Versus

The Commissioner of CentralExcise
No.71, Club Road, Belgaum – 590 001. Respondent(s)

Appearance:

None For the Appellant

Mr. Neeraj Kumar, AR For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21164 /2023

Date of Hearing: 31.10.2023
Date of Decision: 31.10.2023

DR. D.M. MISRA

This appeal is filed against the Order-in-Appeal No. 29/2011 dated 17.3.2011 passed by the Commissioner of Central Excise (Appeals), Mangalore.

2. Briefly stated the facts of the case are that the appellants are manufacturers of P & P Medicines falling under Chapter Sub Heading 3003.10.00 of Central Excise Tariff Act, 1985. They manufacture the said goods on loan license basis for M/s. Wallace Pharmaceuticals Ltd. During the relevant period i.e. fromOctober 2007 to May 2008, they cleared physician samples by discharging duty @ 110% of the cost of production. Alleging thatthe method of valuation adopted by the appellant is not correct as the said physician samples cleared attracts valuation under Section 4/4A of Central Excise Act, 1944. Show-cause notices were issued on 20.10.2008 for the period from October 2007 to May 2008 demanding differential duty of Rs. 7,33,036/- with interest and proposal for penalty. On adjudication demands wereconfirmed. Aggrieved by the said order, they filed appeal before the Commissioner (Appeals). Hence the present appeal.

3. None present for the appellant despite notice. Heard the learned AR for the Revenue. The learned AR for the Revenue submitted that even though the notices were sent to the appellant in the past fixing the date of hearing on 6.10.2023, none appeared for the appellant nor there was any request for adjournment. It is his contention that further adjournment will not yield any result. Consequently, the appeal is taken for hearing on the basis of records and after hearing the learned AR for the Revenue.

4. Learned AR submits that the issue of valuation of physiciansample is no more *res integra* and covered by the recent judgment of Tribunal at Bangalore in the case of ***M/s. Amazon Drugs Pvt. Ltd. Vs. CCE, Bangalore vide Final Order No. 20687/2023 dated 14/07/2023***. He submits that the Tribunal taking note of the principle of law settled by the Larger Bench of the Tribunal in the case of ***Cadila Pharmaceuticals Ltd. Vs. Commr. of C.Ex. Ahmedabad-II 2008 (232) E.L.T. 245 (Tri.-LB)*** and Hon'ble Supreme Court in ***Medley Pharmaceuticals Ltd. Vs. Commr. of C. Ex. & Cus., Daman -2011 (263) E.L.T. 641 (S.C)*** held that the physician samples cleared adopting Rule 8 of the Central Excise (Valuation) Rules, 2000 is contrary to the law laid down by the Hon'ble Supreme Court and the correct method of valuation is under Section 4 of Central Excise Act, 1944 read with Rule 4 of the Central Excise (Valuation) Rules, 2000. He submits that the appeal is thus liablefor dismissal.

5. We have carefully considered the grounds of appeal and submissions of appellant advanced by the learned AR for the Revenue. The short issue for determination is, whether the valuation of physician sample be in accordance with Rule 8 or Rule 4 of the Central Excise (Valuation) Rules, 2000. We find that the Hon'ble Supreme Court in Medley Pharmaceuticals case (supra) has laid down the principle as follows:

*"**41.** Now coming to the valuation of the physician samples for the purpose of levy of excise duty, in our view, this issue need not detain us long in view of the decision of this Court in the case of Commissioner of Central Excise v. M/s. Bal Pharma [Civil Appeal No. 1697 of 2006] [2010 (259) E.L.T. 10 (S.C.)]. This*

Court has upheld the conclusion of the Tribunal that the physician's samples have to be valued on pro-rata basis. TheTribunal, while arriving at the aforesaid conclusion, had relied upon its earlier decision in the case of Commissioner of Central Excise, Calicut v. Trinity Pharmaceuticals Pvt. Ltd., reported as 2005 (188) E.L.T. 48, which has been accepted by the department. Therefore, we hold that physician samples have to be valued on pro-rata basis for the relevant period."

This principle has been followed by this Tribunal in **Amazon Drugs Pvt. Ltd.** and it is observed as follows:

"14. Thus, the contention of the appellant before the Supreme Court that the free physician samples have to be assessed on the cost of manufacture plus 15% profit as contemplated under rule 8 of the 2000 Rules was not accepted by the Supreme Court.

15. In the present appeal, the appellant has also determined the valuation under rule 8 of the 2000 Rules by adding 15% profit to the cost of manufacture. Such

a determination of the assessable value has not been accepted by the Supreme Court. The Commissioner (Appeals), therefore, committed no illegality."

6. We do not find any reason not to follow the judgment of this Tribunal in **Amazon Drugs Pvt. Ltd's** case. Consequently, following the said judgment, the impugned order is upheld and the appeal being devoid of merit, accordingly is dismissed.

(Operative portion of the Order was pronounced in Open Court.)

D.M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 20530 of 2015

(Arising out of Order-in-Original No. 21/2014-15 dated 5.12.2014 passed by the Commissioner of Central Excise, Bengaluru – III Commissionerate, Bengaluru.)

M/s. Kurlon Limited

Jai Bharat Industrial Area,Jalahalli
Camp Road, Yeshwantpur,

Bangalore – 560 022.

Appellant(s)

Versus

The Commissioner of CentralExcise
Bengaluru-III Commissionerate

P.B. No.5400, C. R. Building,

Queen's Road,

Bangalore – 560 001.

Respondent(s)

WITH

1. Central Excise Appeal No. 20524 of 2015 (Mr. Khushroo Engineer, Head Finance of M/s. Kurlon Limited vs. Commissioner of Central Excise, Bangalore-III.

2. Central Excise Appeal No.20527 of 2015 (Mr. M. S. Kamath, Vice President of M/s. Kurlon Limited vs. Commissioner of Central Excise, Bangalore-III.

3. Central Excise Appeal No.20529 of 2015 (Mr. T. Sudhakar Pai, Chairman and Managing Director of M/s. Kurlon Limited vs. Commissioner of Central Excise, Bangalore-III.)

(All arising out of Common Order-in-Original No. 21/2014-15 dated 5.12.2014 passed by the Commissioner of Central Excise, Bengaluru – III Commissionerate, Bengaluru.)

Appearance:

Mr. Rajesh Chander KumarRohra, Sr.
Advocate

Ms. Yovini Rajesh Kumar,Advocate

For the Appellants

Mr. Dyamappa Airani, Dy.
Commissioner (AR) For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL) HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20955 to 20958 /2023

Date of Hearing: 13.06.2023Date of Decision: 20.09.2023

Per : R. BHAGYA DEVI

The appellant, M/s. Kurlon Ltd., is the manufacturer of Rubberised Coir products (RCP) and foam products. Apart from the clearance of foam and foam products, they also captively consume foam products in the manufacture of rubberised coir mattresses. From 01.03.2011, the appellant availed the benefitof Notification No. 1/2011 which enabled them to pay duty at therate of 1% on coir products as against the standard rate of duty of 5% / 6% subject to the condition that no CENVAT credit was availed on the inputs and input services. The benefit of this Notification was availed by the appellant in all their units across the country. The officers of internal audit on scrutiny of records found that the appellant had availed CENVAT credit on the inputsand input services used for manufacture of rubberised coir mattress and products and accordingly, notice was issued to deny the benefit of Notification No.1/2011 dated 1.3.2011. The Commissioner vide impugned order dated 5.12.2014 held that non-availment of CENVAT credit was a precondition to avail the benefit of Notification No. 1/2011 dated 1.3.2011 and therefore, clearance of the final goods at the concessional rate of duty was incorrect in as much as they had availed credit on the inputs andinput services. Accordingly, the Commissioner confirmed demandof duty for the period 1.3.2011 to 31.3.2013 and imposed penalty on the Managing Director and Vice President of thecompany for having violated the conditions of the Notification knowing very well that they were not eligible for the benefit of the concessional rate of duty as and when CENVAT credit was availed on the inputs and input services.

2. Mr. Rajesh Chander Kumar Rohra, Sr. Advocate and Mrs.

Yovini Rajesh Kumar, Advocate on behalf of the appellant submitted that as and when the audit pointed out that credit waswrongly availed, they immediately reversed the credit on the inputs and input services used in the manufacture of foam products which were captively consumed in making the coirmattress. They submitted that in all their units all over the country, they have not availed CENVAT credit, howeverinadvertently they committed an error at their Yeshwanthpur unit at Bangalore. It is submitted that since credit was reversed along with interest before the issuance of notice, it is impliedthat credit was not availed at all and the benefit of the Notification should be extended. They also relied on number of judgements to emphasise the point that once credit is reversed along with interest, the benefit of Notification cannot be denied.

3. The learned Authorised Representative submitted that theappellant was well aware of the fact they cannot avail credit on inputs and input services in order to avail the benefit of Notification No. 1/2011 dated 1.3.2011 and is also a fact that in all their units all over the country this was followed. In view of this, they cannot claim it was an inadvertent error or mistake having availed credit knowing the consequences of the same. Hence, the Authorised Representative stated that the impugned order is to be upheld and appeals are to be dismissed. He also relied on various decisions of the apex court wherein it was held that the exemption Notifications have to be strictly interpreted.

4. Heard both sides. The issue to be decided is whether the appellant is eligible for the benefit of Notification No. 1/2011 dated 1.3.2011 when credit is availed on inputs and input services used in the manufacture of the final products on which the concessional rate of duty is being availed. The appellant manufactures foam and foam products and rubberised coir products. On foam products, standard rate of duty 12% is being discharged and accordingly, credit is availed on all inputs and input services. Foam is also captively used in the manufacture ofRubberised coir mattresses for which concessional rate of duty isavailed and therefore, credit cannot be availed as per the exemption Notification No. 1/2011 dated 1.3.2011. The appellantadmits the fact that they are aware of the fact that on rubberised coir mattresses, they are not supposed to avail CENVAT credit on inputs and inputs services in as much as they were claiming concessional rate of duty. Their only defense is that it was an inadvertent human error on their part but since they have reversed immediately along with interest when pointed out, they cannot be penalised with the standard rate of duty of 5% / 6% denying the benefit of the Notification. The appellant also admits that policy decision was taken to pay 1% duty on rubberised coir products without availing CENVAT credit, from all their units across the country. This clearly proves the fact that they were well aware that to avail the concessional rateof duty of 1% as against the standard rate of duty of 5%/6%, they were willing to forego the CENVAT credit on the inputs and input services availed in the manufacture of rubberised coir products. Moreover, as rightly observed by the adjudicating authority when all other units were strictly following the conditions of the exemption Notification, how could thiscontravention by this unit go unnoticed by their own audit officers during the submission of the financial statement of the company.

5. Now, the question arises whether there was any violationof the conditions of the exemption Notification as the mistake once noticed was made good by reversing the entire credit alongwith interest?

6. Let us examine some of the decisions where the law is clearly laid down by the apex court.

6.1 The Hon'ble Supreme Court of India in the case of **Commissioner of Central Excise, Chandigarh-I vs. Mahaan Dairies dated 17-2-2004 2004 (166) E.L.T. 23 (S.C.)** held that:

"It is settled law that in order to claim benefit of a Notificationa party must strictly comply with the terms of the Notification. If on wordings of the Notification the benefit is not available then by stretching the words of the Notification or by addingwords to the Notification benefit cannot be conferred".

6.2 In the case of **Tata Iron and Steel Co. Ltd. vs. State of Jharkhand and others: (2005) 4 SCC 272**, the supreme courtheld that it is settled law that:

"to avail the benefit of a notification a party should comply withall the conditions of the notification. Further a notification has to be interpreted in term of its

language.it is settled that toavail the benefit of a notification the party must comply with allthe conditions of the notification. It is not open to the court to ignore those conditions and extend the exemption. The principle that in the event a provision of fiscal statute is obscure such construction which favours the assessee may be adopted, would have no application to construction of an exemption notification, as in such a case it is for the assesseeto show that he comes within the purview of exemption".

6.3 The Supreme Court in the case of **Commissioner of C. EX., New Delhi Versus Hari Chand Shri Gopal decided on 18-11-2010 2010 (260) E.L.T. 3 (S.C.)** held that:

"16. In this case, we are only concerned with the question whether the respondents are entitled to get the benefit of the exemption notification dated 11-8-1994 on the ground of "intended use" and "substantial compliance" of the procedure set out in Chapter X of the Excise Rules.

18. ..... The compliance of the provisions of Chapter X is a pre- condition for claiming exemption from payment of excise duty on goods, which otherwise attracted duty..... Even assuming that the respondents were eligible for exemption from duty, the respondents could not be absolved from the legal obligation to comply with the statutory requirements forthe manufacture of excisable goods at the supplier end.

19. The purpose and object of the notification dated 11-8- 1994 was to exempt those specified intermediate goods, which were otherwise excisable to duty, and not to exempt or absolve the respondents from following the statutory requirements for the manufacture of intermediate excisable goods. The notification under Chapter X was designed in such a manner to ensure an inseparable link between the supplier and recipient of excisable goods for the manufacture of specified final products. Rule 192 of Chapter X states that a manufacturer intending to receive duty free goods under remission is required to make an application in Form R-1 for obtaining excisable goods to be used for special industrial purpose giving details of the estimated quantity of each class or variety of goods and the value of such goods likely to be used during the year, commodities to be manufactured and estimated output and clearance of each commodity during the year, manner of manufacture, purpose for which manufactured product is supplied and the source from which excisable goods will be obtained.

22. The law is well settled that a person who claimsexemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if thereis a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification grantingexemption. In *Novopan Indian Ltd.* (supra), this Court held that a person, invoking an exception or exemption provisions, to relieve him of tax liability must establish clearly that he is covered by the said provisions and, in case of doubt or ambiguity, the benefit of it must go to the State. A Constitution Bench of this Court in *Hansraj Gordhandas* v. *H.H. Dave* - (1996) 2 SCR 253, held that such a notification has to be

interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption.

23. Of course, some of the provisions of an exemption notification may be directory in nature and some are of mandatory in nature. A distinction between provisions of statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept clearly distinguished. In *Tata Iron and Steel Co. Ltd.* (supra), this Court held that the principles as regard construction of an exemption notification are no longer *res integra*; whereas the eligibility clause in relation to an exemption notification is given strict meaning where for the notification has to be interpreted in terms of its language, once an assessee satisfies the eligibility clause, the exemption clause therein may be construed literally. An eligibility criteria, therefore, deserves a strict construction, although construction of a condition thereof may be given a liberal meaning if the same is directory in nature.

24. The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirements. Like the concept of "reasonableness", the acceptance or otherwise of a plea of "substantial compliance" depends upon the facts and circumstances of each case and the purpose and object to be achieved and the context of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defence cannot be pleaded if a clear statutory prerequisite which effectuates the object and the purpose of the statute has not been met. Certainly, it means that the Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and not a mirror image type of strict compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed. Fiscal statute generally seeks to preserve the need to comply strictly with regulatory requirements that are important, especially when a party seeks the benefits of an exemption clause that are important. Substantial compliance of an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially complied with notwithstanding the non- compliance of directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. The doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand,

if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given witha view to the orderly conduct of business, they may be fulfilledby substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance of those factors which are considered as essential.
-------The respondents, therefore, on the facts of this case, have not succeeded in establishing the plea of "intended use" or "the substantial compliance" of the procedure set out in Chapter X so as to claim the benefit of the exemption notification dated 11-8-1994.

.....

34. We find it difficult to sustain the reasoning of the Tribunal that the procedure laid down in Chapter X, is meant only to establish the receipt of goods by the recipient unit and their utilization. The Tribunal completely overlooked the object and purpose of the procedure laid down in Chapter X. The goods manufactured at the supplier end were excisable goods and if a party wants remission of duty, he has to follow certain pre-requisities, the object of which is to see that the goods be not diverted or utilized for some other purpose, on the guise ofthe exemption notification. Detailed procedures have been laiddown in Chapter X so as to curb the diversion and misutilization of goods which are otherwise excisable. The pleaof "substantial compliance" and "intended use" is, therefore, rejected for the reasons already stated".

6.4 The Hon'ble Supreme Court of India in the case of **Commissioner of Cus. (Import), Mumbai vs. Dilip Kumar &Company** in Civil Appeal No. 3327 Of 2007, decided on 30-7- 2018 as reported in **2018 (361) E.L.T. 577 (S.C.)** observed that:
"(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed : it cannot imply anything which is not expressed : it cannot import provisions in the statute so as to supply any deficiency : (ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section; and (iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing unjust in a taxpayer escaping ifthe letter of the law fails to catch him on account of Legislature's failure to express itself clearly". Then finally the apex court held that

Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimedby the subject/assessee and it must be interpreted in favour of the revenue.

7. As seen from the above precedent pronouncements, it is abundantly clear that the exemption Notification needs to be interpreted strictly and unless the conditions of the Notification are fulfilled, the benefit of the Notification cannot be extended.

8. With regard to invoking Proviso to Section 11A, it is obvious that the appellant was knowing very well that they are not eligible for availing CENVAT credit for the goods that are

cleared on concessional rate of duty but still they have availed CENVAT credit for almost three years i.e., from 2011 to 2013. It is an admitted fact that a policy decision was taken by them not to avail CENVAT credit from all their units across the country andall the units except the unit at Yeshwanthpur, Bengaluru has not availed credit. This clearly shows that the company was aware ofthe fact that such availment of CENVAT credit was illegal. The irregular availment of credit came to the notice of the department only after the officers of internal audit party visited their unit and verified their records. The Commissioner at para

29 of the impugned order also notes that "*on one hand, the noticee claim that they have taken a policy decision to clear the goods on payment of 1% duty and on the other, they claim that there was confusion in their minds regarding CENVAT credit to be availed. It cannot be accepted that the contravention has not come to the notice of the noticee either at the time of their internal audit, statutory audit or during the preparation of the financial statement of the company.*" In view of the above, it is very clear that the appellant had consciously taken CENVAT credit which was irregular. Hence, having suppressed the facts, the Commissionerwas right in invoking the Proviso to Section 11A. The Hon'ble Delhi High Court in identical circumstances in the case of ***Lally Automobiles Pvt. Ltd. vs. Commissioner (Adjudication), C. Ex: 2018(17) GSTL 433 (Del.)*** responding to the argumentsof similar nature i.e., invocation of extended period of limitation, observed as follows:-

"18. As regards the method of calculation and invocationof extended period of penalty, the assessee's contentions again, to the Court's mind, are groundless. The assessee concededly did not maintain regular separate accounts in respect of non-service tax leviable activities. Therefore, the adjudicating authority adopted the method ofproportionate turnover based attribution to the assessee's liability:

"I find that it was clear in 2008 itself that no Cenvat Creditis available for services used for trading as decided by Hon'ble CESTAT in the Metro shoes case. The noticee has availed the Cenvat Credit used for exempted services namely trading without reversing the proportionate credit. They have never informed the department about taking the wrong credit. This would have been undetected if the facts were not noticed during audit. M/s. Lally Automobiles Private Ltd. have failed to inform the department that they are not maintaining the separate records for input services used for taxable and exempted services. It is already noted that the law requires an assessee to maintain separate records of Cenvat credit received on taxable or non-taxable services. In case the separate records are not maintained, the Cenvat credit is to be reversed as per Rule 6(3) of the Cenvat Credit Rules, 2004;. I find that : M/s. Lally Automobiles Private Ltd. have not reversed the same by suppression of material facts. The excess credit availed utilized by them is liable tobe recovered in terms of Rule 14 of Cenvat Credit Rules, 2004 read with proviso to Section 73(1) of Finance Act, 1994."

19. This Court is of opinion that the lack of any methodin the rules in such cases, would only mean that a reasonable and logical principle should be applied, not concededly that what should and could not be claimed as input credit, (but was in fact so claimed) ought to be "left alone" because of the composite nature of the assessee's business. While any assessee has a right to organize its business in the most convenient and efficient manner, it cannot claim that that such organization is so structured that its tax liabilities cannot be clearly discerned. In this case, the adjudicating authority adopted the proportionatepercentage to the turnover method approach, which in this Court's opinion, is reasonable.

20. This Court is also of the opinion that the invocationof the extended period of limitation was warranted in the circumstances of the case. Being conscious of its trading activity and that it was not liable to service tax (since it didnot include

the amounts earned from that business, in its returns) meant that the assessee was aware of what it wasdoing. It cannot now take shelter under the plea that non-trading activity was expressly exempt from claiming credit, in 2011. That amendment made no difference, given that trading was never taxable under the Finance Act, 1994. In these circumstances, the Revenue was justified ininvoking the extended period of limitation in this case."

The said judgment has later been upheld by the Hon'ble Supreme Court reported in **2019(24) GSTL J115(SC).**

9. In view of the above, invoking of proviso to Section 11A is upheld. The Commissioner has imposed penalty of Rs.22,12,12,586/- on the appellant under Rule 25 read with Section 11AC of Central Excise Act, 1944, which is equivalent to the duty demanded. However, it is noticed that Rs.5,90,57,107/-has already been paid at the rate of 1% during the relevant period; therefore, the penalty also accordingly needs to be re- determined for the differential payment of duty.

10. With regard to penalties on Shri Kushroo, Engineer, Headof Finance; Shri M. S. Kamath, Vice President and Shri T. Sudhakar Pai, Chairman and Managing Director, the only allegation in the show-cause notice is that they are decision makers on the statutory matters of the company. But there are no specific allegations specified to allege their involvement in taking irregular credit by the company in spite of a policy decision was taken by the Senior Officers of the company not to avail credit. The error committed by the ground level officers cannot be alleged to be done with the knowledge of the above senior officers. Therefore, the Chairman and Managing Director of the company, the Vice President and Head of Finance cannot be penalized. It is also a fact that as and when it came to their knowledge, they ordered immediate reversal of credit of Rs.1,57,29,304/- hence, the penalty imposed on them is set aside.

11. Appeal No. E/20530/2015 in respect of the company M/s.

Kurlon Limited, is disposed of by way of remand only for redetermination of penalty under Rule 25 read with Section 11ACof the Central Excise Act, 1944. Appeal No. E/20524/2015 (Mr. Khushroo, Engineer and Head of Finance); Appeal No. E/20527/2015 (Mr. M. S. Kamath, Vice President) and E/20529/2015 (Mr. T. Sudhakar Pai, Chairman and Managing Director) are allowed.

(Order pronounced in Open Court on 20.09.2023.)

(D.M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 21883 of 2014

(Arising out of Order-in-Original No.MYS-EXCUS-000-COM-013-13-14 dated 26.02.2014 passed by the Commissioner of Central Excise, Customs and Service Tax, Mysore.)

M/s. BEML Ltd.
Mysore Complex Belavadi Post, Mysore – 570 018. Appellant(s)

Versus

The Commissioner of Central Excise
S1 & S2, Vinaya Marga,Siddhartha Nagar, Mysore – 570 011. Respondent(s)

WITH

Central Excise Appeal No. 21880 of 2014

(Arising out of Order-in-Original No.MYS-EXCUS-000- COM-013-13-14 dated 26.02.2014 passed by the Commissioner of Central Excise, Customs and Service Tax, Mysore.)

Sri M. Pradeep SwaminathanExecutive Director-Finance M/s. BEML Ltd.
BEML Soudha, 23/1, 4th Main Road
S.R. Nagar, Bangalore – 560 027. Appellant(s)

Versus

The Commissioner of Central Excise
S1 & S2, Vinaya Marga,Siddhartha Nagar, Mysore – 570 011. Respondent(s)

WITH

Central Excise Appeal No. 21881 of 2014

(Arising out of Order-in-Original No.MYS-EXCUS-000- COM-013-13-14 dated 26.02.2014 passed by the Commissioner of Central Excise, Customs and Service Tax, Mysore.)

Sri A. K. Halder
Executive Director-MarketingM/s. BEML Ltd. Appellant(s)

III/V Floor, Unity Buildings,JC Road,
Bangalore – 560 002.

Versus

The Commissioner of Central Excise
S1 & S2, Vinaya Marga,Siddhartha Nagar, Mysore – 570 011. Respondent(s)

AND

Central Excise Appeal No. 21882 of 2014

(Arising out of Order-in-Original No.MYS-EXCUS-000- COM-013-13-14 dated 26.02.2014 passed by the Commissioner of Central Excise, Customs and Service Tax, Mysore.)

Sri M. Pitchiah Director (Finance)M/s. BEML Ltd.
BEML Soudha, 23/1, 4th Main Road
S.R. Nagar, Bangalore – 560 027. Appellant(s)

Versus

The Commissioner of Central Excise
S1 & S2, Vinaya Marga,Siddhartha Nagar, Mysore – 570 011. Respondent(s)

Appearance:

Ms. Neetu James & Mr. RohanKaria, Advocates — For the Appellant

Mr. H. Jayathirtha, Suptd. (AR) — For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20996 - 20999 /2023

Date of Hearing: 21/06/2023
Date of Decision: 13/10/2023

Per : DR. D.M. MISRA

Briefly stated facts of the case are that the appellant, a Public Sector Undertaking are engaged in the manufacture of Dump Trucks, Water sprinkler, Motor grader falling under

Chapters 84 & 87 of the Central Excise Tariff Act, 1985 and on the basis of intelligence and consequent investigation initiated byDGCEI, Bangalore against the appellant, it has been alleged that though, besides manufacturing they were also engaged in the activity of repacking and relabelling of imported and indigenouslyprocured spare parts of Dumpers (Mechanical Drive and Electrical Drive), Water Sprinklers and Motor Graders at their marketing division. The said activity in terms of Section 2(f) of the Central Excise Act, 1944, read with Sl. No 100 of Third Schedule of the Central Excise Tariff Act, 1985 result into "manufacture" and its value for the purpose of excise duty to be determined as per Section 4A after allowing an abatement of 33.5% on the maximum retail price as per Notification No.11/2006 CE (NT) dated 29.5.2006, but it was cleared/sold to various customers without payment of duty. Further, alleging that the appellant had failed to discharge total duty of Rs.62,10,81,326/- between January 2008 to March 2011, a showcause notice was issued to them on 05.4.2013 demanding the said duty with interest and proposal for penalty on the company and personal penalty on co-noticees. Later, by a corrigendum issued on 27.1.2014 the demand amount was revised to Rs.72,34,13,726/-. On adjudication, the total amount was reduced to Rs.50,23,90,685/- and confirmed with interest and equal penalty and personal penalty of Rs.5,00,000/- on each of the other co-noticees. Hence, the present appeals.

2. The learned advocate for the appellant has submitted thatthe Marketing Division of the appellant caters to the needs of the customers, who have already procured the dumpers and other equipment from Mysore (Manufacturing) unit. The MarketingDivision comprises of receiving section, holding section and packing and despatch section. The activities undertaken by the appellant at the Marketing Division comprises of unloading and unpacking; receiving, inspection; labelling; holding/binning (material handling); packing and tagging; repacking anddespatching; material handling and loading in truck. The spare parts are cleared either directly to the customers or stock transferred to the Regional Offices or supplied to the customers based on their requirements. The value adopted for sale of spareparts from the Marketing Division of the appellant is based on the pricelist available/generated in the ERP system. From May 2012 onwards, the system generated STD prices which are considered in case of stock transfer to Regional / District Offices from where the goods are sold to the customers.

2.1 The Ld. Advocate further submitted that the appellant had considered the said activity of re-packing and relabelling undertaken by them do not result into manufacture; accordingly, no duty was paid on sale of the spare parts. He has submitted that all spare parts are cleared to the industrial and institutional consumers only.

2.2 The learned advocate has submitted that the Third Schedule to the Central Excise Act, 1944 was amended in 2006 so as to bring within the scope of Section 2(f)(iii) of the Central Excise Act, 1944, the activities of repacking and relabelling of parts of Automobiles, as amounting to manufacture. Provision under Section 66(b) of the Finance Act, 2006 was brought into with effect from 01.6.2006. In the said amendment the term 'automobile' was not defined. The CBEC vide Circular No.167/38/2008-CX.4 dated 16.12.2008 clarified that since the term 'automobile' is not defined in the Notification, the general meaning has to be adopted.

2.3 The learned advocate referring to the Ministry's Circular No.262/15/86-CX.8 dated 14.7.1987 submitted that Automobile Cess in the said Circular was clarified to be not leviable on the earthmoving machinery including Dumpers. Therefore, the spareparts of the Dumpers etc. cleared by the appellant fall outsidethe scope of the term 'automobile' and therefore, the demand forthe period 01.3.2008 to 26.02.2010 cannot be sustained and liable to be set aside. In support of his contention, that 'dumpers' are not automobiles the learned advocate referred to the decisions of the Larger Bench of the Tribunal in the case of **M/s. Action**

Construction Equipment Ltd. vs. CCE, Delhi- IV, Order dated 6.6.2023. It is his submission that the decision of the Larger Bench is squarely applicable to the presentcase in all force inasmuch as the spare parts of the Dumpers, Tatra Trucks, Tatra Engines cleared by the appellant are earthmoving machines which fall outside the meaning and scope of the term 'automobile' mentioned in Sl. No.100 of the Third Schedule of the Central Excise Act, 1944 as it existed prior to 27.02.2010.

2.4 Further, the learned advocate has submitted that the demand issued invoking extended period of limitation is unsustainable in terms of decision of the Tribunal in their own case reported as **M/s. BEML & Ors. vs. CCE. C & ST, Bangalore: 2014-TIOL-2215-CESTAT-BANG**., wherein in an identical facts and circumstances, demand pertaining to the Marketing Division, Mysore for the period from 29.4.2010 to 31.3.2013, the Tribunal referring to the decision of **J.K. Spinning and Weaving Mills Ltd. & Anr. Vs. Union of India & Ors.: 1987 (32) E.L.T. 234 (SC)** held that extended period of limitation under Section 11A of Central Excise Act, 1944 could not be invoked. The said decision of the Tribunal was upheld by the Hon'ble High Court of Karnataka reported as **Commissionerof Central Excise, Bangalore vs. M/s. BEML Ltd. & Ors.: 2015-TIOL-1189-HC-KAR-CX**.

2.5 Further, referring to the definition of Section 2(f)(iii) of Central Excise Act, 1944 and the judgment of the Hon'ble Supreme Court in the case of **Union of India vs. J.G. Glass Limited: 1998 (97) E.L.T. 5 (SC)**, it is argued that any activitywhich brings in any change in the character of the article therebymaking the product marketable would have to be construed as amounting to 'manufacture'. In the appellant's case since the spare parts were finished, functional and marketable condition and does not add any additional value to the product and makeit marketable to the consumer; hence, the activity undertaken by the appellant cannot be treated as 'manufacture' under the main definition of Section 2(f) of Central Excise Act, 1944. Further, he has submitted that imposition of penalty on theappellant is not sustainable.

3. Learned Authorised Representative for the Revenue reiterated the findings of the learned Commissioner. Rebutting the arguments of the appellant referring to the Larger Bench Decision in Action Construction Equipment Ltd 's case (supra) that Entry at Sl. No.100 in the Third Schedule prior to its amendment was only applicable to "parts, components and assemblies of automobiles" and not to the spare parts of Dumpers as it fall outside the scope of 'automobiles', the learnedAuthorised Representative submitted that the products in the present appeal were not considered by the Larger Bench of the Tribunal in that case, hence, the said ratio is not applicable to the facts of the present case. The Larger Bench considered the products/goods/vehicles viz., Cranes, Forklifts, Compactors, Wheeled Tractor Loader Backhoe and Hydra Cranes, Hydraulic Excavator Loader (Backhoe Loaders), Hydraulic Loader (Wheel Loading Shovel/Shovel Loaders, Road Rollers (Compactors) as it has been specifically held at Para 89 of the said Order that the earth moving machines are not 'automobile'. Comparing to the products in question, the learned Authorised Representative has contended that Dumpers, Motor Graders have not beendiscussed therein in deciding whether the goods referred are 'automobiles' or otherwise.

3.1 Further advancing his arguments, he has referred to the judgment of the Tribunal in the case of **M/s. Komatsu India**

Pvt. Ltd. vs. CCE, Nagpur: 2017 (345) E.L.T. 256 (Tri.-

Mumbai) wherein the Tribunal considered whether the parts of dumpers and other machineries imported, packed/repacked in unit containers affixed with MRP could be subjected to Section 2(f)(iii) of Central Excise Act, 1944. It is his contention that the facts of the said case are squarely applicable to the facts of the present case. Therefore, the demand requires to be confirmed even for extended period of limitation following the said judgment of this Tribunal.

3.2 Distinguishing the judgment of this Tribunal in their own case, learned Authorised Representative has submitted that in the said decision while examining the issue as to whether the demand could be raised in respect of retrospective amendment by invoking extension of period of limitation, it opined in favour of the Appellant. Further he has submitted that the said decision pertaining to the KGF Unit where the activity was started during April 2010 only; whereas in the present case, the demand relates to the period from 2006 onwards. Further, he has submitted that in the said case, after the retrospective amendment, show-cause notice was issued on 22.04.2013 whereas in the present case the DGCEI has initiated investigation on 24.10.2011 and on completion of the investigation, the show-cause notice was issued to the appellant.The DGCEI investigation forced the appellant to obtain Central Excise registration on 10.10.2012 which they have failed to take cognizance more than six years. He has further submitted that the appellants had been carrying out the activity of manufacture even after it was brought under the scope of levy of excise duty, without taking registration and cleared goods without paymentof duty; thus, the confirmation of the demand invoking extendedperiod by the learned Commissioner is justified and sustainable.

4. Heard both sides and perused the records.

5. The short question involved in the present appeal for determination is: whether the activity of packing, repacking,relabelling of spare parts of automobiles, mechanical drive and electrical drive fall within the scope of definition of 'manufacture' prescribed under Section 2(f)(iii) of the Central Excise Act, 1944 during the period January 2008 to March 2011.

5.1 The period of dispute can conveniently be dividedaccording to the amendment carried out to the relevant entry at Sl. No. 100 of Third Schedule; (i) from January 2008 to February 2010, and (ii) March 2010 to March 2011.

5.2 Before analysing the above issue, it is necessary to reproduce the relevant provisions of the Central Excise Act,1944.

Section 2(f) of the Central Excise Act, 1944

[(f) "manufacture" includes any process, -

(i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the Section or Chapter notes of [the Fourth Schedule] as amounting to [manufacture; or]

[(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any

other treatment on the goods to render the product marketable to the consumer,]

and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;]

Serial No.100 of Third Schedule of the Central Excise Tariff Act, 1985 read as under during the relevant period.

From 01.06.2006 to 26.02.2010

Sl. No.	**ng, Sub-Heading or Tariff Item**	**Description of goods**
1	2	3
100	Any Chapter	Parts, Components andassemblies of automobiles

From 27.02.2010 to 31.03.2013

Sl. No.	**ng, Sub-Heading or Tariff Item**	**Description of goods**
1	2	3
100	Any Chapter	Parts, Components and assemblies of vehicles (including chassis fitted with engines) falling under Chapter 87 excluding vehicles falling under headings 8712, 8713, 8715 and 8716

Sl. No.100A has been inserted into the Third Schedule of the Central Excise Tariff Act, 1985 with effect from 29.04.2010 reads as under:

Sl. No.	**ng, Sub-Heading or Tariff Item**	**Description of goods**
1	2	3
100	Any Chapter	Parts, Components and assemblies of goods falling under Tariff item 8426 41 00, Headings 8427, 8429 and sub-heading 8430 10

5.3 For the first period i.e., from January 2008 to February 2010, the appellant has argued that the spare parts involved in the present appeal pertains to Dumpers (Mechanical Drive and Electrical Drive), Water Sprinklers, Motor Graders, Tatra Trucks, Tatra Engines etc., being not as part of 'automobiles', hence fall

outside the scope of Sl. No.100. In other words, repacking and relabelling of spare parts, components and assemblies of automobiles fall outside the scope of Sl. No.100 of Third Schedule to the Central Excise Act, 1944. In support, they referred to the judgment of the Larger Bench of this Tribunal in the case of **M/s. Action Construction Equipment Ltd.** case.

5.4 The Larger Bench was constituted pursuant to a direction of the Hon'ble Supreme Court, as there were conflicting views expressed by the Mumbai Bench of the Tribunal in the case of **CCE, Pune-I vs. JCB India Ltd.: 2014 (312) ELT 593 (Tri.-Mum.)** and Chandigarh Bench of the Tribunal in the case of **M/s. Action Construction Equipment Ltd. & Ors. Vs. CCE, Delhi-IV: 2016 (10) TMI 473- CESTAT CHANDIGARH** inExcise Appeal No.791 of 2012. After analysing the scope of Sl. No.100 of the Third Schedule to the Central Excise Act, 1944, relevant material it has been observed by the Larger Bench as follows:

"89. What follows from the aforesaid discussion is that the earth moving machines involved in the present appeals are not 'automobiles'. It would not be appropriate to borrow the meaning of the word 'automobile' or 'motor vehicle' under the Motor Vehicle Act, 1988 or the Air (Prevention and Control of Pollution) Act, 1981 merely because the word 'automobile' has not been defined in the Central Excise Act, Central Excise Tariff Act or the Notifications issued by the Central Government. In such a situation, it would be appropriate to refer to the dictionaries to find out a general sense in which the word 'automobile' is understood in common parlance. Automobiles, therefore, are conveyance for transportation of passengers and goods on road as also been understood by the department in the various Circulars issued from time to time. Serial No.100A inserted in the ThirdSchedule w.e.f 29.04.2010 is prospective and likewise Serial No.109 inserted in Notification No.49/2008 by Notification No.19/2010 dated 29.04.2010 issued under Section 4A of the Central Excise Act, is prospective in nature.

90. The reference made to the Larger Bench is, accordingly,answered in the following manner:

(i) As the word 'automobile' has not been defined in the Central Excise Act, the Central Excise Tariff Act or theNotifications issued by the Central Government, it would be permissible to refer to the dictionaries to find out thegeneral senses in which the word is understood in common parlance and it will not be appropriate to refer to the definition of the word 'automobile' occurring in the Air (Prevention and Control of Pollution) Act, 1981 or the Motor Vehicles Act, 1988; and

(ii) The amendment made in the Third Schedule to the Central Excise Act by Finance Act, 2011 w.e.f 29.04.2010 by adding serial No.100A to the Third Schedule is prospective in nature."

5.5 Distinguishing the said ratio, the Revenue has argued that the equipment considered in the said judgment are different and hence, the principle laid down in the said judgment cannot be made applicable to the facts of the present case. It was argued that the Mumbai Bench of the Tribunal specifically considered parts of the dumpers in **M/s. Komatsu India Pvt. Ltd.** (supra),therefore, the said judgment be followed and applied to the present case.

5.6 We find the said approach of the Revenue is incorrect in asmuch as the judgment of

M/s. Komatsu India Pvt. Ltd. case rests on the principle settled by the Tribunal in the case of **M/s.**
J.C.B India Ltd. case (supra) which was referred to Larger Bench when the Chandigarh Bench of the Tribunal expressed doubt about the correctness of the said judgement in **M/s. Action Construction Equipment Ltd.'s** case. Secondly, the Larger Bench also in laying down the principles has held that the meaning of the word 'automobile' occurring in Air (Preventionand Control of Pollution) Act, 1981 or the Motor Vehicles Act, 1988 cannot be adopted but the meaning has to be understood is in general sense and as used in common parlance. Further, emphasizing the said meaning as in common parlance, the Larger Bench opined that the scope and meaning of 'automobiles' be understood as the conveyances for transportation of passengers and goods on road; also in the same manner, it has been understood by the department in various Circulars issued from time to time. Further, it is also heldthat the amendment brought into effect from 29.04.2010 isprospective. Hence, following the principles laid down by the Larger Bench in the aforesaid case, we do not see merit in the contention of the department that the ratio of the said judgment is not applicable to the facts of the present case. Consequently, Sl. No. 100 of the Third Schedule shall not be applicable to parts and spares of Dumpers repacked and relabelled by the Appellant for the period from January 2008 to February 2010. Also, the said activities do not fall within the scope of 'manufacture' under either clause (i) or (ii) of Section 2(f) of CEA,1944, hence, not leviable to excise duty. However, for the period from March 2010 to March 2011, the said activities be considered to be 'deemed manufacture' being covered under the amended entry at Sl. No.100 of the Third Schedule.

5.7 The next issue to be considered is invoking of extended period of limitation. The learned advocate for the appellant submits that in their own case, this Tribunal for their Mysore Division reported as **M/s. BEML & Ors. vs. CCE: 2014 (8) TMI 135 (CESTAT-BANG.)** held that extended period of limitation cannot be made applicable for recovery of duty on the basis of retrospective legislation. Distinguishing the said judgment, on the other hand, learned Authorised Representative for the Revenue has submitted that the activity of relabelling and repacking in the said Mysore Division commenced from April 2010, whereas in the present case, the said activity was started in the year 2006, therefore, the appellant was aware of the fact that such activity attracts excise duty. In confirming the demandfor the period, the learned Commissioner has observed thatsince the appellant have been operating for more than six years, under the present era of self-assessment procedure, the department expects the assessee to comply with the requirement of law voluntarily. It is his finding that non- compliance with the provisions of various Rules of Central Excise Rules, 2002 resulted in contravention of the same with intention to evade payment of duty. Following the Larger Benchjudgement, We have observed that for the period upto Feb 2010, sr. no. 100 of the Third Schedule was applicable only to Automobiles, and not to Dumpers being not an automobile, the said sr. no 100 was amended by the Finance Act in 2011 giving retrospective effect from March 2010. This issue need not detain us much as this Tribunal examined all aspects on the applicability of extended period for the said activities relating to Mysore Division and following the principle laid down by the Hon'ble Supreme Court in **J.K. Spinning and Weaving Mills and Others vs. UOI: 1987 (32) ELT 234 (SC)** held that invoking extended period of limitation for demanding duty in implementing a retrospective operation of the law for the period from April 2010 cannot be sustained. We do not find reason in not following the judgment of the Tribunal in appellant's owncase more or less for a similar period and show-cause notice issued in the same month i.e., April 2013. In the result, invokingof extended period of limitation is bad in law. Accordingly, the demand be confined to the normal period of limitation. Consequently, the penalties imposed on the appellants, in the facts and circumstance of the case, in our opinion, isunwarranted. Consequently, penalty imposed on all the appellants are set aside. In the result Appeal No.21883 of 2014is partly allowed to the extent

discussed as above. All other Appeals imposing personal penalty are hereby allowed.

6. All the appeals are disposed of as above.

*(Order pronounced in Open Court on **13.10.2023**.)*

(D.M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 1665 of 2011

(Arising out of Order-in-Appeal No.29/2011 dated17.3.2011 passed by the Commissioner of Central Excise (Appeals), Mangalore.)

Elvina Pharmaceuticals Ltd.
P.B. Road,Kotur Dharwad. Appellant(s)

Versus

The Commissioner of CentralExcise
No.71, Club Road, Belgaum – 590 001. Respondent(s)

Appearance:

None For the Appellant

Mr. Neeraj Kumar, AR For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21164 /2023

Date of Hearing: 31.10.2023
Date of Decision: 31.10.2023

DR. D.M. MISRA

This appeal is filed against the Order-in-Appeal No. 29/2011 dated 17.3.2011 passed by the Commissioner of Central Excise (Appeals), Mangalore.

7. Briefly stated the facts of the case are that the appellants are manufacturers of P & P Medicines falling under Chapter Sub Heading 3003.10.00 of Central Excise Tariff Act, 1985. They manufacture the said goods on loan license basis for M/s. Wallace Pharmaceuticals Ltd. During the relevant period i.e. fromOctober 2007 to May 2008, they cleared physician samples by discharging duty @ 110% of the cost of production. Alleging thatthe method of valuation adopted by the appellant is not correct as the said physician samples cleared attracts valuation under Section 4/4A of Central Excise Act, 1944. Show-cause notices were issued on 20.10.2008 for the period from October 2007 to May 2008

demanding differential duty of Rs. 7,33,036/- with interest and proposal for penalty. On adjudication demands wereconfirmed. Aggrieved by the said order, they filed appeal before the Commissioner (Appeals). Hence the present appeal.

8. None present for the appellant despite notice. Heard the learned AR for the Revenue. The learned AR for the Revenue submitted that even though the notices were sent to the appellant in the past fixing the date of hearing on 6.10.2023, none appeared for the appellant nor there was any request for adjournment. It is his contention that further adjournment will not yield any result. Consequently, the appeal is taken for hearing on the basis of records and after hearing the learned AR for the Revenue.

9. Learned AR submits that the issue of valuation of physiciansample is no more *res integra* and covered by the recent judgment of Tribunal at Bangalore in the case of ***M/s. Amazon Drugs Pvt. Ltd. Vs. CCE, Bangalore vide Final Order No. 20687/2023 dated 14/07/2023***. He submits that the Tribunal taking note of the principle of law settled by the Larger Bench of the Tribunal in the case of ***Cadila Pharmaceuticals Ltd. Vs. Commr. of C.Ex. Ahmedabad-II 2008 (232) E.L.T. 245 (Tri.-LB)*** and Hon'ble Supreme Court in ***Medley Pharmaceuticals Ltd. Vs. Commr. of C. Ex. & Cus., Daman -2011 (263) E.L.T. 641 (S.C)*** held that the physician samples cleared adopting Rule 8 of the Central Excise (Valuation) Rules, 2000 is contrary to the law laid down by the Hon'ble Supreme Court and the correct method of valuation is under Section 4 of Central Excise Act, 1944 read with Rule 4 of the Central Excise (Valuation) Rules, 2000. He submits that the appeal is thus liablefor dismissal.

10. We have carefully considered the grounds of appeal and submissions of appellant advanced by the learned AR for the Revenue. The short issue for determination is, whether the valuation of physician sample be in accordance with Rule 8 or Rule 4 of the Central Excise (Valuation) Rules, 2000. We find that the Hon'ble Supreme Court in Medley Pharmaceuticals case (supra) has laid down the principle as follows:

*"**41.** Now coming to the valuation of the physician samples for the purpose of levy of excise duty, in our view, this issue need not detain us long in view of the decision of this Court in the case of Commissioner of Central Excise v. M/s. Bal Pharma [Civil Appeal No. 1697 of 2006] [2010 (259) E.L.T. 10 (S.C.)]. This*

Court has upheld the conclusion of the Tribunal that the physician's samples have to be valued on pro-rata basis. The Tribunal, while arriving at the aforesaid conclusion, had relied upon its earlier decision in the case of Commissioner of Central Excise, Calicut v. Trinity Pharmaceuticals Pvt. Ltd., reported as 2005 (188) E.L.T. 48, which has been accepted by the department. Therefore, we hold that physician samples have to be valued on pro-rata basis for the relevant period."

This principle has been followed by this Tribunal in **Amazon Drugs Pvt. Ltd.** and it is observed as follows:

"14. Thus, the contention of the appellant before the Supreme Court that the free physician samples have to be assessed on the cost of manufacture plus 15%

profit as contemplated under rule 8 of the 2000 Rules was not accepted by the Supreme Court.

15. In the present appeal, the appellant has also determined the valuation under rule 8 of the 2000 Rules by adding 15% profit to the cost of manufacture. Such a determination of the assessable value has not been accepted by the Supreme Court. The Commissioner (Appeals), therefore, committed no illegality."

11. We do not find any reason not to follow the judgment of this Tribunal in **Amazon Drugs Pvt. Ltd's** case. Consequently, following the said judgment, the impugned order is upheld and the appeal being devoid of merit, accordingly is dismissed.

(Operative portion of the Order was pronounced in Open Court.)

D.M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 821 of 2010

[Arising out of Order-in-Appeal No. 24/2010 dated 15.01.2010 passed by the Commissioner of Central Excise (Appeals-II), Bangalore]

Flexifoil Packaging Pvt Ltd **……Appellant**
24, 5th Cross, 4th Main, Industrial Town,
Rajajinagar, Bangalore

VERSUS

Commissioner of Central Excise, Bangalore-III **……Respondent**
CR Building, PB No. 5400, Queens Road,
Bangalore 560001

APPEARANCE:

Present for the Appellant: None

Present for the Respondent: Sh. H. Jayathirtha, A.R.

CORAM:
HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)
HON'BLE Mrs. R. BHAGYA DEVI, MEMBER (TECHNICAL)

FINAL ORDER NO. 21167/2023

DATE OF HEARING: 16.10.2023DATE OF DECISION: 16.10.2023

PER D. M. MISRA

None present for the appellant. Heard the ld. A.R.

2. This appeal is filed against Order-in-Appeal No. 24/2010 dated 15.01.2010 passed by the Commissioner of Central Excise (Appeals-II), Bangalore.

3. Briefly stated facts of the case are that the appellant are engaged in manufacture of Aluminum Foils falling under Chapter Heading 76071995 of the Central Excise Tariff Act, 1985. During the course of audit, it was noticed that the appellant had not paid duty on packaging charges amounting to Rs. 24,586/-; not maintained records as per Rule 16 of Central Excise Rules, 2002 and also, they have cleared Aluminum Foils discharging concessional rate of duty under Notification No. 9/2003-CE dt. 01.03.2003 @9.6% instead of 16% during the period January, 2004 to May, 2004; further since the processes carried out in respect of Aluminum Foils does not amount to manufacture, they were required to reverse the amount equivalent to credit taken in respect of inputs used therein and the differential duty calculated as Rs. 2,30,887/-. Consequently, show cause notice was issued tothem on 04.10.2007 for recovery of the said amount with interest. On adjudication, the demands were confirmed with interest. On appeal, the ld. Commissioner (Appeals) rejected theirappeal; hence, the present appeal.

4. The matter was listed on several occasions i.e. on 19.06.2023, 28.06.2023, 27.07.2023, 30.08.2023, 03.10.2023 and today i.e. 16.10.2023, but none appeared for the appellant nor any request for adjournment was forwarded. Hence, the matter is taken up on the basis of the records and after hearing the ld. A.R. for the Revenue.

5. Issues involved in the present appeal are : (i) demand of duty of Rs. 24,586/- on packaging charges, (ii) recovery of CENVAT Credit of Rs. 44,469/- on rejected/returned goods and
(iii) differential duty of Rs. 2,30,887/- availed on inputs used in the manufacture of Aluminum Foils.

6. On going through the records, we find the authorities below has confirmed the demand of Rs. 24,586/- on packaging charges being part of the value but no duty was paid claiming itas freight charges. Analyzing the evidences, the adjudicating authority after scrutiny of the relevant invoices placed on record, recorded the findings that even though the appellant have claimedthat these are transport charges and not handling charges, however, supporting transport receipt has not been produced. Since no evidence has been produced by the appellant before the lower authorities nor before this Tribunal, thus, duty of Rs. 24,586/- payable on packaging charges is confirmed.

7. Regarding the CENVAT Credit of Rs. 44,469/- on rejected/returned goods, demand was confirmed as the appellant failed to produce the evidences ie. proper account of receipt and disposal of the same. We also find that the appellant had not enclosed any evidences in this regard, thus it is clear that they had not maintained proper records of receipt goods, processes carried out and disposal of the said goods under Rule 16 of CER,2002 on which credit availed; hence, the said demand is also confirmed.

8. Regarding the differential duty of Rs. 2,30,887/- confirmed by the authorities below, we find that in the show causenotice, it was proposed to recover the differential duty as equivalent to CENVAT Credit involved on the inputs on the groundthat the processes undertaken by the appellant do not result in to manufacture. From the grounds of appeal mentioned by the appellant, we find that the processes carried out by the Appellant on the Aluminum Foils received in the factory are described as foilwash and thereafter subjected to nitro cellulose and then slit into different sizes as per requirements of customers. It is not a simpleprocess of merely cutting the foils into different sizes but other processes are involved which would definitely satisfy the definitionof manufacture pertaining Section 2(f) of Central Excise Act, 1944. Besides, the appellant have been

discharging duty on finished goods treating the said process as manufacture. Hence, denying CENVAT Credit on the inputs, contrary to the principle of law laid down in several cases. The Hon'ble Bombay High Court in the case of Commissioner of Central Excise, Pune-III Vs. Ajinkya Enterprises - 2013 (294) ELT 686 (Bom.) observed as follow:

"10. *Apart from the above, in the present case, the assessment on decoiled HR/CR coils cleared from the factory of the assessee on payment of duty has neither been reversed nor it is held that the assessee is entitled to refund of duty paid at the time of clearing the decoiled HR/CR coils.*

In these circumstances, the CESTAT following its decision in the case of Ashok Enterprises - 2008 (221) E.L.T. 586 (T), Super Forgings - 2007 (217) E.L.T. 559 (T), S.A.I.L. - 2007

(220) E.L.T. 520 (T) = 2009 (15) S.T.R. 640 (Tribunal), M.P.

Telelinks Limited - 2004 (178) E.L.T. 167 (T) and a decision of the Gujarat High Court in the case of CCE v. Creative Enterprises reported in 2009 (235) E.L.T. 785 (Guj.) has heldthat once the duty on final products has been accepted bythe department, CENVAT credit availed need not be reversed even if the activity docs not amount to manufacture. Admittedly, similar view taken by the Gujarat High Court in the case of Creative Enterprises has been upheld by the ApexCourt [see 2009 (243) E.L.T. A121] by dismissing the SLP filed by the Revenue"

The said judgment has been followed by the Hon'ble Karnataka High Court in the case of CCE, Bangalore-V vs. Vishal Precision Steel Tubes & Strips Pvt Ltd – 2017 (349) ELT 686 (Kar.).

9. In view of the above findings, the demands of Rs.24,586/- and Rs.44,469/- with interest are confirmed and the demand of Rs.2,30,887/- is set aside. The impugned order is modified to that extent and the appeal is partly allowed to that extent.

(Operative part of the order pronounced in the open court)

(D. M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS**, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL BANGALORE**

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 218 of 2010

[Arising out of Order-in-Original No. 25/2009-(Denovo) dated 28.11.2009 passed by the Commissioner of Central Excise, Bangalore-II]

Maini Precision Products Pvt Ltd **……Appellant**
No. B-165, 2nd Cross, 1st Stage, Peenya
Industrial Estate, Bangalore

VERSUS

Commissioner of Central Excise, Bangalore-II **……Respondent**
PB N. 5400, C R Building,
Queens Road, Bangalore – 560001

APPEARANCE:

Present for the Appellant: Sh. Rajesh Chander Kumar, Sr. Advocate

Ms. Yovini Rajesh Rohra, Advocate

Present for the Respondent: Mrs. D.S. Sangeetha, Addl. Commr. (AR)

CORAM:
HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)
HON'BLE Mrs. R. BHAGYA DEVI, MEMBER (TECHNICAL)

FINAL ORDER NO. 21148/2023

DATE OF HEARING: 06.06.2023 DATE OF DECISION: 20.10.2023

PER D. M. MISRA

This appeal is filed against Order-in-Original No. 25/09(Denovo) dated 28.11.2009 passed by Commissioner of Central Excise, Bangalore-II Commissionerate.

2. Briefly stated facts of the case are that the appellant are engaged in manufacturing of Fork lift truck parts, components for machinery, automobile parts etc. falling under Chapter 84 & 87 of Central Excise Tariff Act, 1985 (in short 'CETA'). During the period from 01.4.2004 to 31.3.2006 the appellant availed CENVAT Credit of Rs. 2,40,75,746/- on the goods received in their factory and subjected to various processes like blackening, buffing, final inspection, packing etc. which were subsequently exported on the Letter of undertaking without payment of duty and also suo moto credit of Rs.28,700/- on the rejected inputs. It is alleged that the goods were received by the appellant on which CENVAT Credit was availed were in the nature of finished goods and the processes carried out by the appellant do not result into 'manufacture' in terms of Section 2(f) of Central Excise Act, 1944; hence credit availed is inadmissible to them. Also, it is alleged that the appellant have wrongly availed the CENVAT Credit of Rs. 28,700/- suo moto in respect of rejected goods. Consequently, the entire amount of wrong credit availed was proposed to be recovered with interest and penalty and show cause notice dated 08.08.2007 was issued accordingly. On adjudication, the demand was confirmed with interest and penalty by the learned Commissioner. Aggrieved by the said order, the appellant preferred appeal before this Tribunal and vide order dated 07.05.2009, the Tribunal remanded the matter to the adjudicating authority for de novo consideration.

3. On re-adjudication, the learned Commissioner confirmed the demand with interest and penalty, hence, the present appeal.

4. At the outset, the ld. Sr. Advocate for the appellant has submitted that during the period in question, the goods were received by the appellant were not in marketable condition but only after subjecting the same to various processes like blackening, buffing, final inspection, packing etc. as per the requirement of customers, it became marketable even though the impugned goods do not lose their original nomenclature, identity, and essential characters. He has submitted that as per Note 6 to Section XVI of CETA, 1985, the conversion of an article which is incomplete or unfinished would result into 'manufacture'. He has further submitted that various processes undertaken by them which are necessary to meet the requirement of customers; these processes are narrated in detail (page nos. 177 to 355 of Vol. II of Appeal Paper Bok). Further, he has submitted that the processes of drilling, burr removal, grinding, blackening etc. are necessary to complete the goods and to render the same marketable, hence would definitely result into manufacture. In support, he placed reliance on the following decisions:

1) *Western Refrigeration vs. CCE Vapi – 2009 (245) ELT 485 (Tri. Ahmd.)*
2) *Rico Auto Industries vs. CCE New Delhi – 2007 (210) ELT 583 (Tri. Del.)*
3) *Flex Engineering Ltd vs. CCE – 2012 (276) ELT 153 (SC)*
4) *CCE vs Indo Asian Fuse Gear Ltd – 1993 (68) ELT 207 (Tri.)*
5) *Prasad Films Laboratories vs CCE – 2001 (130) ELT 491*
6) *TISCO vs UOI – 1988 (35) ELT 605 (SC)*
7) *Hero Moto Corp vs CC – 2014 (302) ELT 501 (Del.)*

5. On the issue of demand of CENVAT Credit of Rs. 28,700/- which was availed by the appellant suo moto on the inputs rejected initially, on which proportionate credit was already debited, and the said inputs being not cleared from the factory and the invoices were cancelled, hence, CENVAT Credit was availed duo motto by them correctly.

6. The ld. A.R. for the Revenue reiterates the findings of the ld. Commissioner.

7. Heard both sides and perused the records.

8. The Issues involved for determination are : (i) Admissibility of CENVAT Credit of Rs. 2,40,75,746/- on the inputs/goods subjected to various processes viz. blackening, buffing, final inspection, packing etc. in the factory and the resultant the finished goods were exported.

(ii) Admissibility of suo moto credit of Rs. 28,700/-.

9. On the first issue, Revenue's allegation is that the inputs received by the appellant are neither unfinished or semi-finished; also, the processes like drilling, burr removal, grinding, blackening etc. carried out on the said inputs do not result into 'manufacture' as per the definition of Section 2(f) of CEA, 1944; hence, credit availed on such inputs is irregular. The claim of the appellant on the other hand that unless the aforesaid processes are carried out on the goods received, which were as per the requirement of customers, the product cannot be marketable. The details of processes have been listed by the appellant in Appeal Paper Book Vol. II at page nos. 177 to 355. No evidence has been placed by the Revenue in support of the allegation that without subjecting the received inputs to various processes by the appellant, these goods be considered as marketable and could be exported as it is. The processes undertaken by the appellant are necessary to put the product in marketable condition as per the requirement of the customers; the appellants, on the other hand, adduced evidence in the form of rejection letters of the customers rejecting the goods supplied by the Appellant as it did not meet their requirement as per the order placed. Hence, in our opinion various processes blackening, buffing, final inspection, packing etc. carried out on the inputs be considered as processes amounting to manufacture. We find more or less similar principle has been laid down by the Hon'ble Apex Court in the case of *Flex Engineering Ltd (supra)* where it has been observed as under:

***"20**. Thus, if a product is not saleable, it will not be marketable and consequently the process of manufacture would not be held to be complete and duty of excise would not be leviable on it. The corollary to the above is that till the time the step of manufacture continues, all the goods used in relation to it will be considered as inputs and thus, entitled to Modvat credit under Rule 57A of the Rules. In the present case, as aforesaid, each machine is tailor made according to the requirements of individual customers. If the results are not in conformity with the order, then the machine loses its marketability and is of no use to any other customer. Thus, the process of manufacture will not be said to be complete till the time the machines meet the contractual specifications and that will not be possible unless the machines are subjected to individual testing. Even though the revenue has alleged that the process of manufacture is complete as soon as the machine is assembled, yet it has not discharged the onus of proving the marketability of the machines thus assembled, prior to the stage of testing. Moreover, as has been held in the case of Hindustan Zinc Ltd. v. Commissioner of Central Excise, Jaipur, (2005) 2 SCC 662 = 2005 (181) E.L.T. 170 (S.C.), the burden of proving whether a particular product is marketable or not is on the department and in the absence of such proof it cannot be presumed to be marketable. In the absence of the revenue having adduced any such evidence or contorted the assessee's claim that the machines cannot be sold unless testing is done with some alternative evidence as to their marketability, the stand of the revenue cannot be accepted."*

Therefore, the processes carried by the appellant in their premises result into manufacture and accordingly, CENVAT Credit availed on the duty paid on inputs received is admissible to the appellant.

10. On the issue of suo moto credit we find that credit of Rs.28,700/- is irregular in view of the judgment of Larger Bench of this Tribunal in the case of *BDH Industries Ltd vs. CCE, Mumbai – 2008 (229) ELT 364 (Tri. L.B.).*

11. In the result, the impugned Order is modified to the extent of setting aside demand of CENVAT credit of Rs.2,40,75,746/- with interest and penalty, however, the recovery of suo moto credit of Rs.28,700/- with interest and penalty is confirmed. The Appeal is disposed on above terms.

(Order pronounced in the court on 20.10.2023)

D. M. MISRA) MEMBER (JUDICIAL)

(R. BHAGYA DEVI) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 159 of 2009

(Arising out of Order-in-Original No.108/2008-Commr. LTU passed by the Commissioner of Central Excise and Service Tax, Large Taxpayer Unit, Bangalore.)

Praxair India PrivateLimited
Praxair House, No.8, Ulsoor Road,
Bangalore – 560 042.Karnataka. Appellant(s)

Versus

The Commissioner of CentralExcise and Service Tax
Large Tax Payers Unit,
JSS Towers, 100ft Ring Road,Banashankari
III Stage, Bangalore – 560 085. Respondent(s)

Appearance:

Mr. Hemanth Kumar, Advocate — For the Appellant

Mr. H. Jayathirtha, Superintendent (AR) — For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20989 /2023

Date of Hearing: 09.10.2023
Date of Decision: 09.10.2023

Per : DR. D.M. MISRA

This is an appeal filed by the appellant against Order-in- Original No.108/2008-Commr.LTU dated 14.11.2008 passed by the Commissioner of Central Excise and Service Tax, Large Tax Payers' Unit, Bangalore.

2. Briefly stated the facts of the case are that the appellants are manufacturers of Industrial gases viz., oxygen, nitrogen, argon gases falling under Chapter Heading 28 of the Customs Tariff Act, 1985. During the relevant period, they entered into anagreement with M/s. Tata Steel Ltd. to build, own and operate 'Air Suspension Plant' at the site of M/s. Tata Steel Ltd. for manufacture and supply of oxygen, nitrogen and argon gases to M/s. Tata Steel Ltd. subject to the conditions stipulated in the said agreement. They have also entered into similar agreement with other customers during the period from November 2006 to October 2007. Show-cause notice was issued on 28.1.2007 to the appellants demanding duty of Rs.1,14,56,420/- for the period from November 2006 to October 2007 alleging that the facility charges collected on monthly basis, escalation charges, etc., are includable in the assessable value of the gases manufactured and supplied to M/s. Tata Steel Ltd. and others. On adjudication, the demand was reduced to Rs.1,11,28,100/- with interest and penalty of Rs.5,00,000/- was imposed under Rule 25 of the Central Excise Rules, 2002. Hence, the present appeal.

3. The learned advocate for the appellant submits that the demand confirmed in relation to clearances to M/s. Tata Steel Ltd. i.e., Rs.1,09,20,900/- has been paid by them with interest. He submits that this amount is not contested in the present appeal. However, the clearances made to other customers, the agreement with them being not in accordance with the agreement entered with M/s. Tata Steel Ltd., therefore, they contest the duty on such facility charges and escalation charges. On the previous date of hearing i.e., on 11.1.2023, the appellantwas directed to place on record the agreement entered into with other customers which they have failed to produce and sought adjournments on 5.6.2023, 18.7.2023, 10.8.2023 and 13.9.2023 and today on 9.10.2023, however, they could not produce the said agreements till date. Further, adjournment would not yield any result. Hence, the case is decided on the basis of evidences available on record.

4. Per contra, the learned Authorised Representative for the Revenue submits that the same issue has been considered bythis Tribunal earlier in their own case referring to the Board Circular dated 10.11.2014 issued in this regard. He placed the Board's Circular dated 10.11.2014. It is his contention that the facility charges recovered from their customers are includable in the assessable value of the gases in view of the decision in their own case of **BOC India Ltd. Vs. CCE, Jaipur: 2018 (10) G.S.T.L. 309(Tri-Del.)**.

5. Heard both sides and perused the records.

6. We find that the short issue involved in the present appeal is inclusion of facility charges recovered from the customers by the appellant during the relevant period November 2006 to October 2007. Appellant has not contested inclusion of saidcharges in the value of the gases in the case of M/s. Tata Steel Ltd.; they have discharged applicable duty with interest. However, they are contesting the payment of duty on facility charges recovered from other customers claiming that the agreements are different. However, they could not place agreements before the original authority nor before us even though sufficient opportunities have been accorded to them.Therefore, we proceed with the case based on the documents available on record. We find that the issue is no more *res integra*and the issue is covered by the judgment of this Tribunal in the case **BOC India Ltd.** (supra). This Tribunal after taking note of the Board Circular dated 10.11.2014 and 24.4.2014, observed asfollows:

"4. We have heard both sides and perused the appeal records. The appellants are engaged in manufacture &supply of gases liable to Central Excise duty. They have put up storage facilities inside the clients premises to store such gases for subsequent consumption. For such activity, theyare collecting fixed facility charges apart from the sale consideration for the gas. Admittedly, the clarification dated 10-11-2014 issued by the Board on similar set of facts, as well as, the

clarification dated 24-4-2014 issued in respect ofappellant's unit in Orissa are applicable to the present dispute."

6.1 We do not find any reason not to follow the aforesaid judgment of this Tribunal. Hence, the facility charges, escalation charges, etc., collected from all customers are includable in the value of gases sold/supplied to their customers. However, in the facts and circumstances of the case, we do not find any reasonto confirm the penalty imposed on the appellant. Consequently, the impugned order is modified to the extent of setting aside the penalty of Rs.5,00,000/- under Rule 25 of the Central Excise Rules, 2002 and duty amount confirmed along with interest is upheld.

. Appeal is disposed of on above terms accordingly.

(Order dictated and pronounced in Open Court.)

D.M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 2694 of 2011

(Arising out of Order-in-Appeal No.202/2011 dated 15.7.2011 passed by the Commissioner of Central Excise (Appeals-II), Bangalore.)

MRO-TEK Ltd.
Bellary Road,Hebbal,
Bangalore – 560 024. Appellant(s)

Versus

The Commissioner of CentralExcise
(Appeals-II) No.16/1, 5th Floor,
SP Complex, Lalbagh Road,
Bangalore – 560 027. Respondent(s)

Appearance:

Mr. B. V. Kumar, Advocate — For the Appellant

Mr. Dyamappa Airani, AR — For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21250 /2023

Date of Hearing: 01/11/2023
Date of Decision: 15/11/2023

Per : DR. D.M. MISRA

This is an appeal filed against Order-in-Appeal No.202/2011-CE (*de novo*) dated 15.7.2011 passed by Commissioner of Central Excise (Appeals-I), Bangalore.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of Data Communication Equipment such as 'Modem' and 'Network Terminators' classifiable under Chapter Subheading 8517 of Central Excise Tariff Act, 1985. Also, they have been engaged in trading from adjoining premises of Modems, Routers, Multiplexes, Switches, etc. During the period July 1999 and August 1999, the appellant had manufactured and cleared/sold Modems against purchase Orders of the customer. They had divided the total value of Modem viz. value of hardware and value of software. Alleging that such bifurcation of value is with intention to evade

payment of duty as the software was invoiced as "software for PC", show- cause notice was issued to them on 2.8.2004 alleging short payment of duty of Rs.4,75,000/- and proposed to appropriate deposits made by them on 20.07.2004 towards the duty; also interest and penalty have been proposed in the said show-cause notice. On adjudication, the demand was confirmed with interest and equivalent penalty. Aggrieved by the said order, they filed appeal before the learned Commissioner (A) who though confirmed the demand of Rs.4,75,200/-, but dropped penalty imposed under Section 11AC and interest demanded under Section 11AB of Central Excise Act, 1944. Aggrieved by the saidorder, the Revenue filed an appeal before the Tribunal. This Tribunal vide Final Order No.1148/2010 dated 26.8.2010remanded the case to the learned Commissioner (A) to reconsider imposition of penalty under Section 11AC and recovery of interest under Section 11AB of the Central Excise Act, 1944 afresh in the light of the decision of the Hon'bleSupreme Court in the case of **CCE, Pondicherry vs. Acer IndiaLtd.: 2004 (61) RLT 719 (SC)**.

3. In the *de novo* proceedings, the learned Commissioner (A) after analysing the facts of the case and the principles of law laiddown in **Acer India Ltd.'s** case(supra) held that the appellant had suppressed the value of the product and consequently,upheld the order of the adjudicating authority imposing penalty and recovery of interest. Hence, the present appeal.

4. At the outset, the learned advocate Shri B. V. Kumar for the appellant submits that even though the learned Commissioner (A) in the impugned order has wrongly held that the manufacture and clearance of the modems took place in 1999, the judgment of the Hon'ble Supreme Court in **Acer IndiaLtd.** case was delivered in 2004, hence, there could not be any reason to accept the contention of the appellant that the duty was not paid under *bona fide* belief. It is his contention that he has failed to take note of the fact that the judgment of the Hon'ble Supreme Court in the case of **PSI Data Systems vs. CCE: 1997 (89) ELT 3 (SC)** was delivered earlier whereby it was held that a computer and its software are different and an assessee can sell the software separately, if so ordered by the purchaser thereof. Being carried away by the said judgment, the appellant had split the value of the modem, and sold hardware and software separately under different invoices. Further, he hassubmitted that since the entire amount of duty was deposited much before the issuance of show-cause notice, imposition ofpenalty and recovery of interest is unwarranted.

5. Per contra, the learned Authorised Representative for the Revenue reiterating the findings of the learned Commissioner (A)has submitted that the claim of the appellant that they have been carried away by the judgment of the **PSI Data System Ltd's** case is without any merit in as much as after detecting theevasion, statement of Shri R. Ramaswamy, CFO, of the Appellant company was recorded; he has stated that even though the purchase order was for whole of modem which included value of software and value of hardware; the value was split into two, one for hardware portion and the balance amount as the value of software by raising invoices under traded series. Therefore, the learned Commissioner (A) has rightly upheld the imposition of penalty and recovery of interest, besides confirming demand of duty.

6. Heard both sides and perused the records. This is the second round of litigation before this Tribunal. In the earlier round of litigation, the Revenue had challenged the setting aside of penalty and interest by the learned Commissioner (A) in his Order dated 12.9.2005, while confirming the demand, beforethis Tribunal. Consequently, it was remanded to the learned Commissioner (A) to re-examine the issue of imposition of penalty under Section 11AC and recovery of interest under Section 11AB of CEA,1944 in the light of the judgment of the Hon'ble Supreme Court in **Acer India Ltd.'s** case(supra). After analysing the judgments, the learned Commissioner (A) has heldas follows:

"4.2 Leaving at rest the above issue of valuation, let me come to the core issue of imposing of interest and penalty on the appellants which I feel must be primarily on the premise whether they indeed entertained a bonafide view as upheld in the Acer case. In this regard the following trivia can not be lost sight of. The issue of non-inclusion of software value in the assessable value pertained to the months of July and August 1999 itself where as the above judgment was passed much thereafter i.e., on 24.9.2004. Thus, it would be far fetched to say that the appellants had already entertainedthe said view at the point of time itself. In this regard the fact can not be ignored that the said practice of non-inclusion of software value was stopped thereafter on their own for reasons best known to them. The above fact of not including the value of software in the assessable value in the impugned two months was kept under wraps till they paid duty for the said clearances only on 20.07.2004. Here the facts to be noted are the appellants had adopted the above practice only for a short period which was discontinued on their own obviously on the premise that the practice is wrong. However, the duty for the impugned period was paid much after. All these things clearly point out to the fact that they had neither entertained any firm view on the matter as upheld in the Acer decision nor were fully convinced of any such view. Further once a practice was discontinued theywere duty bound to keep the department informed of the same more so when they had felt that the practice adoptedby them was wrong. They were equally duty bound to paythe duty forth with and not wait for four long years.

4.3 Further it also brought on record by the original authority that the invoices for software were raised from the trading Division although the same were embedded in the modem which was manufactured in the factory and the same were marked as "software for PC" although they were for the modems.

5. All the above facts leads one to conclude that it is clear cut case of suppression of facts on the part of the appellants with an intent to evade payment of appropriate Central Excise duty as rightly observed by the original authority in the impugned order. Taking all these factors into consideration and also taking into account that the view heldby the Supreme Court in the case of CCE Pondicherry vs. Acer India Limited [2004 (61) RLT 719 (SC) has not reached finality in the real sense for the reasons discussed at Para 4.1 above, I find that there is no need to interfere with the impugned order."

7. No contrary evidence has been placed by the appellant to rebut the aforesaid findings of the learned Commissioner (A). Also, we do not find merit in the pleading of the learned advocate for the appellant that harbouring a *bona fide* belief, on the basis of the judgment in the case of **PSI Data Systems Ltd.**the appellant had split the value of Modem into Hardware and software. The evidence on record is otherwise. Even though the purchase orders by the customers were for the total value of the Modem, and the software is embedded to the Modem being indispensable, it is the appellant who has knowingly split the value of modem artificially as value of Hardware and value of Software so as to evade payment of duty. In these circumstances, we do not find merit in the contention of the learned advocate for the appellant that the Appellant were undera *bonafide* belief in declaring the value of software separately. Hence, there is no reason to interfere with the order of the learned Commissioner (A).

8. In the result, the impugned order is upheld and the appeal is dismissed.

(Order pronounced in Open Court on 15.11.2023.)

(D.M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALBANGALORE

REGIONAL BENCH - COURT NO. 1

Excise Appeal No. 2660 of 2010

[Arising out of Order-in-Appeal No. 256/2010-CE dated 27.09.2010 passed by the Commissioner of Central Excise(Appeals-I) Bangalore]

MTR Foods Pvt. Ltd.

Plot No. 77 & 78, Bommasandra Industrial Area,Hosur Road,
Bangalore .....**Appellant**

VERSUS

C.C.E, Bangalore - I

P.B. No. 5400, C.R. BuildingQueens Road,
Bangalore – 560 001 ..... **Respondent**

Appearance:

Mr. H.R. Vishwanathan, Advocate for the Appellant

Mr. Dyamappa Airani, Authorised Representative for theRespondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21300 / 2023

Date of Hearing: 21/07/2023Date of Decision: 21/11/2023

Per: Pullela Nageswara Rao

M/s. MTR Foods Ltd. the appellants are manufacturers of Masala instant food mixes and Ready-to-eat packaged food and frozen food falling under Chapter 9, 21 etc., of the Central Excise Tariff Act, 1985. The appellant had manufactured and cleared “Badam Milk Drink-Ready to Drink” at “Nil" rate of duty from October 2007 onwards by classifying this final product under Chapter Heading 0402 9990 of the Central Excise Tariff Act, 1985. Prior to the amendment to Central Excise Tariff Act, 1985 in 2004, wherein 8-digit classification Code was introduced in place of 6-digit, the appellant was classifying the product “Badam Milk Drink-Ready to Drink” as flavoured milk, which was specifically mentioned in Chapter Sub-heading 0401.11 in the erstwhile Central Excise Tariff Act, 1985.

After introduction of 8-digit classification Code, the appellant has classified this product under Chapter 04 of Central Excise Tariff Act, 1985 on the ground that the change from 6 to 8 digits will not change theclassification. Hence the appellant was clearing Badam Milk as flavoured milk under Chapter sub-heading 0402 9990 of the Central Excise Tariff Act, 1985. The appellant was issued with a show-cause notice dated 17.10.2008 alleging that they had manufactured and cleared "Badam Milk Drink - Ready to Drink"at „Nil" rate of duty from October 2007 onwards, classifying under Chapter Sub-Heading 0402 9990. In the show-cause notice the Department alleged that this final product is rightly classifiable under Chapter sub-heading 2202 9030 as „Beveragescontaining Milk" and that as per the HSN notes to ChapterHeading 2202.90 under the heading „other", at Sl. No. 4 reads as „Certain other beverages ready for consumption, such as those with a basis of milk and cocoa" and that Rule 3(a) of the GeneralRules for the Interpretation of Central Excise Tariff stipulatesthat the heading, which provides the most specific description shall be preferred to heading providing a more general description. Hence the Department has classified the item under Chapter Sub-heading 2202 9030. The adjudicating authority has confirmed the classification of "Badam Milk Drink - Ready to Drink" manufactured by the appellant under Chapter Sub- Heading 2202 9990 of the Central Excise Tariff Act, 1985 for the period October 2007, onwards. Aggrieved by the Order-in-Original, the appellant filed an appeal before the Commissioner (Appeals), who has rejected their appeal vide the impugned order. Hence, this appeal was filed before the Tribunal.

2. In the submissions the appellant contended that; from the process of making "Badam Milk Drink – Ready to Drink" the product is nothing but milk in Badam Flavour; the learned Commissioner (Appeals) did not appreciate the difference between "beverages containing milk "and "milk itself in some flavor"; therefore the product is nothing but milk in badam flavorand is rightly classifiable under Chapter 04 as milk and not underChapter 22 as beverages, which is a general entry; they have never contended that Badam Milk is not a beverage but it is classifiable under Chapter 4 and not under Chapter 22; as perthe Wikipedia encyclopaedia the definition of „flavoured milk" is "sweetened diary drink made with milk, sugar, colorings and artificial or natural flavourings and that flavoured milk is often pasteurized using ultra high temperature (UHT) treatment, whichgives a longer shelf life than the plain milk" and that the process undertaken by them is exactly the same as per the definition of „flavoured milk" in the Wikipedia encyclopaedia. They further submitted that learned Commissioner (Appeals) upholding the Badam Milk drink manufactured and cleared by them is more appropriately classifiable under heading 2202 9030 is contrary tothe definition of „flavoured milk" and the provisions of Rule 3(a) of the General Rules for the interpretation of Central Excise Tariffsince Chapter 4 specifically covers milk including flavoured milk and therefore heading 0402 9990 is the specific entry, when compared to chapter sub heading 2202 9030 and that the introduction of 8 digit tariff will not call for any reclassification, since the 8 digit tariff cannot be interpreted so as to change the classification of the product from one chapter to another. Therefore, by virtue of 8-digit tariff, the flavoured milk i.e.Badam Milk in this case will not go out of Chapter 4 to get reclassified under Chapter 22. In view of the above the appellanthas submitted that the impugned order should be set aside.

3. The learned Advocate has submitted that Badam Milk drink is undisputedly a flavoured milk and the composition and list of ingredients is as below:

Component	**% of component in goods**
Toned Milk	89%

Almond/Badam	1%
Sugar, Milk Solids, Cardamom powder, Saffron, and Maltodextrin	10%
Total	100%

He has further submitted that the Department‟s case is that Chapter 04.02 covers milk added with sweetening matter only and that Badam Milk manufactured by them has not been added with sweetening agents like sugar but on the other hand flavoured with badam powder, cardamom, saffron, Maltodextrin and garnished with badam flakes. Such flavoured products fall under the category of „beverages‟ and are rightly classifiable under Chapter 2202 9990. The item cannot be used as a milk perse in view of the addition of flavour added to it and it has to be considered as a beverage and the product is a beverage as there are number of essential flavouring agents added to themilk and it cannot be considered under chapter heading 04 for the purpose of classification. The learned Advocate submits that Badam Milk drink is a flavoured milk made from milk added with sugar and flavours of Badam, Cardamom, Saffron, etc., addingof which do not alter its essential character of milk. The natural constituents of the milk are water, fat, proteins, lactose, minerals and vitamins. If those constituents are replaced with any other substance, only then the flavoured milk could not fall under Chapter 04. However, the goods in question retained all the constituents since not replaced with any constituents and the processes in the preparation of „Badam Milk Drink‟ such as UHT,homogenization, pasteurization etc., are only to provide shelf lifeand to ensure that the milk does not curdle. The process does not in any way alter the essential character of milk so as to go out of Chapter 04. Further he submits that commonlymanufacture is the end result of one or more processes through which the original commodity experiences a change and the processed commodity should be recognized as a new and distinctarticle. In this case the flavoured milk would continue to be milk despite the fact that sugar and flavour has been added only for increasing tastiness. As per Wikipedia, encyclopaedia „Flavoured milk‟ is a sweetened diary drink made with milk, sugar, flavourings, and sometimes food colourings. It may be sold as a pasteurized, refrigerated product, or as an ultra-high- temperature (UHT) product not requiring refrigeration. It may also be made in restaurants or homes by mixing flavourings into milk. The description and the process undertaken by the appellant to produce „Badam Milk Drink‟ is exactly as per the definition of „flavoured milk‟ in the Wikipedia encyclopaedia. Further Chapter 04 is specifically covering “Dairy produce, birds‟ eggs, natural honey, edible products of animal origin, not elsewhere specified or included”. Further sub-heading 04 02covers “milk and cream, concentrated or containing added sugar or other sweetening matter.” In the erstwhile Central Excise Tariff, flavoured milk, whether sweetened or not, put up in unit containers ordinarily intended for sale was specifically covered under Chapter sub-heading 0401.11 and in the present eight- digit tariff, Badam Milk would be classified under Chapter 04 onlyand accordingly, sub-heading 0402 9990 is the most appropriateand specific entry. Merely because 8-digit tariff is introduced thatby itself does not call for reclassification.

3.1. As per the Food Safety and Standards Act, 2006, Section 2(f) of the Milk and Milk Products Order, 1992 „milk‟ means “milkof cow, buffalo, sheep, goat, or a mixture thereof either raw or processed in any manner and includes pasteurized, sterilized, recombined, flavoured, acidified, skimmed, toned, double toned, standardized or full cream milk.”

Hence, „milk" includespasteurised, sterilized and flavoured milk. Hence, the product is covered under „milk" i.e. Chapter 04. Chapter 22 covers Beverages, Spirits and Vinegar. Note 3 of Chapter 22 reads that "for the purpose of heading 2202, the term non-alcoholic beverages mean beverages of an alcoholic strength by volume not exceeding 0.5% volume. This chapter covers predominantly the water-based beverages and milk is not covered under the heading 2202. Sub-heading 2202 9930 covers beverages containing milk. There is a difference between beverages containing milk and the milk itself in some flavour. Since milk itself is a beverage, it cannot say milk containing milk. Therefore, flavoured milk or milk in Badam flavour is rightly classifiable under Chapter 04 as milk and not under Chapter 22 as a beverage, which is a very general entry. As per rule 3(a) of the General Rules for the interpretation to Central Excise Tariff, "the heading which provides the most specific description shallbe preferred to headings providing a more general description." In the instant case, heading for Chapter 22 is "Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured and other non-alcoholic beverages, not including fruit or vegetable juices of heading 2009". As the Chapter heading does not cover any milk ormilk-based product, there is no requirement to go into the chapter sub-heading and tariff item level classification.

3.2. The learned Advocate submits that for classifying the product, one must identify the heading of the chapter, where the product could fall and then sub-heading and finally tariff itemhas to be identified. As there is no specific heading in Chapter 22 which covers milk and milk products, classifying the same in Chapter 22 may not be correct. Chapter 4 provides more specificdescription than Chapter 22, classifying flavoured milk in Chapter 4, which covers „milk" could be more appropriate. Further, in the matter of classification, the burden is on the Department to prove that a particular product is classifiableunder a given entry. In this case the proposed reclassification under Chapter 22 02 is without any basis in as much as the Department has not brought on record any material in support ofthe classification proposed by them.

3.3. The learned Advocate during the hearing has submitted that the issue is no longer res integra and is covered by the following decisions:

a. *Commissioner of Central Excise Vs. Amrit Foods – 2015 (9) TMI 1269 – Supreme Court*

b. *Gujarat Co-op. Milk Marketing Federation Ltd. Vs. State of U.P.–2017 (6) TMI 91–Allahabad High Court*

c. *M/s. Cavinkare Private Limited Vs. CCE – 2019 (11) TMI 1054 – CESTAT CHENNAI*

d. *Nestle India Limited Vs. CCE (LTU), Delhi – 2017 (3) TMI 1636-CESTAT New Delhi*

e. *Commissioner of Central Excise & Customs, Guntur Vs. Crane Betel Nut Powder Works-2008 (221) ELT 99 (Tri.-Bang.) which was affirmed by Hon'ble Supreme Court reported as 2010 (256) ELT A17 (SC)*

4. The learned Authorised Representative (AR) for the Revenue submitted written submissions, wherein he has contended that the product/item „Badam Milk Drink – Ready to Drink" is rightly classifiable under CTH 2202 9030. He has cited the following case-laws:

a. *Ernakulam Regional Co-operative Milk Producers Union Ltd. Vs. Commissioner, Cochin (Final Order Nos. 21785 – 21787/2017 dated 24/08/2017)*

b. *Britannia Industries Ltd. – 2022 (56) G.S.T.L. 36 (App. A.A.R.-GST-T.N.)*

4.1. Learned AR has also relied on the Notification No. 17/2008-CE (NT), wherein flavoured milk of animal origin has been classified under CETH 2202 9030, while allowing Section 11AC benefit for the period 25.02.2005 to 14.06.2007. Learned AR has also contended that as per the HSN, Chapter Heading 0402 excludes "Beverages consisting of milk flavoured with cocoa or other substances".

5. Heard both parties and perused the records.

6. We find that in this case the issue is regarding classification of the product manufactured by the appellant i.e. "Badam Milk Drink Ready to Drink". The appellant contends that they have been classifying this item under 0401 11 as flavoured milk is covered under this heading prior to the introduction of 8-digit classification code vide Central Excise Tariff (Amendment) Act, 2004 w.e.f. 28.02.2005. However, post introduction of 8-digit classification, the Department has classified this product/item under CETH 2202 9030 which reads as under:

"Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured and other non-alcoholic beverages, not including fruit or vegetable juices of heading 20.09" and sub-heading 2202 9030 as beverages containing milk."

7. The appellant contends that with the change in the Classification Code from 6 to 8 digit, the classification of the product/item should not undergo any change. They have also contended that flavoured milk was specifically covered under Chapter heading 0401 11 and with the introduction of 8-digit Classification Code, Department has now reclassified the item under Chapter Heading 2202 9030. The appellant further submits that the impugned item is flavoured milk i.e., milkflavoured with Badam. Hence, it remains to be the milk. In this regard, they have cited the composition of the impugned product/item. They contended that the heading under which the Department has reclassified as mentioned supra does not mention anything in the chapter heading and in classification matters, when an item is to be classified, there should be a mention of the item in the chapter heading and then go to the chapter sub-heading and then go to the tariff item heading. In this case, the Tariff item Heading 2202 9030 under others is "beverages containing milk", whereas the chapter heading 2202 does not mention anything with regard to milk. Hence, any item, which predominantly constitutes milk should get classified under chapter heading 0402. The learned AR for Revenue has cited thecase-law of Ernakulam Regional Co-operative Milk Producers Union, wherein this Tribunal has held as under:

"6. *After considering the submissions of both the parties, we find that there is no infirmity in the impugned order whereby the Commissioner (Appeals) has rightly classified the item under tariff heading 2202 9030 after considering the submissions of the assessee.Further we also find that the Central Government vide Notification No. 17/2008-CE (NT) dt. 27/03/2008 has clarified that the flavoured milk of animal origin will fall under the tariff heading 2202 9030 but no duty will be payable for the period from 28.02.2005 to 14.06.2007. Vide this Notification, the Central Government has exempted the duty for the period mentioned in thenotification and in all the three appeals, the periodcovered is between 28.02.2005 to 16.06.2007. Further we also find that in the case of ERCMPU (MILMA) Vs. CCE, Cochin [2014 (314) ELT 832 (Tri.-Bang.)], the Division Bench of this Tribunal while following the Notification No. 17/2008-CE has held that flavouredmilk of animal origin is entitled to benefit of Notification dt. 27.03.2008. By following the ratio of above decision,we hold that there is no infirmity in the impugned order classifying the flavoured milk of animal origin under tariff item 2202 9030 of Central Excise Tariff but the appellants are not required to pay duty in view of the said notification. Accordingly, we dispose of all the threeappeals by giving the benefit of notification to the appellant."*

8. We find that with the introduction of 8-digit Classification Code, there is a specific entry for beverages containing milk, which was not there in the earlier Central Excise Tariff. Further Tarriff item 0401.11 "flavoured milk whether sweetened or not put up in unit containers ordinarily is not anymore present underChapter 04 after the introduction of 8 digit classification code. With the introduction of the 8 digit, since there is a specific classification for the impugned item under Chapter sub-heading 2202 9030 the same has to be classified under this specific heading in view of Rule 3(a) of the General Rules for the Interpretation of Central Excise Tariff, which says that a specific heading should be preferred for a generic heading. In this case, we find that the impugned item i.e. Badam Milk Drink – Ready toDrink is containing flavourings namely badam powder, cardamom, saffron, Maltodextrin and garnished with badam flakes. Further we find that this item has also undergone the process of homogenization and pasteurization and UHT treatment to increase the shelf life of the product. Such items, which are having a longer shelf life because of the above processes are not akin to normal pasteurized, homogenized and toned milk. The Chapter note 1 to Chapter 04 of the Central Excise Tariff, 1985 reads as "the expression, Milk means full cream milk or partially or completely skimmed milk". Further this item cannot be a substitute for milk in the preparation of beverages made with milk viz. tea and coffee. We find that this item is ready to drink, which is more appropriately classifiable under beverages. The appellant contended that milk is a beverage, hence beverages of milk containing milk means milk containing milk. We find that the Department contended that theproduct/item is classifiable under 2202 9030 and in support theycited the case-law of Ernakulam Regional Cooperative Milk Producers Union (supra). Further we find that the Board, while issuing Section 11C Notification No. 17/2008-CE (NT) has classified flavoured milk of animal origin under chapter sub-heading 2202 9030. We find that the Notification is issued after the introduction of 8-digit classification code and after the full alignment of Central Excise Tariff with HSN. This buttresses the contention of the Department that the impugned item is classifiable under the chapter sub-heading 2202 9030.

9. The case-law of Nestle India (supra) cited by the appellant is distinguishable on facts as the issue involved is classification between Chapter heading 0404 and 1904 of mix and not beverage and the case is based on the Central Excise Tariff that existed before 2005 i.e. before alignment of the Central Excise Tariff with the HSN. The appellant has also cited the case-law of M/s. Amrit Foods, wherein the issue involved is classification of Milk shake mix and soft serve mix between Chapter heading 0404 and 1901.19, hence distinguishable. The decision in the case of M/s CavinKare Pvt., Ltd. (supra) does not have precedential value being less than the monetary limit, hence no appeal was filed by Revenue as per Section 35R of the Central Excise Act, 1944. Further the case of Gujarat Co-operative Milk Federation relates to the VAT case of Uttar Pradesh and isdifferent from Tariff classification under the Central Excise Tariff Act, 1985. In the case of Amrit Foods (supra) the issue is whether milk shake mix and soft serve is to be classified under Chapter Heading 0404.90 or under Chapter 1901.9090 and the issue of classification under 2202.90 was not raised nor discussed. Further the products discussed in this case are not beverages, hence distinguishable. In the case of Crane Betel NutPowder Works (supra), the case is regarding classification of Betel Nut under Chapter sub-heading 2106 9030 or Chapter Tariff Heading 0802 9012. The dispute is regarding the classification after the introduction of 8 digit classification code. The facts in the present case are different and hencedistinguishable.

10. In view of the above discussion and following the ratio of the decision in Ernakulam Regional Co-operative Milk Producers Union Ltd. (cited supra) of this Tribunal, we do not find any reason to interfere with the impugned order. Hence the appeal filed by the appellant is unsustainable and is rejected.

(Order pronounced in Open Court on 21/11/2023)

D.M. Misra)Member (Judicial) (Pullela Nageswara Rao)Member (Technical)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 623 of 2010

(Arising out of Order-in-Original No.120/2009-LTU dt. 31/12/2009passed by Commissioner of Central Excise (LTU), Bangalore)

M/s. 3M India Limited,

No.48-51, Hosur Road, Electronics City,

Bangalore – 561 229

..... **Appellant(s)**

VERSUS

Commissioner of Central Excise (LTU),

JSS Towers, 100ft Ring Road,Banashankari 3rd Stage, Bangalore – 560085.

…….
Respondent(s)

Appearance:
Mr. N. Anand, Advocate for the appellant.

Mr. H. Jayathirtha, Superintendent (AR) for the respondent.

Coram:
Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21417 / 2023

Date of Hearing: 23.08.2023Date of Decision: 20.12.2023

Per: Dr. D. M. Misra

This is an appeal filed against the Order-in-Original No.120/2009-LTU dt. 31/12/2009 passed by Commissioner of Central Excise (LTU), Bangalore. 2. Briefly stated the facts of the case are that the appellant areengaged in the manufacture of self-adhesive tapes and also registered under Service Tax provisions under the taxable category of 'Management Consultancy Service'. During the periodSeptember 2006 to December 2007, they have availed cenvat credit amounting to Rs.1,56,29,750/- on the service tax paid on reverse charge mechanism for receiving 'Management Consultancy Service' from foreign service

provider. Subsequently,on the basis of audit of their records, a show-cause notice was issued to them on 08.04.2009 for recovery of the said credit withinterest and penalty; an amount of Rs.79,22,225/- paid along with interest of Rs.15,38,789/- proposed to be appropriated. On adjudication, the demand of Rs.79,22,225/- and interest of Rs.15,38,789/- attributable to trading activities and demand of Rs.15,83,168/- being credit availed at Bangalore pertaining to manufacturing units located at Ahmedabad and Pune was confirmed with a penalty of Rs.95,05,393/- without having ISD registration. Hence the present appeal.

3.1. At the outset, the learned advocate for the appellant submitted that the disallowance of cenvat credit comprises of twoissues. The first issue relates to denial of cenvat credit of Rs.79,22,225/- relating to their trading activities during the period in question. He has submitted that as per the provisions of Rule 6(5) of Cenvat Credit Rules, 2004, they are entitled to avail cenvatcredit on 'Management Consultancy Service' unless the said service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted service. He has further submitted that even if trading activity is considered as an 'exempted service' during the relevant period, they are entitled toavail credit on the cenvat credit paid on 'Management ConsultancyService' attributable to trading activity. In support, he hasreferred to the following judgments:

i. ***CCE Vs. Metlife India Insurance Company Ltd. [2022(67) GSTL 386 (Kar.)]***

ii. ***Super Packs Vs. CCE, Bangalore [2019(370) ELT 691 (Tri. Bang.)]***

iii. Franke Faber India Ltd. Vs. CCE [2017(52) STR 155(Tri. Mum.)]

iv. ***Marudhan Motors Vs. CCE [2017(47) STR 261 (Tri.Del.)]***

v. Lemon Tree Hotels Pvt. Ltd. Vs. CST [2018(13) GSTL 305 (Tri. Che.)]

vi. ***Lemon Tree Hotels Ltd. Vs. CCE [2018(364) ELT 1078 (Tri. Mum.)]***

vii. Secure Meters Ltd. Vs. CCE [2017(3) GSTL 422 (Tril. Del.)]

3.2. On the second issue, the learned advocate has submitted that cenvat credit of Rs.15,83,168/- was denied to them on the ground that the credit pertains to the units at Ahmedabad and Pune and which was availed at Bangalore Unit prior to the registration of the unit as ISD. He has submitted thatthe said ground for denying the credit at the Bangalore Unit in theabsence of ISD registration at the time of availing credit is no moreres integra being covered by the judgment of the Hon'ble Karnataka High Court in the case of ***CCE Vs. Hinduja Global Solutions Ltd. [2022(61) GSTL 417 (Kar.)]*** wherein their lordships following the decision of the Hon'ble Gujarat High Court in the case of ***CCE Vs. Dashion Ltd. [2016(41) STR 884 (Guj.)***and Hon'ble Madras High Court in the case of ***CCE Vs. Pricol Ltd.[2021(48) GSTL 235 (Mad.)]***., held that credit is admissible.

3.3. The appellant has also submitted that the demand notice issued by the Department is barred by limitation and invoking of extended period cannot be sustained since the fact of taking of credit was disclosed and declared in the returns filed by the appellant. The entire notice has been issued only on the basis ofaudit of the records of the appellant and no facts have beenmis declared or suppressed from the Department. Further he hassubmitted that the cenvat credit was taken on a *bona fide*interpretation of the provisions and clarifications issued by the Board from time to time. Therefore, invoking of extended periodof limitation is not sustainable. In support, they have referred thefollowing judgments:-

i. CCE Vs. Sanmar Speciality Chemicals Ltd.[2016(43) STR 347 (Kar.)]

ii. ***CCE Vs. Zyg Pharma Pvt. Ltd. [2017(358) ELT 101 (MP)]***

iii. Continental Foundation Joint Venture Vs. CCE [2007(216) ELT 177 (SC)]

iv. ***Jaiprakash Industries Ltd. Vs. CCE [2002(146) ELT481 (SC)]***

4.1. *Per contra*, the learned AR for the Revenue reiterated the findings of the learned Commissioner. He has submitted that cenvat credit availed on services attributable to trading activity cannot be admissible in view of the series of judgments by Hon'bleHigh Courts and Tribunal on the subject. In support, he has referred to the judgment of Hon'ble Delhi High Court in the case of Lally Automobiles Pvt. Ltd. Vs. CCE [2018(17) GSTL 422(Del.)]; Aksh Optifibre Ltd. Vs. CCE, Jaipur-I [2018(10) GSTL 551 (Tri. Del.)]; CST, New Delhi Vs. AVL India Pvt. Ltd. [2017(4) GSTL 59 (Tri. Del.)]; Secure Meters Ltd. Vs. CCE, Jaipur-II [2017(3) GSTL 485 (Tri. Del.)] and Ruchika Global Interlinks Vs. CESTAT, Chennai [2017(5) GSTL 225 (Mad.)].

4.2. Further, he has submitted that the appellant has wrongly availed credit pertaining to their units at Ahmedabad and Pune without taking ISD registration at the relevant point of time at their Bangalore unit, hence credit is not admissible

5. Heard both sides and perused records

6. The issues involved in the appeal are admissibility of;

i. cenvat credit of Rs.79,22,225/- attributable to theirtrading activity;

ii. credit of Rs.15,83,168/- pertaining to Ahmedabad and Pune units before obtaining ISD registration at their Bangalore unit, and

iii. whether extended period of limitation be invoked.

7.1. These issues are covered by the judgments of Hon'ble HighCourt and Delhi High Court. As far as admissibility of cenvat creditof trading activity, the Hon'ble Madras High Court in Ruchika Global Interlinks case held as follows:-

10. *To our minds, such a submission cannot be accepted.*

If, the appellant has accepted before us that he was not paying Service Tax on an activity, then the credit of servicesvis-a-vis input services could only be taken on a pro rata basis, as per the formula stipulated in Rule 6(3)(c), as it then obtained at the relevant point in time.

10.1 *In this context, it may also be relevant to note, howexempted services was defined in Rule 2(e) of the 2004 Rules till 31-3-2011 and thereafter.*

Rule position till 31-3-2011

Rule 2(e): "exempted services" means taxable serviceswhich are exempt from the whole of the Service Tax leviablethereon, and includes services on which no Service Tax is leviable under Section 66 of the Finance Act

Rule position with effect from 31-3-2011

Rule 2(e): "Exempted services" means taxable services which are exempt from the whole of the Service Tax leviablethereon, and includes services on which no Service Tax is leviable

under Sec. 66 of the Finance Act; and taxable services whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken.

Explanation. - For the removal of doubts, it is hereby

clarified that "exempted services" includes trading.

10.2 *Clearly, both before and after amendment, "exempted services" meant those taxable services, which were exempt from whole of Service Tax and, included thoseservices on which Service Tax was not leviable, under* Section 66 of the Finance Act. The inclusion in Explanation to Rule 2(e) "trading" was, without doubt, only clarificatory.As accepted by Mr. Jayachandran, the appellant had not being paying Service Tax on trading activity during the relevant period.

10.3 *Therefore, given the rule position, what would govern the matter would be the determination of the issue as to whether or not, a particular service is amenable to Service Tax under Section 66 of the Finance Act.*

10.4 *Since, the trading activity was not amenable toService Tax at the relevant period, surely, the apportionment as provided in Rule 6(3)(c) would get triggered. This is apparent, upon a bare perusal of Rule 6(3)(c) the relevant part of which is as follows.*

RULE 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services. -

(1) xxxx

(2) xxxx

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer or the provider of output service,opting not to maintain separate accounts, shall follow eitherof the following conditions, as applicable to him, namely:-

(a) xxxx

(b) xxxx

(c) The provider of output service shall utilize credit onlyto extent of an amount not exceeding twenty per cent of theamount of Service Tax payable on taxable output service.

11. *Having regard to the rule, position and given the admitted fact that no separate accounts were maintained bythe appellant, with regard to the taxable and non-taxable services, clause (c) of sub-rule (3) of Rule 6 of 2004 Rules would apply.*

12. *For the foregoing reasons, we feel no interference iscalled for with the order of the Tribunal. Accordingly, the questions of law framed are answered in favour of the Revenue and against the assessee.*

7.2. Further, the Hon'ble Delhi High Court in Lally AutomobilesPvt. Ltd. case held as under:-

17. *In the present case, the assessee's argument that there is no mechanism to reverse credit, once taken, in theopinion of this Court, cannot be accepted. The assessee waswell aware of the exact nature and extent of its service taxliability. It was also aware of the eligible service tax inputs.Therefore, when it did claim successfully and unchallenged input*

credits in respect of activities that were not subjectedto service tax levy, it was aware that the claim was excessive and could not be justified. If, for instance, input credits were claimed in respect of goods or rents, attributable to retail business, those credits were clearly impermissible. In these circumstances, this Court finds no infirmity with the concurrent findings of the lower authorityand the CESTAT, which concluded that show cause notice and recoveries were in order.

18. *As regards the method of calculation and invocation ofextended period of penalty, the assessee's contentions again, to the Court's mind, are groundless. The assessee concededly did not maintain regular separate accounts in respect of non-service tax leviable activities. Therefore, the adjudicating authority adopted the method of proportionateturnover based attribution to the assessee's liability:*

"I find that it was clear in 2008 itself that no Cenvat Creditis available for services used for trading as decided by Hon'ble CESTAT in the Metro shoes case. The noticee has availed the Cenvat Credit used for exempted services namely trading without reversing the proportionate credit. They have never informed the department about taking thewrong credit. This would have been undetected if the facts were not noticed during audit. M/s. Lally Automobiles Private Ltd. have failed to inform the department that theyare not maintaining the separate records for input servicesused for taxable and exempted services. It is already notedthat the law requires an assessee to maintain separate records of Cenvat credit received on taxable or non-taxableservices. In case the separate records are not maintained, the Cenvat credit is to be reversed as per Rule 6(3) of the Cenvat Credit Rules, 2004;. I find that : M/s. Lally Automobiles Private Ltd. have not reversed the same by suppression of material facts. The excess credit availed utilized by them is liable to be recovered in terms of Rule 14of Cenvat Credit Rules, 2004 read with proviso to Section 73(1) of Finance Act, 1994."

19. *This Court is of opinion that the lack of any method inthe rules in such cases, would only mean that a reasonableand logical principle should be applied, not concededly that what should and could not be claimed as input credit, (but was in fact so claimed) ought to be "left alone" because of the composite nature of the assessee's business. While any assessee has a right to organize its business in the most convenient and efficient manner, it cannot claim that that such organization is so structured that its tax liabilities cannot be clearly discerned. In this case, the adjudicating authority adopted the proportionate percentage to the turnover method approach, which in this Court's opinion, isreasonable.*

8. On the issue of invoking extended period of limitationon similar circumstances, their lordships observed as under:-

20. This Court is also of the opinion that the invocation of the extended period of limitation was warranted in the circumstances of the case. Being conscious of its trading activity and that it was not liable to service tax (since it didnot include the amounts earned from that business, in its returns) meant that the assessee was aware of what it wasdoing. It cannot now take shelter under the plea that non- trading activity was expressly exempt from claiming credit,in 2011. That amendment made no difference, given that trading was never taxable under the Finance Act, 1994. In these circumstances, the Revenue was justified in invokingthe extended period of limitation in this case.

The judgment of the Hon'ble Delhi High Court has been upheld bythe Hon'ble Supreme Court as reported in 2019(24) GSTL J115 (SC).

9. Thus, the confirmation of demand with interest by the learned Commissioner invoking extended period of limitation on cenvat credit availed on trading activity is upheld.

10. As far as the second issue regarding admissibility of cenvatcredit of Rs.15,83,168/- availed before taking ISD registration atBangalore unit is concerned, we find that the issue is also coveredby the judgment of the Hon'ble Karnataka High Court in the caseof Hinduja

Global Solutions Ltd, (supra). Their Lordships followingthe judgment of Hon'ble Gujarat High Court and Madras High Court, held that cenvat credit cannot be denied to the assessee prior to its registration as an ISD, since the same is procedural irregularities. Para 11 of the said judgment is reproduced below:-

11. In view of the aforesaid, it is clear that the Cenvat credit claimed by the respondent-assessee on the basis of the Invoices/Debit notes issued by the head office for the months of March, July and August, 2006 prior to its registration as ISD on 21-9-2006 being proceduralirregularity and the view of the Hon'ble High Court of Gujarat being accepted by the Department, input tax creditcannot be denied. Accordingly, substantial questions of laware answered in favour of the assessee and against the Revenue.
Thus, the appellant is entitled to avail cenvat credit of Rs.15,83,168/-.

11. In the result, the impugned order is modified to the extent of confirming inadmissible cenvat credit of Rs.79,22,225/- attributable to trading activity and applicable interest of Rs.15,38,789/- paid on the said credit amount; since the cenvat credit and applicable interest is paid much before the issuance ofshow-cause notice, the appellant is entitled for the benefit of 25%of penalty imposed under Section 11AC of the Central Excise Act read with Rule 15(4) of CENVAT Credit Rules, 2004.

12. The demand of cenvat credit of Rs.15,83,168/- confirmed with interest and equivalent penalty before ISD registration is hereby set aside.

13. The appeal is disposed of accordingly.

(Pronounced in open court on 20.12.2023)

(D.M. Misra)Member (Judicial)

(Pullela Nageswara Rao)Member (Technical)

Raja…

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. I

Excise Additional Evidence Application No. 20493 of 2023in
Excise Appeal No. 538 of 2010

[Arising out of Order-in-Appeal No. 302/2009-CE dated 30.12.2009 passed bythe Commissioner of Central Excise (Appeals-I), Bangalore]

Fouress Engineering (I) Ltd **……Appellant**
Plot No. 2, Phase II, Peenya Industrial
Area,Bangalore

VERSUS

Commissioner of Central Excise,Bangalore-II **……Respondent**
PB No. 5400, C R Building,Queens Road,

Bangalore – 560001

APPEARANCE:

Present for the Appellant: Sh. N. Anand, Advocate

Present for the Respondent: Sh. K. Vishwanath, (Supdt.) A.R.

CORAM:

HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL) HON'BLE Mrs. R. BHAGYA DEVI, MEMBER (TECHNICAL)

FINAL ORDER NO. 21480/2023

DATE OF HEARING: 08.12.2023DATE OF DECISION: 08.12.2023

PER D. M. MISRA

This appeal is directed against Order-in-Appeal No. 302/2009-CE dated 30.12.2009 passed by the Commissioner of Central Excise (Appeals-I), Bangalore.

2. Briefly stated facts of the case are that the appellant are engaged in manufacture of different types of industrial valves falling under Chapter Heading 84 of CETA, 1985. On the basis of the audit of the records for the period June 2005 to August 2006, show cause notice was issued to the appellant alleging that they have wrongly availed the Cenvat Credit of Rs.76,528/- on securityservices, Rs.66,420/- on mobile phones provided to the employees and Rs.11,202/- on GTA outwards transportation service; also, it is alleged that they have failed to discharge the duty of Rs.5,126/- on additional testing charges and also the inputs short received involving duty of Rs.61,640/- during the saidperiod. On adjudication, the demand was confirmed with interest and penalty. Against the order of adjudicating authority, the appellant filed appeal before the ld. Commissioner (Appeals), who in turn, rejected their appeal. Hence, the present appeal.

3.1 The ld. Advocate for the appellant has submitted that confirmation of demand of Rs.5,126/- on testing charges is admissible being covered by the judgment of Larger Bench of this Tribunal in the case of ***CCE, Raipur vs. Bhaskar Ispat Pvt Ltd –2004 (167) ELT 189 (Tri. LB)***.

3.2 Further, on the demand of Cenvat Credit of Rs.11,202/- on GTA outwards transportation service, he has submitted that since the period involved prior to 01.04.2008, hence, covered by the judgment of Hon'ble Supreme Court in the case of ***CCE,*** Belgaum vs. Vasavadatta Cements Ltd – 2018 (11) GSTL 3(SC)***.***

3.3 Further, he has submitted that mobile phones have been provided by the appellant during the course of employment and used by the employees in discharge of employment, hence, covered by the judgment of Hon'ble Gujarat High Court in thecase of ***CCE, Ahmedabad vs. Excel Crop Care Ltd – 2008*** (12) STR 436 (Guj.).

3.4 He has also submitted that the security service provided to the residence of MD & JMD is admissible.

3.5 He has further submitted that the inputs short received cannot be denied as the same are intended to be used in the manufacture of finished goods.

4. The ld. A.R. for the Revenue has submitted that Cenvat Credit availed on security services cannot be admissible in view ofthe decision of Hon'ble Gujarat High Court in the case of ***Commissioner of CE & Cus vs. Gujarat Heavy Chemicals Ltd – 2011 (22) STR 610 (Guj).*** Further, he has submitted that theinputs which are not received in the factory and not utilized in manufacture of final product, the Cenvat Credit availed on the same, is required to be recovered from the appellant.

5. Heard both sides and perused the records.

6. It is not in dispute that the appellant have availed Cenvat Credit on security services provided to residence of MD & JMD, on mobile phones, on GTA (outwards transportation) services during the period June, 2005 to August, 2006. We find that the judgments cited by the ld. Advocate for the appellant relating to credit availed on mobile phones and GTA outwards services, are held to be admissible, however, the credit availed on security services provided to the residence of MD & JMD are not admissiblein view of the decision of Hon'ble Gujarat High Court in the case of***Gujarat Heavy Chemicals Ltd'***s case (supra). Further, weagree with the contention of the ld. A.R. for the Revenue that the inputs not received in the factory, being not used in the manufacture of final product, availment of credit on the same is irregular and hence, not admissible. Further, we find that the value of testing charges

at the option of buyer cannot be included in the value of the manufactured products in light of the decision of Larger Bench of this Tribunal in ***Bhaskar Ispat'***s case (supra). Therefore, the demand confirmed on testing charges cannot be sustained and accordingly set aside.

7. In the result, the impugned order is modified and the appeal is partly allowed to the extent of setting aside the confirmation of demand on testing charges; and recovery of Cenvat Credit availed on mobile phones and GTA outwards transportation service. The remaining amount of demands onaccount of credit on security services, input short received with interest are upheld. However, penalty imposed on the appellant isset aside.

8. The appeal is disposed of accordingly; miscellaneousapplication is also disposed of.

(Operative part of the order pronounced in the open court)

(D. M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

RA_Saifi

Back

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 1364 of 2010

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passedby the Commissioner of CE, Bangalore-III Commissionerate]

Karnataka Agro Chemicals **……Appellant**

No. 180, 1st Main Road, Mahalakshmi Layout,

Bangalore 560 086

VERSUS

Commissioner of Central Excise,Bangalore-III **……Respondent**

PB No. 5400, Queens Road,C R Building,
Bangalore Karnataka 560 001

WITH

(i) Excise Appeal No. 1365 of 2010 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(ii) Excise Appeal No. 1366 of 2010 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(iii) Excise Appeal No. 1367 of 2010 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(iv) Excise Appeal No. 1368 of 2010 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(v) Excise Appeal No. 1369 of 2010 (Karnataka

AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(vi) Excise Appeal No. 1370 of 2010 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(vii) Excise Appeal No. 1371 of 2010 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(viii) Excise Appeal No. 1372 of 2010 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(ix) Excise Appeal No. 1373 of 2010 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(x) Excise Appeal No. 1374 of 2010 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xi) Excise Appeal No. 1375 of 2010 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 06-17/2010 dated 31.03.2010 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xii) Excise Appeal No. 20087 of 2015 (Sri Mahesh G Shettyvs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 15/2014-15 dated 17.10.2014 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xiii) Excise Appeal No. 20088 of 2015 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. 15/2014-15 dated 17.10.2014 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xiv) Excise Appeal No. 21306 of 2015 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-27-14-15 dated27.02.2015 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xv) Excise Appeal No. 21307 of 2015 (Sri Mahesh G Shettyvs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-27-14-15 dated27.02.2015 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xvi) Excise Appeal No. 20236 of 2016 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-13-15-16 dated20.11.2015 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xvii) Excise Appeal No. 20237 of 2016 (Sri Mahesh G Shettyvs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-13-15-16 dated20.11.2015 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xviii) Excise Appeal No. 20246 of 2017 (Sri Mahesh G Shettyvs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-20-16-17 dated25.11.2016 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xix) Excise Appeal No. 20247 of 2017 (Karnataka AgroChemicals vs. CCE, Bangalore-III)

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-20-16-17 dated25.11.2016 passed by the Commissioner of CE, Bangalore-III Commissionerate]

(xx) Excise Appeal No. 21212 of 2018 (Karnataka AgroChemicals vs. CCE, Bangalore-West)

[Arising out of Order-in-Original No. 4/2017-PR Commr dated 09.10.2017 passedby the Pr. Commissioner, Bangalore West]

(xxi) Excise Appeal No. 21215 of 2018 (Sri Mahesh G Shettyvs. CCE, Bangalore-West)

[Arising out of Order-in-Original No. 4/2017-PR Commr dated 09.10.2017 passedby the Pr. Commissioner, Bangalore West]

(xxii) Excise Appeal No. 20011 of 2021 (Karnataka AgroChemicals vs.

CCE, Bangalore-West)
[Arising out of Order-in-Original No. 12/2020-(PR Commr) dated 12.10.2020passed by the Pr. Commissioner, Bangalore West]

(xxiii) Excise Appeal No. 20012 of 2021 (Sri Mahesh G Shettyvs. CCE, Bangalore-West)
[Arising out of Order-in-Original No. 12/2020-(PR Commr) dated 12.10.2020passed by the Pr. Commissioner, Bangalore West]

Appearance:

Present for the Appellants: Sh. G. Shivadass, Sr. Advocate

Sh. M.S. Nagaraja, Advocate

Present for the Respondent: Sh. P.R.V. Ramanan, Special Counsel, A.R.

Coram:

Hon'ble Dr. D. M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

FINAL ORDER NO. 21456 to 21479 of 2023

DATE OF HEARING: 27.07.2023DATE OF DECISION: 22.12.2023

Per: Dr. D. M. Misra

These appeals are filed against respective Orders-in-Original passed by the Commissioner of Central Excise, Bangalore, since involve common issues are taken up together for hearing and disposal.

Sl. No.	Appeal No.	Impugned Order No.	Period	Amount involved
1 to 12	E/1364 to 1375/2010	OIO No. 06-17/2010 dated 31.03.2010	August 2001 To 31.12.2009	Rs.2,89,64,308/-, Rs.23,26,36,443/- +interest and penalty of Rs.1,50,00,000/-
13 to 14	E/20087/2015 and E/20088/2015	OIO No. 15/2014-15 dated 17.10.2014	January 2010To August 2013	Rs.31,33,73,346/- +interest +Rs.31,33,73,346/- as penalty Rs.3,15,00,000/- penalty on Shri MaheshG Shetty
15 to 16	E/21306/2015 and E/21307/2015	OIO No. BLR-EXCUS-003-COM-27-14-15 dated 27.02.2015	September 2013 To June 2014	Rs.9,81,15,243/- +interest +Rs.98,00,000/- as penalty Rs.10,00,000/- penaltyon Shri Mahesh G Shetty
17 to 18	E/20236/2016 and E/20237/2016	OIO No. BLR-EXCUS-003-COM-13-15-16 dated 20.11.2015	July 2014 To March 2015	Rs.9,74,30,425/- +interest +Rs.97,00,000/- as penalty Rs.10,00,000/- penaltyon Shri Mahesh G Shetty
19 to 20	E/20246/2017 and E/20247/2017	OIO No. BLR-EXCUS-003-COM-20-16-17 dated 25.11.2016	April 2015 To September 2015	Rs.8,58.83,708/- +interest +Rs.8,58,83,371/- as penalty
				Rs.10,00,000/- penaltyon Shri Mahesh G Shetty

21 to 22	E/21212/2018 and E/21215/2018	OIO No. 4/2017-PR Commr dated09.10.2017	October 2015To March 2017	Rs.23,97,79,059/- +interest +Rs.2,20,00,000/- as penalty Rs.44,00,000/- penaltyon Shri Mahesh G Shetty
23 to 24	E/20011/2021 and E/20012/2021	OIO No. 12/2020-PR Commr dated12.10.2020	April 2017 To June 2017	Rs.5,10,13,235/- +interest +Rs.51,02,000/- as penalty Rs.5,00,000/- penalty onShri Mahesh G Shetty

2. Briefly stated the facts of the case are that the appellant, a partnership firm, are engaged in manufacture of micronutrients fertilizers for soil application and also for foliar application. The appellants have been granted necessary license by the Karnataka State Government under the Fertilizer (Control) Order, 1985 to manufacture and market micronutrient fertilizers in various states. During the relevant period, the appellant had manufactured and cleared micronutrients fertilizers without payment of duty claimingits classification as "other fertilizers" under Chapter Heading 3105 ofCentral Excise Tarriff Act, 1985. On the basis of intelligence and investigation initiated in the year 2000, and on completion of the same, show cause notice was issued to the appellant alleging that the product micronutrient is classifiable as "Plant Growth Regulator" (PGR in short) falling under chapter sub-heading 3808.20 of CETA, 1985 and duty with interest demanded invoking extended period.On adjudication, demands were confirmed with interest and penalty.Aggrieved by the said orders, the appellant approached the Tribunal.

This Tribunal vide Final Order No. 341-347/2007 dated 26.02.2007 set aside the adjudication order and allowed the appeals. The Revenue challenged the said order before the Hon"ble Supreme Court and vide its order dated 15.05.2008, the Hon"ble Supreme Court setting aside invoking the extended period, remanded the matter to the adjudicating authority for de novo adjudication. In de novo proceeding, the learned Commissioner re-examined the issue and concluded the classification under chapter sub-heading 3808.20 as "PGR" and confirmed the demands for the normal period. Also, periodical show cause notices issued from time to time for normal period have also been confirmed with interest and penalty in the novo proceeding. Hence, the present appeals.

3.1 The learned Sr. Advocate for the appellants submits thatthis is the second round of litigation before this Tribunal pursuant to the remand order by the Hon"ble Supreme Court. He submits that subsequent to the order of Hon"ble Supreme Court, remanding the matter to the adjudicating authority to examine the process ofmanufacture of the goods in question, a committee was appointed by the Commissioner to visit the appellant"s factory for verification of the process of manufacture. Consequently, the committee visitedthe factory of the appellant on 06.01.2009 and report was submittedby the committee on 08.05.2009 after conducting necessary verification of manufacturing process at the factory of the appellant. On 10.06.2009, the appellant sought copy of the report furnished bythe

committee before attending the personal hearing allowed by the Commissioner. Thereafter, on 12.09.2009, the departmental officer visited the factory to collect the samples of the goods and on 16.10.2009, a letter from Commissioner was written to the Director, Department of Agriculture, Govt. of Karnataka requesting for testing the samples to ascertain percentage of each mineral and whether the same is a PGR/micronutrient/fertilizer. The Director, Department of Agriculture, Govt. of Karnataka submitted his report on25.11.2009. Later, the Commissioner on 03.12.2009 sought the opinion of Mr. N. R. Bhaskar, Advocate, Supreme Court of India, on the legality of the Committee constituted in light of Supreme Court‟sdirection. On 07.12.2009, in his opinion Mr. N. R. Bhaskar indicatedthat in terms of the Supreme Court‟s direction, the Commissioner/Adjudicating Authority had to themselves verify the process of manufacture without constituting an expert committee. Consequently, the Commissioner visited the factory of the appellant to examine the method of manufacture of micronutrient and the classification of which has been in dispute.

3.2 It is his contention that the sequence of events indicates a pre-meditated approach by the Revenue in the de novo proceedings,wherein the committee‟s report was totally ignored.

3.3 Further, challenging the findings of the ld. Commissioner, it is submitted that even though the Supreme Court vide its order dated 15.05.2008, specifically directed the adjudicating authority to examine the process of manufacture for determination of the classification of micro-nutrient. Pursuant to the said direction, the committee was constituted, who in its report dated 05.05.2009made the following findings:

(a) Nitrogen is used in the form of Urea, Potassium Nitrate andCalcium Nitrate and Potassium is contained in the form of Potassium Nitrate; such compounds are added at thebeginning of the manufacturing process itself and are mixed thoroughly, inferring that the compounds of Nitrogen and Potassium are an integral part of the manufacturing process and not used as a pretence for the purpose of classification.

(b) There is a presence of Nitrogen to the extent of 5% to 7% as had already been declared by the appellant, although the percentage of a compound in the product does not have any bearing regarding the essentiality of compound.

(c) As per the Circular No. 392/25/98-CX dated 19.05.1998, for classification under Chapter 31, the micro-nutrients mustbe separate chemically defined compounds and it should contain Nitrogen. The micronutrients in the instant case adhere to both the conditions.

(d) The Hon‟ble Supreme Court vide its order dated15.05.2008 has stated that plant growth regulators are organic compounds. The micronutrients are clearly not organiccompounds and thus, they may not be called plant growth regulators.

3.4 The learned Advocate for the appellants has further submitted that by not accepting the report the Order of the Supreme Court has not been followed. The order of the Supreme Court should have been strictly followed in the remand proceedings. In support, he placed reliance on the decision of Hon‟ble Gujarat High Court in the case of *Indian Oil Corporation Ltd vs. UOI – 2010*

(262) ELT 94 (Guj.) and the decision of Hon‟ble Supreme Court in the case of *UOI vs. Kamlakshi Finance Corporation Ltd – 1991 (55) ELT 433 (SC).*]

3.5 He has further submitted that the Revenue/Respondent wasbound to follow the specific directions of the Hon‟ble Supreme Courtand by failing to do so, the Respondent has violated the principle of judicial discipline.

3.6 He has further submitted that the finding of the Commissioner that

Nitrogen has been added to the subject products only from the year 2000 onwards and not an essential constituent,is contrary to facts and law. The fact of presence of Nitrogen in the micronutrients cleared by the appellant, has been consistently recorded in the proceedings. The question of presence of Nitrogen was raised by the Revenue in the year 1994 and based on the chemical analysis report by the Chief Chemist, New Delhi, demands were dropped and classification under Chapter Heading 3105 was approved. The samples which were seized and provided to the Chemical Examiner for the chemical test, also indicated presence of Nitrogen in the samples in its report dated 11.01.2001. In the showcause notice dated 26.08.2002, even though it was alleged that Nitrogen was not present as fertilizing element but acknowledged presence of Nitrogen as a chelating agent. Thus, the presence of Nitrogen has been confirmed all along.

3.7 Further, he has submitted that the presence of Nitrogen has also been recorded by the Tribunal in its order dated 26.02.2007 and by the Hon"ble Supreme Court in its order dated 15.05.2008.

3.8 He has further submitted that the learned Commissioner has wrongly placed reliance on the Fertilizer (Control) Order, 1985 and the formulations submitted by the appellant to the Department of Agriculture in ascertaining the presence of Nitrogen or otherwisein the micronutrients manufactured by the appellant.

3.9 He has also submitted that the Fertilizer (Control) Order, 1985 held to be irrelevant for determination of classification under Central Excise in the Circular No. 392/25/98-CX dated 19.05.1998.

3.10 Further, he has submitted that the Commissioner is boundto follow the Board"s Circular, which is binding on him. In support, he has placed reliance on the decision of Hon"ble Supreme Court in the case of *CCE & ST, Rohtak vs. Merino Panel Products Ltd - 2023 (383) ELT 129 (SC).*

3.11 Referring to Note 6 of Chapter 31, HSN Explanatory Notes and Note 1 to Chapter 38 of the CETA, 1985, the ld. Advocate forthe appellant has submitted that the subject goods are mixtures of micronutrients containing Nitrogen and Potassium, and are not separate chemically defined compounds, which are not classifiableas „plant growth regulator" under Chapter Heading 3808 of the CETA, 1985. In support, he referred to following case-laws:

(i) Leeds Kem vs. CCE, Aurangabad – 2001 (134) ELT 294(Tri. Del.)

(ii) CCE, Rohtak vs. Safex Chemicals (I) Ltd – 2017 (7) GSTL 234 (Tri. Chan.)

(iii) Northern Minerals Ltd vs. CCE, Delhi – 2001 (131) ELT 355 (Tri. Del.) approved by Hon'ble Supreme Court reportedas 2003 (156) ELT A161 (SC)

(iv) Ranadey Micronutrients vs. CCE – 1996 (87) ELT 19 (SC)

(v) CCE, Hyderabad-IV vs. Aries Agrovet Industries Ltd – 2017 (7) GSTL 317 (Tri. Hyd.)

(vi) San Industry vs. CCE, Hyderabad-I – 2018 (11) GSTL 320(Tri. Hyd.)

(vii) Shivshakti Bio Plantec Ltd vs. CCE, Hyderabad – 2019 (20) GSTL 243 (Tri. Hyd.)

(viii) Sree Ramcides Chemicals Pvt Ltd vs. CCE, Trichy – 2016 (337) ELT 412 (Tri. Che.)

(ix) Narmada Bio Chem Pvt Ltd vs. CCE, Vadodara-I – 2019 (370) ELT 1276 (Tri.

Ahmd.)

(x) KPR Fertilizers Ltd vs. CCE, Vishakhapatnam-II – 2023 (384) ELT 216 (Tri. Hyd.)

3.12 Further, it is his submission that the subject micronutrient fertilizers with pre-determined proportions of various micronutrients and containing 5% to 7% Nitrogen and Potassium during the relevant period of dispute are classifiable as „other fertilizers" under Chapter Heading 3105 of CETA, 1985.

3.13 Further, he has submitted that the process of mixing of micronutrients, does not amount of „manufacture". It is submitted that the manufacturing activity concerning soil application powder is mainly manual, whereas that of powder foliar spray is partiallymechanized and the major portion of mechanized activity relates to packing of finished product. In simple terms, the entire activity of manufacturing of the products is limited to mixing various raw materials obtained from different sources in specific proportions and packing them, which is ready for consumption. Admittedly, the process of manufacturing is devoid of any chemical reaction. The source of Nitrogen is Urea introduced at the time of mixing various raw materials. The learned Commissioner has held that in the absence of chemical reaction, the method of manufacture has no bearing whatsoever on the issue of classification. The same method of manufacture has also been reported by the committee of officers in their report dated 08.05.2009.

3.14 It is his contention that the process of mixing various micronutrients in predetermined proportions for use of the resultant mixture as fertilizers, has not resulted in emergence of a different commodity with different identity, character and use. Each micronutrient in the mixture is a unique nutrient and independently contributes its nutritive value to the soil or plant. It is submitted that in the absence of a new commodity emerging as a result of the process, no „manufacture" of the goods took place in terms of Section 2(f) of the Central Excise Act, 1944.

3.15 Further, he has submitted that the individual micronutrientsdo not undergo any change in their nutritional character or nutritive value and their function as fertilizing element. The purpose of mixing different micronutrients in providing each nutrient in the required proportion, dose or quantity as per the requirement of the plant and soil conditions. The process of mixing does not alter or change the basic character or utility of each constituent of the mixture of micronutrients. Each micronutrient retains its original nutrition value for soil and plant. They have not lost their identity and combined with other micronutrients to form a different commodity with different identity, character and use. The mixture of micronutrients is marketed based on the proportion of eachconstituent micronutrients. There is no chemical reaction or transformation of micronutrients into a different commodity. The process of mixing duty paid organic and inorganic chemicals into a mixture of micro-nutrients does not amount to "manufacture" of a different commodity. In order to attract duty, the goods must emerge as a result of manufacture and must be marketable. The twin tests need to be satisfied. In support, he relied on the following judgments of Hon"ble Supreme Court:

(i) UOI vs. Delhi Cloth and General Mills Co Ltd – 1977 (1) ELTJ199 (SC)
(ii) South Bihar Sugar Mills Ltd vs. UOI – 1978 (2) ELT J336 (SC)
(iii) UOI vs. J G Glass Industries – 1998 (97) ELT 5 (SC)
(iv) CCE vs. Tarpualin International – 2010 (256) ELT 481(SC)
(v) Metflex (I) Pvt Ltd vs. CCE, New Delhi – 2004 (165) ELT129 (SC)
(vi) Crane Betel Nut Powder Works vs. CCE, Tirupati – 2007 (210) ELT 171 (SC)

3.16 It is his submission that the re-packing and re-labeling of Multiplex Samras does not

amount to „manufacture" being accepted in the impugned orders. Regarding the re-packing of Multiplex Sulphur, it was held by the Tribunal vide its order dated 26.02.2007 that if the value of micronutrient classified under Chapter Heading 3105 is excluded, the aggregate value of clearance would come within the exemption limit under SSI Exemption Notifications.

3.17 Further, he has submitted that the imposition of personal penalty under Rule 26 of the Central Excise Rules, 2002 on Sri Mahesh G Shetty, Partner is not sustainable in view of the judgments of Hon"ble Gujarat High Court in the cases of *CCE vs. Jai Prakash Motwani – 2010 (258) ELT 204 (Guj.)* and *Pravin N Shawvs. CESTAT – 2015 (305) ELT 480 (Guj.).*

4.1 Per contra, the ld. Senior Special Counsel for the Revenue submits that the first round of litigation went upto the Hon"ble Supreme Court and vide order dated 15.05.2008, the matter was remanded for *de novo* consideration with specific observations/directions for consideration of the adjudicating authority. The invoking of extended period of limitation was set aside.

4.2 It is his submission that in the remand order, the Hon"ble Apex Court noted that the adjudicating authority had not examined the method of manufacture of the impugned products; the plea of the appellant that Nitrogen is an essential constituent, hence, classifiable as „other fertilizers", was not considered. Further, it is observed that the impugned products are mixtures of various inorganic substances and the method of manufacture has a strong bearing on the question of determination of classification.

4.3 Further, he has submitted that the Hon"ble Apex Courtobserving that the impugned product being essentially PGR, directedthe adjudicating authority to go into the composition and find out whether 0.31% of Nitrogen would convert PGR into a nutrient fallingunder Chapter Heading 31.05 and whether with the addition of 0.31% of Nitrogen, PGR becomes „other fertilizers" under the same Chapter Heading.

4.4 Further, he has submitted that pursuing the said direction ofthe Hon"ble Supreme Court, the adjudicating authority visited the factory of the appellant and conducted a detailed study of the raw materials required and the manufacturing process. Summarizing thefindings of study conducted, he has submitted as follows:

(i) Basically, the raw materials necessary for the manufacture of the impugned products are mixed in a required proportion and then mixed, ground and packed.

(ii) Raw materials required namely Zinc Sulphate, Calcium Nitrate, Ferrous Sulphate, Urea, Borax, Manganese Sulphate etc., are procured from various manufacturers.

(iii) The process of manufacture is devoid of any chemical reaction.

(iv) Basic process involved is simply mixing the raw materials ina fixed ratio and packing.

(v) Most part of the manufacturing process is manual and the only level of sophistication involved is in packing the foliar spray.

(vi) The products are mixtures of organic and inorganic substances and not distinct compounds.

(vii) Nitrogen is added in the form of Urea.

4.5 The adjudicating authority, on the basis the study conducted, reached the following conclusions:

(a) The process of manufacture of impugned products is devoid of any chemical reaction. The Nitrogen content is not due to any chemical reaction but due to the addition of Urea, whichcan be done even at the time of final use. Thus, the method of manufacture

adopted by the appellant has no bearing on the classification of impugned products.

(b) It is not mandatory to include Nitrogen or Phosphorus or Potassium in micronutrients. Nitrogen is not a basic/fundamental constituent element in the impugned products. Nitrogen is not the element, which makes the impugned products what they are. Conversely, the presenceof Nitrogen in the impugned products does not qualify the goods to be classified as „other fertilizers" under Heading 3105.

(c) For any product to merit classification under heading 31.05, it is mandatory that elements such as Nitrogen orPhosphorus or Potassium, if present, should function as a fertilizing element. In terms of Note 6 to Chapter 31 of the CET mere presence of Nitrogen is not sufficient to hold that any product would fall under Heading 3105. Nitrogen should be present as a fertilizing element. As observed by the ApexCourt, a micronutrient may be fertilizer but not in terms of composition and that Nitrogen or Phosphorus or Potassium is not a constituent element of micronutrient. Thus, it transpires that the impugned products are excluded from the scope of 3105.00 of CET by virtue of Chapter Note 6.

(d) Nitrogen content in the impugned products was 0.31% for the period when the Apex Court gave its Order in May, 2008. For the subsequent period, gradually the percentage content of Nitrogen has been raised to 5%. One of the important criteria to be satisfied for classification of any product under Heading 3105, is that Nitrogen or Phosphorus or Potassium contained in the product should be an essential constituent of the product.

(e) The impugned products contain in principle Zinc Salts, Boric Acid, Ferrous Salts, Manganese Salts, Calcium, Magnesium and Urea. The absence or presence of Nitrogen in the impugned products has no bearing on the classification of the goods under the Fertilizer Control Order. In the instant case, the presence of Nitrogen whether at 0.31% or 5% is not altering the nature of the subject goods, namely, micronutrients. Hence, the addition of Nitrogen in the formof Urea to PGR.

(f) Nitrogen is not an essential constituent of the impugned products. Its addition in the form of Urea was pretence/ non-essential additive, so that the impugned products could be classified as „other fertilizers" falling under Heading 3105.00.

4.6 The learned Commissioner examining the issue in the light of Notifications/Registration Certificates issued by the State Agriculture Department, recorded his findings that elements other than Zn, Fe, Mn and B are not mandatory but optional. In the impugned product, Nitrogen is not the basic or fundamental constituent element.

4.7 Further, referring to the printed labels on the impugned products, it is held that Nitrogen is not indicated as constituent element of the product.

4.8 Further, analyzing the cost worksheets in respect of some ofthe impugned products, it is recorded that Nitrogen was not shownto be present prior to year 2000. The department also not raised the classification of the products during that period. It was only after the appellant commenced adding Urea to the micronutrients to seek classification of the impugned products under Chapter Heading 3105, which was a pretence to show the presence of Nitrogen in the impugned products. Consequently, following the judgment of Hon"ble Supreme Court and examining the issue accordingly, it is held that the impugned products are to be classified under Chapter Heading 3808 and not under Chapter Heading 3105 of the CETA, 1985.

4.9 Responding to the arguments of the appellant on the objection of non-acceptance of the report of the committee of the officers constituted, it is submitted that the adjudicating authority had initially constituted a committee to study the aspects indicated by the Hon"ble Apex Court in its judgment. The committee submitted its report. Thereafter, a doubt arose

whether in terms of the order of the Hon‟ble Apex Court, it was permissible to set up the committee without the permission of the Hon‟ble Apex Court.

Consequently, the opinion of the Senior Standing Counsel of the Central Government was sought, who opined that without express permission of the Hon‟ble Apex Court, it would be ultra-vires the direction of the Court and that the question has to be necessarily determined by the adjudicating authority by verifying the facts himself. Accepting the said opinion, the learned Commissionerhimself visited the appellant‟s factory on 16.12.2009. Hence, non- reliance on the report of committee set up earlier, is of no consequence.

4.10 Further, he has submitted that there are reasonable grounds for the adjudicating authority in not accepting the report of the committee of Superintendents. While he has not differed withthe technical details cited in the said report, but he has rejected the opinions/recommendations contained in the said report. Further, he has submitted that the adjudicating authority is not bound to follow the opinions/recommendations contained in the report.

4.11 Further, replying to the contention of the appellant that in the case of another manufacturer *(CIBA India Ltd vs. CC, Chennai)*, the issue has been settled in favour of the assessee, he has submitted that the issue in the said case was determination of classification between the headings 29.22 and 31.05 and the claim that the subject product was used as fertilizer was not disputed. Hence, reliance cannot be placed on the said decision. Besides, inthe first round of litigation, the Hon‟ble Apex Court itself haveopined that the impugned product is essentially a PGR.

4.12 Also, responding to the argument that the products are not classifiable under Chapter Heading 38.08, since mixtures of individual chemicals or other elements, cannot be considered as PGR, he has submitted that the judgment cited by the appellant would have little value since the Hon‟ble Supreme Court has considered all the issues in the context of the impugned products and has observed that the products are essentially PGR after referring to several technical literatures on the subject.

4.13 Further, he has submitted the as per Note 1 to Chapter 38, what is excluded from that chapter, are separate chemically defined elements or compounds, usually classified under Chapter 28 or 29, other than such elements and compounds used as insecticides,rodenticides, fungicides etc. including PGR, put up as described in heading 38.08. Further, this chapter covers a wide range of chemicals and related products including both organic and inorganic products and also mixtures of chemicals. Further, he submits that therefore, the correct classification of the impugned products be concluded as under Heading 3808.

5. Heard extensively both sides, considered the written submissions and perused the records.

6. This is the second round of litigation before this Tribunal. In the earlier round, this Tribunal has decided the issue viz., classification of Micro Nutrient Fertilisers manufactured by the appellants classifiable as “Other Fertilisers” under Chapter Sub-heading 31.05 of Central Excise Tariff Act, 1985. Revenue‟s contention all along has been that the products inquestion are classifiable as Plant Growth Regulator (PGR) falling under Chapter Subheading 38.08 of Central Excise Tariff Act, 1985. Hence, aggrieved by the order of the Tribunal, the Revenue approached Hon‟ble Supreme Court. The Hon‟ble Supreme Court while disposing Revenue‟s appeal analysed the issues in detail and remanded the matter to the adjudicating authority with certain observation/direction to consider the issue of classification a fresh.

7. We are of the view, therefore, addressing the issues now raised in the present appeals, challenging the de novo order should be limited to the extent of analysing implementation of the observation/direction of the Hon‟ble Supreme Court in remanding the case for deciding the classification of the products viz. micronutrients.

8. The adjudicating authority, pursuant to the remand,commenced the de novo proceeding by appointing a Committee of Officers to examine the process of manufacture of the impugned products and submit their report accordingly. The Committee comprising of two Superintendents visited the factory of the Appellant, examined the process of manufacture and submitted theirreport to the Commissioner on 08.5.2009.

9. Later, the Ld. Commissioner sought the advice of the Government Standing Counsel on the question, that is, whether in the light of the observation of Hon‟ble Supreme Court, delegating the task of examination of the manufacturing process to a Committee of officers, instead of the adjudicating authority himself, would be correct or otherwise. The learned Standing Counsel by his opinion dated 7.12.2009 communicated as:

"On a plain reading of the Hon'ble Supreme Court's order it becomes clear that the question of determination of whetherwith the addition of 0.31% of nitrogen, the PGR becomes "OtherFertilizers" in CSH 3105.00 is the question which needs to be examined by the Adjudicating Authroity as it is the case of the Department that the assessee had added nitrogen only as a pretence so that the impugned product(s) could be classified as "other fertilizer" under CSH 3105.00. Further, their Lordships have expressed that in their view, essentially the impugned product is PGR. However, assessee contends that the impugned product (s) is a mixture of various inorganic substances and therefore.

It is therefore the opinion of the undersigned that constitution ofa expert committee without the express permission of the Hon'ble Supreme Court would be ultravires the directions of the apex Court. The issue in question would necessarily have to be determined by the Commissioner/adjudicating authority by duly verifying and by considering and taking into account all determinants that would go to decide the issue in question."

10. Based on the said legal advice/opinion, the Commissioner himself visited the factory premises of the appellant on 16.12.2009 and examined the process of manufacture of the impugned products.

11. The procedure adopted by the learned Commissioner in carrying out the direction/observation of the Hon‟ble Supreme Court, in the denovo proceeding has been assailed by the appellant. The appellant‟s contention is that the report of the Committee of Superintendents has been discarded without any basis; it is vehemently argued that the report is not accepted by the Ld. Commissioner as the same is not to the desired expectation of the department. Therefore, such an approach of the Commissioner ispre determined and bad in law.

12. We find that the Ld. Commissioner while analyzing the said allegations of the appellant held that since his predecessor after receiving the report of the Committee of officers neither commentednor recorded his opinion on the report, therefore, with a change of adjudicating authority, a reference was made to the departmental standing counsel seeking legal opinion on delegation of the task of examination of method of manufacture to the Committee of officers.The opinion of the learned Standing Counsel was that constitution ofa Committee without express permission of the Hon‟ble Supreme Court would be ultra

vires of the direction of the apex court. Following the said legal advise, the adjudicating authority himself visited the factory premises of the Appellant to examine the process of manufacture before, re-adjudicating the case in the light of the observation/direction of the Hon‟ble Supreme Court.

13. Analyzing the reasoning recoded by the Ld. Commissioneron the objection of the Appellant, we do not see any error orillegality in his approach in not considering the report of the Committee of Officers appointed by his predecessors and ascertaining the process of manufacture himself. Secondly, the direction given by the Hon‟ble Supreme Court is specific and it is to the adjudicating authority to examine the manufacturing process and decide the case accordingly. Therefore, reading the said direction of the Hon‟ble Supreme Court and legal opinion of the Standing Counsel, the course of action adopted by the Ld. Commissioner within the contours of de novo proceedings. Further, on merit, we find that reading the Committee‟s Report on the process of manufacture and that of recorded by the Ld. Commissioner after visit to the factory premises of the appellant, wedo not see any material difference on the facts. What is noticed is that in addition to stating the process of manufacture, the committee of officers in its report proceeded further by interpreting the order of the Hon‟ble Supreme Court, applicability of Note 6 of Chapter 31 and Circular dated 19.5.1998 observing that the goods are rightly classifiable under Chapter 31.05 and the products may not be called as „Plant Growth Regulator. In our view, the interpretation of the Circular, Order of the Hon‟ble Supreme Court and applying the same to the facts of the present case, by the Committee of officers is beyond the scope of authority delegated to the Committee whose only task is to physically verify the process of manufacture by visiting the factory and report the same to Commissioner. Therefore, the report of the Committee of officers commenting on the classification dispute and deciding the classification cannot stand the scrutiny of law and rightly rejected bythe learned Commissioner.

14. Now, before analyzing the finding of the adjudicating authority in carrying out the direction of the Hon‟ble Supreme Courtin the *de novo* proceedings, it is necessary to analyze the context and the observations of the Supreme Court in remanding the case to the adjudicating authority.

15. The Hon‟ble Supreme Court in the said judgement examinedthe issue in detail, that is, whether the impugned products beclassifiable as Plant Grow Regulator (PGR) under Chapter Subheading 3808.20 alleged by the Revenue or under Chapter Subheading 3105.00 as “Other Fertilizers” claimed by the appellant. The observations are reproduced as below:

……..

“17. *The issue involved in this civil appeal is : whether theimpugned product(s) is a PGR or a fertilizer?*

18. The contention of the Department in its show cause noticeis that the micronutrient compounds manufactured by the respondent-assessee were liable to be classified under CSH 3808.20 and not under CSH 3105.00 on account of absence of N,P or K in the impugned product(s). According to the Department,there is 0.31% of nitrogen in the impugned product as a chelating agent and not as a fertilizing element and that even if it is a fertilizing agent, its quantity of 0.31%, would not amount to “essential constituent” in terms of explanatory note 6 toChapter 31.

19. We have examined several reference books, some of which are quoted hereinabove, which shows that micronutrients per se,as against macronutrients, do not contain N, P or K.

20. Micronutrient(s) functionally may be a Fertilizer but not in terms of composition. In fact, N, P or K is the constituentelement of macronutrient and not of micronutrient.

21. Coming to PGRs, it needs to be emphasized that they are organic compounds, other than nutrients, which in small quantityinhibits, promotes, alters or modifies physiological processes in plants.

22. In the present case, the impugned product(s) is "multi micronutrient". It is contended on behalf of the assessee that theimpugned product(s) contains nitrogen, hence it is classifiable as"other fertilizer" under CSH 3105.00. It is contended that nitrogen is an essential constituent of the impugned product(s) and, therefore, the same is classifiable as "other fertilizers".

23. Therefore, the relevant question to be asked is : what is the method of manufacture of "multi micronutrient"? This question becomes relevant as the impugned product(s) is a mixture of various inorganic substances. It is the "method of manufacture" which has a strong bearing on the question whether the product(s) needs to be classified under CSH 3808.20 or under CSH 3105.00. This aspect has not been examined by the Adjudicating Authority.

24. It is alleged by the Department that N, P or K are not the essential constituents of micronutrient(s). We agree. However, in this case, the impugned product(s) is "multi micronutrient" whichthe assessee claims to be a mixture of various inorganic substances. In this connection it is important to note that two tests have been formulated in the circular of CBEC dated 19-5- 1998, namely, whether the subject-product(s) is a chemically defined compound, if so, it goes out of CSH 3105.00. If not, whether the said product(s) contains N, P or K as constituent element in terms of explanatory note 6.

16. Their Lordships analysing the scope of the terms micronutrient, PGR and other fertilizers, in the backdrop of rival claims, observed that admittedly nitrogen is present as a chelating agent, not as a fertilizing agent; even if it is a fertilizing agent, would not amount to an essential constituent under explanatory note 6 of chapter 31.

17. Therefore, it is clear from the said observation of Apex court is that to verify the categorical claim of the appellant that Nitrogen is an essential constituent of the products (multi micronutrients) in question, it is said at para 23 of the judgement that to an answer to the said question, the method of manufacture of „multi-micronutrient" becomes relevant.

18. Thus, the direction of the Hon"ble Supreme Court is to examine the process of manufacture, so as to ascertain the claim of the appellant that Nitrogen is present as an „essential constituent" of the impugned product, hence fall under Chapter Subheading 3105.00. This is further clear, when we read the observation at para 24; the department"s allegation that N, P or K not an essential constitute of a
„Multi Micro Nutrient" has been agreed by their Lordships as a general argument, but proceeded in observing that the impugned product is "Multi Micro Nutrient", which the assessee claims to be a mixture of various inorganic substances. Thereafter, referring to the Circular whichlaid down two tests, it is observed that if the subject products are separate chemically defined compounds, then it goes out of Chapter 31.05, otherwise it is to be examined whether the product contains N, Por K as essential constituent element in terms of Explanatory Notes 6.

19. The observation of the Hon‟ble Supreme Court case reads as below:

"25. *In the show cause notice, no allegation was made by the Department that the impugned product(s) is a distinct chemical compound. Therefore, the only question is whether the impugned product(s) contains nitrogen as an "essential constituent". According to the assessee, the impugned product(s) is a mixture of various inorganic substances whose essential constituent is nitrogen which makes it a fertilizer. It is this point which arises for consideration, viz. whether 0.31% of nitrogen found to exist in the impugned product(s) would make it a fertilizer. In this connection, the aforestated scientific study indicates that PGRs are organic compounds, other than nutrients. As compared to nutrients which play a major role in the plant growth as a whole, PGRs play a restrictive role. PGR do not contain N, P or K. In the impugned product(s) manufactured by the assessee, PGR exists.* ***Therefore, the question to be asked is whether presence ofmere 0.31% of nitrogen would make the PGR in the impugned product classifiable as "other fertilizers" in CSH 3105.00. In our view, essentially the impugned product is PGR****. However, assessee contends that the impugned product(s) is a mixture of various inorganic substances and, therefore, it is for the Adjudicating Authority to go into composition and find out whether 0.31% of nitrogen would convert PGR into nutrient falling under CH 31.05.* ***Whether with addition of 0.31% of nitrogen, the PGR becomes "other fertilizers" in CSH 3105.00 is the question which needs to be examined by the Adjudicating Authority as it is the case of the Department that the assessee has added nitrogen only asa pretence so that the impugned product(s) could be classified as "other fertilizer" under CSH 3105.00****." (emphasis supplied).***

20. Analyzing the process of manufacture, the learned Commissioner came to the conclusion that the entire process is devoid of any chemicalreaction and the source of nitrogen is urea which is added at the time ofmixing various raw materials. He has inferred that the Nitrogen found inthe product are not due to any chemical reaction emerging during the course of manufacture, but introduced artificially as chemical urea at the time of mixing. Further, he has held that adding urea to theproducts at any point of time is not going to change the nature of this product i.e., whether it is added at the beginning, during or at the endof the process of mixing. In this context, he has held that the method of manufacture as directed to be examined by the Hon‟ble Supreme Court found to have no bearing on the issue of determination of classification. In other words, the method of manufacture could not help to determine the presence of „Nitrogen‟ as an essential constituent of the disputed products.

21. The said finding of the learned Commissioner has been assailed by the Appellant submitting that it is contrary to the observation/direction of the Hon‟ble Supreme Court. It is submitted thatthe Supreme Court in the order has held that it is the method of manufacture which has a strong bearing on the question, whether the product needs to be classified under Chapter Subheading 3808 or 3105,which aspect was not examined by the adjudicating authority in the first round of litigation. Accordingly, direction was issued to examine the process of manufacture.

22. We are of the view that the Commissioner‟s observation that the manufacturing process has no bearing on the issue of classification is read out of context, in as much as the case was remanded to the adjudicating authority to examine whether Nitrogen is an „essential constituent‟ and by addition of the same, which admittedly constitute 0.31% (later increased upto 5% during the relevant period) the impugned product held to be PGR by Hon‟ble Supreme Court comprisingof various inorganic substances, would convert PGR into a fertilizer falling under Chapter Sub-heading 3105.00. Even though the Hon‟ble Supreme Court theoretically agreed with the argument of the Revenue that N, P or K is not an essential constituent of the „micronutrients‟, butfor examination of the categorical claim

of the Appellant that it is present as an "essential constituent" of the impugned products, remanded the case for verification of the process of manufacture to ascertain the said fact, as the adjudicating authority had earlier not verified the process of manufacture of the products in determine its classification.

23. In the de novo proceeding, the learned Commissioner after verifying the process of manufacture held that it is purely a physical process of mixing of various constituents; the Nitrogen which is added in the form of urea does not undergo any chemical reaction with any of the constituent of the impugned product, it remains as it is, therefore, adding the same at the beginning or at the end of the process of physical mixing would not make any difference. Accordingly, he has concluded that the process of mixing undertaken by the appellant could not lead to their claim that adding Nitrogen containing chemical urea converts PGR into nutrient falling under Chapter 31.05.

24. In our considered opinion, the said finding of the Ld.

Commissioner answers/satisfies the question raised by the Hon"ble Supreme Court in remanding the case to ascertain whether process of manufacture would demonstrate the presence of „Nitrogen" as an essential constituent though present as a „chelating agent".

25. But, instead of concluding the classification on the outcome of the verification of the manufacturing process, in furtherance of the compliance of the Order of Hon"ble supreme court, the leaned Commissioner analysed other evidences on record to examine whether presence of Nitrogen in the form of urea is an „essential constituent" ofthe products. The learned Commissioner examined the cost sheet of each of the products and the value of nitrogen in the total cost in accordance with the percentage of nitrogen present. Also, he has examined the Notification of the Government of Karnataka setting out standard in respect of micro nutrient fertilizers to conclude that the elements which make up micro nutrients are Zinc, Manganese, Boron which constitute as an essential constituent of the impugned product. Further, he has analyzed that by adding Nitrogen in the form of urea whether it would make nutrient an essential constituent and recorded that there is no mandatory requirement of adding a particular percentage of Nitrogen to the micro nutrient, hence, nitrogen is not a basic and fundamental constituent element for the products manufactured by the appellant. Also, he has considered the literature/ labels marketing the micro nutrient of these products by the appellant. After analyzing the said documents, he has held that these are all marketed as micro nutrient without any emphasis on the presence of Nitrogen as a fertilizing element. Taking note of all these factors into consideration, the learned Commissioner arrived at the conclusion that Nitrogen is not an „essential constituent" of the impugned product. Consequently, these products do not satisfy the chapter Note 6 of Chapter 31 to be classified as other fertilizers.

26. Assailing the said finding, the learned advocate for the appellant submits that as per Chapter Note 6 to Chapter subheading 3105, it is necessary that the micro nutrient in question is used as fertilizer and must contain N, P or K as an essential constituent. He has submitted that since the impugned products of the appellant are registered under the Fertilizer Control Order, 1985 have been recognized as fertilizers since 1994 and the Hon"ble Supreme Court observed that the impugnedproduct contains N, P or K and no percentage prescribed under Chapter
31 for a constituent to be termed as essential constituent, it is to be classified as fertilizer. Also, it has been submitted that addition ofNitrogen, Potassium and fertilizer element at the beginning of theprocess of manufacture is necessary for the product to be used as fertilizer and hence, it is to be considered as essential constituent of the subject product. In support

of their submission that no percentage is prescribed in the Chapter Note, it is submitted that presence of Nitrogenin the product of fertilizer element is sufficient to classify the item underChapter Subheading 3105. He has referred to the judgment of the Tribunal in the case of Commissioner of Central Excise & Service Tax, Hyderabad-IV Vs. Aries Agrovet Industries Ltd.: 2017 (7) GSTL 317 (Tri.-Hyd.); KPR Fertilizers vs. CCE and Service Tax, Visakapatnam: 2023 (384) ELT 216 (Tri.-Hyd.)

27. We do not find substance in the submissions advanced on behalfof the appellant in as much as the Hon‟ble Supreme Court in itsjudgment noted the said arguments and observed that presence of Nitrogen as chelating agent is not sufficient to classify the products as Fertilizer, rather the presence of Nitrogen should be as an „essential constituent‟ to satisfy the Chapter Note 6of Chapter 31. Thus, it is directed for examination of the process of manufacture so as to ascertain whether Nitrogen is present as an „essential constituent‟. The learned Commissioner after analyzing the process of manufacture and other aspects discussed above held that Nitrogen is not an essential constituent of the product and concluded that by addition of Nitrogenthe products held to be PGR by Hon‟ble Supreme Court is not convertedto Fertilizer classifiable under heading 31.05 of CETA, 1985. Therefore, the case laws cited by the Appellant in support of their submission that in absence of prescription of any percentage of Nitrogen, its mere presence in the products would make the same as other Fertilizers are not relevant to the facts of the case in view of the observation of the Hon‟ble Supreme referred as above.

28. In the result, we uphold the finding of the Ld. Commissioner that the impugned goods merit classification under CSH 3808.20 (38089340) of CETA, 1985. Consequently, confirmation of demandswith interest is also upheld. Since the issue relates to classification and interpretation of law, imposition of penalty under Rule 25 on the company and personal penalty under Rule 26 CER, 2002 on the Appellant Shri Mahesh G Shetty is unwarranted and accordingly set aside. The impugned orders are modified and the appeals filed by the Company are partly allowed to the extent mentioned above and Appeals filed by Shri Mahesh G Shetty are allowed.

29. Appeals are disposed off.

(Order pronounced in the open court on 22.12.2023)

(D. M. Misra)Member (Judicial)

(Pullela Nageswara Rao)Member (Technical)

RA_Saifi

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. I

Excise ROA Application No. 20139 of 2020in
Excise Appeal No. 20660 of 2015

[Arising out of Order-in-Appeal No. 08/2015-CE dated 14.01.2015 passed bythe Commissioner of Central Excise (Appeals-I), Bangalore]

KEMS Forgings Ltd **……Appellant**
Plot No. 35-B, KIADB Industrial Area,
Hoskote Taluk,

Bangalore Rural – 532114

VERSUS

……Respondent

Commissioner of Central Excise,Bangalore-I
PB No. 5400, CR Building,Bangalore – 560001

APPEARANCE:

Present for the Appellant: Sh. M.V. Sridhar, ConsultantPresent for the Respondent: Sh. Maneesh Akhoury, AR

CORAM:

HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)

FINAL ORDER NO. 21362/2023

DATE OF HEARING: 08.12.2023DATE OF DECISION: 08.12.2023

PER D. M. MISRA

This miscellaneous application has been filed seekingrestoration of appeal, which was dismissed by this Tribunal vide

Final Order No. 22176/2017 dated 21.09.2017 for non- prosecution.

2.1 The ld. Consultant for the appellant submits that they appeared for hearing of the case on 20.07.2017 and the samewas adjourned to 04.09.2017. On 04.09.2017, the matter did notappear in the cause list; subsequently, the matter was listed on 21.09.2017. On the said date the appellant was not represented since the notice of hearing was not received by them. Thereafter they had not received any communication from the Tribunal. He further submits that as a part of closure of Financial Accounting for the year 2019-20, for submission of certificates of pending litigations, they checked the CESTAT website and came to know that their appeal has been dismissed for non-prosecution. Consequently, they filed the present application immediately for restoration of the appeal.

2.2 He submits that non-appearance of the appellant on 21.09.2017 was due to non-receipt of the notice and not for any other reasons as they attended earlier before CESTAT on 04.9.2017. Also, they have not received the copy of the Final Order dated 21.09.2017 of the Tribunal thereby they could not approach the Tribunal. He has submitted that therefore the appealmay be restored and heard on merit.

3. The ld. AR for the Revenue vehemently argued that there is no proof produced by the Appellant to indicate that the notice, sent to the appellant intimating the date of hearing as 21.09.2017by the Registry, has not been received by the appellant. Further, referring to the judgment of the Tribunal in the case of ***M/s HelloMineral Water (P) Ltd vs. CCE, Noida – 2023 (9) TMI 1135***
– CESTAT ALLAHABAD he submits that the appellant were negligent throughout as they did not approach the Tribunal after September 2017 to inquiry the status of the appeal, therefore, themiscellaneous application for restoration of the appeal does not deserve to be considered and hence be rejected.

4. Heard both the sides and perused the records.

5. I find from the record that the appellants had appeared before Tribunal on 20.07.2017 and the matter was adjourned to 04.09.2017, but in the cause list of 04.09.2017, it was not reflected. Subsequently, the matter was listed on 21.09.2017, but the appellant had not appeared. It is submitted that the notice forhearing on 21.9.2017 was not received by the appellant, hence they did not appear. Also, they were not served with the copy of the order. Thus, they could not approach the Tribunal for restoration of the appeal immediately as the appeal was dismissedfor non-prosecution. While verifying the CESTAT website, in July 2020 for the purpose of certifying the outstanding liabilities and filing the same with appropriate authorities, they came to know that their appeal has been dismissed in year 2017 for non-prosecution. From the records, I find that only one opportunitywas given to the appellant after they appeared for hearing on 20.07.2017 and thereafter it was dismissed for non-prosecution.I find that the explanation furnished for non-appearance and not approaching the Tribunal immediately after dismissal of the appeal, seems to be bonafide. Therefore, in the interest of justice,the order dated 21.09.2017 dismissing their appeal for non- prosecution is recalled and the appeal is restored to its original number.

6. After restoring the appeal, being quite old, is heard on merit with the consent of both

sides.

7.1 The ld. Consultant for the appellant submits that theentire differential CENVAT Credit amounting to Rs.4,39,735/- and the interest amounting to Rs.34,480/- has been paid soon after the audit pointed out short payment of duty in the year 2012. He further submits that in the year 2008, the capital goods, machinery etc lying in their Marathalli unit was shifted to their Hoskote unit on payment of appropriate duty/ reversal of crediton transfer of the capital goods taking into consideration thetransaction value of the capital goods. During the course of audit,it was noticed that they had short paid the total of Rs.5,71,053/- as per the relevant provisions i.e. Rule 3(5) of Cenvat Credit Rules, 2004. Consequently, they paid the entire amount byreversing CENVAT Credit of Rs.3,24,982/- and the balance amount of Rs.2,46,071/- through PLA; also they paid Rs.3,16,880/- as interest by debiting the PLA Account on 25.05.2012. A show cause notice was issued to the appellant proposing penalty and appropriation of the amount paid. After adjudication, the amount paid, has been appropriated, however, further penal proceedings were dropped by the adjudicating authority.

7.2 He submits that the present demand notice issued subsequently alleging that the amount of Rs.3,24,982/- paid pursuant to the earlier demand notice dated 29.02.2012 was irregular and also it is alleged that the CENVAT Credit relating to GTA service availed during the relevant period is inadmissible. This amount has also been paid on October 2012. He further submits that since they have paid the entire amount earlier also and in the earlier proceedings, it has been observed that there was no suppression of facts, hence, imposition of penalty is not warranted. Therefore, in the present appeal, they are challenging the imposition of equivalent penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 15(2) of Cenvat Credit Rules, 2004 only, when the entire amount with interest was paid before issuance of Notice.

8. The ld. AR for the Revenue reiterates the findings of the ld. Commissioner (Appeals).

9. After hearing both sides, I find that before the authorities below as well as before the Tribunal, the appellant have notcontested the reversal of CENVAT Credit along with interest pursuant to the audit objection in 2012. However, they haveargued that as soon as the short payment has pointed out by the audit party, the entire amount of credit along with interest has been paid, which is within normal period of limitation. Therefore, imposition of penalty under Section 11AC of the Central ExciseAct, 1944 read with Rule 15(2) of Cenvat Credit Rules, 2004 is notcorrect. I find force in the contention of the ld. Consultant for the appellant. From the narration of facts and going through the records, I find that initially the capital goods have been cleared from their Marathalli unit to the appellant's new unit on paymentof duty on the transaction value; later the short payment was made in accordance with Rule 3(5) of Cenvat Credit Rules, 2004 on audit objection; also the appellant have paid interest on the duty short paid. The show cause notice proposing appropriation ofthe amount and penalty was adjudicated and penal proceedings dropped. Subsequently, on the basis of the audit objection in 2012, they reversed the CENVAT Credit with interest for normal period of limitation. In these circumstances, imposition of penalty on the appellant under Section 11AC of the Central Excise Act, 1944 read with Rule 15(2) of Cenvat Credit Rules, 2004 is unsustainable in absence of suppression or misdeclaration facts with intent to evade payment of duty. Consequently, the impugned order is modified and imposition/confirmation of penalty is set aside. Appeal is partly allowed to the extentmentioned as above. Miscellaneous application disposed of.

(Dictated and pronounced in the open court)

(D. M. MISRA)MEMBER (JUDICIAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 185 of 2008

[Arising out of Order-in-Appeal No. 106/2007-CE dated 29.11.2007 passed by the Commissioner of Central Excise & ST(Appeals), Cochin]

Poduval Industries
Industrial Development Area,
Edayar, Kerala **……Appellant**

VERSUS

Commissioner of Central Excise, Cochin
C R Building, I S Press Road,Ernakulam, Cochin
Kerala – 682018 **……Respondent**

Appearance:

Sh. Shreehari Kutsa, Advocate for the appellant.

Sh. H. Jayathirtha, Superintendent (AR) for the respondent.

Coram:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21425 / 2023

Date of Hearing: 04.08.2023Date of Decision: 22.12.2023
Per : Dr. D.M.Misra

This appeal is filed against Order-in-Appeal No. 106/2007- CE dated 29.11.2007 passed by the Commissioner of Central Excise & ST (Appeals), Cochin.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of Diesel Generating sets (DG sets) falling under Chapter sub-heading 8502 90 of Central ExciseTariff Act, 1985. On the basis of intelligence and subsequent investigation, a show-cause notice was issued to the appellant on 29/01/2004 alleging that they have manufactured "Acoustic Enclosures" in their factory during the period from 01/04/2000 to 04/06/2002 and cleared the same without payment of duty in theguise of trading of the same, thereby evaded Central Excise dutyof Rs.10,52,892/-; it is proposed to recover the said duty with interest and penalty. On adjudication, the proceedings initiatedin the show-cause notice was dropped. Revenue filed an appeal before the learned Commissioner(Appeals), who after analyzing the evidences on record, set aside the order of the adjudicating authority and allowed the Revenue's appeal confirming the recovery of duty of Rs.10,52,892/- along with interest and imposed penalty of equal amount. Aggrieved by the said order, the appellant preferred an appeal before this Tribunal. The Tribunal by its order dt. 06/02/2018 dismissed the appeal filed bythe appellant. Aggrieved by the said order, appellant approachedthe Hon'ble High Court of Kerala and by order dt. 28/06/2022, the Hon'ble High Court remanded the matter to the Tribunal for freshconsideration. Consequently, the matter is taken up for hearing and disposal.

3. Learned advocate for the appellant assailing the impugnedorder submitted as follows:-

i. During the period 01/04/2000 to 24/06/2002, the appellant, to meet the requirements of the market needsfor supply of acoustic enclosures, outsourced the same from manufacturers having infrastructure facilities. Thesaid acoustic enclosures were manufactured on job work basis and later transported to the customers' premises for fixing with DG sets attached to earth.

ii. The learned Commissioner (Appeals) is not justifiedconfirming the demand without analyzing the cross-examination of the witnesses as none of them confirmedmanufacturing of acoustic enclosures in their factory directly or indirectly.

iii. Reliance placed on the payments towards purchase of raw materials by the job workers was misplaced since itwas done as a matter of commercial expediency as the suppliers were not satisfied with the credit worthiness ofthe job workers.

iv. The authority failed to appreciate the position that acoustic enclosures come into existence only at the customers' site. It is only the panels that are manufactured by certain job workers who were already doing job work for the appellants in connection with the manufacture of DG sets. Since they were already doingjob work for the appellant, they sent raw materials to thesite of the job workers as a matter of commercial expediency and hence no adverse inference can be drawnon these aspects.

v. Undue importance was placed on unloading of raw materials i.e HR sheets at the premises of the appellant as the said raw materials were to be sent for bending and corrugation to workshops. The learned Commissioner(Appeals) failed to appreciate that the ownership of the raw materials always rest with the job workers and merely because the raw materials procuredand routed through the premises of the appellant, the ownership of the same remained with the job workers only.

vi. Learned Commissioner (Appeals) also wrongly concluded that movement of raw materials from the premises of theappellant to the work shop of M/s. Keshava Engineering Works were without challans, since no procedure isprescribed under the Central Excise law, where a unit whose turn over has not exceeded the limit of exemptionto either to intimate the Department or to get prior permission to clear the goods.

vii. However, even if it is held that process of bending / corrugation amounts to

manufacture, the liability would still be on the manufacturer, not on the supplier who supplied the raw materials.

viii. Predominant activity is carried out at the premises of thejob worker, ancillary activities were carried out at the premises of the appellant would not lead to the conclusion that manufacture took place at the premises of the appellant. Stray cases are considered by the learned Commissioner(Appeals) where either owing to excessive demand of acoustic enclosures or where therewere repeated defects in acoustic enclosures manufactured by the job workers, certain specific jobs were carried out at the appellant's premises.

ix. Finding of aluminum scrap cannot lead to the conclusionthat manufacture took place at the appellant's premisessince such sheets were used in the manufacture of DG sets also.

x. Stock statements given to the banks cannot be relied upon in confirming the demand. In support he placed reliance on the following judgments:-

a. CCE Vs. Beekaylon Synthetics Ltd. [2003 taxmann.com 77 (New Delhi – CESTAT)]
b. CCE, Vapi Vs. Synfab Sales [(2015) 57 taxmann.com338(SC)]
c. Coimbatore Spinning & Weaving Co. Ltd. Vs. CIT [95ITR 375]

xi. There was no testing of acoustic enclosure in the factorypremises as the same are assembled only at the premises of the customers.

xii. Drawing /sketches for bending and corrugation found inthe appellant's premises should not lead to any adverseinference as the manufacture of the acoustic enclosure were in consultation and as per the instructions / technical specifications of the appellant.

xiii. Supply of raw materials to job workers being denied by the appellant, onus lies on the Revenue to prove the same.

xiv. Inference that skilled labourers / employees were available at the appellant's factory and also consumptionof glass wool and aluminum perforated sheets used in the manufacture of acoustic enclosures recorded in the factory cannot lead to the conclusion that acoustic enclosures were manufactured in their factory.

xv. Revenue's case is based on surmises and conjectures and circumstantial evidences, which cannot form basis to reject the submissions of the appellant.

xvi. The transaction between the appellant and the job workwas on the principal to principal basis and all agreementswere on commercial terms.

xvii. In view of the provisions of Sections 2(d) and 2(f) of theCentral Excise Act, 1944, the manufacturing activity on the goods being at the job workers' premises, hence thejob workers is the manufacturer and liable to pay duty, which was earlier held by the Tribunal. The fact that theappellant has not opted under Notification No.214/86 dt.01/03/1986 as a result of which excise duty continues tobe liability on the job worker but not on the appellant.

xviii. In the event, acoustic enclosures are manufactured by the appellant, credit on the raw materials and labour used in the manufacture is available to them and liabilityto pay duty would be considerably low which has not been considered by the learned Commissioner(Appeals).

xix. Even though, they are entitled to avail credit on payments of raw material being made by the appellant on behalf of the job worker, proves their bona fide intention.

xx. Assembly of acoustic enclosure results into emergence ofimmovable property; hence not liable to excise duty, a fact not considered by the learned Commissioner(Appeals).

4.1. *Per contra*, learned AR for the Revenue submitted thefollowing:

a. Though the raw materials are procured in the name of Jobworkers, the same are received /unloaded in appellant'sfactory premises – they are taken into their stock – inventory/issues are maintained – the said raw materials are accounted and reported as their stock to statutory departments – account of stock consumption of the materials exclusively

used in manufacture of Acoustic Enclosure is maintained by the appellants. (vouchers for unloading charges)

b. The raw materials received/accounted are sent to jobworkers for bending/corrugating from the factory ofappellant and received back from the jobworkers into their factory. (vouchers of cash payment)

c. Drawings/sketches for bending & corrugating supplied by the appellant, that has been prepared by their Works manager.

d. Though it is contended that the goods are then sent to M/sSEW/SBN, there are no documents available/ submitted to prove that the goods have been sent to them.

e. Manufacturing processes are carried in the premises of the appellant factory only. Consumption/ stock of Glasswool and Aluminium perforated sheets, used exclusively in the manufacture of AE are maintained by the appellant. (vouchers pertaining to Meals allowance bill, food bill, nightallowance, Overtime bill)

f. The job workers are not specialised in manufacture ofAcoustic Enclosure as they do not manufacture the said item for anyone else; they do not have their own specific raw materials suppliers of quality; they do not have any skilled labourers for the said activity; all these proves that the jobworkers have not undertaken any manufacturing activity ofAcoustic Enclosure in their factory and have only raised andissued invoices.

g. The above proves that the manufacturing facility/ capabilityis available in the factory premises. It is also fact that the appellant has skilled labourers/employees who are wellversed in the process of manufacture of Acoustic Enclosure.

h. Book No. 11 contain all details of the all the goods worked upon and supplied by the job worker to the appellant – butthere is not even a single entry in the said book evidencing the fact that Acoustic Enclosure were fabricated and appliedto appellant nor is it available even in other documents recovered from the job worker. Even, Book No. 8, containing bill wise details of actual work carried out with the amount in respect of their customers, does not reflect any Acoustic Enclosure processing work.

i. If the appellant were receiving fully manufactured Acoustic Enclosure ready to despatch in unassembled condition fromjobworker and were clearing as such on trading, procurement of Nylon wheels and Pin sets (used exclusivelyin Acoustic Enclosure) separately on regular basis was not required.

j. The payment – job charges of 3% of Basic value + Sales Tax amount is paid by the appellant to the said jobworker for the purported processing of the AE. It appears to be very meagre and not even one fourth of actual labour and the same is impossible to fabricate for the said amount. Itamounts to the fact that the manufacturing was done in thepremises of appellant with the help of its own skilledemployees and only in order to evade payment of duty, entire financial accounts & raising of invoices in these cases have been created / fabricated. It is clear that the 3% amount paid is nothing but the commission/ a sort of charges paid for raising the invoices in appellant's name andpaying the Sales Tax in their own account.

k. It is also stated by their staff that the Acoustic Enclosure areassembled in the factory and tested before they are finally dispatched. This is further the fact that the appellant havethe manufacturing facility and skilled labour with them for manufacturing AE in their factory premises.

l. Furthermore, immediately after the evasion was unearthed,the appellants stopped the

said procedure and started a newunit. They also sent their skilled employees who were till then working in their factory to the new factory. This showsthat the said employees were actually carrying out the saidmanufacturing activity in the appellant's unit.

4.2. Replying to their grounds, the learned Authorised Representative (AR) for the Revenue submitted as follows:-

I. In the grounds of appeal, among others, the appellants have claimed that they have procured the raw materials in the name of jobworkers and had sentthem for manufacture of Acoustic Enclosures and thatthey received the Acoustic Enclosure under invoice onpayment of Sales Tax. They have claimed that they have not manufactured acoustic Enclosure and if at allthe activity amounts to manufacture, it should be thejobworker who is liable to pay duty as manufacturer.

II. In the grounds of appeal, they have stated that 'The said raw materials were never taken into the appellant's stock at any stage'. The said statement isvery much far from truth, as during the investigation,the department has found a document declaring the material stock position by the appellants to M/s Dhanalakshmi Bank during the month of March 2002,April 2002 and May 2002. The appellant had shown stock of items/ raw materials that were procured in the name of jobworker and exclusively used in the manufacture of Acoustic Enclosure. The same has been clearly brought out in para 19 of the show causenotice. They have also put forth that the procurementin the names of SEW and SBN by the appellant was necessitated solely because the suppliers of raw materials were not convinced of the creditworthinessof SEW and SBN and hence, invariably insisted on thepayments being made by the appellant, as a condition for the sale of goods. Though the appellant has beenstating the above, they have not produced any evidences/ documents to that effect and the same appears to be a bald statement without any support and an afterthought to cover the evasion of duty.

III. Further, they contend that mere supply of raw materials & mere routing of raw materials to a job worker will not leave supplier of raw materials, for whom the work is done by the job worker, the manufacturer of the product, manufactured using thesaid raw materials. In this regard, it has been very evidently brought out at para 20 to 25 of the SCN thatthe appellant had actively engaged their employees for enquiring about the bending facility and were sending the raw materials for the said job work and receiving back in their factory for further process. There are documents to show that they had incurred expenditure in the processes connected to the manufacture of Acoustic Enclosure. It has also been brought out that the said bending/cutting of thesheets had been undertaken as per the drawing/sketches given by appellants. Evidences have also been discussed which support the fact thatsuch activities of cutting/corrugating has been got done even without raising bills between them. As such, it is not mere routing of raw materials, but the appellants had undertaken various processes of workright from the stage of procuring the raw materials tothe testing of the Acoustic Enclosure in their factory premises.

IV. The show cause notice has in detail given entireaccount of the transactions pertaining to manufactureof Acoustic Enclosure involving procuring of raw materials, raising of jobwork bills, sales invoices,carrying out testing, etc., and from the same, it is clear that the matter does not involve mere supply ofraw materials, but much more than that to hold the appellants, being principal manufacturer as the actualmanufacturer of the Acoustic Enclosure. Also, at para26-38 of the show cause notice, the investigation hasdiscussed all the pieces of evidences to prove that themanufacturing activities of Acoustic Enclosure have been carried out at factory premises of the appellant and hence the contention of the appellant that job workers are the manufacturers is not acceptable.

V. The appellants have argued that the agreement entered into between the appellant and the job workers was one, which was on principal to principal

basis and that the job worker was not a hired labourer.It is seen from the documents on record that the appellant has not produced any documentary evidences/ copy of the agreement to prove /support their claim of manufacture was on principal to principal basis.

VI. It has been stated by Shri Jolly Francis, employee/labourer, who was working in the appellantunit that the acoustic enclosure used to be tested within the factory. Even when the said employee wascross examined ruing the adjudication proceedings, while answering the Question No. 6 during the cross examination, he has confirmed that the 'AcousticEnclosures {assembled form} which are to be sent todistant places are tested before dismantling and sending to the buyer. It is clear that the appellant used to carry out the testing in their factory premisesto ensure that the specifications as desired by their customers are met and the same is deliverable/marketable.

VII. At the stage of adjudication process, the appellant intheir reply to SCN had contended that the only panels are manufactured at manufacturer's premises and the AE comes into existence only at the customers site and on assembly it becomes a structure that is fixed to the earth and immovable in nature thereby losingits character as goods for levy of duty. In this regard,the AE, that is fixed to the earth is capable of being unbolted and shifted from a place and is capable of being sold and hence it is not an immovable property.Therefore the same is liable to Central Excise duty.

VIII. Also, the adjudicating authority had held that it is notconclusively established that the appellant had the facility to manufacture AE in their factory. However, on proper analysis of the evidences, that have not been assailed/ contested with evidences by the appellant, proves that they had the capability ofmanufacturing AE in their factory.

IX. It can be seen that the appellant has denied allcharges/points/evidences without any corroborative evidences. They have also failed to produce a copy ofagreement of job work and also documents to explainthe reasons for procuring raw materials in the name of job workers. On perusal of the evidences discussedin the show cause notice, it becomes abundantlyevident that two parties have connived to avoid payment of duty on the manufacture of AcousticEnclosure. It is obvious that there is pieces of evidence of creating an elaborate system of fraudulentdocumentation with intent to evade payment of Central Excise duty, as has been held by the Commissioner (Appeals) in his order dated29.11.2007.

X. The findings of OIA and CESTAT Final Order dated 06.02.2018 are reiterated and considering the abovesubmission, the appeals are liable to be dismissed.

5. Heard both sides and perused records.

6. The short issue involved in the present appeal for consideration is whether appellant during the relevant period i.e.01/04/2000 to 04/06/2002, manufactured and cleared 'Acoustic Enclosures' without payment of duty or the said goods were manufactured on job-work basis by other manufacturers and cleared to the customers directly.

7.1. The allegation of the Revenue is that the appellant in the guise of getting the said acoustic enclosure manufactured on job work basis, but in fact the appellant manufactured the same in their factory premises and later supplied it to their customers to be fitted with the manufactured DG sets.

7.2. In support of the allegation that goods were manufactured in the factory premises of the appellant, the Revenue on the basisof statements recorded and evidences collected, it is claimed thatthe raw materials necessary for the fabrication of acoustic enclosures are procured by them in the name of M/s. SBNEngineering Works and M/s. Steel Engineering Works, but in fact the same were unloaded in the premises of the appellant and it ispurchased by the

appellant as payments were made by them andthe raw materials were received by them. In support of the allegation that the raw materials were unloaded and accounted asstock in the premises of the appellant, the Revenue relied upon the procedure for the purchase of raw materials adopted by the appellant and maintained in their office. Also, vouchers indicating payment of unloading charges against the corresponding invoicesof the suppliers viz. M/s. Premier Steels have been enclosed. Thestock of raw materials maintained thereunder perfectly tallied withthe stock declared to the banks viz. Dhanalakshmi Bank Ltd. during the period March, 2002, April 2002 and May 2002.

7.3. Further it has been placed on record that glass wool and perforated sheets are purchased in the name of the appellant; however it was declared to have been procured in the name of M/s. Steel Engineering Works. Further they have placed on recordsending all the raw materials viz. HR sheets for cutting and bending/corrugating, which is the first process of manufacture ofacoustic enclosure as they were not having such facilities being stated by Shri Sebastian, Works Manager of the appellant. The statements recorded from persons who carried out the bending works viz. Shri V.P. Suresh Babu, Partner of M/s. Kesava Engineering Works in his statement dt. 27/05/2003 categorically stated that they had undertaken bending of HR sheets for makingacoustic enclosure as per the drawings and sketches given by Shri Sebastian. The HR sheets that were required for bending had been brought in to their factory and on completion of bending, it was sent back to the factory of the appellant for making acoustic enclosure. Similar information were also furnished by Shri Vasanth Kumar, representative of M/s. Unifab, in his statement dt. 09.06.2003. All these evidences have been challenged by theappellant arguing that there are stray cases and trivial issues.

8. Besides, evidence in support of manufacturing of acoustic enclosures in their factory viz. payments for overtime to employees, where the vouchers indicate acoustic enclosure were also placed on record. Also, all other allowances, expenses incurred in connection with manufacture of acoustic enclosure were placed on record, which indicate that the acoustic enclosureswere manufactured in the factory premises of the appellant. Thesaid evidences have not been rebutted with material particulars by the appellant.

9. The Revenue also relied on evidences indicating that the purchase bills of acoustic enclosures from M/s. SBN Engineering Works against few invoices for the period December 2000 to January 2001 were fabricated by the appellant as such manufacturing activities were carried out in the job worker's premises. The relevant annexures to the show-cause notice contain the documentary evidences in this regard. Further analyzing the payments made to the job workers brought on record that the amount paid ranging from Rs.660/- to Rs.1340/- being 3% of the total sales value cannot meet even 1/4 of the actual labour expenses involved in the fabrication of the acousticenclosures. Thus, the claim of the appellant that the goods were manufactured on job work basis negated by the Revenue. No contrary evidence is placed by the appellant showing the amountcollected is sufficient to meet the job-work charges and any costing of the manufacture of the same placed on record by the appellant.

10. Thus, the Revenue could be able to establish that even though the appellant claimed to have manufactured the acoustic enclosures on job work basis from M/s. SBN Engineering Works and M/s. Steel Engineering works, in fact the same were manufactured in their premises during the relevant period and cleared without payment of duty. The claim of the evidence fromthe stage of procurement of raw-materials, receipt in the factory,manufacture using their labour force adduced by the Departmentin the demand notice and confirmed in the impugned order by learned Commissioner (Appeals), the owner shifts to the appellant to

establish that the goods acoustic enclosures manufactured on job-work basis. We find that the submissions advanced by the appellant are of general in nature and devoid of rebuttal of evidences brought on record indicating procurement of raw materials, processing of the same in the factory premises, stock of the glass wool etc. used in the manufacture of acoustic enclosures found in their factory, low conversion charges reflected in the invoice of job-worker etc. overwhelmingly indicate that the acoustic enclosures were manufactured and cleared without payment of duty from their factory. In the result, the appeal of the appellant is rejected and order of the Commissioner(Appeals)is upheld.

(Pronounced in open court on 22.12.2023)

(Dr. D.M. MISRA)MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 20486 of 2022

(Arising out of Order-in-Appeal No.29/2021-22-CT dated 21.09.2021 passed by the Commissioner of Central Tax (Appeals-II), Bangalore.)

M/s. Rakon India Pvt. Ltd.
(Formerly known as M/s. Centum Rakon India Pvt. Ltd.)
No.12, KHB Industrial Area,Yelahanka New Town Bangalore – 560 106. Appellant(s)

Versus

The Commissioner of Central Tax
North Commissionerate, HMT Bhavan, Bellary Road,Bangalore – 560 032. Respondent(s)

Appearance:

Mr. Akbar Basha, CA For the Appellant

Mr. Neeraj Kumar, Superintendent (AR) For the Respondent

CORAM:

HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21416 /2023

Date of Hearing: 29/08/2023
Date of Decision: 19/12/2023

Per : R. BHAGYA DEVI

M/s. Rakon India Pvt. Ltd., appellant, is a 100% EOU who manufacture and export 'Crystal and Oscillators'. They filed a refund claim of unutilized cenvat credit on input and input services. The original authority granted refund partly and rejected the balance amount on the ground that the shipping bills were not filed along with the claim. The appellant filed an appeal against this rejection before the Commissioner (Appeals).Since the shipping bills were produced before the Commissioner (Appeals), vide Order-in-Appeal No.375/2017-CT dated 27.10.2017, he remanded for verification of copies of the shipping bills for calculation of the eligible amount of refund.

Theappellant vide letter dated 01.07.2019 requested for verification of documents and processing of the refund claim by submitting copies of shipping bills on 15.7.2019. The original authorityrejected the refund claim on the ground that it was filed beyond the time limit from the date of issue of Order-in-Appeal inaccordance with Explanation B(ec) to Section 11B. The Commissioner (Appeals) upheld this order vide the impugned order on which the appellant is in appeal before this Tribunal.

2. The learned counsel on behalf of the appellant submits that the Commissioner (Appeals) had remanded the case for submission of shipping bills for which there is no time limit. He relied on the following judgements.

- Rakon India Pvt. Ltd. vs. Commissioner of Central Tax,Bangalore: 2021 (54) GSTL 183 (Tri.-Bang.)
- Geetaben Jigneshkumar Patel vs. Commissioner of CentralExcise, Ahmedabad-II: 2021 (44) GSTL 81 (Tri.-Ahmd.)
- Commissioner of Central Excise, Haipur vs. Simplex Eng. &Foundary Works Pvt. Ltd.: 2016 (333) ELT 112 (Tri.-Del.)

2.1 Alternatively, he has requested that even if it is to be rejected, at least the credit should be restored since this is a case of refund of unutilised cenvat credit under Rule 5 of theCenvat Credit Rules 2004.

3. The Authorised Representative representing the Revenue submitted that the relevant date is very clearly mentioned in Section 11B(ec) and therefore, the appellant should have submitted all the shipping bills within one year from the date of receipt of the Commissioner (Appeals) order. Having failed to do so, the authorities were right in rejecting their refund claim and dismissing the same on time bar.

4. Heard both sides. The issue to be decided in this appeal is whether the appellant is eligible refund of unutilised cenvatcredit on inputs and input services. Rule 5 of Cenvat Credit Rules, 2004 and Notification No.27/2012-CE (NT) dated 18.6.2012 are reproduced below:

"Rule 5. Refund of CENVAT credit.- Where any inputs are used in the final products which are clearedfor export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, the CENVAT credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amountsubject to such safeguards, conditions and limitations as may be specified by the Central Government by notification: Provided that no refund of credit shall be allowed if the manufacturer avails of drawback allowed under the Customs and Central Excise DutiesDrawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty."

Cenvat credit — Procedure for Refund — Notification No. 5/2006-C.E. (N.T.) superseded

[Notification No. 27/2012-C.E. (N.T.), dated 18-6-2012]

In exercise of the powers conferred by rule 5 of the CENVAT Credit Rules, 2004 (hereinafter referred to as the "said rules"), and in supersession of the notification of the Government of India in the Ministry of Finance (Department

of Revenue), No. 5/2006- Central Excise (N.T.), dated the 14th March, 2006, published in Gazette of India, Extraordinary, Part II,Section 3, Sub-section (i) vide number G.S.R 156(E), dated the 14th March, 2006, the Central Board of Excise and Customs hereby directs that refund of CENVAT credit shall be allowed subject to the procedure, safeguards, conditions and limitations as specified below, namely :-.

2. Safeguards, conditions and limitations. - Refund of CENVAT Credit under rule 5 of the said rules, shall be subjected to the following safeguards, conditions and limitations, namely:-

(a) the manufacturer or provider of output service shall submit not more than one claim of refund under this rule for every quarter:

Provided that a person exporting goods and servicesimultaneously, may submit two refund claims one in respect of goods exported and other in respect of the export of services every quarter.

(b) in this notification quarter means a period of three consecutive months with the first quarter beginning from 1st April of every year, second quarter from 1st July, third quarter from 1st October and fourth quarter from 1st January of every year.

(c) the value of goods cleared for export during the quarter shall be the sum total of all the goods cleared by the exporter for exports during the quarter as perthe monthly or quarterly return filed by the claimant.

(d) the total value of goods cleared during the quarter shall be the sum total of value of all goods cleared by the claimant during the quarter as per themonthly or quarterly return filed by the claimant.

(e) in respect of the services, for the purpose of computation of total turnover, the value of export services shall be determined in accordance with clause (D) of sub-rule (1) of rule 5 of the said rules.

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(h) the amount that is claimed as refund under rule 5 of the said rules shall be debited by the claimantfrom his CENVAT credit account at the time of making the claim.

(i) In case the amount of refund sanctioned is less than the amount of refund claimed, then the claimant may take back the credit of the difference between the amount claimed and amount sanctioned.

3. Procedure for filing the refund claim. - (a) The manufacturer or provider of output service, as the casemay be, shall submit an application in *Form A* annexed to the notification, to the Assistant Commissioner of Central Excise or DeputyCommissioner of Central Excise, as the case may be,in whose jurisdiction,-

(i) the factory from which the final products are exported is situated.

(ii) the registered premises of the provider of service from which output services are exportedis situated.

(b) The application in the Form A along with the documents specified therein

and enclosures relating tothe quarter for which refund is being claimed shall be filed by the claimant, before the expiry of the period specified in section 11B of the Central Excise Act, 1944 (1 of 1944).

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(d) The applicant shall file the refund claim alongwith the copies of bank realization certificate in respect of the services exported.

(e) The refund claim shall be accompanied by a certificate in *Annexure A-I*, duly signed by the auditor (statutory or any other) certifying the correctness of refund claimed in respect of export of services.

(f) The Assistant Commissioner or Deputy Commissioner to whom the application for refund is made may call for any document in case he has reason to believe that information provided in the refund claim is incorrect or insufficient and further enquiry needs to be caused before the sanction of refund claim.

(g) At the time of sanctioning the refund claim theAssistant Commissioner or Deputy Commissioner shall satisfy himself or herself in respect of the correctness of the claim and the fact that goods cleared for export or services provided have actually been exported and allow the claim of exporter of goods or services in full or part as the case may be.

The Form A along with the following Enclosureshad to be filed along with the refund claim:

(i) Copies of Customs Certified ARE-1 form along with the copies of shipping bill and bill of ladingin case of the export of goods.

(ii) Copies of the Bank Realization Certificates forthe export of services.

(iii) Certificate in Annexure A-I from the Auditor (statutory or any other) certifying the correctness of refund claimed in respect of export of services.

As seen from the above, Rule 5 for refund of cenvat credit under Cenvat Credit Rules, 2004 read with Notification No. 27/2012-CE(NT) dated 18.6.2012 clearly states that refund claim should be accompanied with the copies of the shipping bills which is the basis for claiming any refund under the said Rule. The Original Authority on verification, sanctioned refund claim only to the extent of claim being complete and rejected balance as it wasnot accompanied with the relevant shipping bills. Thereafter, on appeal, the matter stands remanded by the Commissioner (Appeals) observing that *"In appeal the appellant have submitted set of shipping bills claiming these to be pertaining to the export turnover of Rs.5,89,08,005/-. Since the other documents and shipping bills are available with the OriginalSanctioning Authority it is considered proper to direct the appellant to submit the copies of such shipping bills to theoriginal/Sanctioning Authority for verification and re-calculationof the eligible amount of refund after being satisfied with the veracity of the documents submitted."* Therefore, any claim filedthereafter along with the shipping bills is a fresh claim and the appellant on remand should have filed the claim with the stipulated time and instead files after 2 years claiming that there is no time. The laws and the rules that specifically mention thedue dates cannot be ignored.

5. Moreover, as per Section 11B which is reproduced belowclearly defines the

relevant date.

Section 11B. Claim for refund of duty and interest, if any, paid on such duty. -

(1) Any person claiming refund of any 1[duty of excise and interest, if any, paid on such duty] may make an application for refund of such 2[duty and interest, if any, paid on such duty] to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of 1[duty of excise 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 2[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 as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :

Provided further that the limitation of one year shall not apply where any 2[duty and interest, if any, paid on such duty] has been paid under protest.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of theAppellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder orany other law for the time being in force, no refund shall be made except as provided in sub-section (2).

Explanation. - For the purposes of this section, -

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;]

6. Against the Order-in-Appeal No.373-375/2017 dated 27.10.2017 of the Commissioner (Appeals), the appellant filed refund claim along with the shipping bills before the Original Authority on 15.07.2019 and the copies of the shipping billswere submitted only on 14.10.2019. The basis for filing a refund claim under Rule 5 is the shipping bill, whereas the appellantfiled the complete refund claim along with the shipping bills only on 14.10.2019 i.e., after two years from the date of order of the Commissioner (A) is clearly time barred and hence, the claims rejected on time bar by the authorities is justified.

7. Alternatively, the appellant has claimed that in the case of refund being rejected, the unutilised credit should be restored asper Section 142 of the Central Goods and Service Tax Act, 2017.In view of the decision in their own case by the Tribunal in the case of **Rakon India Pvt. Ltd. Versus Commr. of Central Tax, Bangalore North: 2021 (54) G.S.T.L. 183 (Tri. - Bang.)** had requested to remand the case. The Tribunal in the above case had observed that:

"After considering the submissions of both the parties and perusal of the material on record, I find that it is not disputed that the appellant debited an amount of Rs. 60,12,607/- which resulted in excess debit of Rs. 12,44,979/-. **Further, I find that the appellant has filed the present refund claim under Section 11B and not under Rule 5 of CCR read with Notification No.27/2012.** Further, I also find that after the introductionof GST, the appellant could not transitioned the excessdebit into TRAN-I. In that case, the only option for the appellant was to file a refund claim under Section 11B read with Section 142(5). Further, I find that the impugned order has not disputed the eligibility of credit debited in excess. After the introduction of GST in July, 2017, there is no option provided to the noticee to avail Cenvat credit, as the returns have been suspended with regard to erstwhile regime. Consequently, the noticee filedthe refund of the amount debited in excess in terms of provision 142(3) of CGST Act which was allowed as credit". Emphasis supplied.

The above facts are clearly distinguishable in as much as that was not a case of Rule 5 refund; while the present appeal is under Rule 5 of the Cenvat Credit Rules, 2004 and hence the question of refund under Section 142 does not arise. Moreover, as per Section 142, any claim for refund of CENVAT credit is fullyor partially rejected, the amount so rejected shall lapse as seen from clause (3) of Section 142 reproduced below:

"(3) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 (1 of1944):

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse,

8. In view of the above discussions, the appeal is dismissed.

*(Order pronounced in Open Court on **19.12.2023**.)*

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 23715 of 2014 (Arising out of Order-in-Original No.BEL/EXCUS/000/COM/B.HR/ 010/2014-15(cx) Dated 08.09.2014 passed by Commissioner of Central Excise & Customs, Belgaum)

M/s. UltraTech Cement Ltd.,

(Unit: Rajashree Cement Works), Aditya Nagar, Malkhed Road,

Dist: Gulbarga – 585 292..... **Appellant(S)**

VERSUS

Commissioner of Central Excise and Customs,
71, Club Road,

Belgaum – 590 001.....**Respondent(s)**

Appearance:
Present for the Appellant: Mr. Ravi Raghavan, Advocate Present for Respondent: Mr. H. Jayathirtha Authorised Representative

Coram:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21426 / 2023

Date of Hearing: 03.08.2023 Date of Decision: 22.12.2023

Per: Dr. D.M.Misra

This is an appeal filed against the Order-in-Original No. L / EXCUS /000 /COM/ B.HR/ 010/ 2014-15 (CX) dated 08.09.2014passed by Commissioner of Central Excise and Customs, Belgaum.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of cements of various grades falling under Chapter heading 2523 10 00 of the Central Excise Tariff Act, 1985. The appellant captively consume clinker for manufacture of cement in their factory, clear the same to other units of the appellant and also sell some quantity of the same to independent customers (unrelated buyers). In clearing the clinkers to their own sister units, the appellant had determined the cost of the product as per CAS-4 method and accordingly the assessable value as 110% of the cost of the production in accordance to Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (Central Excise Valuation Rules, 2000 for short). Since independent sale to other buyers are also available, show-cause notice was issued to the appellant demanding differential duty by

computing the assessable value of clinkers cleared to sister units in terms of Rule 4 read with Rule 11 of Central Excise Valuation Rules, 2000 for the period from March 2011 to November 2013. The differential duty computed accordingly for the said period amounting to Rs.78,17,68,586/- was demanded with interest and penalty by issuing show-cause notice dated 30.01.2014 invoking extended period of limitation. On adjudication, the demand was confirmed by the learned Commissioner with interest and penalty of equal amount under Section 11AC of Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002; further, the amount of Rs.4,93,93,806/- paid by the appellant was appropriated against the said demand. Assailing the impugned order, the present appeal is filed before this Tribunal.

3.1. At the outset, the learned advocate Shri Ravi Raghavan for the appellant has submitted that during the period in question, the appellant had cleared clinkers of 4136661 .31 MTs to the sister units against the miniscule sale of 6018.19MTs to independent buyers.

3.2. Summary of submissions of Learned Advocate are as below:

a. The question framed by the learned Commissioner is incorrect as the clinker was transferred from one unit to another unit of the same company and not related group of companies.

b. The demand is based on assumptions and presumptions. It is presumed that by adding the differential value of comparable sale price of clearances to independent buyers over the value adopted for clearances of clinkers to sister units, will be the assessable value under Rule 4 of the Central Excise Valuation Rules, 2000.

c. Rule 4 of the Valuation Rules, 2000 provides for adjustments in price on account of time and other relevant factors. The aforesaid adjustments were not considered while computing the demand.

d. The differential duty arrived by applying comparable price of the goods sold to independent buyers under Rule 4 of Central Excise Valuation Rules, 2000. The price at which clinkers were sold to independent buyers was inclusive of freight, whereas the assessable value of stock transferred goods is on ex-factory basis and freight charges are not includable in the assessable value of the clinker transferred to own units. In support, referred to the judgment of Hon'ble Supreme Court in the case of ***Escort JCB Limited Vs. CCE, Delhi [2002(146) ELT 31 (SC)].*** Therefore, the value should be calculated on ex-factory basis even if Rule 4 of the Central Excise Valuation Rules is applied to stock transferred goods i.e. it should be exclusive of freight.

e. The value under Rule 8 of Central Excise Valuation Rules, 2000 read with CAS-4 method is more than the duty payable under Rule 4 of the Central Excise Valuation Rules; hence no differential duty is payable. In support, they have cited the example of sale to independent buyer M/s. Ramco Industries Limited and the price at which during the relevant period transferred to their own units adopting Rule 8 of the Central Excise Valuation Rules.

f. Further he has submitted that the comparable price adopted in computing value under Rule 4 of Central Excise Valuation Rules, 2000 without adopting the comparable goods, which are nearest to time of clearance of goods to own units. The Commissioner has blindly confirmed the demand raised in the show-cause notice without properly applying the principles laid down under Rule 4 of the Central Excise Valuation Rules, 2000 in computing the value and in turn the differential duty, hence bad in law. In support, he placed reliance on the judgment in the case of ***Tilrode Chem Pvt. Ltd. Vs. CCE, Bangalore [2011(264) ELT 306 (Tri.***

Bang.); further affirmed by Hon'ble High Court of Karnataka as reported at Commissioner Vs. Tilrode Chem Pvt. Ltd. **[2015(317) ELT A190(Kar.)]** and in the case of ***Vinir Engineering Pvt. Ltd. Vs. CCE, Bangalore [2004(168) ELT 34 (Tri.-Bang.)].***

g. Further, he has submitted that the quantum of clinker sold to independent buyers is miniscule (approximately 0.05%) compared to clinkers cleared to their sister units for consumption during the relevant period; hence such independent sale be ignored. Further, he has submitted that there is no simultaneous sale to independent customers during the entire period of dispute i.e. March 2011 to November 2013 except only in few months, where the sale was very negligible. Thus, the finding of the Commissioner that simultaneous sale price to independent buyers was available throughout the period of clearance is incorrect.

h. The sister units, where the clinkers were received, used in the manufacture of grey cement and cleared on payment of Central Excise duty as applicable and the recipient unit is entitled for credit whatever the amount paid by the appellant on the clinkers at the time of its clearance; thus the differential duty payable is available as cenvat credit at the end of the recipient unit leading to revenue neutral situation. Further, during the relevant period, they have paid more duty than the demand through PLA., hence the finding of the Commissioner has no basis. In support, he has referred the following judgments:

a) ***Nirlon Ltd. Vs. CCE [2015(320) ELT 22 (SC)]***
b) ***CCE&C(Appeals) Vs. Narayan Polyplast [2005(179) ELT 20 (SC)]***
c) ***CCE Vs. Narmada Chematur Pharmaceuticals [2005(179) ELT 276 (SC)]***

i. Referring to Section 4(1)(b) of the Act and Rule 8 of the Central Excise Valuation Rules, 2000, he has submitted that Rule 8 is the appropriate rule for assessment, which shall be applicable to the facts of the present case, since the clinker on which the duty was proposed to be demanded was not sold but transferred to their sister units on stock transfer basis meant for manufacture of grey cement. In support of his submission, he has referred to the Circular F.No.354/81/2000-TRU dated 30.06.2000 and Circular No.643/34/2002-CX dated 01.07.2002. In view of the said Circulars, which are binding on the department, demand was confirmed, contrary to the same, hence bad in law.

j. Further he has submitted that since the subsequent amendment brought into force w.e.f. 01.12.2013 being clarificatory in nature; hence be applied, retrospectively. In support, he has referred to the following judgments: -

a) ***CCE Vs. Fosroc Chemicals (India) Pvt. Ltd. [2015(318) ELT 240 (Kar.)]***
b) ***UOI Vs. Steel Authority of India Ltd. [2013(297) ELT 166 (Chhattisgarh)]***

k. He has further submitted that the demand is barred by limitation in absence of short payment due to fraud, collusion or any willful mis-statement or suppression of facts or contravention of any provisions of the act or the rules made thereunder with intent to evade payment of duty. Therefore, the demand for the period March 2011 to December 2012 is barred by limitation. They have not suppressed any facts from the Department by the interpretation of the applicability of the relevant rules has been the subject matter of interpretation by Larger Bench, the differential duty payable by the appellant always is available as cenvat credit to the sister units; hence the effect is revenue neutral.

l. Further, he has submitted that in the similar circumstances in the case of ***Ultratech Cement Pvt. Ltd. Vs. CCE, Bhavnagar [2013(295) ELT 470 (Tri. Ahmd.)]*** affirmed by Hon'ble Gujarat High Court, CCE, Bhavnagar Vs. Ultratech Cement Pvt. Ltd. [2014(302) ELT 334 (Guj.)], it is held that extended period cannot be invoked. It is stated that the appellant has been filing ER-1 returns indicating the duty paid on transfer of clinkers to sister units, also since their books of accounts, which have been audited by the statutory auditors periodically and they were under the bona fide belief that the applicable rule for determination of value of stock transferred goods to their sister units is assessable under Rule 8 of the Central Excise Valuation

Rules, 2000 invoking of extended period is bad in law, hence, the demand is bad in law; therefore interest is also not applicable; consequently imposition of penalty is not sustainable.

4. Learned Authorised Representative (AR) for the Revenue reiterates the findings of the learned Commissioner. He has submitted that the appellants were clearing the clinker to their own sister units adopting Rule 8 of Central Excise Valuation Rules, 2000 even though a part of the goods were sold to unrelated buyers during the same period. It is his contention that the issue is no more *res integra* and settled by the Larger Bench of the Tribunal in the case of ***Ispat Industries Ltd. Vs. CCE, Raigad [2007(209) ELT 185 (Tri. LB)].*** Further he has submitted that the said judgment of the Larger Bench was considered by the Hon'ble Gujarat High Court reported as ***CCE, Bhavnagar Vs. Ultratech Cement Pvt. Ltd. [2014(302) ELT 334 (Guj.)]*** and their lordships upheld the view expressed by the Larger Bench.

5. Therefore, in the appellant's case, provisions of Rule 8 of Central Excise Valuation Rules, 2000 will not apply and the assessable value of the goods cleared to their sister units be computed applying provisions of Rule 4 of the Central Excise Valuation Rules, 2000, read with Rule 11 of the said Rules. He submitted that therefore, the method of assessment confirmed by the learned Commissioner is in accordance with the said Larger Bench judgment, hence in accordance with law. Further he has submitted that since the appellants are aware of the fact that Rule 8 of the Central Excise Valuation Rules, 2000 are not applicable, since the price at which such goods are sold is available; hence invocation of extended period by the Commissioner is justified and in support, he has referred the judgment in the case of ***Mahindra & Mahindra Ltd. Vs. CCE, Mumbai-V [2018(362) ELT 382 (Tri. Mum.)].***

6. Heard both sides and perused the records.

7. The present dispute relates to determination of assessable value of clinkers manufactured by the appellant and cleared to their own sister units during the period March 2011 to November, 2013.

8. The Revenue's contention is that Rule 8 of the Central Excise Valuation Rules, 2000 cannot be made applicable as the goods were not wholly consumed or transferred to their sister units but a portion of the goods were sold to independent buyers. It is their argument that Rule 4 of the Central Excise Valuation Rules, 2000 read with Rule 11 be applied in arriving at the assessable value of the clinkers transferred to the sister units. The relevant Rules are reproduced below:

RULE 4. *The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable.*

RULE 8*. Where whole or part of the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value of such goods that are consumed shall be one hundred and ten per cent of the cost of production or manufacture of such goods.*

RULE 11*. If the value of any excisable goods cannot be determined under the foregoing rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub- section (1) of section 4 of the Act.*

9. We find that this issue has been considered by the Larger Bench of the Tribunal in **Ispat Industries Ltd.'s** case and their lordships after noting the Circulars issued by the Board in this regard observed as follows: -

8. The conclusion that we are drawing in the present case would lead to determination of a value which, in our view, will not only be reasonable but also consistent with the provisions

of Section 4 of the Central Excise Act. We would, at this stage, draw support from the judgment of the Supreme Court in the assessee's own case, as reported in 2006 (202) E.L.T. 561, wherein the Court applied "The Gunapradhan Principle" in interpreting the Customs Valuation Rules. We have kept in mind the following observations of the Court in coming to our above conclusion:

"26. In our opinion if there are two possible interpretations of a rule, one which subserves the object of a provision in the parent statute and the other which does not, we have to adopt the former, because adopting the latter will make the rule ultra vires the Act. 27.....

36. In our opinion, the Gunapradhan principle is fully applicable to the interpretation of Rule 9(2). Rule 9(2) is subservient to Section 14. We must, therefore, interpret it in such a way as to make it in accordance with the main object that is contained in Section 14 of the Customs Act. It may be that in isolation Rule 9(2) conveys some other meaning, but when it is read along with Section 14 of the Act, it must be given a meaning which is in accordance with the object of Section 14. The object of Section 14 is 'primary' whereas the conditions in Rule 9 (2) are the 'accessories'. The 'accessory' must, therefore, serve the 'primary'."

9. In view of what we have observed above, we answer the reference in the following terms:

(a) the provisions of Rule 8 of the Valuation Rules will not apply in a case where some part of the production is cleared to independent buyers;

(b) the provisions of Rule 4 are in any case to be preferred over the provisions of Rule 8 not only for the reason that they occur first in the sequential order of the Valuation Rules but also for the reason that in a case where both the rules are applicable, the application of Rule 4 will lead to a determination of a value which will be more consistent and in accordance with the parent statutory provisions of Section 4 of the Central Excise Act, 1944.

10. Therefore, we have no hesitation to hold that the appropriate rules for determination of the assessable value of the goods for the transferred clinkers to sister units will be Rule 4 read with 11 of the Central Excise Valuation Rules, 2004 rather than Rule 8 of the Central Excise Valuation Rules, 2000 for the period in question.

11. Regarding the extended period of limitation, we find that the appellant has been declaring the assessable value adopting Rule 8 of the Central Excise Valuation Rules, 2000 and discharging duty during the relevant period. All these facts are recorded in their ER-1 returns and periodically filed with the department; no objection has been raised by the Department on such method of assessment. Therefore, alleging suppression or mis-declaration of facts with intent to evade payment of duty cannot be sustained. In the appellant's own case for the Gujarat Unit, this Tribunal has considered the issue of invocation of larger period of limitation reported as ***Ultratech Cement Pvt. Ltd. Vs. CCE, Bhavnagar [2013(295) ELT 470 (Tri. Ahmd.)].*** Analysing the facts more or less similar to the present one for the period March 2008 to March 2010, though the method of assessment was held to be not correct, it is held that extended period of limitation cannot be invoked. This Tribunal observed as follows: -

11. *It can be seen from the above reproduced portion of the judgment, that Larger Bench has specifically come to the conclusion that provisions of Rule 8 of Valuation Rules will not apply in a case where some part of the production is cleared to independent buyers. As is already recorded by us, in this case before us, there is a sale of bulk cement to independent buyers at a value which is higher than the value arrived at by the appellant for discharge of duty liability of the cement cleared by them to their own units. On merit, we find that the judgment of the Larger Bench will apply and the value adopted by the appellant for the clearances to independent buyers should be considered for arriving at the value of the duty liability to be discharged by them for removal/clearance of bulk cement to their own units like*

NMCU, MCU, and RMC.

12. *We find strong force in the contentions raised by the ld. Counsel that the Show Cause Notice dated 9.11.2009 has demanded the duty liability for the period March, 2008 to May, 2009 is hit by limitation at least for the period of one year prior to the date of issuance of Show Cause Notice. On perusal of the records, we find that the appellant has been filing monthly returns to the lower authorities from March, 2008 onwards. The lower authorities have not raised any query on this issue. The appellants had every reason to believe that the Board's Circular would be applicable to them and hence sought to value of the goods based upon the cost of production and as per provisions of Rule 8 of Central Excise Valuation Rules. Accordingly, we hold that the demand of duty prior to the period of one year from the date of issuance of Show Cause Notice dated 9.11.2009 is hit by limitation and that portion of demand is liable to be set aside and we do so. All other show cause notices being within limitation, our findings on merits would apply.*

12. The said judgment of the Tribunal was carried over in appeal before the Hon'ble Gujarat High Court reported as ***CCE, Bhavnagar Vs. Ultratech Cement Pvt. Ltd. [2014(302) ELT 334 (Guj.)].*** Their lordships analysing the facts upheld the order of the Tribunal on the issue of limitation observing as follows: -

19. *Thus on both the counts, firstly that there came a decision explaining and clearing the doubts as to in what manner the valuation requires to be done in the event of captive consumption of goods as also in case of goods transferred to sister concern or to another factory of the same assessee and till then, Board circular governed the field. And, also because from March, 2008 onwards. On regular basis, the monthly returns have been filed by the assessee respondent indicating all possible details. Thus, the Tribunal rightly turned down the demand of duty prior to the period of one year from the date of issuance of show cause notice dated 09.11.2009, holding the same to have been hit by the law of limitation.*

20. *In the instant case, we are in complete agreement with the findings of CESTAT, which rightly has concluded from the gamut of facts and evidence that all the materials were available with the Department, which could have been questioned and at no point of time any issue was raised questioning any credential of the respondent with regard to such transfer, the extended period of limitation in the demand notice could not have been sustained. Question of law is appropriately answered by the Tribunal.*

13. Following the aforesaid judgments, we are of the view in the present case also, extended period of limitation cannot be invoked. However, the demand be confined to the normal period of limitation.

14. The learned advocate for the appellant has disputed the method of application of Rule 4 read with Rule 11 of Central Excise Valuation Rules, 2004 in arriving at the differential duty. He has submitted that during the period, no comparable sale price to independent buyer is available; the Department has erroneously adopted the previous highest price and computed the duty. Further, he has submitted that even though sometimes, the value arrived applying Rule 8 is more than the sales value during that period; the Department has conveniently ignored the same. Since we are remanding the matter to re-compute the duty for the normal period of limitation, we direct the Department to strictly follow the provisions of Rule 4 read with Rule 11 of the Central Excise Valuation Rules, 2000 in computing the differential duty payable for the normal period.

15. Consequently, the impugned order is accordingly modified and appeal is partly allowed setting aside demand for the extended period of limitation and remand the matter to the adjudicating authority to re-determine the assessable value applying the principle of Rule 4 read with Rule 11 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and compute the differential duty, interest, if any, accordingly.

16. The Appeal is disposed as above.

Pronounced in open court on 22.12.2023)

(D.M. Misra) Member (Judicial)

(Pullela Nageswara Rao) Member (Technical)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 3190 of 2011

(Arising out of Order-in-Appeal No.301/2011-CE dated 28.09.2011 passed by the Commissioner of Central Excise (Appeals-I), Bangalore.)

M/s. IFB Industries Ltd
No.17, Visweshraiah Industrial Estate Off Whitefield Road
Mahadevapura Bangalore – 560 048. — Appellant(s)

Versus

Commissioner of Central Excise
Bangalore-I Commissionerate No.16/1, 5th Floor,
SP Complex, Lalbagh Road, Bangalore – 560 027. — Respondent(s)

AND

Central Excise Appeal No. 3191 of 2011

(Arising out of Order-in-Appeal No.301/2011-CE dated 28.09.2011 passed by the Commissioner of Central Excise (Appeals-I), Bangalore.)

M/s. IFB Industries Ltd No.17, Visweshraiah Industrial Estate Off Whitefield Road
Mahadevapura Bangalore – 560 048. — Appellant(s)

Versus

Commissioner of Central Excise
Bangalore-I Commissionerate No.16/1, 5th Floor,
SP Complex, Lalbagh Road, Bangalore – 560 027. — Respondent(s)

Appearance:

Shri B. N. Gururaj, Advocate — For the Appellant

Shri Neeraj Kumar, AR — For the Respondent

Final Order No. 20074 - 20075 /2024

Date of Hearing: 02.01.2024 Date of Decision: 02.01.2024
Per : R. BHAGYA DEVI

The appellant manufactures electric motors for washing machines. These motors are cleared for captive use in the manufacture of washing machines and also sold in the spares market and sold as a warranty replacement. The appellant had discharged duty on the basis of 110% of cost of production as per Rule 8 of Central Excise (Valuation) Rules, 2000 with regard to the captively consumed goods and warranty replacements and the value adopted was between Rs.1,520/- and Rs.1,653/-. The goods which were removed to their various service centres, the value adopted was Rs.3,531/-on the basis of sale value at the service centre.

2. The issue under dispute was whether clearance of electrical motors captively used are required to be followed in terms of Rule 8 of Central Excise (Valuation) Rules, 2000 or in terms of Rule 4 of Central Excise (Valuation) Rules, 2000 adopting the price cleared at the time of removal from the factory. From the amended Rule, the value to be adopted should be the value on which the goods were sold at the nearest time of removal and therefore, for captive consumption also the appellant should have adopted the price at which they had sold to the various customers either in the service centres or as warrant replacement. In view of the above, invoking the proviso to Section 11A, the demand was confirmed under proviso to Section 11A imposing penalty under Section 11AC equivalent to the amount of duty in addition to penalty of Rs.2,000/- under Rule 25. Aggrieved by this order, the appellants are in appeal before us.

3. The learned counsel on behalf of the appellant submits that 5 show-cause notices were issued proposing to redetermine the value of motors removed for captive consumption and warranty replacement under Rule 4 of the Central Excise (Valuation) Rules, 2000 adopting the price of motors removed for spares market. It is submitted that in view of the Larger Bench decision in the case of **Ispat Industries Ltd. Vs. CCE, Raigad: 2007 (209) ELT 185 (Tri.-LB)** the appellant accepts the demand and challenges only on the ground of limitation and allowing computation of duty. It is submitted that in two show- cause notices neither the assessable value nor the quantity of goods removed have been specified.

3.1 The details of show-cause notices issued are tabulated below:

Sl. No.	**Appeal No.**	**SCN No./Dt.**	**Period**	**Date of service**	**Remark**
1	E/3191/2011	22.4.2008	Apr. 2007 to Dec. 2007	28.04.2008	Normal period
2	E/3191/2011	No.145/2008 dt. 2.12.2008	Jun. 2006 to Mar. 2007	05.12.2008	Extended period invoked
3	E/3191/2011	No.16/2009 dt. 29.1.2009	Jan. 2008 to June 2008	02.02.2009	Extended period invoked
4	E/3191/2011	No.105/2009 dt. 4.8.2009	July 2008 to March 2008	07.08.2009	Extended period invoked
5	E/3190/2011	No.16/2010 dt. 22.4.2010	April 2009 to Jan. 2010	30.04.2010	Extended period invoked

It is submitted that show-cause notice at Sl. No.1 extended period was not invoked. In show-cause notices at Sl. No.2 to 4, extended period was invoked. It is further submitted that it is a settled law that once a show-cause notice is issued for normal period, subsequent show-cause

notices cannot invoke extended period of limitation. Relying on the **Nizam Sugar Factory vs. CCE: 2006 (197) ELT 465 (SC)**, he submits that all the four show-cause notices which have invoked extended period of limitation needs to be set aside. Since the proviso to Section 11A(1) is not to be invoked, penalty imposed under Section 11AC also needs to be set aside. It is also submitted that till the decision of the Larger Bench, there were conflicting judgements and some of them were in favour of the appellant and therefore, the question of invoking extended period does not arise.

3.2 It is further submitted that since its only captive consumption where no duty has been collected, the cum-duty benefit has to be considered and accordingly, the differential duty has been re-computed as shown below:

Sl. No.	**Demand as per SCN**	**Recomputed demand**	**Difference**
1	3,58,261.00	3,07,572.97	50,688.03
2	8,40,076.00	7,30,536.66	1,09,539.34
3	1,33,574.00	1,15,964.71	17,609.29
4	93,977.00	71,182.79	22,794.21
5	58,498.00	54,044.72	4,453.28
	14,84,386.00	12,79,301.85	2,05,084.15

4. The learned Authorised Representative for the Revenue reiterated the findings of the learned Commissioner.

5. The appellant clears fine blanks and electric motors for washing machines as warranty replacements, spares market and also uses for captive consumption. In view of the Larger Bench decision in the case of **Ispat Industries Ltd. vs. CCE, Raigad: 2007 (209) ELT 185 (Tri.-LB)**, it is a settled law that the appellant should have taken the value of the spares market for all the clearances of captive consumption as well as warranty replacements. Therefore, as far as demand is concerned, it has to be upheld and as admitted by the appellant demands are being upheld. The only question is now with regard to limitation and cum-duty benefit.

5.1 As seen in para 3.1, show-cause notice dated 22.4.2008 demanded an amount of Rs.3,58,261/- under Section 11A(1) of the Central Excise Act, 1944 along with interest under Section 11AB and penalty was imposed under Rule 25 of the Central Excise Rules, 2002. Thereafter, show-cause notice No.145/2008 dated 2.12.2008 was issued for the period June 2006 to March 2007 on the same set of facts based on the audit records which was also part and substance of the earlier show-cause notice demanding duty invoking proviso to Section 11A(1) and imposing penalty under Section 11AC and Rule 25 for the period January 2006 to March 2007 followed by subsequent show-cause notices.

6. In view of the fact that there were decisions both in favour and against the appellant which ultimately the Larger Bench in the case of **Ispat Industries Ltd.** (supra) settled the issue, we find that there is substance in the claim of the appellant that the issue was not without any controversy and hence, they cannot be alleged that facts were suppressed with intention to evade payment of duty. Moreover, as seen from the records, originally show-cause notice was issued without invoking suppression and this was for the period April 2007 to December 2007 and later show-cause notices alleging suppression on the same set of facts for the period prior to 2007 is not justified. In view of the fact that all the assemblies were made on payment of duty and disclosed in their monthly ER-1 returns and the clearances to the spares market was known to the Revenue, the question of wilful suppression cannot be alleged. The benefit of cum-duty which is already a settled issue is also to be extended to the appellant.

7. In view of the facts discussed above and in view of the decision of the Larger Bench, demands in all the Show cause notices are upheld only to the extent of normal period. Penalty imposed under Section 11AC is set aside. The matter is remanded to the original authority to recompute the duty by following the above observations.

8. In the result, the impugned order is modified on above terms and consequently, the appeals are disposed of accordingly.

(Operative portion of the Order was pronounced in Open Court on conclusion of hearing.)

(D.M. MISRA) MEMBER (JUDICIAL)

(R. BHAGYA DEVI) MEMBER (TECHNICAL)

rv

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Excise Appeal No. 21333 of 2016

[Arising out of Order-in-Original No. 22-30/2016 dated 27.05.2016 passed bythe Commissioner of Central Excise, Bangalore-II Commissionerate]

The Himalaya Drug Company

Makali, Bengaluru – 562 162 **……Appellant**

VERSUS

Commissioner of Central Tax

Bangalore North West Commissionerate2nd Floor, South Wing, BMTC Bus Stand Complex, Shivaji Nagar

Bangalore – 560 051 **……Respondent**

Appearance:

Mr. V. Raghuraman, Advocate for the AppellantMr. Rajesh Shastry (AR) for the Respondent
Coram:
Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 20065 / 2024

Date of Hearing: 25.07.2023Date of Decision: 23.01.2024

Per: Pullela Nageswara Rao

M/s. Himalayan Drugs, the appellant is engaged in the manufacture of various products falling under Chapter 23, 30, 33 & 34of first schedule to the Central Excise Tariff Act, 1985.

2. The brief facts are the appellant is clearing Ayurvedic medicineson payment of central excise duty at the applicable rates. The appellanthas cleared the product „LIV 52 Protec‟ without payment of duty classifying the product under Chapter Heading 2309 of Central Excise Tariff Act, 1985. The Department gathered intelligence that the appellant has misclassified the product „LIV 52 Protec‟ as “Animal Feed Supplement” under Central Excise Tariff Heading 230990/23099010 of Central Excise Tariff Act, 1985 and cleared the same without payment of Central Excise duty by misleading that the product does not have therapeutic value, whereas the product appears to be hepato- protective, which protects liver against ill effects of aflatoxins, anthelmintics, liver stimulant-helping in regeneration of liver cells, improves Food Conversion Ratio (FCR) and is a performance enhancer. The appellant also manufactured and cleared „LIV 52 Vet liquid‟, which isalso similar in content and usage classifying under Chapter 3004 as Ayurvedic P or P Medicine on payment of appropriate duty. The dosage of „LIV 52 Protec‟ and „LIV 52 Vet liquid‟ in poultry per 100 birds is the same as under;

Poultry	Dosage for „Liv 52 Protec‟	Dosage for „Liv 52 VetLiquid‟
Chicks	5 ml per day	5 ml per day
Growers	10 ml per day	10 ml per day
Layers/Broilers	20 ml per day	20 ml per day

2.1 The product „LIV 52 Protec‟, which is cleared without payment of duty is used for hepatic disorders and is hepato-protective like the otherproduct „LIV 52 Vet Liquid‟, which is cleared on payment of duty.

2.2 Since both „LIV 52 Protec‟ and „LIV 52 Vet Liquid‟ are used for thesame purpose, Department has investigated into the matter and recorded statement of Smt. Veena Shyam Prasad, Proprietrix of M/s. Vidhya Nutricare (Job worker). In her statement, she has stated that; the raw-materials in natural form are pulverized, sifted for separation of foreign particles and the powdered herbs are mixed in requisite proportion as per the direction of the appellant and they also undertake extraction of blended herbs with water and the decoction in concentrated form is supplied back to the appellants and that they do not carry any testing on the processed material. Further the statement of Dr. Vishwanath, Manager, Business Development was recorded and he has stated that his nature of work includes sales and marketing and technical services pertaining to animal health products, that the field staff meets the customers like veterinarians, consultants, feedmanufacturers, livestock manufacturers, and discuss about the productsand the benefits. They also meet the Veterinary doctors and apprise them of the benefits of product „LIV 52 Protec‟. Further, he stated that there is no difference in the literature distributed to veterinary doctors and other customers pertaining to „LIV 52 Protec‟ and Geriforte Vet. Further, Dr. Rangesh Paramesh, Sr. Medical Advisor of the appellant in his statement stated that „LIV 52‟ is the signature brand of the company, which was started in the year 1955 for human products,which was developed for treatment of liver disorders, subsequently the other products, which are focused on the organ-liver were prefixed with
„LIV 52‟; the ingredients in the composition of „LIV 52 Protec‟, as per theproduct‟s literature specifies that the product is used for hepatic disorders; the product‟s literature in respect of „LIV 52 Vet Liquid‟ and
„Liv 52 Protec‟ mentions similar properties, which denote activity of ingredients used in both the products, the difference between the two isthe concentration of the ingredients and the duration of the usage at which these benefits are seen.

2.3 Further, the chemical analysis report dated 26.04.2006 on the samples of the coded raw material and final product drawn from the jobworker premises, M/s Vidya Nutricare of the Indian Institute of Chemical Technology confirm the following:

i. The raw materials stated to be used in „Liv 52 Protec‟ are qualitatively present in the finished product, quantitatively it may vary.
ii. The formulation has hepato-protective properties.

iii. Indicating the exact composition is difficult after mixing as set of herbal material. The geological and ecological factors will influence the composition of the ingredients in the herb. Use of each of the ingredients in traditional medicines is also provided.
iv. When the raw material samples and products were analysed by Herboprint, it is observed that the ingredients and the product “Liv 52 Protec” have hepato-protective properties along with otherherbal therapeutic properties.

v. The powder analysis of the samples shows the presence of some cell structure.

2.4 In view of the above the therapeutic value of the product „LIV 52 Protec" has been confirmed in the analysis, therefore it appeared that the product is not Poultry/animal feed to merit classification under Chapter 23 but actually a Veterinary Medicine or Ayurvedic Medicine falling under Chapter 30.

2.5 Further, as per Section VI of the HSN, the explanatory Note in respect of Chapter Sub-heading 30.03 states, "medicaments" (excludinggoods of heading No. 30.02, 30.05 or 30.06 consisting of two or more constituents, which have been mixed together for therapeutic or prophylactic uses, not put up in a measured doses or in forms or packing for retail sale)". The explanatory notes to this heading specify that the said heading covers medicinal preparations obtained by mixing two or more substances. However, if they are put in measured doses or in forms or packings for retail sale, they fall in heading 30.04. Other things remaining the same, the classification of product in heading 30.03 or 30.04 depends on whether the product is put up in measured doses or retail packing, where the same gets classified under 30.04 andif it is other than measured doses/retail packing, then the same gets classified under 30.03. Therefore, explanatory notes to heading 30.03 issquarely applicable to heading 30.04 as well, which amongst other things states at point 5 and 6 as under:

5) Medicinal compound vegetable extracts including those obtainedby treating a mixture of plants.

6) Medicinal mixtures of plants or parts of plants of heading 12.11.

2.6 Further the explanatory notes to the heading 30.04 in the foot note excludes food supplements containing vitamins or mineral salts, which are put up for the purpose of maintaining health or wellbeing but have no indication as to use for the prevention or treatment of any disease or ailment.

2.7 In the present case, applying the Section Note VI of HSN in respect of Chapter 30.04 to the product „Liv 52 Protec", it is observed that as per brochure or literature, the dosage and mixing ratio isspecified and the said product is used in treating hepatic disorders. Accordingly, it appeared that the said product does not merit classification under Chapter Sub Heading 2302 for the period up to February 2005 and under Chapter Sub Heading 23099010, from March 2005 onwards as „Animal feed supplement" but is required to be considered as a „Medicament" under Chapter Sub Heading 300339 for the period up to February 2005 and under Chapter Sub Heading 30049011 from March 2005 onwards.

2.8 The Department also relied on the contents of the product literature labels pasted on the packages of the product „Liv 52 Protec", which *inter alia* contained the details like directions for use and benefits of Liv- 52 Protec.

3. In view of the above various literature, statements, Chapter Notes and other product ingredients and the chemical analysis report of the Indian Institute of Chemical Technology, the therapeutic property/utilityof the said product is confirmed. Therefore, the product "Liv 52 Protec" was not an "Animal Feed Supplement" to merit classification under Chapter 23 but actually a veterinary medicine of Ayurvedic base and merit classification under Chapter 30 of Central Excise Tariff Act, 1985.

3.1 Further, from the product literature it also appeared that the ingredients used in the product have therapeutic functions and are also prescribed as Ayurvedic Medicine in the formulations.

3.2 Further, the appellant has also manufactured and cleared the product "Liv 52 Vet

Liquid", classifying the same under Chapter 30 of CETA, 1985 and on payment of appropriate Central Excise duty whereason the other hand classified the product "Liv 52 Protec" under Chapter 23 of CETA, 1985. Further, comparing the above two products, the usage, ingredients of the products etc., are the same in all respects andboth the said products have therapeutic value.

3.3 Further, it was alleged that the appellant has wilfully misstatedthe facts and wilfully classified the products as „Animal feedsupplement", under Chapter Sub Heading 2302/23099010, leviable to Nil rate of duty with an intent to evade payment of duty and hence the proviso to Section 11A (extended period) is invokable.

3.4 Consequently, a show-cause was issued proposing to classify

„Liv-52 Protec" under CETH 3003 39 for the period May 2002 to February 2005 and under CETH 3004 9011 for the period March 2005 toApril 2007 of the Central Excise Tariff Act, 1985 as a Ayurvedic Medicament, demanding Central Excise duty along with interest and imposition of penalty under Section 11AC of Central Excise Act, 1944. Further for the subsequent period 8(eight) show cause notices were issued for the period May 2007 up to June, 2014. The show-cause notices were adjudicated by a common order by the learned Commissioner. The order confirmed the demand invoking the extended period in the show cause notice for the period May, 2002 to April, 2007 and confirmed demand of interest and imposed penalty under Section 11AC of the Central Excise Act, 1944 and for the subsequent periodsthe demands were confirmed with interest and penalty was imposed under Rule 25 of Central Excise Rules, 2004.

4. In the impugned common order, the Learned Commissioner has held that:-

a) It is evident that the use of the product is for prophylactic usesinasmuch as it helps prevent liver related diseases in poultry/livestock. Further, it is evident from the literature of the product that the purpose of mixing the product in animal feed is not merely to optimize the feed ingredients but more for protecting the liver from feed/water related toxins/contaminates, for countering hepatic damage by de-worming agents and tostimulate hepato pancreatic activity. Hence, the classification under Chapter heading 2309.90 is patently, incorrect.

b) The chemical analysis report furnished by the Indian Institute of Chemical Technology, Hyderabad confirmed that the formulation has Hepato-protective properties along with othertherapeutic properties. Further, the HSN explanatory notes toChapter Heading 30.03 states that "medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of two or more constituents, which have been mixed together for therapeutic or prophylactic uses, not put up in a measured doses or in forms or packing for retail sale." The explanatory notes to this heading specify that the said heading covers medicinal preparations obtained by mixing two or more substances. However, if they are put up in measured doses or in forms or packing for retail sale, they fall in heading 30.04. Therefore, the explanatory notes to chapter heading 30.03 are squarelyapplicable to heading 30.04 as well, which amongst other things states at point 5 and 6 as under:

5) Medicinal compound vegetable extracts including those obtained by treating a mixture of plants.

6) Medicinal mixtures of the plants or parts of plants of heading 12.11

Further the explanatory notes to the heading 30.04 in the foot note excludes food supplements containing vitamins or mineral salts, which are put up for the purpose of maintaining health or well being but have no indication as to use for the prevention or treatment of any disease or ailment.

c) In this case „Liv 52 Protec", apart from optimizing the utilization of animal feed ingredients, mainly protects the liver and helps counter hepatic damage thereby clearly indicating its use forprevention or treatment of liver diseases or ailments. Therefore, the product does not merit classification under CSH 2302 for the period upto February 2005 and under CSH 23099010 from March onwards but is required to be considered as medicament under CSH 300339 for the period upto February 2005 and under CSH 30049011 from March onwards.

d) The Hon"ble Apex Court in the case of Dabur India Ltd. Vs.

CCE, Jaipur reported in 2015 (321) E.L.T. 21 (SC) has agreed withthe judgment of the Tribunal for the sole reason that the Department"s own laboratory, CRCL has opined that "Livfit Vet" isnot described in authoritative books for Ayurvedic medicines andit can be considered as animal feed supplement. The Tribunal in the case of Dabur India Ltd. reported in 2005 (183) ELT 432 (Tri.-Del.) had made certain observations, which primarily tilted the decision in favour of the appellant (Dabur India Ltd.). The ground taken by the Tribunal and endorsed by the Hon"ble Supreme Court to classify Livifit Vet is that the Departments own laboratory, CRCLhas opined that the Livfit Vet is not described in authoritative books for Ayurvedic medicines and it can be considered as animal feed supplement. In the instant case, The Indian Institute ofChemical Technology, Hyderabad has categorically stated that theformulation has Hepato-protective properties along with othertherapeutic properties.

e) Further, in the case of Dabur India Ltd. the appellant had submitted number of certificates from experts in the field and users of these products that „Livfit Vet" is not a medicament and itdoes not have any therapeutic value. In the instant case, the appellant has produced letters from traders and veterinarians to substantiate that the product is poultry feed supplement. All theseletters are of a general nature and do not in any way certify, whether the impugned product is a medicament or not. Hence, the ratio of the Supreme Court decision in the case of Dabur IndiaLtd., will not apply to this case. In view of the forgoing, the product „Liv 52 Protec" is rightly classifiable under CSH 300339 forthe period upto February 2005 and under CSH 30049011 from March, 2005, onwards.

f) On the issue of suppression of facts, it is held that the classification list submitted by the appellant to the Department was approved on the basis of the clarifications given by the appellant regarding the manufacturing process and raw materials used in the „Liv 52 Protec" and that the preparation is used in the trade as preparation used in animal feeding. The appellant has failed to bring to the notice of the Department that the materials used in the preparation of „Liv 52 Protec" have therapeutic properties. It was only when the samples of the product were sentfor testing to the Indian Institute of Chemical Technology, Hyderabad, it came to light that the product has hepato protectiveproperties along with other therapeutic properties. Further, the appellant has also failed to bring to the notice of the Department that the impugned product is the same as „Liv 52 Vet Liquid", which is manufactured and cleared on payment of duty under Chapter 3004 of the CETA. Further, although audits were conducted by the AG"s audit party, there is nothing on record to evidence that the nature and use of „Liv 52 Protec" was brought tothe notice of the Department during the audit. Reliance is placed on the decision of Tribunal in the case of Agrico Engineering Works (India) Pvt. Ltd. Vs. CCE, Meerut –2000 (122) ELT 891 (Tribunal), wherein it was held that "the purpose of visit of excise officers was limited and there is nothing on record to show thatthe revenue authority

pointed out this fact to the appellant and even after the discovery of this fact, the revenue has not taken any action."

g) The charge of suppression is justifiable only for the period fromMay 2002 to April 2007. The subsequent show cause notices being periodical in nature do not attract the provisions of Section 11AC. Hence, for the subsequent SCNs, it is held that the appellant has cleared the goods without payment of duty bymisclassifying the goods thereby contravening the provisions of Rule 4, 6 and 8 of the Central Excise Rules, 2002 attracting penalty under Rule 25(1) (a) of the Central Excise Rules, 2002.

5. Assailing the impugned order, the appellant has filed this appeal before this Tribunal. The appellant has contended that the order is not a speaking order in view of the reason that the learned Commissioner has not given any findings in his order against the following contentions raised by them in reply to the show-cause notice.

a. Every month the appellants are submitting the online ER1 Returns showing the details of Animal Feed Supplements manufactured and cleared from their unit under nil rate of duty.

b. The Indian Institute of Chemical Technology, in the conclusion of the Analysis report at page 5, it is said thatthese tests are fingerprinted and interpreted. It was observed that the chemicals and therapeutic quality only was analysed as per the traditional concept. This does not purport to mean that they have conducted therapeutic efficacy studies to suggest that it is a medicament with the said activity.

c. Any goods which have the character of curing a particular ailment can be called as medicament and for manufacture thereof a drug license is definitely required.

d. The Hon"ble Supreme Court in the case of Dabur India Limited Vs. Commissioner of Central Excise –2005 (182) ELT 290 (SC) had held that scientific or technical meaning not to be resorted to. The product must be classified according to theperception of the product in popular parlance or popular meaning attached to it by those using the product.

e. In the very same decision, the Hon"ble Supreme Court hasheld that the responsibility of proper classification of theproduct is on revenue. For this purpose, the departmentshould also bring the certificate from the industry or people, who uses the product and how that product is commonly known in the industry. In the present case, the department has not brought any such evidences or certificates and hence,based on the above said decision, the department has failed to bring evidence to classify the product under Chapter 30 and hence the product should be classified under Chapter 23 of CETA.

f. Further the following statement is given in the packing:

"Herbal veterinary preparation. Not for human use. Not for medicinal use".

g. The show-cause notice has ignored the above declaration printed in the packing, in the literature, etc. The product itselfshows very clearly that the same is not for medicinal use and the same is herbal veterinary preparation. It further declares Animal Feed Supplement on the principal display panel of the label. Further, the literature does not contain a single word of therapeutic claim of the product. The product is clearly a hepatic stimulant and growth supporter.

h. As per the decision in the case of Dabur India Limited Vs. CCE-2005 (182) ELT 290 (SC) and various Circulars of the Department, the following requirements have to be fulfilled toclassify a product under medicament:

i. There must be drug license to manufacture a medicament;

ii. The ingredients should have been specified in authoritative Ayurvedic text books;

iii. Evidence of prescription from the Doctors or mode ofprescription and use should be similar to that of amedicine/drug. It may be noted that medicaments are normally prescribed in doses for a limited times and for specific conditions/ailments

iv. Perception of the product in popular parlance

v. The products claimed to be medicaments should havesubstantial therapeutic claims, which are not subsidiary in nature

i. The department has not produced any such evidence for therapeutic efficacy other than that the ingredients are specified in the Ayurvedic text books. The department has not brought any evidence from the third party to prove that the product is not animal/poultry feed supplement but the same is a medicament.

j. The appellant had submitted letters received from thetraders and veterinarians, who deal with the goods. In the said letters, it is stated that the product is poultry feed supplement. This clearly indicates that the product is to be classified under Chapter 23 and not under Chapter 30 of CETH.

k. The impugned order has considered and only states that the letters are of general nature and do not in any way certify whether the impugned product is medicament or not.

5.1. Further the appellant contended that the impugned order has been passed without any discussion on the above contentions of the appellant.

5.2 In this regard they have cited the case-laws of Hon‟ble Apex Courtin the case of M/s. Chandana Impex Pvt. Ltd. Vs. CCE, New Delhi 2001
(269) E.L.T. 433 (SC), wherein the Hon‟ble Apex Court has ruled that the Court should have examined each question formulated with reference to material considered by the Tribunal giving its reasons. Remedy of appeal would be meaningless unless litigant made aware of reasons, which weighed with court in denying him relief prayed for. In the present case as well, the impugned order has been passed without giving full reference or finding about the submission of the appellant, which has rendered the impugned order meaningless and against the principles of natural justice. In this regard, the appellant had cited catena of decisions on this issue.

6. The learned Authorised Representative (AR) for the Revenue has submitted the following averments; the certificate furnished by the Indian Institute of Chemical Technology, Hyderabad states that as per the hebro print test, Liv 52 Protec contents, possess therapeutic attributes; the appellant‟s contention that the therapeutic efficacy studyhas not been done hence the report is not complete is devoid of any merit. Moreso when the appellant themselves have not adduced any proof of efficacy study that „Liv 52 Protec‟ does not have any therapeutic and prophylactic attributes; the argument of the appellant that if „Liv 52 Protec‟ has to qualify as Ayurvedic medicament, the regulatory authority invariably would make them take the drug licence in compliance of the extant drug laws enforced by Government of Karnataka is not relevant to classification of goods; „Liv 52 Protec‟ is manufactured using herbs i) Sarapunkha (ii) Bhumyaamlaki (iii) Arjuna

(iv) Yavtika (v) Kakamachi (vi) Nimba (vii) Punarnava (viii) Bhringaraja;an expert casually certifying stating that „Liv 52 Protec‟ is a foodsupplement and also known in the market as animal food cannot be the basis to classify „Liv 52 Protec‟ as non-ayurvedic medicine; the argument that „Liv 52 Protec‟ is used only to strengthen the liver or spleen is wholly devoid of merit and also against the basic tenets of Ayurveda, which is Doshahara/Parihara branch of medicinal scienceinferring that it has therapeutic attributes; traditionally a number of plants are used to treat various types of hepatic disorders but few of them are pharmacologically evaluated for safety and efficacy; ayurveda is centuries old

traditional medicine practised even in India today; thereare certain safe medicinal plants with well established medicinal properties both in clinical practice and in modern science publications; the appellant admits Kakmachi being one ingredient of „Liv 52 Protec‟ and Guduchi being one ingredient of „Liv 52 Vet‟ and the argument that „Liv 52 Protec‟ per se has no therapeutic cum prophylactic attribute is wholly misrepresentation inasmuch as the combination of Andrographis paniculate (Kalmegha), Tinospora cordifolia (Guduchi), and Solanum nigrum (Kakmachi) was traditionally used in Indian System of Medicine (Ayurveda) for the treatment of various liver-related disorder; as regards the classification under heading 2302 the learned Authorised Representative submits that preparations containing active substances (vitamins or provitamins, amino acids, antibiotics, cocidiostats etc.)would fall under heading 2302 of the Central Excise Tariff provided suchpreparations are of a kind used in animal feeding, however it may be noted that heading 2309 of HSN excludes products of Chapter 29 and medicaments of heading 3003 or 3004. Hence while deciding the classification of products claimed to be animal supplements, it may be necessary to ensure that the said animal feed supplements or ordinarily or commonly known in the trade as products for a specific use in animalfeeding; further a study of the instruction on the packages claimed that

„Liv 52 Protec‟ protects damage against liver. The appellant has relied on the case of Dabur India reported in 2005 (183) ELT 432 (Tri.-Del.) wherein it is held that “now coming to the test report or opinion broughton record by both the sides we observe that CRCL has opined that „LivfitVet‟ is not described in authoritative books of Ayurveda medicine, CBECvide Circular 25/1991 dated 03.10.1991 inter alia has stated that a preparation would merit classification as a Ayurvedic medicine, if in the common parlance it is known as an Ayurvedic medicine and all its ingredients are mentioned in the books of Ayurvedic medicines. It has also been observed that the aforesaid two tests have been upheld by the Hon‟ble Supreme Court in the case of M/s. Richardson Hindustan; hence any preparations containing herbs and shrubs, the main ingredients of Ayurveda to qualify as Ayurvedic medicaments, theyshould be mentioned in the authoritative books of Ayurvedic medicines, the appellant has admitted that „Liv 52 Protec‟ has presence of eight ingredients all of which undisputedly have a mention in the authoritative books of Ayurvedic medicine. Hence, the first test to qualify as Ayurvedic medicine is fulfilled. The appellant on his own volition has accepted that there are five herbs (i) Bhumyaamlaki- Treatment of liver diseases (ii) Arjuna-Emaciation & Chronic Thrombosis); (3) Kakamachi
– Treatment of Skin Diseases (iv) Punarnava – Treatment of Diuretic

(5) Bhringaraja – Treatment of intestinal worm, all undisputedly presentin the formulation prepared/manufactured by the appellant-company and sold in the market under the brand name „Liv 52 Vet‟, which is admittedly classified under CSH 3004 as Ayurvedic P or P medicines andcleared on payment of appropriate duty; the comparison of the formulation of „Liv 52 Protec‟ and „Liv 52 Vet‟ show that they are havingtherapeutic cum prophylactic property and would merit classification as Ayurvedic medicine/medicament. This is supported by the statement of Dr. Ramesh Paramesh, Senior Medical Advisor R&D Himalayan Drug; admittedly „Liv 52 Vet‟ being a polyherbal formulation of eighteen herbsis accepted as a veterinary medicaments and out of this eight herbs have a presence in „Liv 52 Protec‟ proves the point beyond doubt that the impugned product manufactured by the appellant has therapeutic or prophylactic attributes; the appellant has quoted the self-procured certification/opinion about functional usage of „Liv 52 Protec‟ from veterinary science teaching personnel/traders dealing with the impugned items stating that the item in the common parlance is known as animal feed supplement. However, there are differing use as couldbe seen in the YouTube channel, wherein it is shown in the titled program „Veterinary Medicine Review‟, that „Liv 52 Protec‟ is a Ayurvedicmedicine. The learned Authorised Representative (AR) contends thatthe YouTube broadcast about „Liv 52 Protec‟ has a

larger audience and public reach and hence that should be taken for the purpose of common parlance test. Consequently, in the common parlance test the product Liv 52 Protec qualifies as an Ayurvedic medicine.

7. Heard both sides and perused the records, carefully.

8. The issue to be decided in this case is whether the polyherbal preparation "Liv 52 Protec" manufactured by the appellant is classifiableunder CETH 2302/230990/23099010 as „Animal Feed Supplement" as classified by the appellant or under CETH 300339/30049011 as
„Ayurvedic Medicaments" as adjudged by the revenue.

9. We find that Tariff item Heading 23099010 under Chapter Heading 2309, "Preparation of a kind used in animal feeding", under others reads as „Compounded animal feed". The Tariff Heading 30049011 under Chapter Heading 3004, "Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses put up in measure doses (including those in the form of transdermal administration systems) orin forms or packages for retail sale", under others, "Ayurvedic, Unani, Siddha, Homeopathic or Biochemic systems medicaments, put up for retail sale" reads as "of Ayurvedic systems".

10. In this regard it is pertinent to examine the followingterminology/ definitions;

a. Medicaments- A medication (also called medicament, medicine,pharmaceutical drug, medicinal drug or simply drug) is a drug used to diagnose, cure, treat, or prevent disease. Drug therapy (Pharmacotherapy) is an important part of the medical field and relies on the science of pharmacology for continual advancement and on pharmacy for appropriate management. Drugs are classified in many ways. One of the key divisions is by levelof control, which distinguishes prescription drugs (those that apharmacist dispenses only on the order of a physician, from over-the-counter drugs those that consumers can order for themselves). Another key distinction is between traditional small molecule drugs, usually derived from chemical synthesis, and biopharmaceuticals, which include recombinant proteins, vaccines, blood products used therapeutically, gene therapy, monoclonal antibodies and cell therapy (for instance, stem cell therapies). Other ways to classify medicines are by mode ofaction, route of administration, biological system affected,or therapeutic effects.

b. Therapeutic - **Therapeutic effect** refers to the response(s) after a treatment of any kind, the results of which are judged tobe useful or favorable. This is true whether the result was expected, unexpected, or even an unintended consequence. An adverse effect (including nocebo) is the converse and refers to harmful or undesired response(s). What constitutes a therapeutic effect versus a side effect is a matter of both the nature of the situation and the goals of treatment. No inherent difference separates therapeutic and undesired side effects; both responses are behavioral/physiologic changes that occur as a response to the treatment strategy or agent.

c. Prophylactic- **Prophylaxis** is a Greek word and concept. It means any action taken to guard or prevent beforehand. The corresponding adjective is **prophylactic**. The concept of prophylaxis has two parts. First is forethought. A person has to realise the need first of all. Second is taking appropriate action. Any failure of prophylaxis is a failure at either stage 1 or stage 2. Successful prophylaxis means one has anticipated and avoidedsome undesirable outcome. Prophylaxis is the central ideain preventative medicine. People usually think medical treatment helps sick people to get healthy. Prophylactic treatmentis helpful in a different way. *Primary prophylaxis* tries to stophealthy people from getting sick. *Secondary prophylaxis* tries to stop people, who are sick from getting worse.

11. A drug is any chemical substance that when consumed causes a change in an

organism's physiology. Drugs are typically distinguished from food and other substances that provide nutritional support.In pharmacology, a drug is a chemical substance, typically of known structure, which, when administered to a living organism, produces a biological effect. A pharmaceutical drug, also called a medication or medicine, is a chemical substance used to treat, cure, prevent or diagnose a disease or to promote well-being. Traditionally drugs wereobtained through extraction from medicinal plants, but more recently also by organic synthesis. Pharmaceutical drugs may be used for alimited duration, or on a regular basis for chronic disorders.A *medication* or *medicine* is a drug taken to cure or ameliorate any symptoms of an illness or medical condition. The use may also beas preventive medicine that has future benefits but does not treat any existing or pre-existing diseases or symptoms.

12. The appellant submits that their product „Liv52 Protec" is not a medicament but an animal feed supplement and it does not havetherapeutic or prophylactic properties. A food supplement gives nutrition in the form of carbohydrates, proteins, vitamins, minerals, Trace minerals etc. The major herbs in „Liv 52 Protec" are Andrographispaniculata (Yavtika) enhances the body"s resistance against common infections by stimulating the production of antibodies. It also acts as a hepato-protective that helps prevent liver damage. Phyllanthus amarus (Bhumyaamalaki) is a rich antioxidant, which is effective in the treatment of infective hepatitis. It contains wedelolactone and dimethyl wedelolactone and stimulates the secretion of digestive enzymes. It eliminates toxins and aids in the regeneration of hepatopancreas. The herbal ingredients in the impugned product also have similar hepato- protective properties. We find that „Liv 52 Protec" liquid stabilizes the hepatic cell membrane and promotes regeneration of the liver and also protects the liver from toxins, drugs and chemicals. Liv 52 Protec, is anappetite stimulant that increases and restores appetite in animal.

13. We find that as per the product literature the Key Benefits of „Liv 52 Protec" are;

- An appetite stimulant that increases and restores appetite inanimals.
- Stabilizes the hepatic cell membrane and promotes repair andregeneration of the liver.
- Protects the liver from toxins, drugs and chemicals.
- Enhances the secretory activity of the liver, which facilitates theoverall metabolism of the body.
- Improves the functional efficiency of the liver and pancreas whichleads to better utilization of feed.

And the directions for Use:

- Camels, cattle, buffalo and horses:50ml twice daily
- Calves, pigs and foals:20-25ml twice daily

14. We find that the impugned product „Liv 52 Protec" is manufacturedusing herbs i) Sarapunkha (ii) Bhumyaamlaki (iii) Arjuna (iv) Yavtika

(v) Kakamachi (vi) Nimba (vii) Punarnava (viii) Bhringaraja and these ingredients have both Therapeutic as well as Prophylactic attributes and „Liv 52 Protec" is administered to live stock to benefit from these attributes.

15. We find that the Appellant also manufacturers, „Liv 52 Vet liquid" for cats and dogs, which is marketed as a drug under Chapter 30 of Central Excise Tariff Act, 1985. We find that the composition of „Liv 52 Vet liquid" and „Liv 52 Protec" or similar, except for certain herbs, whichare not common to both the products. However, this does not take away the basic purpose of the impugned product „Liv 52 Protec", which is a poly herbal preparation and a hepato-protective preparation. A food supplement is something, which provides nutrition to living being, animals, birds, aqua etc. It is in the form of carbohydrates, proteins, vitamins, amino acids, minerals, trace minerals, etc. Food supplementsare administered in the cases of malnutrition or under nourishment, the impugned product, „Liv 52 Protec" is not administered for that purpose. The impugned goods are liquid preparations using Poly herbals. The herbs used in „Liv 52 Protec" are not chosen for nutritive value nor theyare proteins or carbohydrates or amino acids or vitamins or minerals or trace minerals. Though, any plant material would have some elementsof the above, they are not chosen for these properties but for the medicinal properties, which reduces the morbidity in animals, birds, aqua, etc. Therefore, the goods which are cleared by the appellant namely „Liv 52 Protec" are in the category of medicaments/drugs classifiable under Chapter 30 of Central Excise Tariff Act, 1985.

16. The appellant has contended that for an item to be classifiedunder Chapter 30, it is required to have a Drug licence from the competent authority. We find that as regards the classification under Central Excise Tariff Act, 1985 the item, has to be classified only as per its functionality/properties under the appropriate Chapter Heading/sub heading/Tariff item. The requirement of any licence or otherwise would come subsequently and it has no bearing on the classification under the Central Excise Tariff Act, 1985.

17. In this case, the appellant is manufacturing a similar product „Liv 52 Vet" and classifying the same under Chapter Heading 30 as an „Ayurvedic medicament" and paying the appropriate duty. However, „Liv52 Protec" is branded and marketed as animal feed supplement. Animalfeed supplements are mixtures that are added either to animal feed or fed directly to animals to provide extra nutrients such as vitamins and minerals. The impugned product „Liv 52 Protec" does not have vitamins or minerals, which would supplement the animal feed. Further we find that the tariff heading item 2309 9010 reads as „Compounded animal feed" and not as „animal feed supplement." Hence, we find that the classification of the impugned product as animal feed supplement is not proper under chapter heading 23 and it should be classified under Chapter 30.

18. In view of the above discussion, we are of the opinion that the product „Liv 52 Protec" is rightly classifiable under Chapter Sub-heading300339 for the period upto February 2005 and under Chapter sub- heading 30049011 from March 2005 onwards. The appellant relied on the case of Dabur India Ltd. CCE, Jaipur reported in 2015 (321) E.L.T. 21 (SC). The learned Commissioner has distinguished the case in viewof the chemical analysis report of the Indian Institute of Chemical Technology, Hyderabad, and the mention of the ingredients in the impugned product in the authoritative books of Ayurvedic Medicine, which we find is proper. Further the impugned goods are being marketed as Ayurvedic medicine in some of the media channels, hence the common parlance test is also satisfied. Further, we find that „Liv 52 Protec Liquid" in bulk is exported under the Chapter Heading 30039011.

19. As regards the invocation of the extended period, we find that theappellant has been submitting ER-1 showing the details of the goods manufactured and cleared by them. The details of goods cleared *inter alia* include „Liv52 Protec" as well as „Liv 52 Vet Liquid". Further theDepartment has also conducted an audit for the period under dispute and no audit point was raised to indicate that there is suppression of facts and the Department is fully aware of the facts and issues and the goods were cleared in accordance with the approved classification list. Therefore, we find that the invocation

of extended period for confirmation of demand of duty for the period May 2002 to April, 2007is not legally sustainable.

20. Since the correct classification of the product „Liv 52 Protec‟ is under Chapter 30, the confirmation of the demand for the normalperiod in the impugned order covering the period May 2002 to April 2007 is upheld along with interest and the confirmation of demand for the subsequent periods from May 2007 to June 2014 along with interestis also upheld.

21. In the facts and circumstances of the case and as the issue involved is classification, the penalties imposed under Section 11AC andRule 25 of Central Excise Rules, 2002 are not legally sustainable, hence they are dropped.

22. The appeal is accordingly disposed as per the above terms with consequential relief, if any, as per law.

(Order pronounced in Open Court on 23.01.2024)

(D.M. Misra)Member (Judicial)

(P. Nageswara Rao)Member (Technical)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 1965 of 2011

(Arising out of Order-in-Appeal No.344/2011 dated 6.5.2011 passed by the Commissioner of Central Excise (Appeals-II), Bangalore.)

M/s. Minerva Mills
Post Box No.2310, Magadi Road,
Bangalore – 560 023. Appellant(s)

Versus

Commissioner of CentralExcise
Bangalore-III CommissionerateQueens Road,
Bangalore. Respondent(s)

Appearance:

Shri Raghavendra B. Hanjer,Advocate — For the Appellant

Shri H. Jayathirtha, Authorised Representative — For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

FINAL Order No. 20066 /2024

Date of Hearing: 08.01.2024
Date of Decision: 08.01.2024

Per : R. BHAGYA DEVI

The appellant M/s. Minerva Mills, a unit of M/s. National Textile Corporation (NTC) manufactures textiles fabric, terry towels, etc. the appellant undertakes processing of their own cloth and also receives grey fabrics from other units of NTC for processing like bleaching/dyeing and mercerizing on job work basis. For the goods received on job work basis from Karnataka Handloom Development Corporation (KHDC) a state governmentundertaking the appellant adopted selling price declared by KHDC while returning the processing cloth to KHDC. However,the Department observed that the value adopted by the appellant was incorrect and therefore, it needs to be re- determined by including the landed cost of the raw materials, processing charges, and all other relevant charges as per Section
4 of the Central Excise Act, 1944. Accordingly, the OriginalAuthority adopting the principle specified by the Hon'ble Supreme Court in the case of **Ujagar Prints: 1989 (39) ELT 493 (SC)**, the assessable value was re-determined taking into consideration the landed cost of the raw materials and all other processing charges including the profit of the processors, which was upheld by the Commissioner (Appeals). The appellant

accepting the re-determining of the assessable value contested only on the issue of time bar before the Commissioner (A). The Commissioner (A) in the impugned order held that since the appellant had not followed the cost construction method though they were aware of the fact that the landed cost including the processing charges had to be taken into account for discharging their duty liability they had willfully mis-declared the cost. It is also stated by the Commissioner (A) in the impugned order that this fact came to the notice of the department only when the audit party had verified the records of the appellant and since allthe facts were known to the department, only on the visit of the audit party it is a clear case of suppression and accordingly he justified the allegation of mis-declaration and suppression. The appellant is in appeal before us only on the question of timelimit.

2. During the hearing, it was submitted by the learned counsel for the appellant that when the appellant received the grey fabrics and after processing, the grey fabrics were returned to KHDC, KHDC declared the selling price of the processed fabric and therefore, they declared the same selling price and paid excise duty based on the selling price declared by the KHDC. The clearances were made by filing statutory price declaration from time to time to the Central Excise Department till the time audit visited them in 2002, no objections were raised on these declarations. It is also submitted that the processed fabrics was not meant for sale in open market but for free distribution to the downtrodden school children and the entire cost was borne by the State Government. The appellant under a *bona fide* belief that the price declared by the KHDC included the real cost of the grey fabric and the processing charges paid duty on that selling price. It is only on issuance of CBEC circular No.619/10/2002-CX dated 19.2.2002 and No. 643/34/2002-CX dated 1.7.2002 the department object to the valuation adopted by the appellant. Accordingly, show-cause notice dated 1.8.2003 was issued for the differential duty amount of Rs.27,01,925/- for the period July1998 to September 2002 along with interest and penalty. The demand was confirmed by the Commissioner (A) vide Order-in- Appeal No.66/2004 dated 30.06.2004 and an appeal was filed against this order. The Hon'ble Tribunal vide Final Order No.948/2009 dated 13.07.2009 allowed the appeal by way of remand to the Commissioner (A) for reconsideration of the issue afresh. On remand, the present impugned order is passed by theCommissioner (A) confirming the demands by upholding the mis-declaration and suppression. It is further submitted by the appellant when this issue was taken up KHDC vide their letter dated 22.6.2002 it was clarified that the cost of grey fabric indicated in the delivery note was based on standard procurement rates and it is the correct value of the grey fabrics. Further, KHDC vide letter 31.10.2002 furnished the landed cost duly certified by the Chartered Accountant and the appellant alsofurnished the actual job charges collected from KHDC during the said period. The appellant further submits that as per the landingcost and processing charges, and after taking into account the deemed credit available to them the excise duty payable bythem is Rs.7,13,398/- and therefore, they are eligible for refund of Rs.37,66,124/-. On limitation, it is claimed that they have been filing statutory price declaration along with RT-12 returns clearly indicating the selling price of the processed fabrics as declared by KHDC. Since the show-cause notice and the orders admit that the demands are based on the price declaration filed by the appellant, there cannot be any suppression of facts on thepart of the appellant with an intent to evade payment of duty. It is further claimed that periodical show-cause notices for denying the deemed credit availed on the fabrics received for job work for the period August 1999 to March 2003 were issued. Hence, itis claimed that entire demand is time barred.

3. The learned Authorised Representative for the departmentreiterated the findings of the lower authorities.

4. In the Final Order No. 948/2009 dated 13.07.2009, theTribunal observed as follows:

"Without expressing any opinion on the merits of the case, we remand the matter

to the learned Commissioner (A) for reconsideration of the issue afresh."

Accordingly, the Commissioner (A) in the impugned order upheldthe demand of duty on merits and on limitation. As per the Supreme Court's decision in the case of **Ujagar Prints** (supra) and based on CBEC circular No.619/10/2002-CX dated 19.2.2002 and No. 643/34/2002-CX dated 1.7.2002, it is a settled issue that the job worker has to discharge duty based on the landed cost and the processing charges and therefore, on merits the demand is upheld. From the records placed before us,it is seen that the selling price of KHDC at times it is higher than the landed cost and the duty has been discharged on this higher value which has not been disputed by the department, however, the differential duty has been demanded in all those cases wherethe landed cost is higher than the selling price declared byKHDC. It is also on record that the appellants have been filing allthese documents before the department in terms of monthly RT-12 Returns and price declarations, therefore, it cannot be alleged that the appellant had mis-declared or suppressed the facts in as much as they had cleared the processed goods on payment of duty at the selling price declared by KHDC and it is also on record that the selling price declared by KHDC is more than the landed cost plus processing charges in some of the cases. Therefore, the fact that the material facts weresuppressed or the value was mis-declared is not justified. In the case of **Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur** dated on 22-1-2013 **2013 (288) E.L.T. 161 (S.C.)** the Supreme Court while dealing with the proviso to Section 11A on limitation observed that:

"A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact itis the mildest expression used in the proviso. Yet the surroundingsin which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

"It is settled law that for invoking the extended period of limitation duty should not have been paid, short levied or short paid or erroneously refunded because of either fraud, collusion, wilful misstatement, suppression of facts or contravention of any provisionor rules. This Court has held that these ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or willful misstatement or suppression of fact or contravention of anyprovision is not sufficient to attract the extended period of limitation."

This Court while interpreting Section 11-A of the Central Excise Act in Collector of Central Excise v. H.M.M. Ltd. (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement of suppression of fact with intent to evade the payment of duty. It has been observed :

'...Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been

practiced or that the assessee was guilty of wilful misstatement or suppression of

fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.'

5. In the present case, since the facts were known to the department and there is no evidence placed on record for wilful evasion of duty with intent to evade, the question of invoking proviso to Section 11A does not arise. The impugned order is allowed to the extent of confirmation of duty only for the normal period. The appeal is allowed partially.

(Operative portion of the Order was pronounced in Open Court.)

(D.M. MISRA)MEMBER (JUDICIAL)

(R. BHAGYA DEVI)MEMBER (TECHNICAL)

rv

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHANDIGARH
REGIONAL BENCH – COURT NO. 1
Excise Appeal No. 58315 Of 2013

[Arising out of OIA No. 292-293/CE/Appl/Chd-II(J&K)/2013 dated 03.06.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

M/s Ind Swift Labs Ltd : Appellant (s)
Industrial Growth Centre, Sambha (J&K)

Vs

Commissioner of Central
Excise, Chandigarh-II : Respondent (s)

Plot No. 19, C.R. Building, Sector-17-C Chandigarh-160017

With

2. **Excise Appeal No. 58316 of 2013 [M/s Ind Swift Labs Ltd]** [Arising out of OIA No. 150-167/CE/Appl/Chd-II(J&K)/2013 dated 26.03.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

3. **Excise Appeal No. 58317 of 2013 [M/s Ind Swift Labs Ltd]** [Arising out of OIA No. 150-167/CE/Appl/Chd-II(J&K)/2013 dated 26.03.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

4. **Excise Appeal No. 58318 of 2013 [M/s Ind Swift Labs Ltd]** [Arising out of OIA No. 150-167/CE/Appl/Chd-II(J&K)/2013 dated 26.03.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

5. **Excise Appeal No. 58319 of 2013 [M/s Ind Swift Labs Ltd]** [Arising out of OIA No. 150-167/CE/Appl/Chd-II(J&K)/2013 dated 26.03.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

6. **Excise Appeal No. 58320 of 2013 [M/s Ind Swift Labs Ltd]** [Arising out of OIA No. 150-167/CE/Appl/Chd-II(J&K)/2013 dated 26.03.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

7. **Excise Appeal No. 58322 of 2013 [M/s Ind Swift Labs Ltd]** [Arising out of OIA No. 150-167/CE/Appl/Chd-II(J&K)/2013 dated 26.03.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

8. **Excise Appeal No. 58323 of 2013 [M/s Ind Swift Labs Ltd]** [Arising out of OIA No. 150-167/CE/Appl/Chd-II(J&K)/2013 dated 26.03.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

9. **Excise Appeal No. 58324 of 2013 [M/s Ind Swift Labs Ltd]** [Arising out of OIA No. 150-167/CE/Appl/Chd-II(J&K)/2013 dated 26.03.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

10. **Excise Appeal No. 60726 of 2013 [Shree Balaji Alloys]** [Arising out of OIA No. JNK-EXCUS-OOO-APP-122-125/13-14 dated 30.072013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

11. **Excise Appeal No. 60727 of 2013 [Shree Balaji Alloys]** [Arising out of OIA No. JNK-EXCUS-OOO-APP-122-125/13-14 dated 30.072013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

12. Excise Appeal No. 51789 of 2015 [Howco Petrofer LIP vs. CCE & ST-Jammu & Kashmir]
[Arising out of OIA No. JNK-EXCUS-000-APP-943-948-14-15 dated 19.02.2015 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

13. Excise Appeal No. 51790 of 2015 [Howco Petrofer LIP vs. CCE & ST-Jammu & Kashmir]
[Arising out of OIA No. JNK-EXCUS-000-APP-943-948-14-15 dated 19.02.2015 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

14. Excise Appeal No. 51791 of 2015 [Howco Petrofer LIP vs. CCE & ST-Jammu & Kashmir]
[Arising out of OIA No. JNK-EXCUS-000-APP-943-948-14-15 dated 19.02.2015 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

15. Excise Appeal No. 51792 of 2015 [Howco Petrofer LIP vs. CCE & ST-Jammu & Kashmir]
[Arising out of OIA No. JNK-EXCUS-000-APP-943-948-14-15 dated 19.02.2015 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

16. Excise Appeal No. 51793 of 2015 [Howco Petrofer LIP vs. CCE & ST-Jammu & Kashmir]
[Arising out of OIA No. JNK-EXCUS-000-APP-943-948-14-15 dated 19.02.2015 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

17. Excise Appeal No. 51794 of 2015 [Howco Petrofer LIP vs. CCE & ST-Jammu & Kashmir]
[Arising out of OIA No. JNK-EXCUS-000-APP-943-948-14-15 dated 19.02.2015 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

18. Excise Appeal No. 60069 of 2018 [J & K Pigments Ltd. vs. CCE & ST-Jammu & Kashmir]
[Arising out of OIA No. JNK-EXCUS-000-APP-24-17-18 dated 28.09.2017

passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

19. Excise Appeal No. 60410 of 2018 [PBI Metals Private Limited vs. CCE & ST- Jammu & Kashmir]
[Arising out of OIA No. JNK-EXCUS-000-APP-203-213-13-14 dated 06.09.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

20. Excise Appeal No. 60411 of 2018 [PBI Metals Private Limited vs. CCE & ST- Jammu & Kashmir]
[Arising out of OIA No. JNK-EXCUS-000-APP-203-213-13-14 dated 06.09.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

21. Excise Appeal No. 60412 of 2018 [PBI Metals Private Limited vs. CCE & ST- Jammu & Kashmir]

[Arising out of OIA No. JNK-EXCUS-000-APP-203-213-13-14 dated 06.09.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

22. Excise Appeal No. 60413 of 2018 [PBI Metals Private Limited vs. CCE & ST- Jammu & Kashmir]

[Arising out of OIA No. JNK-EXCUS-000-APP-203-213-13-14 dated 06.09.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

23. Excise Appeal No. 60414 of 2018 [PBI Metals Private Limited vs. CCE & ST- Jammu & Kashmir]

[Arising out of OIA No. JNK-EXCUS-000-APP-203-213-13-14 dated 06.09.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

24. Excise Appeal No. 60415 of 2018 [PBI Metals Private Limited vs. CCE & ST- Jammu & Kashmir]

[Arising out of OIA No. JNK-EXCUS-000-APP-203-213-13-14 dated 06.09.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

25. Excise Appeal No. 60416 of 2018 [PBI Metals Private Limited vs. CCE & ST- Jammu & Kashmir]

[Arising out of OIA No. JNK-EXCUS-000-APP-203-213-13-14 dated 06.09.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

26. Excise Appeal No. 60417 of 2018 [PBI Metals Private Limited vs. CCE & ST- Jammu & Kashmir]

[Arising out of OIA No. JNK-EXCUS-000-APP-203-213-13-14 dated 06.09.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

27. Excise Appeal No. 60418 of 2018 [PBI Metals Private Limited vs. CCE & ST- Jammu & Kashmir]

[Arising out of OIA No. JNK-EXCUS-000-APP-203-213-13-14 dated 06.09.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

28. Excise Appeal No. 60419 of 2018 [PBI Metals Private Limited vs. CCE & ST- Jammu & Kashmir]

[Arising out of OIA No. JNK-EXCUS-000-APP-203-213-13-14 dated 06.09.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

29. Excise Appeal No. 60420 of 2018 [PBI Metals Private Limited vs. CCE & ST- Jammu & Kashmir]

[Arising out of OIA No. JNK-EXCUS-000-APP-203-213-13-14 dated 06.09.2013 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

APPEARANCE:

Shri Veer Singh, Shri Naveen Bindal, Shri Vikrant Kackaria, Shri Rajat Mittal
Advocates for the Appellant

Shri Rajeev Gupta, Shri Siddharth Jaiswal, Shri Nikhil Kumar Singh, Shri Aneesh Dewan, Shri Harish Kapoor, Shri Narinder Singh, Shri Shivam Syal, DRs for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL) HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No. A/60412-60440/2023

Date of Hearing:19.09.2023 Date of Decision:19.09.2023

Per : S. S. GARG

The above mentioned 29 Appeals filed by the different appellants are taken up together for discussion and decision. The only issue involved in all these appeals is "whether the refund of education cess and secondary and higher education cess" which was paid along with excise duty in terms of Notification No. 56/2002-CE dated 14.11.2002 as amended is admissible or not.

2. Heard both the parties and perused the records.

3. In all these cases cited above, the refund claim was rejected by the Adjudicating Authority and the order of the Adjudicating Authority has been upheld by the Ld. Commissioner (Appeals). Aggrieved by the order of the Ld. Commissioner (Appeals), these appellants have filed these appeals against the impugned orders.

2. The appellants are registered in the state of Jammu & Kashmir and were availing benefit of area based exemption under Notification No. 56/2002-CE dated 14.11.2002. The said notification provides mechanism to give effect to aforesaid exemption by way of refund of duty paid through PLA. As per the procedure, the manufacturer avails Cenvat Credit of duty/cess paid by them on inputs and utilises whole of the CENVAT credit available with them on last day of the month for payment of Central Excise duty and Cess. The balance amount of duty is paid in cash and on application of refund, the refund is granted for payment of Central Excise made in cash only. The refund is granted by way of cash or by way of self credit in PLA. The above said issue is no more res-integra and stands finally decided by the decision of the Hon'ble Supreme Court in the case of M/s Unicorn Industries vs. Union of India reported as 2019 (370) ELT 3 (S.C) wherein the Hon'ble Apex Court, after considering the provisions of Notification No. 71/2003-CE dated 09.09.2003 has held that a notification has to be issued for providing exemption under the said source of power and that in the absence of notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted.

3. Further, we note that the provisions of Notification No. 56/2002- CE dated 14.11.2002 are ***pari-materia*** to the provisions of Notification No. 71/2003-CE dated 09.09.2003. It is pertinent to reproduce the relevant findings of the case of M/s Unicorn Industries cited (supra) which are reproduced herein below:-

"39. Rule 8 of Central Excise Rules, 1944, authorises the Central Government to grant an exemption to any excisable goods from the whole or any part of duty leviable on such goods. Rule 8 is extracted hereunder :

"8. Power to authorise an exemption from duty in special cases. - (1) The Central Government may from time to time, by notification in the official Gazette, exempt (subject to such conditions as may be specified in the notification) any excisable goods from the whole or any part of duty leviable on such goods.

(2) The Central Board of Excise and Customs may by special order in each case exempt from the payment of duty, under circumstances of an exceptional nature, any excisable goods."

The word 'duty' is defined under Rule 2(v) to mean the duty as levied under the Act.

4. Notification dated 9-9-2003 issued in the present case makes it clear that exemption was granted under Section 5A of the Act of 1944, concerning additional duties under the Act of 1957 and additional duties of excise under the Act of 1978. It was questioned on the ground that it provided for limited exemption only under the Acts referred to therein. There is no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have included other duties also. The notification could not have contemplated the inclusion of education cess and secondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the duty of excise. The duty on NCCD, education cess and secondary and higher education cess are in the nature of additional excise duty and it would not mean that exemption notification dated 9-9-2003 covers them particularly when there is no reference to the notification issued under the Finance Act, 2001. There was no question of granting exemption related to cess was not in vogue at the relevant time imposed later on vide Section 91 of the Act of 2004 and Section 126 of the Act of 2007. The provisions of Act of 1944 and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the source of power to exempt the NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. The High Court was right in relying upon the decision of three-Judge Bench of this Court in *Modi Rubber Limited* (supra), which has been followed by another three-Judge Bench of this Court in *Rita Textiles Private Limited* (supra).

5. The Circular of 2004 issued based on the interpretation of the provisions made by one of the Customs Officers, is of no avail as such Circular has no force of law and cannot be said to be binding on the Court. Similarly, the Circular issued by Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has no force of law and cannot be said to be binding concerning the interpretation of the provisions by the Courts. The reason employed in *SRD Nutrients Private Limited* (supra) that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, education cess, secondary and higher education cess. Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted.

6. The decision of Larger Bench is binding on the Smaller Bench has been held by this Court in several decisions such as *Mahanagar Railway Vendors' Union* v. *Union of India & Ors.*, (1994) Suppl. 1 SCC 609, *State of Maharashtra & Ors.* v. *Mana Adim Jamat Mandal,* AIR 2006 SC 3446 and *State of Uttar Pradesh & Ors.* v. *Ajay Kumar Sharma & Ors.*, (2016) 15 SCC
289. The decision rendered in ignorance of a binding precedent and/or ignorance of a provision has been held to be *per incuriam* in *Subhash Chandra & Ors.* v. *Delhi Subordinate Services Selection Board & Ors.*, (2009) 15 SCC 458, *Dashrath Rupsingh Rathod* v. *State of Maharashtra,* (2014) 9 SCC 129, and *Central Board of Dawoodi Bohra Community & Ors.* v. *State of Maharashtra & Ors.,* (2005) 2 SCC 673 = 2010 (254) E.L.T. 196 (S.C.). It was

held that a smaller bench could not disagree with the view taken by a Larger Bench.

7. Thus, it is clear that before the Division Bench deciding *SRD Nutrients Private Limited* and *Bajaj Auto Limited* (supra), the previous binding decisions of three-Judge Bench in *Modi Rubber* (supra) and *Rita Textiles Private Limited* (supra) were not placed for

consideration. Thus, the decisions in *SRD Nutrients Private Limited* and *Bajaj Auto Limited* (supra) are clearly *per incuriam*. The decisions in *Modi Rubber* (supra) and *Rita Textiles Private Limited* (supra) are binding on us being of Coordinate Bench, and we respectfully follow them. We did not find any ground to take a different view.

8. Resultantly, we have no hesitation in dismissing the appeals. The judgment and order of the High Court are upheld, and the appeals are dismissed. No costs."

3. By following the ratio of the decision in the case of M/s Unicorn Industries cited (supra), we are of the considered opinion that there is no infirmity in the impugned order vide which the refund of the education cess and higher secondary education cess has been denied. We uphold the impugned orders by dismissing all the appeals of the appellants.

(Operative part of the order pronounced in the open Court)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

G.Y.

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALCHANDIGARH
REGIONAL BENCH – COURT NO. 1
Excise Appeal No. 52972 Of 2015

[Arising out of OIA No. JNK-EXCUS-000-APP-06 TO 17/15/16 dated 20.04.2015

passed by the Commissioner (Appeals) of Central Excise-II, Chandigarh]

M/s Jammu Pigments Limited : Appellant (s)
Logate More, Kathua, Jammu & Kashmir

Vs

CCE & ST- Chandigarh-I : Respondent (s)
C.R. Building, Sector 17-C, Chandigarh

APPEARANCE:

Shri Umang Goyal, Advocate for the Appellant

Shri Aneesh Dewan, Authorised Representative for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL) HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

ORDER No. 60001/2024

Date of Hearing:03.01.2024Date of Decision:03.01.2024

Per : S. S. GARG

The present appeal is directed against the impugned order dated20.04.2015 whereby the Commissioner (Appeals) has rejected the refund claim of the appellant.

2. Heard both the parties and perused the records.

3. The only issue involved in this appeal is "whether the refund of education cess and secondary and higher education cess" which was paid along with excise duty in terms of Notification No. 56/2002-CE dated 14.11.2002 as amended is admissible or not.

This issue has been considered by this Tribunal in bunch of appeals and this Tribunal in the case of M/s Ind Swift Labs Ltd. vs. Commissioner of Central Excise, Chandigarh-II vide Final Order No. A/60412-60440/2023 dated 19.09.2023 has rejected the appeal of theappellant by relying upon the decision of the Hon'ble Apex Court in thecase of M/s Unicorn Industries vs. Union of India reported as 2019

(370) ELT 3 (SC). It is pertinent to reproduce the relevant findings recorded by this Tribunal in the case of M/s Ind Swift Labs Ltd cited (supra) as under:-

"2. The appellants are registered in the state of Jammu & Kashmir and were availing benefit of area based exemption under Notification No. 56/2002-CE dated 14.11.2002. The said notification provides mechanism to give effect to aforesaid exemption by way of refund of duty paid through PLA. As per the procedure, the manufacturer avails Cenvat Credit of duty/cess paid by them on inputs and utilises whole of the CENVAT credit available with them on last day of the month for payment of Central Excise duty and Cess. The balance amount of duty is paid in cash and onapplication of refund, the refund is granted for payment of Central Excise made in cash only. The refund is granted by way of cash or by way of self credit in PLA. The above said issue is no more res-integra and standsfinally decided by the decision of the Hon'ble Supreme Court in the case of M/s Unicorn Industries vs. Union of India reported as 2019 (370) ELT 3 (S.C) wherein the Hon'ble Apex Court, after considering the provisions of Notification No. 71/2003-CE dated 09.09.2003 has held that a notification has to be issued for providing exemption under the said source of power and that in the absence of notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted.

3. Further, we note that the provisions of Notification No. 56/2002-CE dated 14.11.2002 are ***pari-materia*** to the provisions of Notification No. 71/2003-CE dated 09.09.2003. It is pertinent to reproduce the relevant findings of the case of M/s Unicorn Industries cited (supra) which arereproduced herein below:-

"39. Rule 8 of Central Excise Rules, 1944, authorises the Central Government to grant an exemption to any excisable goods from the whole or any part of duty leviable on such goods. Rule 8 is extracted hereunder :

"8. Power to authorise an exemption from duty in special cases. -

(1) The Central Government may from time to time, by notification in the official Gazette, exempt (subject to such conditions as may be specified in the notification) any excisable goods from the whole or any part of duty leviable on such goods.

(2) The Central Board of Excise and Customs may by special order in each case exempt from the payment of duty, under circumstances of an exceptional nature, any excisable goods."

The word 'duty' is defined under Rule 2(v) to mean the duty as levied under the Act.

4. Notification dated 9-9-2003 issued in the present case makes itclear that exemption was granted under Section 5A of the Act of 1944, concerning additional duties under the Act of 1957 and additional duties of excise under the Act of 1978. It was questioned on the ground that it provided for limited exemption only under the Acts referred to therein. There is no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have included other duties also. The notification could not have contemplated the inclusion of education cess and secondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the dutyof excise. The duty on NCCD, education cess and secondary and higher education cess are in the nature of additional excise duty and it would not mean that exemption notification dated 9-9-2003 covers them particularly when there is no reference to the notification issued under theFinance Act, 2001. There was no question of granting exemption related to cess was not in vogue at the relevant time imposed later on videSection 91 of the Act of 2004 and Section 126 of the Act of 2007. The provisions of Act of 1944 and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the source of power to exempt the NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the

said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. The High Court was right in relying upon the decision of three-Judge Bench of this Court in *Modi Rubber Limited* (supra), which has been followed by another three-Judge Bench of this Court in *Rita Textiles Private Limited* (supra).

5. The Circular of 2004 issued based on the interpretation of theprovisions made by one of the Customs Officers, is of no avail as such Circular has no force of law and cannot be said to be binding on the Court. Similarly, the Circular issued by Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has no force of law and cannot be said to be binding concerning the interpretation of the provisions by the Courts. The reason employed in *SRD Nutrients Private Limited* (supra) that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, education cess, secondary and higher education cess. Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to havebeen exempted.

6. The decision of Larger Bench is binding on the Smaller Bench has been held by this Court in several decisions such as *Mahanagar Railway Vendors' Union* v. *Union of India & Ors.*, (1994) Suppl. 1 SCC 609, *State of Maharashtra & Ors.* v. *Mana Adim Jamat Mandal,* AIR 2006 SC3446 and *State of Uttar Pradesh & Ors.* v. *Ajay Kumar Sharma & Ors.*, (2016) 15 SCC 289. The decision rendered in ignorance of a binding precedent and/or ignorance of a provision has been held to be *per incuriam* in *Subhash Chandra & Ors.* v. *Delhi Subordinate Services Selection Board & Ors.*, (2009) 15 SCC 458, *Dashrath Rupsingh Rathod*
v. *State of Maharashtra*, (2014) 9 SCC 129, and *Central Board of Dawoodi Bohra Community & Ors.* v. *State of Maharashtra & Ors.*, (2005) 2 SCC 673 = 2010 (254) E.L.T. 196 (S.C.). It was held that a smaller bench could not disagree with the view taken by a Larger Bench.

7. Thus, it is clear that before the Division Bench deciding *SRD Nutrients Private Limited* and *Bajaj Auto Limited* (supra), the previous binding decisions of three-Judge Bench in *Modi Rubber* (supra) and *Rita Textiles Private Limited* (supra) were not placed for consideration. Thus, the decisions in *SRD Nutrients Private Limited* and *Bajaj Auto Limited* (supra) are clearly *per incuriam*. The decisions in *Modi Rubber* (supra) and *Rita Textiles Private Limited* (supra) are binding on us being of Coordinate Bench, and we respectfully follow them. We did not find any ground to take a different view.

8. Resultantly, we have no hesitation in dismissing the appeals. The judgment and order of the High Court are upheld, and the appeals are dismissed. No costs."

3. By following the ratio of the decision in the case of M/s Unicorn Industries cited (supra), we are of the considered opinion that there is no infirmity in the impugned order vide which the refund of the education cess and higher secondary education cess has been denied. We uphold the impugned orders by dismissing all the appeals of the appellants."

4. By following the ratio of the abovementioned case cited (supra),we don't find any infirmity in the impugned order which is upheld by dismissing the appeal of the appellant.

(Operative part of the order pronounced in the open court)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

G.Y.

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATETRIBUNAL, SOUTH ZONAL BENCH, CHENNAICOURT HALL No. III

EXCISE APPEAL No. 41009 Of 2018

(Arising out of Order-in-Appeal No.18/2017-2018 (Audit – I) dated 07.02.2018 passed by Commissioner of GST and Central Excise (Appeals - II), Newry Towers, 2054-I, II Avenue, 12th Main Road, Anna Nagar, Chennai 600 040)

M/s.Alfred Berg & Co., (I) Pvt. Ltd. **…. Appellant**
Hunters Road, P.B.No.3529,Chennai 600 112

Versus

The Commissioner of GST & Central Excise **…Respondent**
Chennai North Commissionerate

No.26/1, Mahathma Gandhi Road, NungambakkamChennai 600 034

APPEARANCE :

Mr. M.N.Bharathi, AdvocateFor the Appellant
Mr. Rudra Pratap Singh, Addl. Commissioner (A.R)For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL) HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 28.07.2023DATE OF DECISION: 02.08.2023

FINAL ORDER No. 40630/2023

Excise Appeal No. 41009 of 2018

ORDER : Per Ms. SULEKHA BEEVI C.S.

1. Brief facts are that the appellant was earlier a manufacturing factory engaged in manufacture of P or P Medicaments falling under chapter 13 of Central Excise Tariff Act 1985. The appellant stopped their manufacturing activity in the year 2014 and sold the assets to another company namely M/s. Mesmer Pharmaceuticals through a Memorandum of Understanding dated 10.11.2014.

2. The appellant company then filed a refund claim for refund of Rs.2,17,45,625 vide their letter dated 18/7/2016 being the book balance outstanding in their CENVAT account.

3. Thus the appellant sought for refund of accumulated CENVAT credit lying in their books by way of cash from the department. Show cause Notice dated 24/8/2016 was issued to the appellant proposing to deny the refund claim. After due process of law, the Original authority rejected the refund claim. Against this order the appellant preferred an appeal before the commissioner appeals who vide order impugned herein upheld the rejection of refund claim. Hence this appeal.

4. The Ld. counsel Shri M.N.Bharathi appeared and argued for the appellant. It is submitted that the appellant sold their factory to M/s.M.N. Pharmaceutical and they have ceased to be the manufacturer.The refund claim is for refund of the unutilised credit lying in the CENVAT account. The decision in the case of *Union of India* vs *SlovakIndia Trading Company Ltd*. reported in 2008 (223) E.L.T. A170 (SC) Excise Appeal No. 41009 of 2018

was referred to by the learned counsel for the appellant to submit thatthe appellant would be eligible for refund. However, the Ld. counsel submitted by the recent decision of the Tribunal in the case of *Gauri Plasticulture Pvt Ltd.* Vs *Commissioner of Customs Excise*, Indore 2019 (30) GSTL 224 (Bom.), the issue stands covered against the appellant and that the Honourable High Court in the said judgement had also considered the decision of the Honourable Supreme Court in the case of *Slovak India Trading Co. Pvt. Ltd*. (Supra)

5. The Ld. AR Shri Rana Rudra Pratap Singh appeared for the department and supported the finding in the impugned order.

6. Heard both sides.

7. The issue is whether the appellant is eligible for refund of unutilised credit lying in their CENVAT account at the time of closing the factory. The Honourable High Court of Bombay in the case of *GauriPlasticulture Pvt. Ltd.* (Supra) had occasion to consider the very sameissue. The decision of the Honourable High Court of Karnataka in the case of *Union of India* Vs *Slovak India Trading Co. Pvt. Ltd*. (Karnataka)was referred to by the Honourable High Court. It was observed that the Division Bench of the Honourable High Court of Karnataka in the said case took a view that there is no express prohibition in Rule 5 to refund the unutilised CENVAT credit. The revenue filed an appeal against such decision before the Honourable Apex court, and on the basis of the representation made by ASG who appeared on behalf of the Union of India that in similar decisions passed by the Tribunal, therevenue had not filed any appeal, the Honourable Apex Court had Excise Appeal No. 41009 of 2018 dismissed the appeal filed by the revenue. Thus there was no declaration of law under Article 141 of the Constitution of India in thesaid case. After adverting to various decisions on the point the Hon'bleHigh Court of Bombay held that the refund cannot be granted. The relevant paragraph reads as under:

"31. The sheet anchor of Mr. Patil's arguments is the judgment of the earlierDivision Bench of this Court and that is based on the view taken by the High Court of Karnataka. The High Court of Karnataka has not discussed the schemeof Cenvat credit in details. The South Zonal Bench of the CESTAT in *Slovak India* (supra) considered the case of refund of unutilised Cenvat credit on account of closure of the factory of the said Slovak India. The Commissioner (Appeals) took the view that there is no provision in Rule 5 of the Cenvat Credit Rules to grant cash refund. After being approached, what the CESTATobserved is that there is a consistent view taken by the Tribunal that such claimis eligible and the assessee can seek refund when it goes out of the Modvat scheme (predecessor of Cenvat) or the unit is closed. This is the reasoning in the Tribunal's order and though the appeal of the Revenue before the High Court of Karnataka at Bengaluru raised several grounds and pleas, the High Court referred to the arguments and in para 4 of its order, reproduced Rule 5 of the Cenvat Credit Rules, 2002. In para 5, the reasoning of the High Court ofKarnataka reads thus :-

"5. There is no express prohibition in terms of Rule 5. Even otherwise, it refers to a manufacturer as we see from Rule 5 itself. Admittedly, in the case on hand, there is no manufacture in the lightof closure of the Company. Therefore, Rule 5 is not available for the purpose of rejection as rightly rules by the Tribunal. The Tribunal hasnoticed that various case laws in which similar claims were allowed.The Tribunal, in our view, is fully justified in ordering refund particularly in the light of the closure of the factory and in the light of the assessee coming out of the Modvat Scheme. In these circumstances, we answer all the three questions as framed in para 17against the Revenue and in favour of the assessee."

8. Thus, the High Court of Karnataka took the view that there is no expressprohibition in terms of Rule 5 and that rule refers to a manufacturer. Thus, evenif there is no manufacture in the light of the closure of the factory, the assesseebeing a manufacturer is construed as one coming out of the Modvat scheme but still eligible for cash refund. The factory is closed and the inputs were notused in the manufacture of a final product is, thus, overlooked. So long as theassessee is a manufacturer even if his factory is closed, the input credit was available, is thus the view. Hence, the refund was held to be permissible.

9. When the matter was carried to the Hon'ble Supreme Court by the Revenue, the Hon'ble Supreme Court noted the concession of the Learned Additional Solicitor General. That concession is that the views of the Tribunalsto the aforesaid effect have not been appealed against by the Revenue/Union of India. Pertinently, there is no concession by the Additional Solicitor Generalof India on the point of law. Hence, going by this concession on fact, the Special Leave Petition of the Revenue was dismissed. This, by no stretch of Excise Appeal No. 41009 of 2018 imagination, is a confirmation or approval of the view taken by the South Zonal Bench of the Tribunal at Bengaluru or the High Court of Karnataka.

10. Pertinently, when the matter was brought before this Court in the case of*Jain Vanguard* (supra), this Court, relying upon the judgment in the case of *Slovak India* (supra) and the order in the Special Leave Petition, dismissed the Revenue's appeal. The aggrieved Revenue, carried the matter to the Hon'ble Supreme Court and the order passed on that Special Leave Petition reads as under :-

"Delay condoned.

We find no reason to interfere with the impugned order in exercise ofour discretion under Article 136 of the Constitution. The Special Leave Petition is, accordingly, dismissed leaving the question of law open."

11. The Special Leave Petition was dismissed, but the question of law was expressly kept open. It is in these circumstances that we are not in agreement with Mr. Patil that the issue or the controversy before us stands concluded against the Revenue. The question of law was still open to be raised and equallyexamined by us. There is no question of judicial discipline in such matters. Thecounsel relied upon this principle of judicial discipline by inviting our attentionto the judgment of the Hon'ble Rajasthan High Court in the case of *Welcure Drugs and Pharmaceuticals Ltd.* v. *Commissioner of Central Excise, Jaipur* reported in 2018 (15) G.S.T.L. 257. There, the Hon'ble Rajasthan High Courtconcluded that the Revenue cannot seek to urge before that High Court that theview taken by four different High Courts approving the order of CESTAT haslost its persuasive value, particularly when the Special Leave Petitions againstthe view taken by four different High Courts were either not filed or filed but not entertained. Thus, the Tribunals have taken a consistent view and the Revenue could not succeed in having that set aside. It is in these circumstances,the Rajasthan High Court negatived the contention of the Revenue that the Tribunal under the jurisdiction of that High Court could have distinguished theorders and judgments of its Benches. That was found to be contrary to the judicial discipline. It is in these circumstances so also when there was a LargerBench view of the Tribunal having a binding effect, that the principle of judicial discipline was pressed into service.

12. After the view taken in *Steel Strips Ltd.* (supra) and which was also fairlybrought to our notice, it is evident that this principle has no application to the facts and circumstances before us.

13. Finally, we do not find any merit in the arguments of Mr. Patil to the effect that if the earlier judgment is not appealed against, an appeal against the subsequent order or judgment passed relying upon the earlier judgment cannotbe sustained. He pressed into service the judgment of the Hon'ble Supreme Court in the case of *Birla Corporation Ltd.* v. *Commissioner of Central Excise*

- 2005 (186) E.L.T. 266 (S.C.). There, the issue was entirely different. The issue was whether the duty paid on spares of ropeway used for the purpose oftransporting the crushed limestone from the mines located 4.2 kilometer awayto the factory is entitled to Modvat credit. That was disallowed on the groundthat ropeway transports raw material from the mines to the factory premises and is not a material handling equipment within the factory premises. It was not disputed that the crushed limestone is brought from the mines to the factory Excise Appeal No. 41009 of 2018 premises where it is deposited utilising the ropeway as a means of transportation.

14. An identical issue came up for consideration in the case of *J.K. UdaipurUdyog Limited* v. *Commissioner of Central Excise*, 2001 (130) E.L.T. 996 (sic). In that case, the Tribunal followed the principles laid down in its prior decision and held that the Modvat credit was admissible. A civil appeal was preferred to the Hon'ble Supreme Court, but that was dismissed as not pressed.That is because the judgment relied upon by the Tribunal in the case of *J.K. Udaipur Udyog Limited* (supra) and the *Commissioner of Central Excise, Chennai* v. *Pepsico India Holdings Limited* 2001 (130) E.L.T. 193 (Tri.) was accepted by the Chief Commissioner of Central Excise, Chennai. In these circumstances, the Special Leave Petition by Birla Corporation Limited cameto be allowed. The Hon'ble Supreme Court held that when same question arisesfor consideration, the facts are almost identical, then, the Revenue cannot be permitted to take a different stand. More so, when the earlier appeal involving identical issue was not pressed and therefore, dismissed. Hence, a contrary stand cannot be taken and that will confuse everybody. This judgment, therefore, has no application to the issue before us.

15. The referring order has already discussed in detail as to how the principleof merger cannot be invoked in this case. In the order passed in the case of *JainVanguard* (supra), the question of law was expressly kept open. Hence, the earlier view of the Tribunal does not merge with dismissal of the Special LeavePetition in the case of *Slovak India* (supra). Hence, this principle has also no application.

16. As a result of the above discussion, we answer the questions of law framed above as (a) and (b) in the negative. They have to be answered againstthe assessee and in favour of the Revenue. Questions (a) and (b) having been answered accordingly, needless to state that the order of the Hon'ble SupremeCourt in the case of *Slovak India* (supra) cannot be read as a declaration of lawunder Article 141 of the Constitution of India.

17. The reference is disposed of accordingly. The appeals filed by respectiveparties may now be listed before the Division Bench for disposal in accordancewith our judgment."

18. The facts being identical following the above decision we are of the opinion that the refund can not be allowed. The appeal filed by theappellant is dismissed.

(Pronounced in court on 02.08.2023)

(**VASA SESHAGIRI RAO)**
Member (Technical)

(SULEKHA BEEVI C.S.)
Member (Judicial)

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

Excise Appeal No. 40700 of 2014

(Arising out of Order-in-Appeal No. 04/2014 dated 08.01.2014 passed by Commissioner of Excise(Appeals), Lal Bahadur Shashtri Marg, C.R. Buildings, Madurai – 625 002)

Mr. Innasimuthu ...Appellant
Prop. M/s. Innasimuthu Packages,

No. 2./168, 2/169 & 2/136-North Street,Kamanaickenpatti,

Kovilpatti – 628 501.

Versus

Commissioner of GST & Central Excise ...Respondent
Lal Bahadur Shashtri Marg,

C.R. Buildings,Bibikulam,

Madurai – 625 002.

APPEARANCE:

For the Appellant : None
For the Respondent : Shri Harendra Singh Pal, Assistant Commissioner / A.R

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL) HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING / DECISION : 14.09.2023FINAL ORDER No. 40799/ 2023

Order : Per Ms. SULEKHA BEEVI C.S.

Brief facts are that the appellants are engaged in the manufacture of Safety Matches falling under the Chapter heading of 3605 of CETA, 1985. On scrutiny of the ER-1 Returns, it was found that the appellant had purchased machine made dipped splints from M/s. Thilagarathinam Match Industries and had undertaken the process of filling of match boxes with such match splints and packaging the same in their factory premises without the aid of power. The appellant then cleared such matches for home Excise Appeal No. 40706/2014 consumption without payment of duty. It appeared that the appellants had failed to fulfil their duty liability in accordance with the provisions of Central Excise Act and Rules read with Notification No. 214/89-CE. A Show cause notice was issued invoking theextended period proposing to demand the Excise duty of Rs.1,75,422/- along with interest and also for imposing penalty. After due process of law, the original authority confirmed the demand along with interest and imposed penalties. On appeal, the Commissioner (Appeals) upheld the same. Hence, this appeal.

2. None appeared for the appellant, even though notice was issued.

3. The Ld. Authorised Representative Shri M. Ambe appeared and argued for the Department. It is submitted that in the appellant's own case for the previous period, the issued stands covered by the decision of the Tribunal in appeal Nos. E/41197,41147,41148/2013 *vide* Final Order Nos. 40172-40174/2023 dated 17.03.2023. The Tribunal held that the appellantis not eligible for the benefit of Notification No. 4/2006-CE dated 01.03.2006 as they had used the dipped splints which were manufactured using the aid of power.

4. Heard the Ld. AR and perused the records.

5. By judicial discipline, following the decision in the appellant'sown case, we are of the considered opinion that the impugned orderdoes not require any interference. In the result, the appeal is dismissed.

(Order dictated in court)

(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

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IN THE CUSTOMS, EXCISE & SERVICE TAXAPPELLATE TRIBUNAL, CHENNAI

Excise Appeal No.40012 to 40016 of 2023

(Arising out of Order in Appeal No. 46 to 50/2022 (CTA – I) dated 3.11.2022 passedby the Commissioner of GST & Central Excise (Appeals – I), Chennai)

M/s. Ankit Ispat Pvt. Ltd. **Appellant**
AML Towers, No. 9, 6th Street Gopalapuram, Chennai – 600 086.

Vs.

Commissioner of GST & Central Excise **Respondent**
No. 1, Williams Road Cantonment, Trichy – 620 001.

APPEARANCE:

Ms. G. Vardini Karthik, Advocate for the Appellant Shri N. Satyanarayanan, AC (AR) for the Respondent

CORAM

Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order Nos. 41084 to 41088/2023

Date of Hearing : 17.11.2023Date of Decision: 08.12.2023

These appeals are filed by the appellants against Order in AppealNo. 46 to 50/2022 (CTA – I) dated 3.11.2022 passed by the Commissioner of GST and Central Excise (Appeals – I), Chennai (impugned order).

2. Brief facts of the case are that the appellants having Central Excise registration are manufacturers of MS ingots. During the courseof audit of books of accounts of the appellant for the period from September 2008 to September 2010, it was found that the appellant had taken credit on imported shredded scrap to the tune of Rs.24,01,371/- on the basis of photocopies of Bills of Entry. It appeared that the aforesaid documents were not eligible and valid documents to avail CENVAT credit in terms of Rule 9(1) of CENVAT Credit Rules, 2004. After due process of law, the original authority confirmed the demand of Rs.24,01,371/- for the above period along with interest and imposed equal penalty. The appellant preferred appeals before Commissioner (Appeals) who vide the impugned orderrejected the appeals on the ground of time-bar. Hence the appellant isbefore this Tribunal.

3. The learned counsel Smt. G. Vardini Karthik appeared for the appellant and Shri N. Satyanarayanan, learned AR appeared for the department.

3.1 The learned counsel for the appellant submitted that no objection was raised by the Commissioner (Appeals) on the limitation aspect atthe time of their filing the appeals, which was entertained with27.09.2021 as the date of Service of Orders and no defect notice for non-filing of condonation of delay was ever raised. Hence the impugnedorder needs to be set aside. She has further handed over a chart containing the sequence of events of the case as under.

DATE	SEQUENCE OF EVENTS
	DECLARATION AS SICK INDUSTRIES

17.11.2015	Form A u/s 15(1) of Sick Industries Companies (Special Provisions) A 1985, before BIFR for rehabilitation was filed by Appellant and registere the Board as Case No. 157/2015
22.11.2015	Copy of **Form A** and BIFR letter filed was filed by the Appellantto the Revenue Authorities
	DEPARTMENT PROCEEDINGS
25.02.2014	**SCN** issued for Wrong Availment of CENVAT Credit, shows the endorsement as "despatched" but there is no evidence such as postal Acknowledgement card have been furnished to showthat the sa has been received by the Appellant.
20.05.2016	**Order in Original** passed determining demand with interest and pena holding that photocopy of the Bill of Entry is not avalid document to cl CENVAT credit
29.06.2021	**Writ Petition in WP No. 16061/2018** was filed before the Hon'ble High Court challenging the Recovery Notice dated
	14.06.2018 challenging the service of the orders and Show cause notices. The Hon'ble Jurisdictional High court granted an Interim Stay during Admission of Writ Petition and subsequently when the matter was taker for final hearing on 29.06.2021, the Hon'ble Jurisdictional High C directed the petitioner to approach the competent authorities.
27.09.2021	As per the directions of the Hon'ble High Court in the above Writ Petit the appellant with an intention to file an appeal before the appropr authority requested the respondent to furnish the copies of the Orde Originals and Show cause notices on 02.09.2021. In response the offic Commissionerof GST and CE , Pondicherry , issued **Certified Copy** of S and O-I-O enabling the appellant to prefer appeal
15.11.2021	**On receipt of the Orders, 5 Appeals were** filed in Form EA-1 against 5 order in originals to Commissioner of GST and Cer Excise(Appeals) and appeals were entertained and nodefects were pointed on account of delay in filing, while processing and numbering the appe and the appeals were numbered and entertained
03.11.2022	**The Commissioner of GST and CE (Appeals-I) after hearing Appellant passed Order-in-Appeal** No. 46- 50/2022(CTA-I) where appeals were dismissed on the ground of limitation without considering merits of the case,which are squarely covered in favour of the Appellant.
21.1.2023	**An appeal** through Form EA-3 against order dated 3.11.2022was filed

She stated that the Commissioner (Appeals) had failed to appreciate that rejecting their appeal on the ground of limitation without a noticeto them amounts to a violation of natural justice. That by not looking into the merits of the matter he had prejudiced their case as they hada strong case on merits. She stated that although the department purports to have despatched the SCN and Order-in-originals to them as stated in departments letter C No I/10/09/2018-Legal dated 27/09/2021, they had not received the said documents and became aware of the same only after they received a recovery notice dated 14/06/2021. Their unit had closed its operations on 04/11/2015 and they had approached BIFR for rehabilitation, hence perhaps no documents sent by the Department were received by them. They had informed the Department about reference to BIFR vide their letter dated 23/11/2015 about the same. They then filed **Writ Petition in WP No. 16061/2018** before the Hon'ble Jurisdictional High Court who directed them (petitioner) to approach the competent authorities. Accordingly, they requested the Department to furnish the copies of the Order in Originals and Show cause notices on 02.09.2021. In response the office of Commissioner of GST and CE,

Pondicherry, issued Certified Copy of SCN and O-I-O on 27.09.2021 enabling the appellant to prefer appeal on 15.11.2021. The appeal was hence not time barred. They had a strong case on merits. She relied on the Orderof the Hon'ble Bangalore Tribunal in the case of **Venkaterwara Power Projects Ltd. Vs. CCE, Central Excise** Appeal No. 20007 of 2021 dated 18/01/2021, to state that it was for the Department to give proofof service of the order by the assessee in the absence of which the dateof obtaining a copy of the order by the appellant will be considered asthe date of receipt of order. She hence prayed that the matter may beremanded to the Commissioner (Appeals) for a decision on merits.

3.2 The learned AR representing Revenue has opposed the prayer and stated that it is clear from Departments letter dated 27/09/2021 that the SCN, PH intimation and Orders were despatched to the Appellant as per their address on record and hence there was no violation of the principles of natural justice if the appellant had not defended their case before the original authority. In fact there is no proof that the Appellant had sent letter dated 23/11/2015 regarding registration of application with BIFR to the Department. They had alsobeen confronted on their claim regarding the non-receipt of SCN, Orders etc by the Commissioner (Appeals) and did not have a satisfactory reply, as recorded in the impugned order. He reiterated the points given in the impugned order and prayed that the appeal maybe rejected.

4. I have carefully gone through the Appeals and the submissions made by the rival parties. I find that the following questions require aresolution.

A. Whether the Commissioner (Appeals) was correct in rejecting their appeal without issuing a notice to them as per principles of naturaljustice.

B. Whether the appeals filed by them were time-barred.

Whether the Commissioner (Appeals) was correct in rejecting their appeal without issuing a notice to them as per principles of natural justice.

5. While proceedings before the Commissioner (Appeals) are meant to be simplified procedures that do not involve the strict rigors of a court proceeding, the question still arises whether the appeal could have been rejected without putting the Appellant on notice regarding the question of time bar. The Appellant's grouse is that no objection was raised by the Commissioner (Appeals) on the limitation aspect atthe time of their filing the appeals.

5.1 The procedure followed by the Registry of a departmental appellate body in a case where the time period for filing an appeal is legally disputed, is not to take a decision on their own, but to place thematter before the concerned Authority for a decision. To that extent the decision of the Registry cannot be faulted. The question is whetherthe Commissioner (Appeals) erred in not issuing a notice to the Appellant on the issue of time bar before hearing them in the matter.

5.2 I find that the question of time bar is a mixed question of fact and law. The Commissioner (Appeals) was faced with an issue which at first involves the ascertainment of facts on the evidence adduced bythe Appellant. He would then have to determine the right of the Appellant on an application of the appropriate provision of law to the facts as ascertained. Hence in the impugned case the inference from facts resulted in a question of law, which was answered. It would not have been possible for the Commissioner (Appeals) to have come to aprima facie conclusion that the matter was time barred till the matter was heard out on facts.

5.3 Further the Appellant was aware of the statutory delay in filing the appeal as between the dates of the order and the date on which they had filed the appeals, for whatever reason. Since they were to assert before the Commissioner (Appeals) that the appeal was filed ontime they should and would have come prepared to defend the matteras the reason for delay in filing the appeal was solely in their knowledge. The legal principle involved is that he who asserts should prove. Even Section 106 of the Indian Evidence Act., 1872 gives statutory recognition to this universally accepted rule of evidence as stated below:

"106. Burden of proving fact especially within knowledge. —When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him"

5.4 The principles of natural justice are not a straight-jacket formula.

It has been held by courts that whether in fact, prejudice has been caused to the person by not doing a certain action, has to be consideredon the facts and circumstances of each case. To sustain the allegationof violation of principles of natural justice one must establish that

prejudice has been caused by non-observance thereof. [See **BarCouncil of India Vs. High Court of Kerala**, [(2004) 6 SCC 311]. Asstated earlier this being a case where the burden of proof has been shifted by the department to the appellant by issue of letter dated 27.9.2021, it was for the Appellant themselves to demonstrate that theAppeal was filed within the time limit prescribed by the statute, no prejudice has been caused to them by not giving them a notice regarding time-bar. For the reasons discussed I find that the Commissioner (Appeals) decision cannot be faulted on this score.

Whether the appeals filed by the Appellant were time-barred.

6. I find that the issue raised by the appellant involves a question of fact and law. Although the issue of fact was examined by the learnedCommissioner (Appeals) before coming to a conclusion I find that the Tribunal being the last fact-finding authority, it is essential that the Appellants pleading should be examined for its correctness.

6.1 The Appellant has raised the issue in terms of **section 37C of the Central Excise Act 1944**, to state that the decision, order, summons or notice should have been served by tendering or sending it by registered post with acknowledgement due, to them. The same had not been done. The said section is reproduced below for ease of reference.

37C. Service of decisions, orders, summons, etc.—

(1) Any decision or order passed or any summons or noticeissued under this Act or the rules made thereunder, shall beserved,—

(a) by tendering the decision, order, summons or notice, orsending it by registered post with acknowledgement due, tothe person for whom it is intended or his authorised agent,if any;

(b) if the decision, order, summons or notice cannot be served in the manner provided in clause (a), by affixing a copy thereof, to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;

(c) if the decision, order, summons or notice cannot be served in the manner provided in clauses (a) and (b), by affixing a copy thereof on the notice board of the officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on whichthe decision, order, summons or notice is tendered ordelivered by post or a copy thereof is affixed in the mannerprovided in sub-section (1).]

6.2 Since the issue regarding the service of SCN, PH letter and FinalOrders are in dispute, I reproduce the Table contained in the Departments letter dated 27/09/2021 submitted by the Appellant, foreasy reference.

S. No.	Name of the unit with RC No.	Details of documents
1.	M/s. Ankit Ispat, Unit- I, RS No. 57/1 Nainikatalai Road,Polagam Village, Karaikal	1. Copy of SCN 6/2014 dt. 25.2.2014 (v dispatch seal) 2. Copy of PH intimation dated12.6.2015 24.2.206 (withdispatch seal) Copy of OIO 11/2016-CEx. of JC, Trichy, 20.5.2016 (with dispatchseal)
2.	M/s. Ankit Ispat, Unit- I, RS No. 57/1 Nainikatalai Road,Polagam Village, Karaikal	1. Copy of SCN 12/2015 dt. 15.6.2016 (wit dispatch seal) 2. Copy of PH intimation dated 24.2.20162 (with dispatch seal) Copy of OIO 12/2016-CEx. of JC, Trichy, 20.5.2016 (with dispatchseal)

3.	M/s. Ankit Ispat, Unit- I, RS No. 57/2 Nainikatalai Road,Polagam Village, Karaikal	1. Copy of SCN 12/2014 dt. 8.5.2014 (with dispatch seal) 2. Copy of postal acknowledgementcard 3. Copy of PH intimation dated12.6.2015 24.2.206 (withdispatch seal) 3. Copy of OIO 13/2016-CEx. of JC, Trichy, 20.5.2016 (with dispatchseal)
4.	M/s. Ankit Ispat, Unit- I, RS No. 57/2 Nainikatalai Road,Polagam Village, Karaikal	1. Copy of SCN 13/2014 dt. 9.5.2014 (with dispatch seal) 2. Copy of postal acknowledgmentcard 3. Copy of PH intimation dated12.6.2015, 05.01.2016 and 24.2.206 (with dispatch seal) 4. Copy of OIO 14/2016-CEx. of JC,Trichy 20.5.2016 (with dispatch seal)
5.	M/s. Ankit Ispat, Unit- I, RS No. 57/2 Nainikatalai Road,Polagam Village, Karaikal	1. Copy of SCN issued vide C. No. V/CH.72/15/02/2011 dated 21.6.2011 of AC, Karaikal (with dispatch seal) 2. Copy of postal acknowledgmentcard 3. Letter dated 14.12.2011 of the Tax payer seeking adjournment ofpersonal hearing. 4. Copy of PH intimation dated 23.11.20 15.12.2011 (withdespatch seal) 5. Copy of OIO 6/2011-CEx. of AC,Karaik dated 16.3.2012 (with dispatch seal) 6. Copy of postal acknowledgmentcard

From the Department's letter it is seen that despatch details of the letter were given for each document. For some of the letters postal acknowledgement of the Appellant having received the letter is also seen. For example, the Appellant had received SCN C. No V/Ch.72/15/02/2011 dated 21/06/2011 as per Postal Acknowledgement Card and has also requested for an adjournment of personal hearing vide their letter dated 14/12/2011. The O-I-O in the case dated 16/03/2012 wasalso received by them as per the Postal Acknowledgement Card. Noneof these facts have been contested by the Appellant. Hence theAppellant has not been truthful by claiming non-receipt of orders and has not come before the Tribunal with clean hands.

6.3 The record of finding of the learned Commissioner (Appeals) in this regard is relevant. Paras 7.3 to 7.5(b) of the impugned order is reproduced below.

"7.3 At this juncture, it is pertinent to mention that on query during the personal hearing about their claim of non-receipt of SCNs and Orders, the appellant informed that the factory was closed and the same could have been served bythe postal department but they were not sure as to who received the same and they came to know only after receiptof recovery notice. On specific query, out during the personal hearing as to how non-delivery of SCNs and orderscan be substantiated when the proof of dispatch by registered A/D and acknowledgments for delivery as detailed as detailed in para 7.2 above have already been communicated to the appellant by the department, the onlyreply given was that they are not aware to whom the documents were delivered by the postal department. At thisjuncture, it is pertinent to mention that contrary to the clamof the appellant that the department was aware that the unithas been closed before the date of SCN, it is observed thatall impugned 5 SCNs have been issued between 21.6.2011to 15.6.2015 much before the closure of the units from 5.11.2015 as claimed by the appellant.

7.4 As regards the appellant's claim that they have filed application before the BIFR on 5.11.2015 and filed copies ofthe same with the Commissioner of Central Excise, Tiruchirappalli Commissionerate, I find that along with the instant appeals, the appellant has merely filed copies of three letters (i) letter dated 23.11.2015 addressed theCommissioner, Tiruchirappalli Commissionerate and (ii) twoletters dated 24.11.2015 addressed to the Assistant Excise,Karaikal Range – III but neither of them contain any acknowledgment from the department towards receipt nor did the appellant file any postal acknowledgment card in proof of delivery of said letters. Further, they have also notfurnished any proof about the intimation, if any, filed with the department about any alternate address for communication. It has nowhere been brought on record thatappellant provided any alternate address to the department. In absence of such intimation of alternate address, it is unfair to cast responsibility on department to locate the appellant particularly when in original address some personis available to receive the documents on behalf of the appellant.

7.5 (a) In view of the above, it is established that the contentions of the appellant are contrary to the facts and have been advanced with an intention to cover up the non-filing of appeals within the stipulated time limit as the delayranges from 5 years to 9 years from the date of theimpugned Order in Original.

7.5 (b) There is no reason to doubt that postal authorities would not have delivered impugned documents at appellant's address. It is not important to ascertain as to who received the documents at premises on behalf of the appellant. It is foregone conclusion that anyone present at premises would be with prior approval and consent ofappellant. Accordingly, it was between appellant and the 'authorised occupant' present at material time at premises who received such documents to ensure that such documents were brought to the notice of appellant. Failureto do so on part of appellant cannot become a valid reasonto condone delay for filing appeal.

From the discussions above it is found as under:

(i) While the letter purportedly given by the Appellant regarding having approached BIFR has no despatch details or acknowledgement of receipt by the Department, they are demanding postal acknowledgement from the Department for the documents despatchedto them which has been supplied.

(ii) They have not formally given the Department any alternate address for service of documents/ notice etc

(iii) Postal acknowledgement for the receipt of some of the documents has been supplied by the Department to the Appellant.

(iv) All the 5 Show Cause Notices have been issued to the Appellant between 21/06/2011 and 15/06/2015 much before the closure of the unit from 05/11/2015.

(v) Although the whole issue arose from an Audit visit and objectionraised by the Audit team, the Appellant has not shown due diligence tofollow up on the matter with the Department, though the notices wereissued to them much before the closure of their unit, as is expected ofany compliant assessee.

(vi) The department has given sufficient evidence both direct and circumstantial showing dispatch of the orders, hence adverse inference could be drawn against the Appellant for having failed to discharge theburden of proof which has now shifted to them.

The facts now need to be examined in the light of law on the subject.

6.4 As per **section 37C of the Central Excise Act 1944** reproduced at para 6.1 above, any decision or order passed or any summons or notice issued under this Act or the rules made thereunder,shall be served, by tendering the decision, order, summons or notice,or sending it by registered post with acknowledgement due, to the person for whom it is intended or his authorised agent, if any. The question raised is whether the service has been done in the manner provided. The Hon'ble Supreme Court of India in

its judgment (five Judge) in **The Chief Inspector Of Mines And Another vs Lala Karam Chand Thapar Etc** [1961 AIR 838 / 1962 SCR (1) 9], held that, whatever the General Clauses Act says, whether as regards the meanings of words or as regards legal principles, has to be read into every statute to which it applies. **Section 27 in The General ClausesAct, 1897** throws light on the meaning of service by post. It states:

"Section 27. Meaning of service by post. - Where any CentralAct or Regulation made after the commencement of this Actauthorizes or requires any document to be served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless adifferent intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and postingby registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

It is seen that a document is deemed to be served by post by properlyaddressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in theordinary course of post.

6.5 The Department has by its letter dated 27/09/2021 demonstratedthe despatch details of the letter for each document, postal acknowledgements have also been enclosed for some of the documents. Unlike the Appellants claim of ignorance of receipt of the impugned documents the Commissioner (Appeals) has shown that all the SCN's were issued prior to the closure of the Appellants factory. Factual details and circumstances show the service of the impugned orders on the Appellant. The inaction on their part bars the Appellant from claiming a remedy of filing an appeal almost a decade after the receipt of the earliest Order in Original No 06/2011–C.Ex. dated 16/03/2012, as evidenced by postal acknowledgement card, there by wrongly alleging non-receipt of orders and violation of the natural justice. Hence the judgment of the Hon'ble Bangalore Tribunal in the case of **Venkaterwara Power Projects Ltd. Vs. CCE, Central Excise** Appeal No. 20007 of 2021 dated 18/01/2021, is also distinguished.

7. From the discussion above the Appellants pleadings fails both on facts and law. The impugned order merits to be upheld and is so ordered. The appeals are dismissed.

(Pronounced in open court on 8.12.2023)

(**M. AJIT KUMAR**)
Member (Technical)

Rex

Back

IN THE CUSTOMS, EXCISE & SERVICE TAXAPPELLATE TRIBUNAL, CHENNAI

(Arising out of Order in Appeal No. Order-in-Original No. 7/2013 (Commr.) dated 31.12.2013 passed by the Commissioner of Customs, Central Excise and Service, Coimbatore)

Excise Appeal No. 41061/2014

M/s. Vaibhav Metals **Appellant**

2324, Priyanka NagriWagholi, Pune

With

Excise Appeal No. 41062/2014M/s. Bothra Metals and Alloys Pvt. Ltd.

37, Ramwadi, Room No. 16, 2nd FloorKalbadevi Road, Mumbai

With

Excise Appeal No. 41063/2014M/s. Yash Industries

Gut No. 139B, Village ShivreTaluk Bhor Dist. Pune

With

Excise Appeal No. 41064/2014M/s. Shree Padmavati Metals

5/47, Tardeo, A.C. MarketTardeo, Market

And

Excise Appeal No. 41070/2014M/s. Shrinivas Impex

30, Oppanakara Street

Ground Floor, Jain PlazaCoimbatore

Vs.

Commissioner of GST & Central Excise **Respondent**

6/7 A.T.D. Street, Race CourseCoimbatore – 641 018.

APPEARANCE:

For Appellant : Shri S. Durairaj, Advocate For Respondent: Shri M. Ambe, DC (AR) and

Shri Harendra Singh Pal, AC (AR)

CORAM

Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order Nos. 41074 to 41078/2023

Date of Hearing : 08.11.2023Date of Decision: 06.12.2023

These appeals are filed by the appellants against Order inOriginal No. 7/2012 (Commr.) dated 31.12.2013 passed by the Commissioner of Central Excise, Coimbatore (impugned order).

2. Brief facts of the case are that M/s. Vignesh Alloys Pvt. Ltd. (VAPL) engaged in the manufacture of aluminium alloy ingots and zincalloy ingots falling under Chapter 76 and 79 of the First Schedule to the CETA, 1985. They were availing CENVAT credit for payment of duty. Intelligence gathered and investigated by the officers of DGCEI, Mumbai revealed that certain importers (appellants herein) of aluminium scrap show on record that they have sold the goods imported by them on high sea sales basis to the registered dealers ormanufacturers of aluminium ingots and similar other products ofaluminium. The goods on importation were however diverted by the original importers to certain other actual users i.e. manufacturers of aluminium ingots, profiles etc. whereas the CENVAT credit of CVD paidon those goods were availed by the said purchasers of such goods on high sea sales basis as reflected in the Bills of Entry. The actual usersof the goods then clandestinely cleared the finished goods manufactured from the imported scrap without accounting for the same in their books and thereby suppressed the actual production. Themanufacturers who purchased the imported goods on high sea sales basis for availing the CENVAT credit actually bought locally available scrap (at lower value) to account for the production of the finished goods in their factory. The department was of the opinion that centralexcise duty was being evaded by way of illegal availment of CENVAT credit of CVD paid on the imported goods by the manufacturers of aluminium products without physically receiving the goods i.e. imported aluminium scrap allegedly purchased from the traders on high sea sales basis into their factory. On the basis of the investigation conducted, Show Cause Notice dated 6.11.2009 was issued to the appellants proposing to demand Rs.3,14,24,906/- being the wrongly availed inadmissible CENVAT credit by VAPL Coimbatore. Penalties were proposed under Rule 26 of the Central Excise Rules, 2002 on various importers and persons involved in the alleged illegal actincluding the appellants. After due process of law, the original authorityconfirmed the demand and imposed penalties on the appellants. Hencethe appellants have filed these appeals before this Tribunal.

3. I have heard learned counsel Shri S. Durairaj for the appellantsand learned Shri M. Ambe, Deputy Commissioner (AR) and learned Shri Harendra Pal Singh, Assistant Commissioner AR for the Department.

3.1 The learned counsel for the appellants fairly submits that the main appellant M/s. Vignesh Alloys Pvt. Ltd. filed an appeal before thisTribunal and the same was dismissed for non-compliance of predeposit. The main charge against the appellants was for abetting M/s. Vignesh Alloys Pvt. Ltd. and penal provisions under Rule 26 of theCentral Excise Rules, 2002 were initiated against them. He stated thatthe impugned order was based on statements recorded under Section-
14. Requirement of statements recorded under Section-14 to comply

with obligation under Section 9D(2) of the Central Excise Act, 1944 before being admitted in evidence was not met. He relied on the judgment of the Hon'ble High Court of Punjab and Haryana in the caseof Jindal Drugs (P) Ltd Vs UOI [2016 (340) ELT 67 (P&H)]. Hence the benefit of nominal penalty should be given to the appellant. For the application of Rule-26 of the Central Excise Rules, 2002, the conditionprecedent is that the person who in any manner deals with, any excisable goods, which he knows or reason to believe are liable for confiscation. In the present case, there is no evidence that theappellants were aware of the goods being liable for confiscation. Further, import duties were promptly paid at the time of import clearance. Therefore, Rule 26 is not applicable. He stated that the prayer of all the Appellants is to restrict the penalty to the extent of pre-deposit, which was already paid.

3.2 The learned AR's have submitted on behalf of Revenue that this is a case where the Appellants sold aluminium scrap on 'high sea sales'basis to M/s Vignesh Alloys (P) Ltd. who filed the Bill of Entry. Both, the appellants and M/s Vignesh Alloys (P) Ltd have abetted in divertingthe imported goods to other manufacturers who took CENVAT credit without receipt of goods and the appellants were hence liable for a penalty. The main noticee involved in the case i.e. M/s Vignesh

Alloys
(P) Ltd. has not pursued his appeal before this Tribunal or availed anyother alternative remedy and the matter has reached a finality on themain charge. The penalty imposed on those who collaborated and benefitted from the illegal action hence needs to be upheld. Rule 9D isapplicable in the case of prosecution and not in departmental proceedings. Moreover in this case cross examination of persons who gave the statements as sought by the appellant was allowed but not availed. Investigation had shown that the appellants had prior knowledge of the clandestine activity and hence the penalty was rightlyimposed. They prayed that the Appeals may be rejected.

4. I have carefully gone through the facts of the case and have heard the rival parties. I find that this is a case of misuse of importedgoods by using import documents to avail CENVAT credit in a mannerviolative of the provisions of the Central Excise Rules, 2002. Investigation into the matter resulted in the issue of the impugned order after following the due process. The order confirmed the demandand imposed penalties on M/s Vignesh Alloys (P) Ltd., further penaltieswere also imposed on the Appellants

5. Appellants are praying for restricting the penalty to the extent ofpre-deposit, which they have already paid. Since a legal issue has beenraised regarding the statement of individuals raised upon in theimpugned order, not meeting the obligation of law as per Sec. 9D of the Central Excise Act, 1944, I proceed to examine the issue raised first.

6. Requirement of statements recorded under Section-14 tocomply with obligation under Section 9D of the Central Excise Act, 1944 before being admitted in evidence.

6.1 Section 9D of the Central Excise Act 1944 is reproduced below:

"9D. Relevancy of statements under certain circumstances.-

(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant,for the purpose of proving, in any prosecution for an offenceunder this Act, the truth of the facts which it contains,-

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presencecannot be obtained without an amount of delay or expensewhich, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examinedas a witness in the case before the Court and the Court is ofopinion that, having regard to the circumstances of the case,the statement should be admitted in evidence in the interests of justice.

(2) The provision of sub-section (1) shall, so far as may be,apply in relation to any proceeding under this Act, other thana proceeding before a Court, as they apply in relation to a proceeding before a Court."

It is seen that section 9D is relevant for the purpose of proving the truth of a fact, in any prosecution launched for an offence under the Central Excise act, 1944. The impugned order does not emanate froma proceeding of prosecution. A five judge Bench of the Apex Court by a majority decision in **Thomas Dana vs The State Of Punjab, [1959AIR 375]** held that there is no escape from the conclusion that the proceedings before the Sea Customs Authorities under s. 167(8)(which was a pre-cursor to the Customs Act, 1962, a sister Act to theFA 1994 and CEA, 1944), were not "prosecution" within the meaning of Art. 20 (2) of the Constitution.

6.2 The matter was examined again recently in February 2019 by theApex Court in its judgment in **Department Of Customs vs Sharad Gandhi Proprietor** [LAWS(SC)-2019-2-277 / CRIMINAL APPEAL NO(S).174 OF 2019 Arising out of SLP (Crl.) No.9159 of 2015). The Hon'ble Court held:

'63. In fact, we find that this Court in the **Assistant Collector of Customs, Calcutta vs. Sitaram Agarwala and Another** AIR 1966 SC 955 considered the scheme of Sea Customs Act, 1878 as contained in Section 167 This is what

the Court had to declare in regard to the aforesaid penalties :

"Then comes Ch. XVI dealing with offenses and penalties.Offence enumerated in Ch. XVI are of two

kinds; first thereare contraventions of the Act and rules thereunder which are dealt with by Customs officers and the penalty for which is imposed by them. These may be compendiously called customs offences. Besides these there are criminal offences which are dealt with by Magistrates and which result in conviction and sentence of imprisonment and/or fine. These two kinds of offences have been created to ensure that no fraud is committed in the matter of paymentof duty and also to ensure that there is no smuggling of goods, without payment of duty or in defiance of any prohibition or restriction imposed under Ch. IV of the Act."

Thus, this Court has held that there are custom offences and criminal offences. The criminal offences were dealt with by the Magistrate which may culminate in conviction and imposition of imprisonment and or fine. Thus, this being the scheme of the SeaCustoms Act, when Section 5 of the Antiquity (Export Control) Act, 1947 provided that prosecution for contravening Section3 of the said Act would be without prejudice to the imposition ofpenalties and ordering confiscation the word 'penalty' could takein both the customs offences and also the criminal offences. If itis interpreted as embracing the criminal offences then the word 'penalty' would also embrace within its scope penalty by way of imprisonment or fine imposed for the commission of a criminal offence after a prosecution before the Magistrate.

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85. The upshot of the above discussion is as follows:- Prosecutionunder Sections 132 and 135(1)(a) of the Customs Act, 1962, is not barred in regard to the antiquities or art treasures.

6.3 The judgement above makes it clear that offences and penaltiesare of two distinct kinds. First there are contraventions of the Act andRules thereunder which are dealt with by Customs officers and the penalty for which is imposed by them, called customs offences. Besidesthese there are criminal offences which are dealt with by Magistrates and which result in conviction and sentence of imprisonment and/or fine. Action by quasi-judicial officers under CEA 1944 is not done as per the provisions of criminal law. Prosecution of offenders are launched separately in a criminal court as seen from para 85 of the Hon'ble Supreme Court judgment above. It is in these prosecution cases that section 9D ibid becomes relevant.

6.4 Further the legal position that statements recorded under Section14 of the Act, referred to under Section 9D are admissible in evidencehas been held by the Supreme Court in the case of **K.T.M.S. Mohd. &Anr. Vs. Union of India** ((1992) 3 SCC 178):

"34. We think it is not necessary to recapitulate and recite all thedecisions on this legal aspect. But suffice to say that the core ofall the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine quo non to act on it forany purpose and if the statement appears to have been obtainedby any inducement, threat, coercion or by any improper means that statement must be rejected brevi manu. At the same time,it is to be noted that merely because a statement is retracted, itcannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted. However, even if the maker of the statement failsto establish his allegations of inducement, threat etc. against theofficer who recorded the statement, the authority while acting onthe inculpatory statement of the maker is not completely relievedof his obligations in at least subjectively applying its mind to thesubsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in severaldecisions has ruled that even in passing a detention order on thebasis of an inculpatory statement of a detenu who has violated the provisions of the FERA or the Customs Act etc. the detainingauthority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order will be vitiated..." (emphasis added)

The relevance of statements recorded under the Customs Act 1962 hasbeen examined by the Hon'ble Apex court in a plethora of case as listed. In **Ramesh Chandra Mehta v. State of West Bengal** [AIR 1970 SC 940 / 1969 (2) SCR 461] it was held that when an inquiry is being conducted under Section

108 of the Customs Act, the person who gives the statement does not stand in the character of an accusedperson. In **Percy Rustomji Basta v. The State of Maharashtra** [1983 (13) E.L.T. 1443 (S.C.) / AIR 1971 SC 1087], the Apex Court
did not agree with the contention that Section 24 of the Evidence Act was a bar to the admissibility of a statement given by the accused of offences under the Customs Act. Similar findings on issues of law werereiterated in **Harbans Singh Sardar Lenasingh and anr. v. The state of Maharashtra** (AIR 1972 SC 1224); **Veera Ibrahim v. The State of Maharashtra** [1983 (13) E.L.T. 1590 (S.C.) / AIR 1976 SC 1167]; **Poolpandi etc. v. Superintendent, Central Excise and Ors.**[1992 (60) E.L.T. 24 (S.C.) / AIR 1992 SC 1795]

6.5 From the above it is relevant to note that standards of evidentiary requirement differ greatly between civil and criminal laws.It is not disputed that, in this case, cross examination of persons who gave the statements as sought by the appellant was allowed but not availed. In **Commissioner of Customs, Calcutta Vs South India Television (P) Ltd [2007-TIOL-126-SC-CUS]** it was stated;
"…. We may clarify that strict rules of evidence do not applyto adjudication proceedings. They apply strictly to the courts' proceedings. . ."

Hence the learned AA has on his satisfaction, after allowing for cross examination which was not availed, correctly relied upon the statements and cannot be faulted. This Tribunal cannot go into the merits of the AA's satisfaction, if it is reasonable. As held by the Hon'bleApex Court in **Gazi Saduddin v. State of Maharashtra and Another[(2003) 7 SCC 330]**;
"Primarily, the satisfaction has to be of the authority passingthe order. If the satisfaction recorded by the authority is objective and is based on the material on record then the courts would not interfere with the order passed by the authority only because another view possibly can be taken. Such satisfaction of the authority can be interfered with only if the satisfaction recorded is either demonstratively perverse based on no evidence, misreading of evidence or which a reasonable person could not form or that the personconcerned was not given due opportunity resulting in prejudicing his rights under the Act."

6.6 It is not the case that all the appellants have stated that the statements were taken under duress. Only one of the Appellant Shri Manoj Champalal Jain of M/s Padmavathi Metals, had stated that the statements were taken from him under duress, after a lapse of more than one year. The said complaint was examined and rejected by the Adjudicating Authority. The very fact that only one of the four Appellants has retracted his statement gives credence to the process.Even in the more stringent case of criminal proceedings, let alone departmental proceedings, it is for the person making a claim that a statement has been obtained by officials from him under 'duress' etc. to establish the same. Section 24 of the **The Indian Evidence Act, 1872,** which deals with confessions made during criminal proceedingsand has more stringent safeguards, can be taken as a guide, and runsas follows
"Section 24 : Confession caused by inducement, threat, or promise, when irrelevant in criminal proceeding:

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to, the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

To attract the provisions of this section, the following facts haveto be established:

(a) that the confession has been made by an accused, personto a person in authority;

(b) that it must appear to the Court that the confession, has been obtained by reason of any inducement, threat or promise proceeding from a person in authority;

(c) that the inducement, threat or promise must have reference to the charge against the accused person; and

(d) the inducement, threat or promise, must, in the opinion ofthe Court, be such that the accused

in making the confession believed or supposed that by making it he wouldpin any advantage or avoid any evil of temporal nature in reference to the proceedings against him.

No such proof has been provided on the above lines to taint the statements relied upon.

6.7 The belief, knowledge and intention of the parties involved in a blame worthy act are a part of evidence. A conspiracy is always hatched in secrecy, and it is at times impossible to adduce direct evidence of the same. Documentary evidence in such cases is not forthcoming. Hence the intention of the parties involved in these activities is effectively brought to life through the statements of those who are in the know of things. Voluntary statements, if clearly provedand found acceptable, are the most effective proof of law and can't beignored. The legal issue of the admissibility of the statements in evidence in the impugned case is hence found valid.

6.8 The counsel for the appellant has referred to the judgment of the

Hon'ble High Court of Punjab and Haryana in the case of **Jindal Drugs**

(P) Ltd Vs UOI [2016 (340) ELT 67 (P&H)]. The said judgment statesthat two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D (1), viz. the person who made the statement has to first be examined asa witness in the case before the adjudicating authority, and

i) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

6.9 The examination of witnesses is an integral part of a criminal trial. Section 135–165 of the Evidence Act, 1872 deals with examination and cross-examination of witnesses. There are three parts to the examination of a witness under Section 138 of the Evidence Act.It is felt that this elaborate procedure would not be applicable to the category of 'customs offences' vis-a-vis 'criminal offences' as distinguished by the Hon'ble Apex Court' judgment in Sitaram Agarwala (supra).

6.10 It is seen that in the impugned case the Adjudicating Authority permitted the cross examination of the persons who had given the statement though the opportunity was not availed by the noticee's. Hence the provisions of the sections are fulfilled. The Apex Court in **"Bishnu Prasad Sinha v. State of Assam" [AIR 2007 SUPREME COURT 848**] held as under;

"31. A confessional statement, as is well known, is admissible in evidence. It is a relevant fact. The Court mayrely thereupon if it is voluntarily given. It may also form thebasis of the conviction, wherefor the Court may only have to satisfy itself in regard to voluntariness and truthfulness thereof and in given cases, some corroboration thereof. . . .

."

6.11 In this context the expression 'so far as may be', used in sub section (2) of section 9D ibid gains importance. Sub section (2) must be read harmoniously with sub section (1). It has been held by the Apex Court in **M/S. Ispat Industries Ltd vs Commissioner Of Customs, Mumbai** [(2006) 202 ELT 561] as under:

The Gunapradhan Axiom states :

"If a word or sentence purporting to express a subordinate ideaclash with the principal idea, the former must be adjusted to thelatter or must be disregarded altogether".

The principal idea in this case is as per section 9D(1) of the Central Excise Act 1944, which clearly states that it is concerned with a statement which shall be relevant, for the purpose of proving, in any prosecution for an offence under the Act. Detailed Criminal Court procedures are not expected for proceedings having only civil consequences. As discussed earlier departmental proceedings do not tantamount to prosecution as understood within the meaning of Art. 20(2) of the Constitution. This being so the learned Adjudicating Authority has after following the cross-examination procedure and on his satisfaction, correctly relied upon the statements and cannot be faulted. Hence, I do not find any lacunae in the proceedings by the Adjudicating Authority and the impugned order does not deviate fromthe provisions of section 9D ibid.

7. Appellants had prior knowledge of the clandestine activity

7.1 I find that the charges against the appellants have been made after a very detailed investigation of clandestine activity by a group ofpeople who have abetted to evade payment of duty by misusing high-sea sales and CENVAT schemes. It is difficult to find direct evidence insuch cases and they are mostly proved by a mix of direct and indirectevidence, as duty evasion is seldom an open affair. The blame worthyact has hence to be inferred from the circumstances and the conduct of the people involved. Although relating to a criminal case in **Shivnarayan Laxminarayan Joshi & Ors. vs. State of Maharashtra** [(1980) 2 SCC 465], it was observed by the Apex Court:

"It is manifest that a conspiracy is always hatched insecrecy, and it is impossible to adduce direct evidence of thesame. The offence can be only proved largely from the inferences drawn from acts or illegal omission committed bythe conspirators in pursuance of a common design "

7.2 The main noticee has not taken forward his appeal and the legalposition has crystalised in terms of the impugned order, bringing finality to the issue of establishing duty evasion. The circumstances asbrought out in the impugned order taken cumulatively form a chain leading to the conclusion that the Appellants were fully involved and abetted with the main notice in the clandestine scheme to wrongly utilise inadmissible CENVAT credit at the cost of the exchequer.

7.3 Now I shall examine the role of the individual Appellants.

7.4 From the impugned order it is seen that M/s Vaibhav Metals wereengaged in the purchase and sale of non-ferrous and ferrous metal scrap. S/Shri Vaibhav Babulal Mandoth and Babulal Rajmal Mandoth were the partners in M/s Vaibhav Metals. The company through its partners engaged Shri Chandrabhan Avdesh Singh (C. A. Singh) who had a CHA license in the name of M/s Reliance Overseas Services as CHA and instructed him on the handling of scrap cleared on High Sea Sale basis. The scrap though bought by manufacturers mainly VAPL onhigh sea sale basis were delivered by shri C.A. Singh only as per the instructions of the partners of M/s Vaibhav Metals. The said scrap wasnot unloaded at the said factories of the high seas buyers and were unloaded at places indicated by the partners of M/s Vaibhav Metals. Documents were falsely created to show that they had been deliveredto their actual destination. The CHA and the partner of M/s. Vaibhav Meals when confronted with documents have agreed that the importedgoods have been diverted from its actual destination. M/S Vaibhav Metals had hence with full knowledge of the clandestine nature of the activity facilitated VAPL to avail credit based on documents without actual receipt of goods.

7.5 From the impugned order, it is seen that S/Shri SunderlalLikhmichand Bothra, Sardarmai C Suthar, Narendar L Bothra and Krishnalal Bothra were Directors of M/s Bothra Metals and Alloys Pvt. Ltd. The company was trading in scrap purchased locally and imported.Till 2007 they used to import scrap on high seas basis and after that directly on their Co's name. They had sold aluminum scrap to VAPL byhigh sea sales through M/s Shree Padmavati Metals. When confronted with documents they agreed that the goods had been diverted. HenceM/s. Bothra Metals and Alloys Pvt. Ltd. were fully aware of theclandestine activity and its consequences.

7.6 From the impugned order it is seen that Shri Prashant Motilal Sharma was the proprietor of M/s Yash Industries which was manufacturing aluminum alloy ingots. They had sold one container of aluminum to VAPL on high seas sale basis. When confronted with documents he agreed that the imported goods had been diverted fromtheir actual destination. Hence M/s. Yash Industries were fully aware of the clandestine activity and its consequences.

7.7 From the impugned order it is seen that Shri Manoj Champalal Jain was the proprietor M/s Shri Padmavathi Metals. The Co was trading in scrap purchased locally and imported. He had sold three consignments of aluminum scrap to VAPL. He had engaged the CHA and the transporter for the goods. On being confronted with documents

showing that the vehicle shown to have transported the goods did nothave a permit and the check post report that scrap had not been transported to the premises of VAPL, he agreed that the goods had been diverted. Hence they were aware that the impugned goods wereliable for confiscation and they were liable for penal action under Rule25 of the Central Excise Rules 2002.

7.8 From the impugned order it is seen that Shri Vinod Babulaiji Mandot is the partner of M/s Shrinivas Impex. The Co was engaged inthe trading of scrap of aluminum, copper, brass, zinc etc. They had sold aluminum scrap to VAPL on high seas basis. When confronted withdocuments he agreed that the goods had been diverted. This diversionof imported goods sold on high seas basis was also collaborated by Shri

C. A. Singh CHA. Hence M/s. Shrinivas Impex were fully aware of the clandestine activity and its

consequences.

7.9 The discussion in the impugned order has established the role and knowledge of the appellants in the clandestine activity designed tomisuse CENVAT credit.

8. Imposition of penalty

8.1 I find that the prayer of the Appellants is to confine the penalty to the amounts of pre-deposits made. I find that the involvement of the Appellants has been established mainly on the basis of collaborative statements, perhaps due to the clandestine nature of theactivity and the lack of proper documentation in such cases, asdiscussed above. However, the imposition of stiff penalties requires stronger evidence. Hence to that extent the penalties imposed on the Appellants are disproportionate and needs to be modified. I also find that the matter relates to a very old issue and there would be no purpose in extending the litigation on the matter of penalty. On balance, I feel it proper to restrict the penalties to the pre-deposits made as pleaded.

8.2 Considering the totality of the matter, I modify the impugned order, inasmuch as it relates to the appellants and order that the penalty be restricted as under:-

S. No.	Appeal No.	Appellant	Amount deposited
1.	E/41061/2014	Vaibhav Metals	3,00,000/-
2.	E/41062/2014	Bothra Metals and Alloys Ltd.	50,000/-
3.	E/41063/2014	Yash Industries	25,000/-
4.	E/41064/2014	Shri Padmavathi Metals	75,000/-
5.	E/41070/2014	Shrinivas Impex	2,00,000/-

The appeals are disposed of accordingly.

(Pronounced in open court on 06.12.2023)

(**M. AJIT KUMAR**)
Member (Technical)

Rex

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

REGIONAL BENCH – COURT NO.1

Excise Appeal No.79198 of 2018

(Arising out of Order-in-Appeal No.126/Kol.1/2018 dated 20.08.2018 passed byCommissioner (Appeals) of CGST & Excise, Kolkata)

M/s Avail Printers Private Limited
45B, Raja Rammohan Roy Sarani, Kolkata-700009

Appellant

VERSUS

Commissioner of CGST & Excise, Kolkata North
180,Shantipally, Rajdanga Main Road, Kolkata-700107

Respondent

APPERANCE :

None for the Appellant

Shri P.K.Ghosh & Shri B.K.Singh, both Authorized Representative for theRespondent

CORAM:

HON'BLE MR.RAJEEV TANDON, MEMBER (TECHNICAL)FINAL ORDER NO.75055/2024

DATE OF HEARING : 18 .01.2024

DATE OF DECISION : 18 .01.2024

Per Rajeev Tandon :

The appellant has filed the present appeal assailing the Order-in- Appeal No.126/Kol.1/2018 dated 20.08.2018.

2. None is present for the appellant. I also note that the notice of hearing has been returned back as undelivered with remark "left". It is seen from the records that six hearings have been offered to the appellants within a span of one year. Therefore, in the interest of justice, I proceed to hear the issue even in the absence of the appellant.

3. The short issue involved in this matter is as regards the availmentof cenvat credit in terms of Rule 6 (3) of Cenvat Credit Rules, 2004.

4. It is adduced by the Department that the appellant availed cenvatcredit on various dutiable products i.e. Box, Level, Tag, Book Cover, Book, Bill & Challan, Corrugated Box, Sticker, Calendar, etc. and non- dutiable products, i.e. Poster, Leaflet, Challan Bill, Envelop, Magazine, Advertisement materials etc. The appellant has claimed that they have been manufacturing the aforesaid goods and the credit has been taken on the inputs received for the manufacture of the said goods and were paying duty as applicable. They have also mentioned in the appeal filedthat they have maintained separate accounts for the inputs received for dutiable and exempted products and they have availed cenvat credit only in respect of inputs utilized in the manufacture of dutiable goods. Therefore, the appellants submit that no cenvat credit was availed by them on inputs like, duplex board, ink, glue etc. used during production of exempted goods on job work basis.

5. In response to the show-cause notice issued to the appellant by the Department, the appellant has maintained the said stance. However, the finding of the ld.Adjudicating Authority as recorded is as under :

> it has been submitted by the assessee that they asked the visiting Audit team for verification of the separate records maintained by them but the team refused to do so on the plea that non observance of the statutory formalities of maintaining such records. I find from the submitted records and documents that the separate registers and documents as made available during the personal hearing are for such inputs which are non-dutiable in nature and utilization of those has been made into the manufacturing of such goods/items which are exempted in nature. So it is not understood why the visiting audit team refused to verify those documents if the same had been placed before them at the time of auditing even if the maintenance of those registers were not mandatory on the part of assessee on account of non duty-paid characters of inputs. But while going through the contents of those attested copies of the registers as well as the copy of the ER-7, I find that the Return was pertaining to 14-15 and the register contains

entries starting from 01.04.2014 at the earliest and continued mostly upto the end of that financial year 2014-15. Transactions of different types of inputs are there in the pages of the registers but for all such varieties, the starting date is 01.04.2014. The present case is for the period 2009-10 to 2013-14 (upto February 2014) and before this forum I do not find any such document/ register which contain/s any entry/s pertaining to the impugned period of the Show Cause Notice. So even assuming that, the assessee did always use non duty-paid inputs for manufacturing of exempted items, I cannot find any supportive documentary evidence from them so far pertaining to their plea of immunity for such period. I also do not find any reason that even vehemently opposing the allegation which was absolutely fact-based, why the assessee failed to substantiate their plea based on documentary evidences. So, based on my findings, I do not find any reason to contradict with the allegations leveled against the assessee for want of documentary evidence/s.

6. During arguments, the ld.A.R. for the Revenue relies on the Tribunal's decision in the case of Lally Automobiles Private Limited Vs. Commissioner of Service Tax, Delhi reported in 2018 (10) GSTL 3 10 (Tri.-Del.) in support of his case.

7. In the appeal proceedings, the appellate authority observed that the appellant did not provide necessary documents as required under the provisions of Rules 6 (1), 6 (2) and 6 (3) of the Cenvat Credit Rules,2004 (supra). The ld.Appellate Authority, inter alia, pointed out that the documentary evidence tendered in the matter is for the period 01.04.2014 onwards, while the instant case pertains to the period from 2009-10 to February, 2014.

8. Under the circumstances having failed to produce necessary documents and/or the fact of not representing their case before the authorities tendering such evidences as warranted in law, I am constrained to decide the matter on the basis of evidence as available before me.

9. In view of the aforesaid, the order of the lower authority istherefore not required to be interfered with. The appeal filed by the appellant is dismissed.

(Dictated and pronounced in the open court)

(Rajeev Tandon) Member (Technical)

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATETRIBUNAL, KOLKATA

EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Excise Appeal No.259 of 2009

(Arising out of Order-in-Original No.80/Commr./CE/Kol-II/Adjn/2008-09 dated09.02.2009 passed by Commissioner of Central Excise, Kolkata-II.)

M/s. Asha Engineering Works
(20/1, Benaras Road, Salkia, Howrah-711106.)

…Appellant

VERSUS

Commissioner of Central Excise, Kolkata-II
…..Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

APPEARANCE

NONE for the Appellant (s)

Shri S.Mukhopadhyay, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL) HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 77365/2023

DATE OF HEARING : 9 October 2023
DATE OF DECISION : 9 October 2023

Per : R. MURALIDHAR :

None has appeared on behalf of the appellant in spite of notice. Since the appeal pertains to the year 2009, we have taken up the appeal for disposal with the help of the Ld.AR.

2. The facts of the case are that the appellants were engaged in job-work amounting to manufacture in terms of section 2(f)(i) of Central Excise Act on behalf of M/s. Usha Martin Ltd. Excise Duty was demanded and was confirmed after due process. Being aggrieved the appellant is before us.

3. We have perused the appeal papers and relevant documents with the help of the Ld.AR. The Appellants have been undertaking job-work for M/s. Usha Martin Ltd.. This job-work resulted in completion ofmanufactured items. It is further seen that they are affixing the brand name of M/s. Usha Martin Ltd. in the goods manufactured by them in

the course of job-work. The appellants have initially taken the standthat since they were a small unit and they were eligible for SSI benefit in terms of Notification No.8/2003-CE dated 01.03.2008. The Central Excise Officers visited the factory on 15.05.2008 and found that the appellant was engaged in carrying out various manufacturing activities like machining, drilling, tapping, threading, grinding and other activitieson the rough cast iron body bearing the brand name 'ISMAL'. The patters, drawings & designs are all received from M/s. Usha Martin Ltd.. After manufacturing the goods, the appellant is affixing the brand nameof M/s. Usha Martin Ltd. according to their drawings and specifications. All these activities clearly pointed out that the appellants were engaged in manufacturing activity and the goods were manufactured under the brand name of 'Usha Martin'. The adjudicating authority has gonethrough all the factual details and has given detailed findings in the Order-in-Original. The relevant portion of the Order-in-Original arereproduced below:-

"I have carefully gone through the records of the case, the oral and written submissions made by the noticee and the copies of case decisions relied upon in defence.
The points of allegations in the SCN are that the noticee was manufacturing Tube Unit (castings) for supply to M/s. Usha Martin Ltd., Usha ISMAL Division, Ranchi, embossing goods with brand name "ISMAL" of M/s. Usha Martin Ltd. Since their sale value was below
S.S.I. exemption limit, they did not pay duty in terms of Notification No.8/2003-C.Ex dated 01.03.08. It has been alleged that since the supplied goods were affixed with the brand name of the consignee, theyare not eligible for the exemption in terms of clause 3(b) of the said notification, which states- "any product manufactured with the brand name or trade name (whether registered or not) of other person is not eligible for exemption."
The Central Excise Offices who visited the factory on 15.5.08 found thatsome manufacturing activities like machining, drilling, tapping, threading, grinding and other activities were being carried out of some rough cast Iron body bearing "ISMAL" brand mark on the body/surface of all cast Iron items with the help of lathe, drilling and grinding machines. Two samples were also drawn by the officers out of severalfully finished items lying in the factory with the brand name "ISMAL".
From the copies of the drawing received along with the information from Ranchi Commissionerate of Central Excise as well as recovered from the factory premises of the noticee, it is seen that indication has been given on the drawing to emboss the brand "ISMAL" on the body ofthe said tube unit casting "in raised letter".
From Inspection Report dated 14.02.08 of the goods made by M/s.Usha Martin Limited, it is seen that two pieces were rejected since "ISMAL" logo was not embossed on them.
Shri Sital Chandra Bodhak stated in his stated dated 15.05.08 under Section 14 of the said Act that they embossed the identification mark "ISMAL" on each and every tube unit castings supplied ot M/s. Usha Martin Ltd., which was got done from the C.I. Castings suppliers under their active supervision and as per specification given by M/s. Usha Martin Ltd. Shri Bodhak also submitted a copy of specimen drawing bearing No.B-40/3124 dt. 14.02.08, which indicates that the goods of the drawing are to be embossed with "ISMAL" brand.
…….

The arguments of the noticee are mostly centered on the fact that they are not the manufacturers and that not on all the goods the brand name was used. In this respect they relied on several decisions of the courts. But they did not argue on the point as to when the items became 'goods' as per the drawing and specification supplied by the target consignee, i.e. when the items became fit for dispatch to M/s. Usha Martin Ltd. in terms of their specification and when the total manufacturing process reached completion to make the items 'goods'.
The noticee received purchase orders from their sole customer M/s. Usha Martin Ltd. and drawings and designs for the new items. Same drawing is to be followed for repeated orders of the same product. The noticee then gets the 'patterns' made from the pattern manufacturers according to the drawings and specifications. Then they supply the patterns to the foundries and get the items manufactured throughеffective supervision. Some of such foundries have admitted that they are only responsible in as much as supply of molten raw material or "Galamal" is concerned. Every other thing, from the pattern to the rough casting is under control and supervision of the noticee. The supplied pattern itself contains the

designs/drawings and brand nameof the target consignee. The foundry owner has not to put any heed to the perfection of the article except melting the raw materials in the furnace. Even the labourers are also engaged by the noticee. Some suppliers, however, make the items upto rough casting level, which according to the suppliers, cannot be marketed and sent to M/s. Usha Martin.

After the rough casting stage the rest of the manufacturing process was completed at the noticee's factory, to make the items fit as per M/s. Usha Martin's drawing and specification. Since Usha Martin is the sole customer and the goods are tailor made, the same are subjected tosuch processes in the factory of the noticee which make the manufacturing of the goods complete as per the drawing, specification and purchase order. Hence, the processes which are undertaken at the factory of the noticee are nothing but complementary to the initial manufacturing process upto rough casting level. This will be moreclearly understood from the example that, if the rough castings are taken to the market for selling or to M/s. Usha Martin, these cannot be sold. At the market their value may be that of scrap at the most andnot at all equivalent to what would be its price at the hand of Usha Martin when it passes through the complete manufacturing process at the noticee's factory and finds its ultimate specification as per the orderfo M/s. Usha Martin Ltd. The complementary process include grinding, poof machining, making holes as per drawing, drilling and threading as per specifications, and these are the processes undertaken at the factory of the noticee for the completion of their manufactured product. Hence these processes all clearly covered under section 2(f)(i).

……..

In view of the above discussions it is established on the basis of recordsthat the processes undertaken by the noticee in its factory for completion of the manufactured products is manufacture in terms with Section 2(f)(i) of the said Act and the itself is the manufacturer by engaging in their production or manufacture on its own account. They are also affixing brand name of M/s. Usha Martin Ltd. according to their drawing and specification on the goods manufactured by them.

All the dealings came to light when the Central Excise officers visitedthe factory of the noticee following information received from other Commissionerates of Central Excise. The noticee has contended that they were having bonafide belief that they were not manufacturer; hence duty was not payable by them. They also argued that no elementof the proviso to Section 11A(1) was present in the case to attractlarger period of demand. But I find that the noticee continued their manufacturing activity affixing brand name of other person on themanufactured goods, but did not take Central Excise registration and pay duty. Hence, larger period of demand is rightly invoked in this case and for their intent to evade payment of duty, penalty under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002 is warranted. The noticee is also required to pay interest in terms of Section 11AB of the Act.

4. From the above extracts of the Order-in-Original, it is seen that the adjudicating authority has followed the principles of natural justice and has given a very detailed finding for coming to the conclusion and confirming the demand.

5. Therefore, we do not see any reason to interfere with the Order- in-Original, particularly when the Appellant has not brought in any specific ground in the present appeal to counter the detailed findings.

6. Accordingly, we hold that the Order-in-Original passed is sustainable and we dismiss the Appeal filed by the Appellant.

(Operative part of the order was pronounced in the open Court.)

Sd/

(R. MURALIDHAR) MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN) MEMBER (TECHNICAL)

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

EASTERN ZONAL BENCH: KOLKATA

Excise Appeal No. 231 of 2011

(Arising out of the Order-in-Appeal No. 08/Kol-V/2011 dated 24.01.2011passed by Commissioner of Central Excise, (Appeal-I), Kolkata.)

M/s Klar Sehen Pvt. Ltd.,
EPIP, Amingaon, Guwahati-
781031. **…Appellant (s)**

VERSUS

Commissioner of Central Excise, Kolkata.

169, A.J.C. Bose Road, Bamboo Villa, 4th Floor, Kolkata-700014.

. ...**Respondent(s)**

APPERANCE :

None, for the Appellant
Shri K. Chowdhury, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL MEMBER (JUDICIAL) HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No. 76329/2023

DATE OF HEARING : 03.08.2023DATE OF DECISION : 03.08.2023

PER K. ANPAZHAKAN :

The issue involved in the present appeal is regarding demand of CentralExcise Duty on Physician Samples. The contention of the department is thatthe valuation of the impugned goods should have been determined under Rule
4 of the valuation rules, 2000 based on the pro rate value of medicaments sold in the trade and valued under Section 4A. However, the Appellant cleared the impugned goods by determining the value under Rule 8 of the Valuation Rules 2000 and paid duty accordingly.

2. A Show Cause Notice dated 16.08.2007 was issued to the Appellant demanding differential duty of Rs. 1,16,514/-, for the period May 2005 to November 2006, which was adjudicated the Assistant Commissioner videOrder-in-Original dated 31.03.2009 confirmed the amount of duty of Rs.1,16,514/- and appropriated the amount already paid under protest by the appellant towards the duty confirmed,

confirmed interest under Section 11AB of the Central Excise Act, 1944 and imposed penalty of Rs.5000/- under rule 25 of the Central Excise Rules, 2002. An appeal was filed by the Appellant before the Commissioner of (Appeal -I), who upheld the order in original. Being aggrieved, the Appellant filed the present appeal before this Tribunal.

3. The Appellant contended that the Ld. Commissioner erred in observing that *"*that matter was concluded by the judgment of Hon'ble Mumbai High Court in case of Indian Drug manufactures anr- Vs.- UOI I(2008 (235) ELT 22 (Bomb HC) holding the contention of the said circular correct*"*. The issue of valuation of Physician Sample has not been settled for want of value of such goods sold as required under Rule 4 of the valuation Rules, 2000. Value under rule 4 read with rule 2(c) of the valuation rules 2000 means *"*transactionvalue*"* under Section 4 of the Central Excise Act, 1944. Transaction value of the P or P allopathic medicaments i.e. such goods, not available as P or P allopathic medicaments sold in the trade are valued under Section 4A and not u/s 4 of the Central Excise Act, 1944. As such the lower authorities grossly erred in assessing the duty of physician sample on the basis of value of the P or P medicament sold in trade and valued under Section 4A.

4. The Learned Commissioner (Appeal) erred in not considering the judgment of Tribunal in the case of CCE Vs. Anglo French [2008 (231) ELT, 636 (T)]. In the said case, the Tribunal agreed to the contention of the Appellant holding that the valuation of the free physician samples has to be valued under cost construction method.

5. The Learned Commissioner (Appeals) erred in relying on the decision of the Tribunal in the case of CCE Vs. Zandu Pharmaceuticals Works reported in 2003(158) ELT 253 (T) distinguishing the decision of the Tribunal in the case of CCE Vs. Anglo French reported in 2008(231) ELT-636 (T) (relied on by the appellant) . The decision of Zandu Pharmaceuticals Works, being passed muchearlier has no force to negate the decision of Anglo French, which was passed much later. Accordingly, they prayed for setting aside the impugned order.

6. The Ld. A.R. supported the impugned order and contended that the Hon,ble Supreme Court has already decided the issue in the case of Commissioner of Central Excise and Customs, Surat Vs Sun Pharmaceuticals Inds Ltd. reported in 2015(326) ELT 3 (SC), wherein the Hon'ble Apex Court has categorically held that valuation of physician samples is to be done as per Section 4(1)(a) of the Central Excise Act, 1944. During the period under dispute, there was a Board Circular available on the issue and the Appellant failed to follow the same. Accordingly, he prayed for dismissing the party's appeal.

7. Heard both sides and perused the appeal records.

8. We observe that the issue is no more res integra. The Hon,ble Supreme Court has already decided the issue in the case of Commissioner of Central Excise and Customs, Surat Vs Sun Pharmaceuticals Inds Ltd. reported in 2015(326) ELT 3 (SC), wherein it has been categorically held that valuation of physician samples is to be done as per Section 4(1)(a) of the Central Excise Act, 1944. The relevant portion of the decision is reproduced below:

9. Central Board of Excise and Customs also issued Circular No. 813/10/2005- CX dated 25/04/2005 and later another Circular in F.No.6/5/2009-DS-(CX- 1&4), dated 19.02.2010 was also issued clarifying the issue. The said clarification issued in Circular No. 813/10/2005-CX dated 25/04/2005 is reproduced below:

10. We observe that the Appellant failed to follow the Board Circular dated 25.04.2005, which was available during the relevant period. Subsequently TheHon'ble Bombay High Court also decided the issue in the case of Indian Drug Manufacturers and others Vs UOI reported in 2008 (@#%) ELT 22(Bom HC). Accordingly, by following the decisions of the Hon'ble Apex Court, Bombay High Court and the Board Circulars cited above, We hold that the valuation of physician samples is to be done as per under Rule 4 of the valuation rules, 2000 based on the pro rate value of medicaments sold in the trade and valuedunder Section 4A. Accordingly, we uphold the demand of duty along with interest confirmed in the impugned order.

11. Regarding penalty, we observe that there were some contradicting decisions by the Tribunals during the relevant period and confusion prevailed regarding the correct method of valuation to be adoped for payment of dutyon physician samples. However, the practice being followed by the Appellant was known to the department. Thus, there was no suppression or

violation of any of the provisions of the Act involved and hence, we hold that no penalty imposable under Rule 25 of the Central Excise Rules. 2002. Accordingly, we set aside the penalty imposed under Rule 25 of the CER 2002.

12. In view of the above, we uphold the demand of duty along with interest in the impugned order. The penalty imposed under Rule 25 of CER, 2002 is set aside. The appeal is disposed off on the above terms.

(Dictated and pronounced in the open Court)

Sd/-

(Ashok Jindal) Member (Judicial)

Sd/-

Tushar

(K. Anpazhakan) Member (Technical)

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

REGIONAL BENCH – COURT NO.2

Excise Appeal No.103 of 2011

(Arising out of Order-in-Appeal No.35/Kol.IV/2010 dated 18.11.2010 passed byCommissioner (Appeals) of Central Excise, Kolkata)

M/s Bharat Roll Industries Private Limited
Unit II, Vill.-Jaganathpur, P.O.-Bamunari, Dist.-Hooghly

Appellant

VERSUS

Commissioner of Central Excise, Kolkata IV
180,Shantipally,Rajdanga Main Road, Kolkata-700107

Respondent

WITH

Excise Appeal No.114 of 2012

(Arising out of Order-in-Appeal No.87/Kol.IV/2011 dated 21.10.2011 passed byCommissioner (Appeals) of Central Excise, Kolkata)

M/s Bharat Roll Industries Private Limited
Unit II, Vill.-Jaganathpur, P.O.-Bamunari, Serampore, Dist.-Hooghly

Appellant

VERSUS

Commissioner of Central Excise, Kolkata IV
180,Shantipally,Rajdanga Main Road, Kolkata-700107

Respondent

APPERANCE :

Shri Ananda Kumar Manna, Authorised Representative for the AppellantShri K.Chowdhury, Authorised Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL) HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO…76400-76401/2023

DATE OF HEARING : 03 .08.2023

DATE OF DECISION : 03 .08.2023

Per Ashok Jindal :

The appellants are in appeals against the impugned orderswherein differential duties have been demanded from the appellants.

Excise Appeal No.103 of 2011 & 114 of 2012

2. As the facts are identical in both the appeals, therefore, both the appeals are disposed off by a common order.

3. The facts of the case are that the appellants have two Units, namely, Unit I & Unit II. The Unit I is located at Vill.-Kantalia, P.O.- Nibra, Dist. Hooghly and the Unit II is located at Vill.-Jagannathpur, P.O.-Bamunari, Dist.- Hooghly.

3.1 During the course of audit of Unit II, it was noticed that duringthe period 2001-2002 and 2002-2003, the appellant has cleared the goods from their factory, Unit II to their other factory, Unit I for use andconsumption by that unit for the manufacture and production of other finished excisable goods on payment of duty without following theprovisions as laid down in Section 4 of the Central Excise Act, 1944 read with Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 for determining the value of the goods.

3.2 The appellant was asked to produce the cost sheet or any other documents in support of their cost of production for those goods, but the appellant did not produce those documents. Thereafter, on examination of the Trial Balance and Balance Sheetpertaining to the impugned period, the assessable value was re- determined in terms of the provisions of Section 4 (1)(b) of the Central Excise Act, 1944 read with Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. It was found that by way of not including the elements required to be included in the cost of production and consequently, the assessable value of the excisable goods cleared from their Unit II to Unit I. The appellant has under-valued of such goods. Consequently, the appellant has paid less duty and on the said premise, two show-cause notices were issued to the appellants for demand of differential duty from the appellants.

3.3 The matter was adjudicated and the demand of duty was confirmed against the appellants.

3.4 Against the said order, the appellants are before us.

4. The ld.Authorised Representative of the appellants, submits that the appellant has cleared the goods on transaction value, which is 115% of the cost, but the appellants did not give any CAS-4. Therefore,the Department assumed that the price on the basis of which the goodswere cleared and duties were paid. Since the said price is the cost price and they loaded 15% on the said amount for determination of value. Therefore, the said value adopted is on the basis of assumption and presumption.

4.1 The ld.Authorised Representative for the appellants, has also relied on the Larger Bench's decision of this Tribunal in the case of M/s Ispat Industries Limited Vs. Commissioner of Central Excise, Raigad reported in 2007 (209) ELT 185 (Tri.-LB-Mumbai). He also relies on the decision of this Tribunal in the case o Mafatlal Industries Limited Vs. Commissioner of Central Excise, Daman reported in 2009 (241) ELT 153(Tri.-Ahmd.), which has been affirmed by the Hon'ble Apex Court as reported in 2010 (255) ELT A77 (SC).

5. On the other hand, the ld.A.R. for the Revenue supported the impugned order.

6. Heard the parties and considered the submissions.

7. In this case, the sole issue before us is that in case whether the appellant is transferring the goods to their sister unit for further manufacture of other articles in terms of the provisions of Section 4 (1)(b) of the Central Excise Act, 1944 read with Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. What should be the value of the goods ?

8. We find that in this case, it is admitted position that the appellant is clearing the goods to their sister unit on transaction value, but how the transaction value has been ascertained , that is not known, but in terms of the provisions of Section 4 (1)(b) of the Central Excise Act, 1944 read with Rule 8 of the Central Excise Valuation (Determination ofPrice of Excisable Goods) Rules, 2000, the goods were cleared to their sister unit, then value should be 115% on the cost of production or manufacture of such goods and the cost of production has to be determined , so as to include the cost of material liable to cost and overhead including price and depreciation has to be properly provided. That has to be done on the basis of CAS-4. Admittedly, the appellant has not adopted CAS-4 for determining their transaction value also.

9. In that circumstances, as pe Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, the whole of the production has been cleared to sister unit, then the same is to be determined by paying duty on the cost of the articles at 115 % of the cost of production or manufacture of such goods. Admittedly, theappellant has not done so and it is also not known, how the appellant has arrived at the transaction value.

10. In that circumstances, we hold that the appellant is required to pay duty in terms of the provisions of Section 4 (1)(b) of the Central Excise Act, 1944 read with Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, at the rate of 115% of the cost of production or manufacture of such goods.

11. The case law relied upon by the ld.Authorised Representative for the appellants, in the case of Ispat Industries (supra) is not applicableto the present facts and circumstances of these cases.

12. In that case, the goods were cleared to another unit of theappellant and balance products were sold to independent buyers. It is not the facts in the case in hand.

13. Further, in the case of Mafatlal Industries Limited, the issue involved relates to non-inclusion of notional profit for clearance toanother unit of the assesse, whereas in this case, the appellant has failed to produce any evidence to show that how the transaction value has been arrived at. In that circumstances, the said decision is not applicable to the facts and circumstances of the case.

14. As the appellant has paid the duty on transaction value, which is not known, how the appellant has arrived at the transaction value ?

15. Therefore, the transaction value is rejected and we hold that the appellants are liable to pay duty in terms of the provisions of Section 4 (1)(b) of the Central Excise Act, 1944 read with Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

16. In the above terms, we do not find any merit in the appeals filed by the appellants. Accordingly, we upheld the impugned orders and dismissed both the appeals.

(Operative part of the order was pronounced in the open court)

Sd/-

(Ashok Jindal)Member (Judicial)

Sd/- (K.Anpazhakan)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division BenchCourt – I

Excise Appeal No. 2993 of 2011

(Arising out of OIA No. 42 & 43/2011 (H-I) CE dt.31.05.2011 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals-I), Hyderabad)

Sri Sai Krishna Health Care Products
Plot No.7A/1, Near APTRANSCO Sub-Station **.....Appellant**
Phase-1,IDA Patancheru, Medak Dist., AP – 502 319

VERSUS

Commissioner of Central TaxMedchal – GST
Above SBI Bazarghat Branch, Lakdikapool, **……Respondent**
Hyderabad, Telangana – 500 004

Appearance

Shri P. Sai Makrandh, Advocate for the Appellant (Amicus Curie).Shri A.V.L.N. Chary, AR for the Respondent.

Coram:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30410/2023

Date of Hearing: 12.07.2023Date of Decision: 04.12.2023

[Order per: A.K. JYOTISHI]

The Appellant – M/s Sri Sai Krishna Health Care Products (SSKHCP) is engaged in manufacture of mosquito coils falling under Chapter Sub-heading No.3808.00 of the Central Excise Tariff. Based on investigation conducted bythe Anti-Evasion Wing of Hyderabad-I Commissionerate, it was noticed that the Appellants were engaged in manufacture and supply of mosquito coils to one – M/s Sree Ramcides Chemicals Pvt Ltd (SRCPL) and M/s Farmax Health and FoodProducts Pvt Ltd (Farmax). These mosquito coils were being cleared under the name "STOP" for SRCPL and under the name "TODAY" for Farmax.

2. It also appeared to the department that the exemption benefit under Notification No.08/2003-CE dt.01.03.2003, which was being claimed by the Appellant, was not correct as they were not meeting the condition No.4 of the said notification. The condition No.4 of the said notification provided that the exemption contained in the notification shall not apply to specified goodsbearing a brand name or trade name, whether registered or not, of another person. It also explained the meaning of the brand name or trade name for thepurpose of notification as under:

""brand name" or "trade name" means a brand name or a trade name, whether registered or not, that is to say, a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goodsand some person using such name or mark with or without any indication of the identity of the person."

3. Therefore, SCN dt.19.11.2009 was issued covering the period 10.07.2007to 26.09.2008, demanding excise duty of Rs.15,96,225/- and also proposed for imposing penalty under Sec 11AC of the Act. On Adjudication by the Original Authority, the entire demand proposed was confirmed along with interest and also imposed equal penalty on the Appellant, penalty of Rs.5,00,000/- on Mr.
G.N.V. Satish – partner of the Appellant and penalty of Rs.50,000/- on SRCPL. However, the Adjudicating Authority did not appropriate the advance deposit including demand of interest on the same made by SRCPL and also did not impose any penalty on Mr. M. Malla Reddy, Director of Farmax. On Appeal, aftergoing through the defense submissions, Commissioner (Appeals) upheld the Order passed by the Original Authority by way of rejection of Appeal filed by theAppellant. However, the Appeal filed by Mr. G.N.V. Satish – partner of the Appellant was allowed.

4. The Appellant is in Appeal against the Order passed by the Commissioner (Appeals). Since no one is appearing on behalf of the Appellant on many occasions, the Bench appointed Mr. P. Sai Makrandh as amicus curie, on behalf of the Appellant.

5. Amicus curie has taken us through the genesis of the case and the issues involved. His main argument is that the denial of the exemption is possible only when goods manufactured by the Appellant bearing a brand name or trade name, belongs to another person. Therefore, in order to deny the benefit exemption notification, two conditions needs to be fulfilled, viz., that the brand name should not belong to someone else and secondly, that the brand name should be used in the course of trade to indicate a connection between the goods (mosquito coils) and the person using the name (SRCPL/Farmax). He hasalso relied on the observation of the Commissioner (Appeals), wherein, he has observed that M/s SRCPL and Farmax had applied for trademark or the brand name and that they used the term 'TM' on the packaging and that the Appellants have not brought any evidence on record that SRCPL or Farmax are not the owners of the brand. However, mere filing of an application for the brand name does not confirm the brand name to the applicant, viz., SRCPL/Farmax. He has also relied on certain amendments made in Notification No. 08/2003-CE vide Notification No.47/2008 dt.01.09.2008, whereby, a exception was made in condition No.4 in Paragraph 4 of the Notification by way of – "where the specified goods are in the nature of packing materials and are meant for use as packing materials by or on behalf of the person whose brand name they bear." However, he fairly concedes that barring period involved from01.09.2008 to 26.09.2008, this condition would not be available in terms of original notification. He has also not been able to explain whether this condition has retrospective effect or otherwise.

6. The Revenue, on the other hand, has reiterated the decisions of the Commissioner (Appeals) and has relied on case law CCE, Trichy vs Rukmani Pakkwell Traders [2004 (165) ELT 481 (SC)], in support of their contention thatin the given factual matrix of the case, where there is admittedly, a owner ofthe registered trademark, the benefit is not available to the Appellants.

7. Heard the parties and perused the records.

8. The main issue which needs to be decided is whether the Appellants were clearing the goods under the brand name of another person or otherwise. Admittedly, the Appellants were manufacturing mosquito coils, which werebeing cleared to two parties viz., SRCPL & Farmax, in terms of Agreement entered between the Appellant and SRCPL/Farmax. It is not disputed that the goods were being manufactured by the Appellant and were being cleared in packed form from the factory of the Appellants. It is also not disputed that on packing materials certain details like brand name/trade name etc., of SRCPL/Farmax were imprinted. It is also not disputed that the names of SRCPL/Farmax were appearing as "marketed by" even though the names of the Appellants were also appearing as "manufactured by". It is on the record that the department has recorded the statements of both Appellants as well as SRCPL/Farmax, and has also relied on certain documents

including advertisements, trademark application, etc., to establish that the brands viz., “STOP” and “TODAY” were linked to SRCPL and Farmax respectively. Thestatements have clearly linked that these companies were in the business of both manufacturing and trading and were using these brands in respect of variety of products. The market was already aware of the identity of these brand names, even though they might be in relation to some other products. It is also an admitted fact that Appellant has not brought any evidence on record that these brand names are either owned by them or by somebody else other than SRCPL/Farmax.

9. Paragraph 4 of notification is unambiguous regarding definition of brand name/trade name, in as much as, it refers to any name or mark or symbol or monogram, etc., whether registered or not, which is used in relation to such specified goods for the purpose of indicating, or so as to indicate, a connectionin the course of trade between such specified goods and some person using such name or mark would be brand name/trade name for the purpose of this notification.

10. Thus, in the absence of the Appellant’s providing any evidence that they were the brand name owners, irrespective of the fact that whether it was registered in their name or not and the market’s perception that brand name belonged to somebody else, it is not possible to consider that it did not belongto others. In fact, in this case, sufficient evidence is on record by way of statements and other relied upon documents to the effect that these brand names/trade names were belonging to SRCPL and Farmax.

11. The Commissioner (Appeals) has gone into details before coming to the conclusion that both the brand names belong to some other person. TheAppellants reliance on the case law cited is not relevant. In the case of CCE, Hyderabad vs Stangen Immuno Diagnostics [2015 (318) ELT 585 (SC)], the issue in the said case was whether two different parties were using the same trademark and logo simultaneously in their own rights, which is not the case here as it is clearly the case where the Appellant has failed to prove that they were the owners of the brand name/trade name of “STOP” and “TODAY”. The Hon’ble Supreme Court observed that the Assessee, in this case, is using brand name as the owner thereof itself, and was not using brand name as belongingto some other person. Further, with regard to condition No.4, the Hon’ble Supreme Court made an observation, inter alia, that explanation (ix) gives a unique and particular definition to the term “brand name” or “trade name”, in asmuch as, the definition of brand name or trade name contained therein is concerned with a particular name or mark which is used to indicate, in the course of trade, a connection between such specified goods as satisfying the criterion provided in aforesaid condition No.4 and the manufacturer which is using such name or mark with or without any indication of the identity of itself. The Hon’ble Supreme Court further observed that the central idea contained in the aforesaid definition is that the mark is used with the purpose to show connection of the goods with some person who is using the name or mark and therefore, in order to qualify as ‘brand name’ or ‘trade name’, it has to be established that such mark, symbol, design or name, etc., has acquired the reputation of the nature that one is able to associate the said mark with the manufacturer.

12. In this case, as rightly observed by the Commissioner (Appeals), there is sufficient evidence to clearly establish that brand name or trade name belonged to other persons viz., SRCPL/Farmax and not to the Appellant. Further, there is nothing on record to establish that the Appellants were perceived to be the brand name owner for “STOP” and “TODAY” in the market.

13. Therefore, the Order of Commissioner (Appeals) is based on correctappreciation of facts and legal provisions and therefore, the same need not be interfered with and accordingly, we pass the following Order:

The Appeal filed by the Appellant is dismissed.

(Pronounced in the Open Court on 04.12.2023)

(ANIL CHOUDHARY)MEMBER (JUDICIAL)

Veda

(A.K. JYOTISHI) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 85243 OF 2014

[Arising out of Order-in-Original No: 78-79/MAK(78-79) COMMR/RGD/13-14 dated 27th September 2013 passed by the Commissioner of Central Excise, Customs & Service Tax, Raigad.]

JSW Steel (Salav) Ltd
Village Salav, Post: Revanda, Dist: Raigad – 402202 … ***Appellant***

versus

Commissioner of Central Excise & Service Tax Raigad
Plot No. 1, Sector 17 Khandeshwar,
Navi Mumbai 410206 ***…Respondent***

APPEARANCE:

Shri Rajesh Ostwal, Advocate for the appellant

Shri Sunil Kumar Katiyar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL) HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 87197/2023

DATE OF HEARING: 29/08/2023

DATE OF DECISION: 06/12/2023

PER: C J MATHEW

This appeal of M/s JSW Steels (Salav) Limited, against order[1] [1] [order-in-original no. 78-79/MAK(78-79) COMMR/RGD/13-14 dated 27th September 2013 of Commissioner of Central Excise, Customs & Service Tax, Raigad, pertains to the recovery of credit of ₹ 1,21,36,223/- taken under CENVAT Credit Rules, 2004, for the period from March 2006 to September 2010 and for the period from April 2011 to December 2011, that the appellant was held as not entitled to.

2. The brief facts of the case are that the appellant, who operates a jetty for 'captive use' at Salav on the banks of Revanda creek under a thirty year lease agreement with the Maharashtra Maritime Board (MMB) for unloading of 'iron ore lumps' and 'iron ore pellets' at the last stage of transportation to their factory for use in the manufacture of 'hot briquettes iron' and 'sponge iron', had, in order to ensure availability of sufficient depth in the creek, for vessels carrying the raw materials from ships at anchorage to conveniently berth at the jetty, been getting the 'creek bed' dredged regularly and, against invoices issued by provider of the service, availed credit to extent of tax on such service.

3. The proceedings initiated against them in 2011 for recovery of credit availed from March

2006 to September 2010, and by notice dated 26th April 2012 for the period thereafter, culminated in confirmation of recovery of both amounts under rule 14 of CENVAT Credit Rules, 2004 along with imposition of penalty of like amount in relation to the first notice, and ₹ 1,25,000/- for the subsequent period, under rule 15 of CENVAT Credit Rules, 2004. The contention of the central excise authorities was that the impugned 'taxable service' was not in conformity with the definition of 'input service' in rule 2(l) of CENVAT Credit Rules, 2004.

4. We have heard Learned Counsel for the appellant and Learned Authorised Representative.

5. The issue lies within the narrow compass of eligibility of the impugned services in accordance with rule 3 of CENVAT Credit Rules, 2004 which permits availment of credit. It is contended by Learned Counsel for the appellant that by conformity with the definition of 'input service' in rule 2(l) of CENVAT Credit Rules, 2004 permitting such services as are used directly or indirectly in the manufacture of goods, with no evidence on record to dispute this claim for entitlement, denial thereto was inappropriate. According to him, the first limb of the definition itself include the impugned activity and, in addition, the second limb, incorporating 'procurement of inputs' as well as 'inward transportation of input goods', sufficed to enable availment of tax discharged on receipt of the impugned activity as credit. It was further submitted that the expression 'activities relating to business', as existed prior to 1st April 2011 and with no limits thereon, would also apply to a substantial portion of the demand. That the expression 'activity relating to business' is inclusive of all of these was sought to be supported by reliance on the decision of the Hon'ble Supreme Court in *Coca Cola India Pvt Ltd v. Commissioner of Central Excise, Pune – II [2009 (15) STR 657 (Bom)]* and of the Hon'ble High Court of Karnataka in *Commissioner of Central Excise, Bangalore – III v. Stanzen Totototetsu India (P) Ltd [2011 (23) STR 444 (Kar.)]*. Further, our attention was drawn to the overarching interpretation afforded by the Hon'ble High Court of Bombay in *Commissioner of Central Excise, Nagpur v. Ultratech Cement Ltd [2010 (20) STR 577 (Bom.)]*. Learned Counsel argued that the admitted fact of services not having been physically received in the factory was also not an impediment in view of decisions of the Hon'ble High Court of Bombay in *Deepak Fertilizer & Petrochemicals Corporation Ltd v. Commissioner of Central Excise, Belapur [2013 (32) STR 532 (Bom.)]*, in *Oil & Natural Gas Corporation Ltd Commissioner of Central Excise, Service Tax & Customs, Raigad [2013 (32) STR 31 (Bom.)]* and in *Commissioner of Central Excise & Customs, Aurangabad v. Endurance Technology Pvt Ltd [2017 (52) STR 361 (Bom.)]*. According to Learned Counsel, the decision of the Tribunal in *JSW Jaigarh Port Ltd v. Commissioner of CGST, Kolhapur [2023 (6) TMI 239 – CESTAT MUMBAI]* and *'4.7 Thus we are of the view that till the time it can be shown that input services have been used by the manufacturer of finished goods, in the process of manufacture or for conducting this business of manufacture of finished goods, the*

Cenvat credit on the input services cannot be denied, even if the said services are received at place other than factory premises. Even in the case of inputs, Hon'ble Bombay High Court in the case of Deepak Fertilizers & Petrochemicals Corpn. Ltd. [2013 (32) STR 532 (Bom.)], held as follows:-

"5. Now at the outset it must be noted that Rule 3(1) allows a manufacturer of final products to take credit inter alia of Service Tax which is paid on (i) any input or capital goods received in the factory of manufacturer of the final product; and (ii) any input service received by the manufacturer of the final product. The subordinate legislation in the present case makes a distinction between inputs or capital goods on the one hand and input services on the other. Clause (i) above provides that the Service Tax should be paid on any input or capital goods received in the factory of manufacture of the final product. Such a restriction, however, is not imposed in regard to input services since the only stipulation in clause

(ii) is that the input services should be received by the manufacturer of the final product. Hence, even as a matter of first principle on a plain and literal construction of Rule 3(1) the Tribunal was not justified in holding that the appellant would not be entitled to avail of Cenvat credit in respect of services utilized in relation to ammonia storage tanks on the ground that they were situated outside the factory of production. The definition of the expression 'input service' covers any services used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final

products. The words 'directly or indirectly' and 'in or in relation to' are words of width and amplitude. The subordinate legislation has advisedly used a broad and comprehensive expression while defining the expression 'input service'. Rule 2(l) initially provides that input service means any services of the description falling in sub-clauses

(i) and (ii). Rule 2(l) then provides an inclusive definition by enumerating certain specified services. Among those services are services pertaining to the procurement of inputs and inward transportation of inputs. The Tribunal, proceeded to interpret the inclusive part of the definition and held that the Legislature restricted the benefit of Cenvat credit for input services used in respect of inputs only to these two categories viz. for the procurement of inputs and for the inward transportation of inputs. This interpretation which has been placed by the Tribunal is ex facie contrary to the provisions contained in Rule 2(l). The first part of Rule 2(l) inter alia covers any services used by the manufacturer directly or indirectly, in or in relation to the manufacture of final products. The inclusive part of the definition enumerates certain specified categories of services. However, it would be farfetched to interpret Rule 2(l) to mean that only two categories of services in relation to inputs viz. for the procurement of inputs and for the inward transportation of inputs were intended to be brought within the purview of Rule 2(l). Rule 2(l) must be read in its entirety. The Tribunal has placed an interpretation which runs contrary to the plain and literal meaning of the words used in Rule 2(l). Moreover as we have noted earlier, whereas Rule 3(1) allows a manufacturer of final products to take credit of excise duty and Service Tax among others paid on any input or capital goods received in the factory of manufacturer of the final product, insofar as any input service is concerned, the only stipulation is that it should be received by the manufacturer of the final product. This must be read with the broad and comprehensive meaning of the expression 'input service' in Rule 2(l).The input services in the present case were used by the appellant whether directly or indirectly, in or in relation to the manufacture of final products. The appellant, it is undisputed, manufactures dutiable final products and the storage and use of ammonia is an intrinsic part of that process."'

and in *JSW Steel (Salav) Ltd and Welspun Maxsteel Ltd v. Commissioner of Central Excise, Raigad [2022 (1) TMI 967 – CESTAT MUMBAI]*, as well as in *Ultratech Cement Limited v. Commissioner of Central Excise & Service Tax, Surat [2021 (3) TMI 630 – CESTAT AHMEDABAD,* was similarly applicable to the facts of the case.

6. The principal issue in this dispute is neither that of the appellant not having paid for the service inclusive of tax liability as recorded in the bills raised by the provider nor of such service not having been provided within the factory premises but, in fact, turns on whether the appellant was recipient of service. While 'input service' in rule 2(l) of CENVAT Credit Rules, 2004 is broad enough to cover activities that found even indirect use in manufacture, the primary eligibility, arising from rule 3 of CENVAT Credit Rules, 2004 accruing only to the recipient of 'such service', is untenable.

7. It is common ground that the waters, which had been deepened by dredging for approach of barges, did not belong to the appellant. Nor do the waters belong to any particular owner other than the Republic of India. The administrative control over such waters is vested with the Maharashtra Maritime Board (MMB) and any improvement, or enhancement of capability, would render the Maharashtra Maritime Board (MMB) to be recipient of service irrespective of the source of payment for such service. This is an aspect that the appellant has not been able to controvert and it is on this aspect that the eligibility of CENVAT credit must rest for, otherwise, rule 3 of CENVAT Credit Rules, 2004 would be rendered superfluous. It is only by reading definitions into the framework of the scheme, permitting the recipient of the service to avail of credit, that the integrity of the scheme can be maintained; the appellant has not been able to provide any precedent decision which would alter such construct of the CENVAT scheme. In *re JSW Jaigarh Port Ltd,* the issue for consideration was the entitlement for credit by the port operator that rested upon the area of the port being under the control of the appellant therein. In *re JSW Steel (Salav) Ltd,* the dispute pertains to the services availed for setting up of, and operation, of the jetty which was under undisputed lease to the appellant. The tax discharged on services performed on such leased property, while the

waters and ‘creek bed’ were not, does conform to the secondary qualification of being the recipient of the service entitling availment of credit of tax paid on ‘taxable service’ that conform to threshold eligibility by inclusion in definition. The decision of the Tribunal in *re Ultratech Cement Ltd* arose in similar circumstances of claim by recipient of service and, hence, would not apply to the resolution of the present dispute.

8. For above reasons, we find no merit in the appeal which is dismissed.

(Order pronounced in the open court on 06/12/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.1350 of 2011

(Arising out of Order-In-Original No.49/Commr./LKO/CX/2010-11 dated31.12.2010 passed by Commissioner, Central Excise & Service Tax, Lucknow)

Commissioner, Central Excise & Service Tax, Lucknow
…..Appellant

(7-A, Ashok Marg, Lucknow-226010)

VERSUS

M/s Harsh Traders **….Respondent**

(165, Deep Nagar, RDSO, Manak Nagar, Lucknow)

APPEARANCE:

Shri Manish Raj, Authorized Representative for the AppellantNone for the Respondent

CORAM: **HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)**
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70175/2023

DATE OF HEARING : 03.11.2023
DATE OF DECISION : 03.11.2023

SANJIV SRIVASTAVA:

This appeal filed by revenue is directed against the Order- In-Original No. 49/Commr./LKO/CX/2010-11 dated 31.12.2010 of the Commissioner, Central Excise & Service Tax, Lucknow. While adjudging the case demand of central excise duty of Rs.137.50 Lakhs Rs.275.00 Lakhs has been confirmed against onthe respondent. However, while imposing a penalty, a penalty of only Rs.137.50 lakhs has been imposed on the appellant under Section 11AC of the Central Excise Act, 1944.

2.0 Revenue has filed this appeal only seeking a modificationin the impugned order to the extent that penalty equivalent to the duty confirmed under Section 11AC of the Central Excise Act

should be imposed and the total penalty should have been 137.50 lakh + Rs.275.00 lakhs.

3.0 Notice for hearing was issued to the respondent a number of times which have been received back undelivered. The matter has been adjourned on each occasion for the reason that respondent did not respond to any of the notices issued to them by the registry. Matter has been adjourned for more than 03 times whereas as per proviso to Section 35C 1(A) matter could have been adjourned maximum for 03 times on the request of any party to appeal. For ready reference Section 35C(1A) is reproduced below:-

"Section 35C. Orders of Appellate Tribunal. - (1A) The Appellate Tribunal may, if sufficient cause is shown,at any stage of hearing of an appeal, grant time, from timeto time, to the parties or any of them and adjourn thehearing of the appeal for reasons to be recorded in writing: **Provided that no such adjournment shall be grantedmore than three times to a party during hearing of theappeal.**"

Rule 21 of the CESTAT Procedure Rules, 1982 provides as follows:**"RULE 21. Hearing of appeals ex parte.** — Where on the day fixed for the hearing of the appeal or on any other day to which the hearing is adjourned the appellant appears and the respondent does not appear when the appeal is called onfor hearing, the Tribunal may hear and decide the appeal ex parte."

Thus in terms of Rule 21 of the Cestat procedure Rules, 1982 this appeal has been taken up for hearing ex-parte.

4.0 Learned Departmental Representative appearing on behalf of the appellant-Department submits that by reiterating the grounds taken in the appeal it is only by oversight Adjudication Authority has failed to impose penalty in respect of demand confirmed by her amounting to Rs.275.00 lakhs.

5.0 We have considered the impugned order along with the submissions made in the appeal and during the course of arguments. It is interesting to note that appellant has consistently evaded appearing before the Adjudicating Authority.Relevant para of the O-I-O is reproduced below:-

43. "The opportunity of personal hearing were given to Shri Ranjeet Verma proprietor of M/s Harsh Traders and Smt Seema Verma, w/o Shri Ranjeet Verma on 16.6.2010. Both, Shri Ranjeet Verma and Smt Seema Verma failed to appear for personal hearing on 16.6.2010.

44. A letter dated 30.6.2010 was received from ShriRanjeet Verma and Smt Seema Verma wherein it was informed that indicating that they are residing at the new address: i.e Clo Smt Kamlesh Verma, Behind RDSOGurudwara, Deep Nagar, Lucknow, Mobile No 7668508147.

45. According to the request of the assesse and Smt Seema Verma another opportunity /date for personal hearing on 17.8.2010 at 11.30 Hrs was given to M/s Harsh Traders,165, Deep Nagar, Lucknow and Smt Seema Vema, w/o Shri Ranjeet Verma and M/s Aditya Packs, Lucknow vide this office C.No V(30)Adj)/Lko/238/2009/8255-58 dated 21.7.2010.

46. The letter was sent for delivery through Range Superintendent. The Superintendent, Central Excise, Range-

1. Talkatora, Division-1, Lucknow informed that he had contacted Shri Ranjeet Verma on 29.7.2010, on the mobile number communicated by the assessee in letter dated 30.6.2010 to serve the letter for personal hearing fixed on 17.8.2010. Shri Ranjeet Verma had informed that he would be available at his sister's place (ie at the new address mentioned in his letter dated 30.6.2010) around 13.00 Hrsto receive the letter. The officers reached the place but did not find Shri Ranjeet Verma or Smt Seema Verma. The lady present at the new address introduced herself as Smt Kamlesh Verma -sister of Shri Ranjeet Verma. She informed the officers that Shri Ranjeet Verma and Smt Seema Verma had left the address at 165, Deep Nagar, RDSO, Lucknow and the new address was not known to her. She also refusedto receive the letters. Thereafter the officers visited thepremises at 165, Deep Nagar, RDSO, Lucknow but found it locked and no one was found in the premises. It was informed by the neighbors that the premises was closed since long time. Consequently, the letter granting opportunity of personal hearing to Shri Ranjeet Verma and Smt Seema Verma was sent by speed post but was returnedas 'undelivered by the postal authorities. Therefore on 5.8.2010, the Central Excise officers pasted the letter granting opportunity of personal hearing on 17.8.2010 at thefront door of M/s Harsh Traders, 165, Deep Nagar, RDSO, Lucknow under the provisions of Section 37 C (1) of the Central Excise Act, 1944.

47. On 17.8.2010, Shri G.K.Dhusia, Consultant for M/s Aditya Packs, Lucknow

appeared for personal hearing before the Commissioner, Central Excise and Service Tax, Lucknow and reiterated the points of the written reply and had nothing to say besides that.

48. Shri Ranjeet Verma, proprietor of M/s Harsh Traders, 165-Deep Nagar, RDSO, Manak Nagar, Lucknow and Smt Seema Verma both failed to turn up for personal hearing on 17.8.2010 at 11.30 Hrs.

49. Another opportunity for personal hearing was given to M/s Harsh Traders. 165-Deep Nagar, RDSO, Manak Nagar, Lucknow and Smt Seema Verma on 27.9.2010 at 11.30 Hrs.

50 The Superintendent, Central Excise, Range-1, Talkatora, Division-1, Lucknow vide letter C.No 20- CE/14/harsh Traders/RTK/07/452 dated 27.9.2010 informed that the letter for personal hearing on 27.9.2010 was given through the counsel (of M/s Harsh Traders) to Shri S.N.Srivastava (Advocate), C-5, Sector -B, Aliganj, Lucknow,but the same were returned by Shri S.N.. Srivastava, councel for M/s Harsh Trader with the remark "returned the applicant's copy as he is not traceable". The officers found premises locked at M/s Harsh Traders, 165, Deep Nagar, RDSO as well as the address of Smt Kamlesh Verma. The officers pasted the photocopies of the notice of granting opportunity of personal hearing on 27.9.2010 at the front door of the premises of M/s Harsh Traders, 165, Deep Nagar, RDSO, Lucknow and at the door of Smt Kamlesh Verma under the proper Panchnama dated 24.9.2009

51 Shri Ranjeet Verma, proprietor of M/s Harsh Traders.165-Deep Nagar, RDSO, Manak Nagar, Lucknow and Smt Seema Verma both failed to turn up for personal hearing on 27.9.2010 at 11.30 Hrs also. Since ample opportunity had been provided to the noticees to represent their case and they seem to be deliberately misusing the time given to them. I propose to take up the case for adjudication on the basis of records available."

6.0 We also note that Hon'ble Supreme Court has in the case of Ishwarlal Mali Rathod [Order dated September 20, 2021 in Special Leave Petition (Civil) Nos.14117•14118 OF 2021] has observed the case as follows:

"1. Present is the classic example of misuse of theadjournments granted by the court. Present SLPs have been preferred challenging the impugned order dated 17.02.2021 passed by the High Court of Madhya Pradesh, Bench at Indore in
M.P. No.107 of 2021 and M.P. No. 108 of 2021 by which theHigh Court has dismissed the said misc. petition preferred by thepetitioner – original defendant, confirming the order passed by the learned Trial Court dated 21.12.2020 closing the right to cross¬examine the plaintiff's witness.

…

4. As observed hereinabove, present is a classic example of misuse of adjournments granted by the court. It is to be noted that the respondents herein – original plaintiffs filed the suit for eviction, arrears of rent and mesne profit as far as back in the year 2013. That thereafter despite the repeated adjournments sought and granted by the court and even twice the adjournments were granted as a last opportunity and even the cost was imposed, the defendant failed to cross examine the plaintiff's witness. Although the adequate liberty was given to the defendant to cross examine the plaintiff'switness, they never availed of the same and went on delayingthe proceedings by repeated prayers of adjournment and unfortunately the Trial Court and even subsequently the High Court continued to grant adjournment after adjournment and as such contributed the delay in disposal of thesuit which as such was for eviction. Such approach is wholly condemnable. Law and professional ethics do not permit such practice. Repeated adjournments on one or the other pretext and adopting the dilatory tactics is an insult to justice andconcept of speedy disposal of cases. Petitioner – defendant actedin a manner to cause colossal insult to justice and to concept of speedy disposal of civil litigation.

5. Grant of repeated adjournments in routine manner and how itaffects ultimately the justice delivery system as such came to be considered by this court in catena of decisions andasking/grant of repeated adjournments have been repeatedly condemned by this court.

5.1 In the case of Shiv Cotex v. Tirgun Auto Plast (P) Ltd. (2011)

9 SCC 678, it is observed and held in paragraphs 14 to 17 as under:•

"14. … Is the court obliged to give adjournment after adjournment merely because the stakes are high in the dispute? Should the court be a silent spectator and leave control of the case to a party to the case who has decided not to take the case forward?

15. It is sad, but true, that the litigants seek—and the courts grant—adjournments at the drop of the hat. In the cases where the Judges are little proactive and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realise that adjournments do dent the efficacy of the judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit.

16. No litigant has a right to abuse the procedure provided in CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system.

17. … A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit—whether the plaintiff or the defendant—must cooperate with the courtin ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril."

5.2 Commenting on the delay in the justice delivery system, although in respect of the criminal trial, Krishna Iyer, J. in the case of Babu Singh v. State of U.P. (1978) 1 SCC 579 has observed in paragraph 4 as under:•

"4. … Our justice system, even in grave cases, suffers from slow motion syndrome which is lethal to 'fair trial', whateverthe ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings."

5.3 In the case of Noor Mohammed v. Jethanand and Anr.(2013) 5 SCC 202, using very harsh words and condemning the repeated adjournments sought by the lawyers and granted by the courts, this court has observed in paragraph 1, 12, 13, 27 and 28 as under:•

"1. In a democratic body polity which is governed by a written Constitution and where the Rule of Law is paramount, the judiciary is regarded as sentinel on the quivive not only to protect the fundamental rights of the citizensbut also to see that the democratic values as enshrined in the Constitution are respected and the faith and hope of thepeople in the constitutional system are not atrophied. Sacrosanctity of the Rule of Law neither recognises a master and a slave nor does it conceive of a ruler and a subject but, in quintessentially, encapsules and sings in glory of the values of liberty, equality and justice in accordance with law requiring the present generationto have the responsibility to sustain them with all fairness for the posterity ostracizing all affectations. To maintain the sacredness of democracy, sacrifice in continuum by every member of the collective is a categorical imperative. The fundamental conception of democracy can only be preserved as a colossal and priceless treasure where virtue and values of justice rule supreme and intellectual anemia is kept at bay by constant patience, consistent perseverance, and argus eyed vigilance. The foundation of justice, apart from other things, rests on the speedy delineation of the lis pending in courts. It would not be an exaggeration to state that it is the primary morality of justice and ethical fulcrum of the judiciary. Itsprofundity lies in not allowing anything to cripple the same orto do any act which would freeze it or make it suffer from impotency. Delayed delineation of a controversyin a court of law creates a dent in the normative dispensation of justice and in the ultimate eventuate, the Bench and the Bar gradually lose their reverence, for the sense of divinity and nobility really flows from the institutional serviceability. Therefore, historically, emphasis has been laid on individual institutionalism and collective institutionalism of an adjudicator while administering justice. It can be stated without any fear of contradiction that the collective collegiality can never be regarded as an alien concept to speedy dispensation of justice. That is the hallmark of duty, and that is the real measure.

12. The proceedings in the second appeal before the High Court, if we allow ourselves to say so, epitomises the corrosive effect that adjournments can have on a litigation and how a lis can get entangled in the tentacles ofan octopus. The philosophy of justice, the role of a lawyerand the court, the obligation of a litigant and all legislative commands, the nobility of the

Bench and the Bar, the ability and efficiency of all concerned and ultimately the divinity of law are likely to make way for apathy and indifference when delay of the present nature takes place, for procrastination on the part of anyone destroys the values of life and creates a catastrophic turbulence in the sanctity of law. The virtues of adjudication cannot be allowedto be paralyzed by adjournments and non demonstration of due diligence to deal with the matter. One cannot be oblivious to the feeling necessities of the time. No one can afford to sit in an ivory tower. Neither a Judge nor a lawyer can ignore "the total push and pressure of the cosmos". It is devastating to expect infinite patience. Change of attitude is the warrant and command of the day. We may recall with profit what Justice Cardozo had said: "It is true, I think,today in every department of the law that the social value ofa rule has become a test of growing power and importance."[Benjamin N. Cardozo, The Nature of Judicial Process (Cosimo Inc., 2009) 73]

13. It has to be kept in mind that the time of leisure has tobe given a decent burial. The sooner it takes place, the betterit is. It is the obligation of the present generation to march with the time and remind oneself every moment that the ruleof law is the centripodal concern and delay in delineation and disposal of cases injects an artificial virus andbecomes a vitiating element. The unfortunate characteristics of endemic delays have to be avoided at any cost. One has to bear in mind that this is the day, this is the hour and this is the moment, when all soldiers of lawfight from the path. One has to remind oneself of the great saying, "Awake, Arise, 'O' Partha".

27. The anguish expressed in the past and therole ascribed to the Judges, the lawyers and the litigants is a matter of perpetual concern and the same has to be reflectedupon every moment. An attitude of indifference can neitherbe appreciated nor tolerated. Therefore, the serviceability of the institution gains significance. That is the command of the Majesty of Law and none should make any maladroit effort tocreate a concavity in the same. Procrastination, whether at the individual or institutional level, is a systemic disorder. Its corrosive effect and impact is like a disorderly state of the physical frame of a man suffering from an incurable and fast progressive malignancy. Delay either by the functionaries of the court or the members of theBar significantly exhibits indolence and one canaphoristically say, borrowing a line from Southwell "creeping snails have the weakest force" [Robert Southwell, "Loss in Delay", in William B. Turnbull (Ed.), The Poetical Works of the Rev. Robert Southwell (John Russell Smith, London 1856), p. 60.] . Slightly more than five decades back, talking about the responsibility of the lawyers, Nizer Louis had put thus: "I consider it a lawyer's task to bring calm and confidence to the distressed client. Almost everyone who comes to a law office is emotionally affected by a problem. It is only a matter of degree and of the client's inner resources to withstand the pressure." [Nizer Louis, My Life inCourt (Doubleday & Co. Inc., New York 1961), p. 213]

A few lines from the illustrious Justice Frankfurter is fruitfulto recapitulate:

"I think a person who throughout his life is nothing but a practising lawyer fulfils a very great and essential function in the life of society. Think of the responsibilities on the one hand, and the satisfaction on the other, to be a lawyer in the true sense." [Felix Frankfurter, "Proceedings in Honor of Mr. Justice Frankfurter and Distinguished Allumni, Occasional Pamphlet No. 3" (Harvard Law School, Cambridge, 1960), pp. 4•5]

28. In a democratic set•up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith inthe system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentationof faith has the effect potentiality to bring in a state ofcataclysm where justice may become a casualty. A litigant expects a reasoned verdict from a temperate Judge but does not intend to and, rightly so, to guillotine much of time at thealtar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of lawbut also a natural right. This right can be fully ripened by the requisite commitment of all concerned with the system. It cannot be regarded as a facet of Utopianism because such a thought is likely to make the right a mirage losing the centrality of purpose. Therefore, whoever has a role to play in the justice dispensation system cannot be allowed to remotely conceive of a casual approach."

5.4 In the aforesaid decision, this court also considered the role of advocate in the justice delivery system and considered the earlier decisions in paragraphs 17 to 22 which read as under:•

"17. In Ramon Services (P) Ltd. v. Subhash Kapoor [(2001) 1 SCC 118 : 2001 SCC (Cri) 3 : 2001 SCC (L&S)
152 : AIR 2001 SC 207] , after referring to a passage from Mahabir Prasad Singh v. Jacks Aviation (P) Ltd. [(1999) 1 SCC 37 : AIR 1999 SC 287] , the Court cautioned thus :

(Ramon Services case [(2001) 1 SCC 118 : 2001 SCC (Cri)3 : 2001 SCC (L&S) 152 : AIR 2001 SC 207] , SCC p. 126, para 15)

"15. … Nonetheless we put the profession to notice that in future the advocate would also be answerable for theconsequence suffered by the party if the non•appearance was solely on the ground of a strike call. It is unjust and inequitable to cause the party alone to suffer for the self imposed dereliction of his advocate. We may further add that the litigant who suffers entirely on account of his advocate's nonappearance in court, has also the remedy to sue the advocate for damages but that remedy would remain unaffected by the course adopted in this case. Even so, in situations like this, when the court mulcts the party with costs for the failure of his advocate to appear, we make it clear that the same court has power to permit the party to realize the costs from the advocate concerned. However, such direction can be passed only after affording an opportunity to the advocate. If hehas any justifiable cause the court can certainly absolve him from such a liability."

Be it noted, though the said passage was stated in the context of strike by the lawyers, yet it has its accent on non•appearance by a counsel in the court.

18. In this context, we may refer to the pronouncement in Pandurang Dattatraya Khandekar v. Bar Council of Maharashtra [(1984) 2 SCC 556 : 1984 SCC (Cri) 335] , wherein the Court observed that : (SCC p. 563, para 9)

"9. … An advocate stands in a loco parentis towards the litigants and it therefore follows that the client is entitled to receive disinterested, sincereand honest treatment especially where the client approaches the advocate for succor in times of need."

19. In Lt. Col. S.J. Chaudhary v. State (Delhi Admn.) [(1984) 1 SCC 722 : 1984 SCC (Cri) 163 : AIR 1984 SC 618] , a three•Judge Bench, while dealing with the role ofan advocate in a criminal trial, has observed as follows : (SCC pp. 723•24, para 3)

"3. We are unable to appreciate the difficulty said to be experienced by the petitioner. It is stated that his advocate is finding it difficult to attend the court from day to day. It isthe duty of every advocate, who accepts the brief in acriminal case to attend the trial from day to day. We cannot over•stress the duty of the advocate to attendto the trial from day to day. Having accepted the brief, he will be committing a breach of his professional duty, if he sofails to attend."

20. In Mahabir Prasad Singh [(1999) 1 SCC 37 : AIR 1999 SC 287], the Bench, laying emphasis onthe obligation of a lawyer in his duty towards the Court and the duty of the Court to the Bar, has ruled as under: (SCCp. 44, paras 17•18)

"17. … 'A lawyer is under obligation to do nothing that shall detract from the dignity of the court of which he ishimself a sworn officer and assistant. He should at alltimes pay deferential respect to the Judge, and scrupulously observe the decorum of the courtroom.' [Warevelle's Legal Ethics, p. 182]

18. Of course, it is not a unilateral affair. There is a reciprocal duty for the court also to be courteous to the members of the Bar and to make every endeavour for maintaining and protecting the respect which members of the Bar are entitled to have from their clients as well as from the litigant public. Both the Bench and the Bar are the two inextricable wings of the judicial forum and thereforethe aforesaid mutual respect is sine qua non for the efficientfunctioning of the solemn work carried on in courts of law. But that does not mean that any advocate or a group of them can boycott the courts or any particular court and ask the court to desist from discharging judicial functions. At any rate, no advocate can ask thecourt to avoid a case on the ground that he does not wantto appear in that court."

21. While recapitulating the duties of a lawyer towards the court and society, being a member of the legal profession, this Court in O.P. Sharma v. High Court of P&H [(2011) 6 SCC 86 : (2011) 3 SCC (Civ) 218 : (2011) 2 SCC (Cri) 821 : (2011) 2 SCC (L&S) 11] has observed that :(SCC p. 92, para 17)

"17. The role and status of lawyers at the beginning of sovereign and democratic India is accounted asextremely vital in deciding that the nation's administration was to be governed by the rule of law."

The Bench emphasised on the role of eminentlawyers in the framing of the Constitution. The emphasis was also laid on the concept that lawyers are the officers of the court in the administration of justice.

22. In R.K. Garg v. State of H.P. [(1981) 3 SCC 166

: 1981 SCC (Cri) 663] , Chandrachud, C.J., speaking for theCourt pertaining to the relationship between the Bench and the Bar, opined thus : (SCC p. 170, para 9)

"9. … the Bar and the Bench are an integral part of the same mechanism which administers justice to the people. Many members of the Bench are drawn from the Bar and their past association is a source of inspiration and pride to them. It ought to be a matter of equal pride to the Bar. It is unquestionably true that courtesy breeds courtesy and just as charity has to begin at home, courtesy must begin with the Judge. A discourteous Judge islike an ill tuned instrument in the setting of a courtroom.But members of the Bar will do well to rememberthat such flagrant violations of professional ethics and cultured conduct will only result in the ultimate destruction of a system without which no democracy can survive."

5.5 Today the judiciary and the justice delivery systemis facing acute problem of delay which ultimately affects the right of the litigant to access to justice and the speedy trial. Arrears are mounting because of such delay anddilatory tactics and asking repeated adjournments by the advocates and mechanically and in routine manner granted by the courts. It cannot be disputed that due to delay in access to justice and not getting the timely justice it may shakenthe trust and confidence of the litigants in the justice delivery system. Many a times, the task of adjournments is used to kill Justice. Repeated adjournments break the back of the litigants. The courts are enjoying upon to perform their duties with the object of strengthening the confidence of common man in the institution entrusted with the administrationof the justice. Any effort which weakens the system and shake the faith of the common man in the justice dispensation has to be discouraged. Therefore the courts shall not grant the adjournments in routine manner and mechanically and shall not be a party to cause for delay in dispensing the justice. The courts have to be diligence and take timely action in order to usher in efficient justice dispensation system and maintain faith in rule of law. We are also aware that whenever the trial courts refused to grant unnecessary adjournments manya times they are accused of being strict and they may face displeasure of the Bar. However, the judicial officers shall not worry about that if his conscience is clear and the judicial officer has to bear in mind his duties to the litigants who are before the courts and who have come for justice and for whom Courts are meant and all efforts shall be made by the courts to provide timely justice to the litigants. Take an example of the present case. Suit was for eviction. Many a times the suits are filed for eviction on the ground of bonafide requirements of the landlord. If plaintiff who seeks eviction decree on the ground of personal bonafide requirement is not getting the timely justiceand he ultimately gets the decree after 10 to 15 years, at times cause for getting the eviction decree on the ground of personal bonafide requirement may be defeated. The resultant effect would be that such a litigant would lose confidence in the justice delivery system and instead of filing civil suit and following the law he may adopt the other mode which has no backing of law and ultimately it affects the rule of law. Therefore, the courtshall be very slow in granting adjournments and as observed hereinabove they shall not grant repeated adjournments in routine manner. Time has now come to change the work culture and get out of the adjournment culture so that confidence and trust put by the litigants in the Justice delivery system is not shaken and Rule of Law is maintained.

5.6 In view of the above and for the reasons stated above and considering the fact that in the present case ten times adjournments were given between 2015 to 2019 and twicethe orders were passed granting time for cross examination as a last chance and that too at one point of time even a cost was also imposed and even thereafter also when lastly the HighCourt passed an order with extending the time it wasspecifically mentioned that no further time shall be extended and/or granted still the petitioner – defendant never availed of the liberty and the grace shown. In fact it can be said that the petitioner – defendant misused the liberty and the graceshown by the court. It is reported that as such now even the main suit has been disposed of. In view of the circumstances, the present SLPs deserve to be dismissed and are accordingly dismissed."

7. On the basis of the records, the case has been adjudicated by the Original Authority confirming the demand amounting to Rs. 137.50 lakh + Rs.2.75 lakhs. While confirming the demand for invoking the provisions of extended period and for impositionof penalty under Section 11AC, adjudicating authority has recorded as follows:

"104 I hold that on 11.5.09, one Pouch Packing Machine installed in the registered premises of M/s Harsh Trader, 165, Deep nagar, Lucknow, was found operational. The excisable/ notified goods "Gutkha" with brand name 'Prem Bahar' and 'Partner' (MRP Re 1.00) were being manufactured since Ju;ly 2008 in contravention of Pan Masala Machines (Capacity Determination and Collection of Duty) Rules, 2008. I find, duty amounting to Rs 137.50 Lakhs is demandable and liable torecovery from M/s Harsh Traders, Lucknow under the proviso to Section 11 A (1) of the Central Excise Act, 1944 alongwithinterest under Section 11AB of the Central Excise Act, 1944.

105. 104 I hold that on 11.5.09, two Pouch Packing Machines installed in the unregistered premises Little Care Public School, Behind RDSO, Gurudwara, Surya Nagar, Lucknow were found operational. The excisable/ notified goods "Gutkha" with brand name 'Prem Bahar' and 'Partner' (MRP Re 1.00) were being manufactured since July 2008 in contravention of Pan Masala Machines (Capacity Determination and Collection of Duty) Rules, 2008. I find, duty amounting to Rs 275.00 Lakhs is demandable and liable to recovery from M/s Harsh Traders, Lucknow under the proviso to Section 11 A (1) of the Central Excise Act, 1944 alongwith interest under Section 11AB of the Central Excise Act, 1944.

110. I find that Noticee No 1 and Noticee No 2 are liable to penal action separately, under 17(1) of Pan Masala Machines (Capacity Determination and Collection of Duty) Rules, 2008, tread with Rule 25 of the Central Excise Rules, 2002 and Section 11AC of the Central Excise Act, 1944 for contravention of the Rules committed at 165 Deep Nagar, RDSO, Manak Nagar, Lucknbow and Little Care Public School, Behind RDSO, Gurudwara, Surya Nagar, Lucknow.

8. From the above it is quite evident that the duty has been confirmed against appellant by invoking the proviso to Section 11A (1) of the Central Excise Act,1944 and respondent has been held liable for penalty under Section 11 AC for the duty confirmed at both the premises i.e the registered premises ofM/s Harsh Trader, 165, Deep nagar, RDSO, Manak Nagar Lucknow and unregistered premises at Little Care Public School, Behind RDSO, Gurudwara, Surya Nagar, Lucknow. However while imposing the penalty under Section 11 AC penalty has been imposed only in respect of the duty confirmed at the registered premises of M/s Harsh Trader, 165, Deep nagar,RDSO, Manak Nagar Lucknow

9. It is a settled law that in a case where demand has been confirmed invoking extended period of limitation penaltyequivalent to duty evaded needs to be imposed and there is no discretion to any authority as held by the Hon'ble Supreme Courtin the case of Union of India V/s M/s Rajasthan Spinning & Weaving reported as 2009 (238) E.L.T. 3 (S.C.). Relevant part ofthe judgment is reproduced below:-

"14. Sub-section 1A of Section 11A provides that in case the person in default to whom the notice is given under the proviso to sub-section 1 makes payment of duty in full or in part as may be accepted by him, together with interest under Section 11AB and penalty equal to 25% of the accepted amount of duty within thirty days of the date of receipt of notice then the proceeding against him would be deemed to be conclusive (without prejudice to the provisions of Sections 9, 9A and 9AA) as provided in the proviso to sub-section 2 of Section 11A. Sub- section 1A and the proviso to sub-section 2 were inserted with effect from July 13, 2006 and, therefore, have no application to the periods relevant to the two appeals.

15. Sub-section 2B of Section 11A provides that in case the person in default makes payment of the escaped amount of dutybefore the service of notice then the Revenue will not give him the notice under sub-section 1. This, perhaps, is the basis of the common though erroneous view that no penalty would be leviable if the escaped amount of duty is paid before the service of notice. It, however, overlooks the two explanations qualifying the main provision. Explanation 1 makes it clear that the payment would, nevertheless, be subject to imposition of interest under Section 11AB. Explanation 2 makes it further clearthat in case the escape of duty is intentional and by reason of deception the main provision of sub section 2B will have no application.

16. The other provision with which we are concerned in thiscase is Section 11AC relating to penalty. It is as follows :

[11AC. Penalty for short-levy or non-levy of duty in certaincases.- where any duty of excise has not been levied or paid orhas been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement orsuppression of facts, or contravention of any of the provisions ofthis Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty asdetermined under sub-section (2) of section 11A, shall also beliable to pay a penalty equal to the duty so determined : [Provided that where such duty as determined under sub-section

(2) of section 11A, and the interest payable thereon undersection 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paidby such person under this section shall be twenty-five per centof the duty so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purpose of this section, the duty as reduced or increased, as the case may be, shall be taken into account :

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect –

Explanation. - For the removal of doubts, it is hereby declared that -

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(1) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in thefirst proviso or the fourth proviso shall be adjusted against the total amount due from such person.]

17. The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.

18. One cannot fail to notice that both the proviso to sub- section 1 of Section 11A and Section 11AC use the same expressions : "....by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intentto evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that ifthe notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application ofthe penalty provision in Section 11AC of the Act. On behalf of theassessees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.

19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.

20. At this stage, we need to examine the recent decision ofthis Court in Dharamendra Textile (supra). In almost every case relating to penalty, the decision is referred to on behalf of

the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automaticallyget attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textile and we see no reason to understand orread that decision in that manner. In Dharamendra Textile the court framed the issues before it, in paragraph 2 of the decision, as follows :

"2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr. [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the "Act') inserted by Finance Act, 1996 with theintention of imposing mandatory penalty on persons who evadedpayment of tax should be read to contain mens rea as anessential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the "Rules') and adecision of this Court in Chairman, SEBI v. Shriram Mutual Fund & Anr. [2006 (5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred toa larger Bench."

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows :

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget referencehas been made to the provision stating that the levy of penalty isa mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered...".

21. From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11ACwould apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows :

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period oflimitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statues mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or thequantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The saidclause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the

statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here."

23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable ina case the concerned authority would have no discretion inquantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. Thatis what Dharamendra Textile decides."

10. Taking note of the above, we are of the view that theappeal of the Revenue is having merits and needs to be allowed.

11.0 Appeal filed by the Revenue is allowed.

(Dictated and pronounced in open court)

(P.K. CHOUDHARY)MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)MEMBER (TECHNICAL)

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Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70108 of 2016

(Arising out of Order-in-Appeal Nos.394-395-CE/APPL.LKO/LKO/2015 dated 14/10/2015 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow)

M/s Mamta Steel India Pvt. Ltd., **…..Appellant**
(Peeparpur, (Sanha), Amethi)

VERSUS

Commissioner of Central Excise, Lucknow ….Respondent

(7A Ashok Marg, Lucknow)

WITH

Excise Appeal No.70109 of 2016

(Arising out of Order-in-Appeal Nos.394-395-CE/APPL.LKO/LKO/2015 dated 14/10/2015 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow)

Shri Lal Padmakar Singh, Director, **…..Appellant**
(M/s Mamta Steel India Pvt. Ltd.,Peeparpur, (Sanha), Amethi)

VERSUS

Commissioner of Central Excise, Lucknow ….Respondent

(7A Ashok Marg, Lucknow)

APPEARANCE:

Shri S.P. Ojha, Consultant for the Appellant

Shri Sandeep Pandey, Authorised Representative for the Respondent

CORAM: **HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NOs.70207-70208/2023

DATE OF HEARING : 06 November, 2023 DATE OF PRONOUNCEMENT : 21 November, 2023

SANJIV SRIVASTAVA:

These two appeals are directed against common Order-in- Appeal Nos.394-395-CE/APPL.LKO/LKO/2015 dated 14/10/2015 passed by Commissioner (Appeals) Customs, Central Excise &

Service Tax, Lucknow. By the impugned order Commissioner(Appeal) has held as follows:-

ORDER

Both appeals i.e. Appeal No.- 39-ST(CX)/2015 dated 31.03.2015, filed by M/s Mamta Steel India Pvt. Ltd.,Peeparpur (Sanha), Amethi, District- Chhatrapati Sahuji Maharaj Nagar- 227405, and Appeal No.- 40-ST(CX)/2015 dated 31.03.2015, filed by Shri Lal Padmakar Singh, Director of M/s Mamta Steel India Pvt. Ltd., Peeparpur (Sanha), Amethi, District- Chhatrapati Sahuji Maharaj Nagar (U.P.), are dismissed and corresponding O-I-O No.- 51/ADC/LKO/CX/2014-15 dated 12.01.2015, is upheld.

1.2 Original Authority vide his Order-in-Original No.51/ADC/LKO/CX/2014-15 dated 12/01/2015 held as follows:-

ORDER

On the basis of foregoing discussion and findings, I pass the following order:-

1. I confirm the total demand of Rs. 2,00,449/--00 (RsTwo lacs four hundred and forty nine only) not paid on shortage found in stock of MS Ingots in the premises ofM/s Mamta Steel under Section 11A(4) of the CentralExcise Act, 1944 along with interest at the applicable rate under Section 11AA ibid.

2. I confirm the demand of Central Excise Duty (including Education Cess, Secondary & Higher Education Cess) tothe tune of Rs.36,46,346/-[Rs Thirty six lakh forty six thousand three hundred and forty six only] not paid on thefinished goods removed clandestinely under the cover of the duplicate/forged invoices (issued from books at Sr.No.6 & 8 of the 'Resumption Memo') in addition to otherbooks (Sr.No.7 & 9 of the 'Resumption Memo') from the factory premises of M/s Mamata, Section 11A(4) of the Central Excise Act, 1944; along with interest at the applicable rate Section 11AA ibid.

3. I impose a penalty of Rs.38,46,395/- [Rupees Thirty Eight lakh forty six thousand three hundred and ninetyFive only] upon M/s. Mamta Steel India Pvt. Ltd., Amethi, Distt. C.S.M. Nagar (U.P.) Pin Code-227408. under Rule 25of the Central Excise Rules, 2002 read with Section 11 AC of the Central Excise Act, 1944.

4. I also impose a penalty of Rs.38,46,395/- [Rupees Thirty Eight lakh forty six thousand three hundred and ninety Five only] upon Shri Lal Padmakar Singh, director M/s Mamta Steel India Pvt. Ltd., under Rule 26 of the Central Excise Rules, 2002."

2.1 Appellant-I M/s Mamta Steel India Pvt. Ltd. is a manufacturing unit and Appellant-II Shri Lal Padmakar Singh is director of the said unit. Appellants were engaged in manufacture of MS Ingots, falling under Tariff Item No.72061090of schedule to Central Excise Tariff Act, 1985. Appellants' unit was visited by Central Excise Officers on 30.11.2011 and verification of the stock was done under a proper panchnama. It was found that there was shortage of finished goods to theextent of 72.78 MT on which Central Excise duty of Rs.2,00,449/- was payable. Various records such as RG-1 register, Form-IV register and various invoice books were also resumed under the Panchnama dated 30.11.2011.

2.2 During the course of scrutiny of records it was observed that appellants have been clearing the goods against the same invoice, number of times to various customers and thus was evading central excise duty. After completion of the investigations and inquires a show cause notice dated 22.03.2013 was issued to the appellants asking them to show cause as to why:-

Appellant-I

"(a) Central Excise duty (including Education Cess,Secondary & Higher Education Cess) to the tune of Rs.2,00,449/- not paid on the shortage found in the stock of M.S. Ingots in the factory premises of M/s Mamata,

should not be demanded and recovered under the provisions of Section 11A(4) of the Central Excise Act, 1944;

(b) The Central Excise duty (including Education Cess,Secondary & Higher Education Cess) to the tune of Rs.36,46,346/- not paid on the finished goods removed clandestinely under the cover of the duplicate/forged invoices (issued from books at Sr.No.6 & 8 of the 'Resumption Memo') in addition to other books (Sr.No.7 &9 of the 'Resumption Memo') from the factory premises of M/s Mamata, should not be demanded and recovered under the provisions of Section 11A(4) of the Central Excise Act, 1944;

(c) Interest at applicable rates, on the duty not paid,should not be demanded and recovered under Section11AA of the Central Excise Act, 1944; and

(d) Penalty should not be imposed upon them for contravention of Rules 4,6,8,10, 11 of Central Excise Rules, 2002, under Rule 25 of the Rules, ibid read with Section 11AC of the Central Excise Act, 1944 for their actof suppression the facts, fraud, collusion and contravention of provisions of various Rules, ibid with intent to evade payment of duty as discussed in foregoing paras."

Appellant-II was asked to show cause as to why penalty should not be imposed upon him under Rule 26 of the said Rules for his acts of knowingly, deliberately and actively engaging in concealing/ selling & purchasing/ dealing with transactions in aforementioned clandestine removal of excisable finished goods by the Appellant No.I and of preparing duplicate/forged Invoices.

2.3 This show cause notice was adjudicated as per the Order- in-Original referred in para 1.2 above. Aggrieved appellants filed appeal before Commissioner (Appeals) which was dismissed as per the impugned order as stated in para-1 above. Aggrieved appellant challenged this order before this Tribunal and the Tribunal vide its Final Order Nos.71270-71271/2017 dated 17.10.2017 dismissed the appeals by observing as follows:-

"5. Having considered the rival contentions and on perusal of records it is notice from the show cause notice dated 22.03.2013 that invoices with same numbers such are Invoice No.26 was issued on various dated such as 01.11.2011, 02.11.2011, 03.11.2011, 04.11.2011, 05.11.2011 and 06.11.2011 indicating various quantities ofingots cleared and similar situation was in Invoice No. 27or Invoice No. 28 etc. Further, in the invoice book mentioned at Serial No. 8 of Annexure A, Invoice No. 3was issued several times. No convincing defence was put forth against issue of number of invoices with the same number on various occasion to different purchasescontaining different information about the quantity of ingots cleared. Therefore, I do not find any infirmity in the order passed by the learned Commissioner (Appeals). I, therefore, declined to interfere with the impugned Order- in-Appeal. Both the present appeals are dismissed."

2.4 Against the order of dismissal appellants filed appeal before Hon'ble Allahabad High Court, wherein vide order dated 01.08.2019 in Central Excise Appeal No.17 of 2018 Hon'ble High Court has allowed the appeal of the appellants by remanding thematter back to the Tribunal observing as follows:-

"17. Providing of reasons in orders is of essence in judicial proceedings. Every litigant who approaches the Court with a prayer is entitled to know the reasons for acceptance or rejection of such request. Either of the parties to the lishas a right of appeal and, therefore, it is essential for themto know the considered opinion of the Court or the Tribunalto make the remedy of appeal meaningful. It is the reasoning which ultimately culminates into final decision which may be subject to examination of the Appellate or other higher Courts. It is not only desirable but, in view of the consistent position of law, mandatory for the Court to pass orders while recording reasons in support thereof, however, brief they may be. Brevity in reasoning cannotbe understood in legal parlance as absence of reasons. While no reasoning in support of judicial orders is impermissible, the brief reasoning would suffice to meetthe ends of justice at least at the interlocutory stages and would render the remedy of appeal purposeful and meaningful. It is a settled canon of legal jurisprudence thatthe Courts are vested with discretionary powers but such powers are to be exercised judiciously, equitably and in consonance with the settled principles of law. Whether or not, such judicial discretion has been exercised inaccordance with the accepted norms, can only be reflected by the reasons recorded in the order impugned before

the higher Court. Often it is said that absence of reasoning may ipso facto indicate whimsical exercise of judicial discretion. Patricia Wald, Chief Justice of the D.C. Circuit Court of Appeals in the Article, "The problem with the Courts: **Black-robed Bureaucracy Or Collegiality Under Challenge" 42 Md.L. Rev. 766, 782 (1983),** observed as under:-

'My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the Court that a bare signal of affirmance, dismissal, or reversal does not.'

18. *The Court cannot lose sight of the fact that a losing litigant has a cause to plead and a right to challenge the order if it is adverse to him. Opinion of the Court alone canexplain the cause which led to passing of the final order. Whether an argument was rejected validly or otherwise, reasoning of the order alone can show. To evaluate the submissions is obligation of the Court and to know the* reasons for rejection of its contention is a legitimate expectation on the part of the litigant.

19. *It will be useful to refer to the words of Justice Roslyn Atkinson, Supreme Court of Queensland, at AIJA Conference at Brisbane on 13-9-2002 in relation to Judgment Writing. Describing that some judgments could be complex, in distinction to routine judgments, where onerequires deeper thoughts, and the other could be disposed of easily but in either cases, reasons they must have. While speaking about purpose of a judgment, she said,'The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written:-*

(1) *to clarify your own thoughts;*
(2) *to explain your decision to the parties;*
(3) *to communicate the reasons for the decision to the public; and*
(4) *to provide reasons for an Appellate Court to consider.'*

20. *Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision. In* ***Alexander Machinery (Dudley) Ltd. v. Crabtree 1974 ICR 120 (NIRC),*** *the Court went to the extent of observing that 'Failure to give reasons amounts to denialof justice'. Reasons are really linchpin to administration of justice. They are the link between the mind of the decision-taker and the controversy in question. To justify our conclusion, reasons are essential. Absence of reasoning would render the judicial order liable tointerference by the higher court. Reasons are the soul of the decision and its absence would render the order opento judicial chastism. The consistent judicial opinion is that every order determining rights of the parties in a Court of law ought not to be recorded without supportive reasons. Issuing reasoned order is not only beneficial to the higher* courts but is even of great utility for providing publicunderstanding of law and imposing self- discipline in the Judge as their discretion is controlled by well- established norms. Absence of reasoning is impermissible in judicial pronouncement.

22. *The contention raised before us that absence of reasoning in the impugned order would render the order liable to be set aside, particularly, in face of the fact that the Tribunal found merit and allowed the appeal.*

23. *Reason is the very life of law. When the reason of alaw once ceases, the law itself generally ceases (Wharton'sLaw Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons onthe contrary essentially introduces an element of uncertainty, dissatisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejectingclaim/prayer of a party whether at the very threshold i.e.at admission stage or after regular hearing, howsoever concise they may be.*

24. *It is the duty cast upon the Appellate Authority that even if it is in agreement with the view taken by the first Appellate Authority, it should give its own reasons/findingswhich may indicate that there has been application of mindand also the consideration of grounds raised in the appeal by the revisionist. In absence of reasons it is difficult to come to a conclusion that there has been any applicationof mind by the Tribunal and such an order in the opinion ofthe Court cannot*

be sustained and deserves to be set aside.

25. Accordingly, the appeals are allowed. Judgment and order dated 17.10.2017 passed by the Central Excise and Service Tax Appellate Tribunal, Allahabad is hereby set- aside.

26. The matter is remanded to the Customs Excise and Service Tax Appellate Tribunal (CESTAT) for redetermination, in terms of the discussion made above, after affording opportunity to the parties expeditiously, saywithin a period of three months from the date of production of a certified copy of this order in accordance with law."

2.5 Hence, these appeals.

3.1 I have heard Shri S.P. Ojha learned Consultant appearing for the appellant and Shri Sandeep Pandey learned Authorised Representative appearing for the revenue.

3.2 Arguing for the appellants learned Counsel submits that-

- In the present case the demand made in respect of shortages of stock is without any merits as the stock was determined on the basis of eye estimation and not by actual weighment. It has been held by the Tribunal inseries of decisions that such demands made on the basisof eve estimation cannot be sustained. Reliance can be placed to the decision of Allahabad Bench in the case of Shree Gurunanak Steel & Allied Industries Vs Commissioner of Central Excise, Lucknow Final Order No.71243/2019 dated 28.06.2019.
- It is admitted in para 6 of the show cause notice No.31 dated 30.11.2011 issued from the alleged forged invoice book was issued to M/s United Steel Industries for removalof 32.860 MT M.S. Ingots but in follow-up action conductedon 01.12.2011 at M/s United Steel Industries, no discrepancy was found.
- Director of the appellant (appellant-II) never admitted removal of M.S. Ingots without payment of duty.
- Show cause notice admits that all the invoices from May 2011 to November 2011 were issued either to M/s United Steel Industries or M/s Kumar Industries, Officers visited at both the units and verified all the invoices issued by the appellants during the period from May, 2011 to November 2011. They did not find any discrepancy in the records. Both the said units have denied to receive any goods otherthan goods received through proper invoices produced by them.
- It is settled position in law that whosoever makes anexistence of certain facts must make in by producing cogent evidences unless there is exception in the law.Reliance can be placed by the following decisions-
  - M/s Vikram Cement Vs CCE, Kanpur 2012 (286) ELT 615 (Tri.-Delhi),
  - CCE Vs Brims Product 2011 (271) ELT 184 (Pat.)
  - CCE Vs Renny Steel Casting (P) Ltd. 2013 (288) ELT 45 (P & H).
- Since the demand of duty is not sustainable the demand ofinterest or imposition of penalty dovetailed with such demand of duty are also not sustainable. For the same reason no penalty can be imposed on the appellant-II. Further, he places reliance by the decision of Hon'ble Supreme Court in the case of CCE Vs HMM 1995 (76) ELT 497 (SC).

3.3 Arguing for the Revenue Learned Authorized Representative submits that-

- It is wrong to say that the stock taking was made on eye estimation basis. Panchnama specifically records that the goods actually weighted, this fact of physical verification ofstock has been admitted by the director-appellant-ii in his statement recorded on the spot. The invoices against which these demands have been made are the invoices which are found to be issued from the invoice books maintained by the appellant-I. Once there invoices arebearing the same serial number and have been used for clearance of the goods number of times in case where such documentary evidence is available. No further verification is needed, this is the only case that the appellant shouldbe asked to pay the duty as demanded in the show cause notice.
- The charge of clandestine clearance against the appellant by using invoice of same number for clandestine clearance to the goods is well founded and the appellant-I is liable for appropriate penal action in terms of Section 11AC and appellant-II is liable for penalty under Rule 26 of Central Excise Rules, 2002.
- Appeal may be dismissed.

4.1 I have considered the impugned order along with the submissions made in the appeal and during the course of arguments.

4.2 Appellants have contested the demand made in respect of shortages noticed by relying the decision of this Tribunal in the case of Shree Gurunanak Steel & Allied Industries (supra), wherein following has been held:-

"3. The issue to be decided is as to whether the shortages by itself cannot be said to have been on accountof clandestine removal or said fact has to be proved by production of the other tangible and positive evidences.The said issue was considered by the Hon'ble Allahabad High Court in the case of Minakhee Castings reported as 2011 (274) ELT 180 (Allahabad) and it was held that the shortages, by itself, cannot lead to the finding of clandestine activity. I also note that an identical issue was considered by the Tribunal in the case of JHV Steels Ltd. Vs Commissioner of Customs, Central Excise & Service Taxvide Final Order No. 70368 of 2018 dated 07.02.2018wherein it was observed as under:-

"4. It is very clear from the narration in the said show cause notice as scripted hereinabove that actual weighment of finished goods was not carried out by the officers and shortage was estimated on the basis of approximation. On the basis of such approximation charges of shortage of finished goods cannot be leveled. The burden was on Revenue to prove that there was shortage in the finished goods. Further there was also burden on Revenue to prove that the alleged goods were manufactured and cleared without payment of duty by conducting appropriate investigation. No such investigation was carried out. Therefore, I set aside the impugnedOrder-in-Appeal and allow the appeal. The appellant shall be entitled for consequential relief, as per law."

4. Inasmuch as, in the present case the entire case of revenue is based upon the shortages without there being any other evidences, I set aside the impugned order and allow the appeal with consequential relief to the appellant."

In the present case, this decision may not be applicable. For this purpose I am referring to the panchnama recorded on30.11.2011 for stock taking:-

"अधिकारय ने फRYk म उपलध, तैयार माल व कचे माल क जांच

और उनके भौतिक सयापन का काय ारtभ कियl। ी सिह ने बतायl

कि उनक फRk म M.S. Ingot (CSH 72061090) का िनमाकिया जाता हजिसम मयत: M.S. Scrap, sponge iron, Ferro alloys का योग किया जाता हl फRk मे एक भ ठ हजिसक मता

6 टन क हl रकाह का िनरk ण करने के दौरान अधिकारय ने क RG-1 (Daily stock Account) दिांक 30/11/2011 क

closing balance तक भरा हआ ह और जिसम आज दिंक30/10/2011 का उपादन कल 12 टन M.S. Ingot भी शामिल हlअधिकारय ने फRk म उपलध M. S. Ingot क मा का भौतिक पे आकलन करने पर पाया कि टाक मे कल 251 M.S.Ingots जिनका

कल वजन तौलने पर 25.602 MT पाया गयl, मौज िमलेि जबकि

Daily stock Register म कल मा 97.680 MT (C.B 30/11/11)

दज हl इस कार m.s Ingots के टाक म कल 72.078 MT क कमी

पाई गई। टाक म इस कमी के बारे म प े जाने पर ी लाल पदमाकर

सिह कोई संतोषजनक उर नहk दे सके। यदयपि उहोने इस कमी को

वीकार करते हुए यह कहा कि वह आज दिन भर फRk न आ सके थे

और उनके पीछे ी बी एस शRला, अधिक्त हता Rk मौज था शायद

उन्होंने हk कोई माल निकाला हो पर कांटना भ गये हो। इस बारे म

कोई प ट उ र वह ी बी एस शRला से पछकर हk दे पाये ग।

M.S.Ingots के टाक के पाई गई कमी का क्ल म य Rs.27000/MT

(Invoice No.30 dated27/11/11 आखिरk जारk इंवाइस) के आधार ₹19,46,106 होता ह इस पर दे य उ पाद शुल्क (Cenvat

₹194611 + Ed.Cess ₹3892+ H.S.E.Cess ₹1946) क्ल

V309449 ह जिसे ी सिह ने अतिशी अदा करने का आ9वासन दिया।

अन्य व तओं के टाक म sponge iron तथा Femn हवा fesi का

टाक सहk पाया गया।"

4.3 Director of the appellant-I i.e. appellant-II, in hisstatement recorded on the spot admitted the shortages andexpressed de-satisfaction over the physical verification of stock. The relevant part of his statement is reproduced bellow:-

"म लाल पदमाकर सिह मे. ममता टkल इण्डिया प्रा. लि., सनहा पीपरपर

अमेठ जिला- सी. एस. एम. नगर म डायरे Rटर ह अन्य डायरे Rटर मेरk पत्नी मेरk मां ह अत: म वयं हk फRk का सम त काय एवं जिम्मेदारk देखता

ह। मेरk क. वष 2011 के माच अप्रैल से सचालित, कh य उ पादन क विभाग म

M.S. Ingots का उ पादन करने के लिए पंजीकत हई, मेरk फRk म एक

इंडRशन फRk लगी ह जिसक उ पादन मता 6 टन ति हkट ह,

फRk म M.S. Ingots के उ पादन के लिए कच्चे माल के प्र अधिकतर एम.एस. प का इ तेमाल होता ह, जो कि हम कबाडिय से

भी, सीधे उ पादनकता से खरkदते ह, हमारk फRk म एRसाईज संबंधी

रकाड, हमारे एकाउंट ट बी.एम. शRला दखते ह जो आज अधिकारय क

फRk म आने से पहले हk अपने घर चले गये थे अत: एRसाईज रकाड

के विषय म म अभी कछ बता नहीं सकता, अधिकारय के प्रश्न पछने पर मझे यह कहना ह कि मेरk फRk म म4यत: पंज आयरन तथा क पिटल

ग5स जैसे- प्लेट, मोड, ांसफामर आदि पर सनवैट े डिट लिया ह,

अधिकारय ने मेरे फRk म उपल ध M.S. Ingots, पंज आयरन, फेरो मैगनीज के टाक का भौतिक स यापन किया, और इंगट के आरजी-1 म दज टाक से क्ल 72.078 एमटk माल क कमी के आधार पर

.1946106 होता ह तथा इस पर दे य उपाद शाक क्ल े ₹2,00,440/- आता ह, इस कमी के बारे म म अभी कोई भी उतर द दे सकता R य fक म आज fदन भर फR k नहk आ सका था और शायद मेरk अनपि थत म बी.एम. शRला, अfधक्त ह ता रk ने कोई माल fनकाला हो fकंत शायद इंईस काटना भल गये ह, इस बारे म कोई प ट उ तर म बी.एम. शRला से पछकर दे पाऊगा। म M.S. Ingots टाक म पाई गयी कमी से पणत: सहमत ह। इसके अति रRत अfधकार य ने फR k म उपल ध क्छ रकाड एवं कागजात म ये पंचनामा बनाकर अपने क जे म fलया, म अfधकार य दवारा फR k म क गई जांच एवं भौतिक

स यापन क कायवाहk से पण: संत ट ह और इसीलिए मने पंचनामे पर

ह ता र fकए ह। पंचनामे के संल नक म दज रकाड अथवा कागजात जो

मेरk फR k से ात हए ह के अति रRत अय कोई सामान अथवा कागजात अपने क जे म नहk fलया। मेरा यह बयान fबना fकसी द

अथवा दबाव म fदया गया ह और यह मेरे जानकार के अनसार स य ह।"

4.4 Having admitted about the shortages of the stock andexpressing satisfaction in the manner of physical verification of stock appellant cannot turn back and make a claim, contrary to the same. Entire stock taking by way of physical weighment has been done as recorded in the panchnama which is a substantial piece of evidence and cannot be denied in this manner. Accordingly, I do not find any merits in the statements of the appellant in this regard.

4.5 Another demand of Rs.36,46,346/- has been confirmed against the appellant in respect of the goods cleared clandestinely. Appellant has contested this demand stating thatin respect of the invoices as per the invoice books maintained bythem were sought to be verified from the customers. It was found that nothing incriminating was found hence there is no force in the demand. The relevant paras of the show causenotice is reproduced bellow:-

5. hereas on preliminary scrutiny of the invoice books of the party appearing at Sl.No.6, 7, 8 & 9 of the 'ResumptionMemo' dated 30.11.2011, it appeared that invoice books at Sl.No.6 & 8 are forged ones and have been used in addition to other Invoice Book, at Sl.No. 9 of the 'Resumption Memo', which contained particulars of removed goods in accordance with their production, removal and duty payment related records (viz. RG - 1 PLA, RG23APt-II, ER-1 etc). Invoice book mentioned at S.No. 7 has been found to contain two filled invoices (triplicate copy) only having the identical details mentionedin the corresponding invoices issued from the original invoice book (at S.No.9). The aforesaid forged invoice books (at S.No.6 & 8) being used simultaneously to the original one appeared to be used for clandestine removalof unaccounted production of M.S. Ingots. The details of these forged invoices are summarized in a Chart-'A' &Chart-'B' as appended below.

CHART-'A'

Invoice Book mentioned at SL No 6 of Annexure 'A'of the resumption memo resumed from M/s Mamta Steel Pvt. Ltd on 30.11.11 (RUD-3)

S No	Invoice No	Date	Buyer's Name	Quantity of Ingots	Value	CENVAT Duty	Edu Cess	SHE Cess	Total Duty
1	25	30.10.11	Kumar Industries	34.360	829416	82942	1659	829	85430
2	26	01.11.11	United Steel Industries	35.070	846555	84656	1693	847	87196

3	26	02.11.11	Kumar Industries	35.410	854762	85476	1710	855	88041
4	27	02.11.11	United Steel Industries	15.470	417690	41769	835	418	43022
5	26	03.11.11	United Steel Industries	33.200	896400	89640	1793	896	92329

	26	04.11.11	United Steel Industries	30.410	821070	82107	1642	821	84570
7	27	04.11.11	Kumar Industries	24.620	664740	66474	1329	665	68468
8	26	05.11.11	Kumar Industries	33.790	815657	81566	1631	816	84013
9	26	06.11.11	United Steel Industries	34.460	930420	93042	1861	930	95833
10	27	08.11.11	United Steel Industries	32.470	876690	87669	1753	877	90299
11	27	09.11.11	United Steel Industries	33.380	901260	90126	1803	901	92830
12	28	09.11.11	Kumar Industries	33.200	896400	89640	1793	896	92329
13	27	10.11.11	United Steel Industries	33.100	893700	89370	1787	894	92051
14	27	11.11.11	Kumar Industries	33.270	898290	89829	1797	898	92524
15	27	12.11.11	Kumar Industries	33.490	904230	90423	1808	904	93135
16	27	13.11.11	Kumar Industries	33.090	893430	89343	1787	893	92023
17	27	14.11.11	Kumar Industries	33.750	911250	91125	1823	911	93859

18	28	14.11.11	Kumar Industries	35.090	947430	94743	1895	947	97585
19	28	16.11.11	Kumar Industries	34.410	929070	92907	1858	929	95694
20	28	17.11.11	Kumar Industries	8.730	235710	23571	471	236	24278
21	29	17.11.11	Kumar Industries	32.810	885870	88587	1772	886	91245
22	29	19.11.11	United Steel Industries	29.140	786780	78678	1574	787	81039
23	29	20.11.11	United Steel Industries	32.100	866700	86670	1733	867	89270
24	29	21.11.11	United Steel Industries	34.080	920160	92016	1840	920	94776
25	30	24.11.11	Kumar Industries	33.070	892890	89289	1786	893	91968
26	30	25.11.11	United Steel Industries	32.770	884790	88479	1770	885	91134
27	30	26.11.11	United Steel Industries	32.450	876150	87615	1752	876	90243
28	31	27.11.11	Kumar Industries	32.490	877230	87723	1754	877	90354
29	31	28.11.11	Kumar Industries	32.230	870210	87021	1740	870	89631
30	31	29.11.11	United Steel Industries	33.450	903150	90315	1806	903	93024
31	31	30.11.11	United Steel Industries	32.860	887220	88722	1774	887	91383
			Total	978.220	26015320	2601533	52029	26014	2679576

Invoice Book mentioned at SL No 8 of Annexure 'A'of the resumption memo resumed from M/s Mamta Steel Pvt. Ltd on 30.11.11 (RUD-3)

No	Invoice No	Date	Buyer's Name	Quantity of Ingots	Value	CENVAT Duty	Edu Cess	SHE Cess	Total Duty
1	1	03.05.11	United Steel Industries	9.000	198000	19800	396	198	20394
2	1	05.05.11	United Steel Industries	8.000	190908	19091	382	191	19664
3	2	11.05.11	United Steel Industries	8.950	213703	21370	427	214	22011
4	3	15.05.11	United Steel Industries	8.990	216821	21682	434	217	22333
5	3	15.05.11	United Steel Industries	8.950	215845	21585	432	216	22233
6	3	17.05.11	United Steel Industries	32.780	791007	79101	1582	791	81474
7	3	20.05.11	United Steel Industries	8.990	216821	21682	434	217	22333
8	3	20.05.11	United Steel Industries	32.780	791014	79101	1582	791	81474
9	3	21.05.11	United Steel Industries	36.510	881351	88135	1763	881	90779
10	4	21.05.11	United Steel Industries	8.990	216730	21673	433	217	22323
11	3	22.05.11	United Steel Industries	32.780	791014	79101	1582	791	81474
12	3	24.05.11	United Steel Industries	8.920	215114	21511	430	215	22156

13	3	24.05.11	United Steel Industries	40.860	986320	98632	1973	986	101591
14	3	25.05.11	United Steel Industries	32.780	791014	79101	1582	791	81474
15	3	28.05.11	United Steel Industries	32.780	791014	79101	1582	791	81474
16	3	29.05.11	United Steel Industries	36.510	881351	88135	1763	881	90779
17	3	30.05.11	United Steel Industries	36.510	881351	88135	1763	881	90779
18	3	01.065.11	United Steel Industries	8.880	214132	21413	428	214	22055
			Total	393.96	9483510	948347	18937	9487	976771

S No	Computation of invoices of Book	Quantityof Ingots	Value	CENVAT Duty	Edu Cess	SHE Cess	TotalDuty
	No 6 & 8						
1	Book No 6	978.220	26015320	2601533	52029	26014	2679576
2	Book No 8	393.96	9483510	948347	18937	9487	976771
		1372.18	35498830	3549880	70966	35501	3656347

CHART-'B'

Invoice Book mentioned at SL No 7 of Annexure 'A'of the resumption memo resumed from M/s Mamta Steel Pvt. Ltd on 30.11.11 (RUD-5)

S No	Invoice No	Date	Buyer's Name	Quantity of Ingots	Value	CENVAT Duty	Edu Cess	SHE Cess	Total Duty
	1	09.05.11	United Steel Industries	26.570	640961	64096	1281	641	66019
2	2	13.05.11	United Steel Industries	32.180	776510	77651	1553	777	79981

				58.75	141747 1	14174 7	2834	1418	14600 0

Invoice Book mentioned at SL No 9 of Annexure 'A'of the resumption memo resumed from M/s Mamta Steel Pvt. Ltd on 30.11.11 (RUD-6)

S No	Invoice No	Date	Buyer's Name	Quantity of Ingots	Value	CENVAT Duty	Edu Cess	SHE Cess	Total Duty
1	1	09.05. 11	United Steel Industries	26.57	640961	64096	1282	641	66019
2	2	13.05. 11	United Steel Industries	32.18	776503	77650	1553	777	79980
3	3	17.06. 11	United Steel Industries	32.28	779206	77921	1558	779	80258
4	4	28.06. 11	United Steel Industries	31.98	771965	77197	1544	772	79513
5	5	16.07. 11	United Steel Industries	30	724170	72417	1448	724	74589
6	6	25.07. 11	Kumar Industries	36.58	883005	88301	1766	883	90950
			es						
7	7	28.07. 11	United Steel Industries	34.33	828692	82869	1657	829	85355
8	8	30.07. 11	Kumar Industries	28.32	683616	68362	1367	684	70413
9	9	08.08. 11	United Steel Industries	36.89	826152	82615	1652	826	85093
10	10	18.08. 11	United Steel Industries	31.44	758930	75893	1518	759	78170
11	11	25.08. 11	Kumar Industries	32.69	789104	78910	1578	789	81277

12	12	28.08.11	United Steel Industries	15.19	366671	36667	733	367	37767
13	13	30.08.11	Kumar Industries	32.74	790311	79031	1581	790	81402
14	14	31.08.11	Kumar Industries	34	820726	82073	1641	821	84535
15	15	07.09.11	United Steel Industries	34.75	838830	83883	1678	839	86400
16	16	23.09.11	Kumar Industries	32.15	776069	77607	1552	776	79935
17	17	25.09.11	United Steel Industries	33.93	819036	81904	1638	819	84361
18	18	28.09.11	Kumar Industries	35.3	852187	85219	1704	852	87775
19	19	02.10.11	United Steel Industries	34.8	840037	84004	1680	840	86524
20	20	12.10.11	Kumar Industries	33.91	818553	81855	1637	819	84311
21	21	19.10.11	Kumar Industries	35.85	865383	86538	1731	865	89134
22	22	20.10.11	Kumar Industries	33.05	797794	79779	1596	798	82173
23	23	24.10.11	Kumar Industries	37.53	1013310	101331	2027	1013	104371
24	24	28.10.11	United Steel Industries	34.8	840037	84004	1680	840	86524
25	25	31.10.11	Kumar Industries	30	810000	81000	1620	810	83430
26	26	07.11.11	Kumar Industries	30.74	829980	82998	1660	830	85488

27	27	15.11.11	United Steel Industries	32.95	884250	88425	1769	884	91078
28	28	18.11.11	Kumar Industries	27.56	744120	74412	1488	744	76644
29	29	23.11.11	Kumar Industries	30.2	815400	81540	1631	815	83986
30	30	27.11.11	United Steel Industries	32.63	881010	88101	1762	881	90744
			Total	965.34	23866008	2386586	47731	23870	2458187

6. *Whereas on further examination of the forged invoice book at Sl.No.6 of the 'Resumption Memo', it was found that the last issued Invoice bearing No.31 dated 30.11.2011 was issued to M/s United Steel Industries,13/1, Industrial Area, Nadarganj, Amausi, Lucknow, for removal of 32.860 MT M.S. Ingots. Since, it was a forged invoice, a follow-up action was conducted in the factory of M/s United Steel Industries, Amausi on 01.12.2011. Infollow-up action conducted as above, prima-facie no discrepancy in the stock of M.S. Ingots / raw material was noticed by the officers on that day. Statement of Shri R.K. Srivastava, Authorized Signatory was also recorded on*
01.12.11 wherein he stated : -

- *that M/s United Steel Industries started to purchase*

  M.S. Ingots from M/s Mamta from the month of May,2011 which was utilized as raw material forproduction of its finished goods viz. M.S. Angle, M.S. Bar, M.S. Channel, M.S. Flat etc.;

- *that during the period from 14.05.11 to 30.11.11,the unit had purchased M.S. Ingots 14 times from M/s Mamta and the copies of invoices issued by M / sMamta and ledger account were also provided; last invoice no.30 was issued by M/s Mamta on 27.11.11.*

7. *And whereas the resumed records being maintained by the party were examined thoroughly and they were found to contain details/information as under:*

- *RG-1 Register (RUD-7): contains production,clearance and stock position of finished goods on daily basis. It shows balance of stock of M.S.Ingotsas on 30.11.11 as 97.680 MT after adding 12.0 MT ofday's production.*
- *Form-IV Register (RUD-8): contains receipt, issueand stock position of raw materials viz. Scrap, Ferro Silicon and Silico Manganese on daily basis.*
- *Incoming Goods Register (Sponge & Scrap) (RUD-9):contains invoice-wise details of sponge iron and scrap received in the factory of M/s Mamta during 2011-12 (upto 23.09.11).*
- *Gate Register (RUD-10): contains date-wise entries regarding incoming and outgoing of the workers fromthe factory during the period 3.9.11 to 30.10.11. There is clear mention of the designation of Shri Brajesh as Munshi, Virendra as Supervisor, Shri RamKaran Maurya as Melter.*
- *Furnace Record/Attendance (RUD-11): contains attendance of staff and labourers including Brajesh, Virendra Supervisors and Ram Karan, Melter during the period 1.11.11 to 29.11.11. It also gives information whether the plant (production) was working or not on a particular date. The time of last heat was mentioned at the end of date- wise page. On the page for the date 20.11.11 and 21.11.11, it ismentioned that due to shortage of scrap, only four*

(4) heats could be produced.(Maal na hone ki wajah se chaar heat nikal paee) whereas on that dates in the RG-1, the party has shown 'Nil' production. This clearly proves that production of four heats or 6MTx4heats = 24 MTs each has been suppressed on
20.11.11 and 21.11.11.

- *Invoice Book (S.No. 6): contains triplicate folio of duplicate/forged invoices issued for clandestine removal of M.S. ingots. First page of invoice bears invoice no. 25 dated 30.10.11 and 33 ^ (nd) page*
  i.e. the last issued folio of invoice bears no. 31 dated

  30.11.11. Each no. of invoice has been used many times as evident from invoice folios.
- *Invoice Book (S.No. 7): contains two folios of issued invoices bearing S.No. 1 & 2 which are identical to the original ones issued from book no. 9.*
- *Invoice Book (S.No. 8): contains triplicate folio of duplicate/forged invoices issued for clandestine removal of M.S. ingots. First page of invoice bears invoice no. 01 dated 03.05.11 and 18 ^ 0 page i.e. the last issued folio of invoice bears no. 03 dated*
  01.06.11. Each no. of invoice has been used many times as evident from invoice folios
- *Invoice Book (S.No. 9): contains triplicate folio of original invoices issued for removal of M.S. ingots. First page of invoice bears invoice no. 01 dated*
  09.05.11 and 30th page i.e. the last issued folio of invoice bears no. 30 dated 27.11.11. Each no. of invoice has been used once only as evident from invoice folios.
- *Invoice Book of M/s Bharat Sponge and Iron Scrap Supplier (RUD- 12): contains used invoice folios bearing no. 51 dated 9.10.11 to no. 91 dated*
  28.11.11 for sale of Scrap Iron to M/s Mamta only.

- *Scrap Sorting Book (RUD-13): contains carbon copy of scrap sorting details which describe the quality of* scrap, quantity, rate per kg, total amount to be paid for the consignment and dated signature of Scrap sorting person i.e Shri Sanjeev during the period from 16.11.11 to 24.11.11. A comparative chart prepared on this basis vis-à-vis quantity of scrapsold as per invoices of M/s Bharat Sponge issued during the corresponding period (Annexure-I) evidences that the quantity of scrap which was received by M/s Mamta as per sale invoices of M/s Bharat Sponge or Form IV of M/s Mamta is 30.69 MT as compared to quantity sorted at the end of M/s Mamta (or M/s Bharat, as per version of party, who sold this quantity, in turn, to M/s Mamta) as 230.10 MT. Thus, this huge difference in receipt of main raw material i.e. scrap is a clear evidence of non accountal of raw material with malafide intention to use them in manufacture of suppressed productionof M.S.ingots in the factory of M/s Mamta which was removed clandestinely without issue of legitimateinvoices and without payment of CENVAT duty payable thereon.
- *Gate Pass Books (S.No.12) (RUD-14): contains carbon copy of folios issued 10 in numbers, during the period 28.6.2011 to 04.07.2011. It shows three consignments of incoming scrap on 28.06.2011and one consignment each on 29.06.11 and 03.07.11.But the Form-IV of the party maintained for scrap does not show any such receipt on that dates. This clearly shows that the party has not accounted for the actual receipt of scrap in their books. The book bears the signature of Shri Sanjeev and Shri Ashish Kumar, apparently.*

- *Dharam Kanta Parchi Book (RUD-15): contains folios issued during the period 19.11.11 to 30.11.11 for weighment of M.S.ingots dispatched from the factoryunder cover of either genuine invoices or forged* invoices. It bears the signature of the same Shri Sanjeev on a few folios as the preparer. The contents of the chart prepared on the basis of this Dhram Kanta Parchi Book and the dispatches made under cover of Invoice books (S.No. 6 & 9) establishes the modus operandi of the party adopted for removal of M.S. Ingots clandestinely.

CHART

S. No.	Date	Net Quantity of M.S. Ingot (in Kgs)	Truck No.	Corresponding Invoice no.	Invoice is sued from Book No.
1	19.11.11	29140	UP44T2723	29	**06 (forged)**
2	21.11.11	34080	UP44T1662	29	**06 (forged)**

3	-	30200	UP44T2723	29 dt.23.11.11	**09 (forged)**
4	24.11.11	33070	UP44T2723	30	**06 (forged)**
5	25.11.11	32770	UP44T2723	30	**06 (forged)**
6	26.11.11	32450	UP44T2723	30	**06 (forged)**
7	27.11.11	32630	UP44T2723	30	**09 (Original)**
8	27.11.11	32490	UP44T1662	31	**06 (forged)**
9	28.11.11	32230	UP44T1662	31	**06 (forged)**
10	29.11.11	33450	UP44T2723	31	**06 (forged)**
11	30.11.11	32860	UP44T2723	31	**06 (forged)**

On going through the party's resumed records and the charts mentioned above, it appears-

- *that all forged invoices were issued to M/s United Industries, Industrial Area, Amausi, Lucknow and M/s Kumar Industries, Industrial Area Nadarganj, Lucknow for sale of unaccounted goods; and*
- *that the party have also purchased unaccounted-for raw material to manufacture these clandestinely removed goods."*

4.6 Adjudicating Authority in his Order-in-Original has examined the above evidences and concluded that the charge of clandestine clearance against the appellant is well founded. Accordingly, I do not find any merits in the submissions made bythe appellant. The demand made against the appellant is based on the documents, invoice books resumed during the search operation under Section 36A of the Central Excise Act provides that-

36A. Presumption as to documents in certain cases.—Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law and such document is tendered by the prosecution in evidence against him and any other person who is tried jointly with him, the Court shall,—

(a) unless the contrary is proved by such person, presume—

(i) the truth of the contents of such document;

(ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is inthat person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence."

4.7 Nothing has been produced to contradict the information contained in the records resumed during the search operation from the premises of the appellant; the presumption for redemption of documents is in legal presumption under Rule 36Aof the Act. Hon'ble Kerala High Court has in case of Kollatra Abbas Haji [1984 (15) E.L.T. 129 (Ker.)] interpreting similar provision under Customs Act, 1962 observed as follows:

6. Section 138B of the Customs Act, 1962 reads :

"138B. Relevancy of statements under certain circumstances.

(1) A statement made and signed by a person before any Gazetted officer of Customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of

proving, in any prosecution for an offence under this Act, the truth of the facts which it contains;

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, underthe circumstances of the case, the court considers unreasonable;or

(b) when he person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest ofjustice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

The respondents' Counsel, Shri P. Santhalingam submits that thefact that a statement made and signed by a person is relevant for the purpose of clause (b) makes it equally relevant for the purpose of confronting a person when examined under Section
107. The petitioner was confronted, counsel points out, with the statements of the co-accused and those statements are relevant material in the light of Section 138B. Counsel further points out that clause (b) says that statement has to be admitted in evidence when the maker of the statement is examined as a witness. Counsel then refers to Section 139 which reads :

"139. Presumption as to documents in certain cases.—Where any document -

(i) is produced by any person or has been seized from the custody or control of any person, in either case, under this Act orunder any other law, or

(ii) has been received from any place outside India in thecourse of investigation of any offence alleged to have beencommitted by any person under this Act,

and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the court shall -

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person bywhom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i) also presume, unless the contrary is proved, the truth of the contents of such document."

This shows, that the Court shall presume, unless the contrary is proved, that the signature and every other part of the document referred to in the Section is genuine. There is much force in Counsel's submission. Section 138B makes it clear that in proceedings before an administrator, as in the case of a proceeding in a court of law, a statement made and signed by a person is material and it has to be admitted in evidence in the interest of justice. Section 139 places the burden upon themaker of the statement to deny the genuineness of his signatureor any statement contained in the document. It is not disputedby the petitioner's counsel that the expression `document' wouldinclude the statements signed by the co-accused. Section 139 leaves no doubt that a court shall presume, unless the contraryis proved, that the signature of the maker is genuine and every other part of the document is equally genuine. This is the principle on which the court must act. Section 139 does not exclude the applicability of this principle in proceedings before anadministrator. If it is open to a court to draw the statutory presumption, it is equally open to an administrator in proceedings of this kind to draw a like presumption and conclude, in the absence of evidence to the contrary, that every word contained in the statement and the signature appearing on the face of it are those of the maker. This being the position in law, the respondents were entitled to rely upon every word in the statements signed by the witnesses, notwithstanding their attempt to retract therefrom, especially when there is no evidence of threat. As stated earlier, counsel for the petitioner made no attempt to elicit any such

information from the officers or from the co-accused themselves. In R.S. Kalyanaraman v. Collector of Customs, Madras (1978 Tax L.R. 1735) the Madras High Court repelled the contention that the confession of a co- accused was not evidence on the basis of which a person could be found guilty in departmental proceedings. The Court stated :

"..... The fact that the criminal Court had acquitted the petitioner would be of no consequence since the acquittal was onthe footing that the confession of a co-accused could not be usedagainst the petitioner. In departmental proceedings, there is no bar to use such statements. "

In my view it is sufficient to conclude that the charge of clandestine clearances based on these documents resumed during the search of the appellant is well within the preponderance of probability in such cases as has been proponedby Hon'ble Supreme Court in the case of D. Bhoormull [1983

(13) ELT 1546 (SC)]. Relevant paras of the said order arereproduced bellow:-

"32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remainin the special or peculiar knowledge of the person concerned init. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned :and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in `Law if Evidence' (12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, presumptio juris : but every day's practice shows that it may be successfully encountered by the presumption of guilt arisingfrom the recent (unexplained) possession of stolen property," though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice.

33. Another point to be noted is that the incidence, extent and nature of the burden of proof for proceedings for confiscation under the first part of the entry in the 3rd column of clause (8)of Section 167 may not be the same as in proceedings when the imposition of the other kind of penalty under the second part of the entry is contemplated. We have already alluded to thisaspect of the matter. It will be sufficient to reiterate that the penalty of confiscation is a penalty in rem which is enforced against the goods and the second kind of penalty is one in personam which is enforced against the person concerned in the smuggling of the goods. In the case of the former, therefore, itis not necessary for the Customs authorities to prove that any particular person is concerned with their illicit importation or exportation. It is enough if the Department furnishes prima facieproof of the goods being smuggled stocks. In the case of the latter penalty, the Department has to prove further that the person proceeded against was concerned in the smuggling.

34. The propriety and legality of the Collector's impugned orderhad to be judged in the light of the above principles.

35. It is not correct to say that this is a case of no evidence. While it is true that no direct evidence of the illicit importation of the goods was adduced by the Department, it had made available to the Collector several circumstances of a determinative character which coupled with the inference arising from the dubious conduct of Baboothmull and Bhoormull, could reasonably lead to conclusion drawn by the Collector, that they were smuggled goods. These circumstances have been set out by us earlier in this judgment. We may recapitulate only the most salient among them.

43. If we may so with great respect, it is proper to read intothe above observations more than what the context and the peculiar facts of that case demanded. While it is true that in criminal trials to which the Evidence Act, in terms, applies, this section is not intended to relieve the prosecution of the initial burden which lies on it to prove the positive facts of its own case, it can be said by way of generalisation that the effect of the material facts being exclusively or

especially within the knowledge of the accused, is that it may, proportionately withthe gravity or the relative triviality of the issues at stake, in some special type of case, lighten the burden of proof resting on the prosecution. For instance, once it is shown that the accused was travelling without a ticket; a prima facie case against him is proved. If he once had such a ticket and lost it, it will be for him to prove this fact within his special knowledge. Similarly, if a person is proved to be in recent possession of stolen goods, the prosecution will be deemed to have established the charge that he was either the thief or had received those stolen goodsknowing them to be stolen. If his possession was innocent and lacked the requisite incriminating knowledge, then it will be for him to explain or establish those facts within his peculiar knowledge, failing which the prosecution will be entitled to take advantage of the presumption of fact arising against him, in discharging its burden of proof.

44. These fundamental principles, shorn of technicalities, as wehave discussed earlier, apply only in a broad and pragmatic way to proceedings under Section 167(8) of the Act. The broad effectof the application of the basic principle underlying Section 106,. Evidence Act to cases under Section 167(8) of the Act, is that the Department would be deemed to have discharged its burden if it adduces only so much evidence, circumstantial or direct, asis sufficient, to raise a presumption in its favour with regard to the existence of the fact sought to be proved. Amba Lal's case, (1961) 1 SCR 933 = 1983 E.L.T. 1321, was a case of no evidence. The only circumstantial evidence viz. the conduct of Amba Lal in making conflicting statements, could not be taken into account because he was never given an opportunity toexplain the alleged discrepancies. The status of Amba Lal viz.that he was an immigrant from Pakistan and had come to Indiain 1947-before the customs barrier was raised-bringing along with him the goods in question, had greatly strengthened the initial presumption of innocence in his favour. Amba Lal's case thus stands on its own facts."

By applying the principle laid down by the Hon'ble Apex Court asabove in case of Delhi Bench has held as follows:

"6. We have considered the submissions of both the sides. Regarding difference in the figures of clearances made from the factory as per gate passes and figures of clearance as per Railway Receipts, we observe that the Adjudicating Authority hasgiven his findings that the dispatch of goods had not beendisputed by the appellants. The appellants had not disputed the same before us also. Their defence is that the unsold tapes/cassettes which were returned to Bhopal were re-dispatched by rail together with those cleared on the day under GP-Is from the factory. The Adjudicating Authority had given his findings to the effect that they were specifically asked to produced documents and details in support of the saidcontention and that "even after ample and repeated opportunity given to them they failed to produce any evidence in support of their claim of returned goods." Even now the appellants have not brought on record any documentary evidence to show that the duty paid goods received at Bhopal from different diagnostic center were despatched by rail. As the appellants had not disputed the dispatch of goods and had not brought any evidence on record in support of their contention, non-cross-examination of the persons concerned does not affect the case ofthe Revenue. The appellants have now placed heavy reliance on the deposition of A.K. Godbole before the Adjudicating Authority. But we observe that the same Godbole in his statement dated 17-2-1994 clearly deposed that the tapes mentioned in Railway Receipts were removed from factory without Gatepass/duty paying document. There is nothing on record to show that he ever retracted his statement. We also observe that this statement was recorded in February, 1994 that is much after thesearch of the factory of the appellants on 19-9-1993. There is nosubstance in his answer that since the officer did not ask him about the absence of gate pass, he did not inform them about clearance of goods from Bhopal. When the question was put to him about the goods mentioned in Railway Receipts, he clearly answered that "blfy, esjk ;g ekuuk gS fd mijksDr R.R. esa fudkyh xbZ video Tapes fcuk fdlh Gate-pass/duty paying documents ds vUnj Factory ls clear dh xbZ A" If the goods were cleared from Bhopal and about which he was aware he should have mentioned the same instead of deposing that the video tapes were cleared without gate pass/duty paying documents. In view of this his version made after more than 4 years of making initialstatement is not tenable. We, therefore, find no infirmity in the findings recorded by the Adjudicating Authority.

7. Regarding E-185 cassettes, it was mentioned in Internal Office Memo that 3800 E185 cassettes were to be carried out by the E.D. Loding was to be continued in the night shift also.

The Revenue has come to the conclusion, we think rightly, that the appellants had manufactured the said cassettes. Their conclusionwas strengthened from the telegram sent to one Narsimha Raoof Vijaywada intimating him that his ordered goods 3800 of E185were ready for despatch. The appellants have not explainedanything about the said Inter Office Memo and the telegram sentby them to said Narsimha Rao. They have on the other hand emphasized that R.N. Sharma, Dy. Manager (Production), was not produced for cross-examination and Shri Agrahari, Account Clerk had mentioned that he had no knowledge that E-185cassettes were ever manufactured. In a case when a unit is involved in clandestine manufacture and removal of goods, it is possible that all the hands working in unit may not be taken into confidence. Shri Sharma, on the other hand, was Deputy Manager Production of the appellants and obviously would know about the goods manufactured in the factory. There is nothingon record also to suggest that Shri Sharma retracted his statement anytime. Taking into consideration all the facts coupled with Inter Office Memo and said Telegram we agree withthe findings reached in the impugned Order by the Adjudicating Authority that the appellants were manufacturing and clearing goods without recording in the statutory records and without payment of duty. This finding is strengthened from the fact that some documents were torn and found during the search of the factory premises. These torn papers were issue notes of video tapes which were issued for packing. There is no substance inthe appellants' contention that the scribe of the torn papers was never located nor interrogated. The finding of the said tornpapers from the factory had not been denied nor it had been claimed that they did not pertain to them. In respect of double sets of invoices the appellants have only contended that no evidence had been brought on record by Revenue to show that the goods had actually been removed and dispatched. In a case of clandestine removal, the Revenue cannot be burdened toprove in respect of each and every document that goods were actually removed and dispatched. It is for the appellants toexplain the existence of double sets of invoice which, in our *opinion, they have not done. Further their explanation that bills raised for discounting purpose were for commercial reasons besides being averred first time, has not been substantiated withany document/affidavit. We also do not find any substance in their submissions that from the account of the raw material brought into the factory it was not possible to manufacture any quantity of tapes and cassettes in excess of the quantity mentioned in RG-1 register.* ***In a case of clandestine manufacture and removal of goods, the Revenue cannot prove the case with mathematical precision. It was observed by the Supreme Court in Collector of Customs v.***

D. Bhoormul - 1983 (13) E.L.T. 1546 (S.C.) that "in order to appreciate the scope and nature of the onus cast by it, due regard must be paid to other kindred principles, no less fundamental of universal application. One of them being that the prosecution or Department is not required to prove its case with mathematical precision, but what is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of the facts in issue." In our opinion, the Revenue has established their case about the manufacture and clearance of goods by the appellantswithout entering them into statutory records and without payment of duty. Accordingly, we uphold the demand of duty as confirmed in the impugned Order. *"*

4.8 Hon'ble High Court while remanding the matter has not stated that the arguments advanced by the appellant has been accepted while the matter has been remanded only for passing an speaking order by keeping all the issues open.

4.9 As all the charges made against the appellant have been upheld including the charge of clandestine clearances the penaltyimposed under Section 11AC is also justified.

4.10 As for as Appellant-II is concerned, I find that he is a person who was responsible for all the activities and was also thebeneficiary of the act of clandestine clearance. Further, I note

that he has been constantly issued summons to join the investigation and tell the truth. The relevant paragraphs are reproduced bellow:-

"10. The sequence of two summons dated 02.12.2011/08.12.11as stated, 3rd summons dated 19.12.2011 was issued to Shri Lal Padmakar Singh & Shri B.M. Shukla to appear before the designated authorities on 27.12.2011 which were got served to them on 26.12.11 through the staff of Central Excise Division, Raebareli, but they didn't appear that time too. Despite above, aletter dated 27.12.11 was received from Shri Lal Padmakar Singh wherein he informed that his accountant had resignedfrom the office of his factory w.e.f. 02.12.11 and his whereaboutwas not known to him, therefore, he returned the summons to the department for not being served upon him. Further, in reference to summons issued on 19.12.11 to Shri Lal Padmakar, Shri Singh informed that he was out of station for treatment at that time and hence, he was unable to attend the office for tendering his statement. He requested for some other date inthe 3rd week of January, 2012 so that he might appear beforethe designated authorities to tender his statement with full cooperation. Therefore, summons meant for Shri Lal Padmakar Singh as well as Shri B.M. Shukla were again issued to appear before the Superintendent (Prev.) on 19th or 23nd January 2012. In addition to above, copy of summons were also sent to the Assistant Commissioner, Central Excise Division, Raebareli on 11.01.2012 for service upon them. The Assistant Commissioner, Raebareli was also requested that summons meant for Shri B.M. Shukla might be served upon him after obtaining his permanent address from M/s Mamta. However, summons meant for Shri Lal Padmakar Singh, director was delivered on 17.01.12 in the factory office by the staff of Central Excise Division, Raebareli forproviding it to Shri Singh as he was not available in the factoryat that time. However, summons to Shri B.M. Shukla could notbe served upon him and it was stated by the factory staff that hehad left the job, thus, the summons was returned back to the officials. Further, Shri Lal Padmakar Singh submitted two letters both dated 25.01.2012 to the Department. In these letters he requested for supply of the photocopies of certain documents i.e.RG-1 (daily stock account), Form-IV (register containing stock ofraw material) registers & other records so that he may be able tounderstand the same properly and prepare himself to tender his statement before the designated authorities. In furtherance, **4th** summons was again issued to Shri Lal Padmakar Singh on
06.02.12 requiring him to appear before the designated authority on 13.02.12 alongwith the documents mentioned in theschedule to the summons. Summons dated 06.02.12 was sent tothe Assistant Commissioner, Central Excise Division, Raebarelifor service upon Shri Singh. Copies of Form-IV & RG-1 register were also sent through 'speed post' to him vide the office letter C.No.1249 dated 06.02.12. A separate letter dated 06.02.12 wasalso sent to the Assistant Commissioner, Central Excise Division, Raebareli to obtain the whereabouts / permanent address of Shri
B.M. Shukla from the said factory. Meanwhile, copies of Form-IV & RG-1 were again supplied to the party through 'speed post' vide this office letter even C.No.2303 dated 13.03.12 which was received back undelivered from the postal authorities with the remark as "Inkari Vapas sd/16.03.12" (Denied, returned). However, the photocopies of the same were served to one Shri Vijay Kumar Singh of M/s Mamta Steel on 18.03.12 in thefactory through the officers of the Central Excise Division, Raebareli. Although the desired documents were alreadysupplied to the party, Shri Singh again submitted a counterletter dated 22.03.12 (received on 23.03.12) for supply of photocopies of documents to him to have full knowledge of the same so that he would be able to disclose information desired bythe Department. All the documents as desired by the party had been provided to them on 09.04.12.

11. It appears from the foregoing that Shri Lal Padmakar Singh, director of the company was deliberately delaying the process of investigation and so had chosen not to appear before the designated authority to tender his statement. Again 5thsummons dated 20.04.12 was sent through 'speed post' to Shri Lal Padmakar Singh on 01.05.12 to appear before thedesignated authority. Attested copy of the summons was also served on the party on 26.04.12 by the staff of Central Excise Division, Raebareli in the factory. This time in pursuance of the summons dated 20.04.12, Shri Lal Padmakar Singh appeared on
01.05.12 before the designated authority i.e. Superintendent(Prev.), Central Excise & Service Tax, Lucknow and tendered his statement dated 01.05.12 wherein he stated interalia:--

1. that his factory is a registered unit and it started production of M.S. Ingots w.e.f. 11.05.2011; that he took loan from Bank of Baroda;

2. that there are 6 office staff & 20 labourers who work in the factory only when the factory runs;

3. that work relating to production/sale of the factory and purchase of raw material is looked after by S/Shri Vijay and Sunil Singh; work relating to excise matters islooked after by Shri Sonu Gupta; and work relating to trade tax is looked after by Shri Pankaj, Advocate. All these workers were temporary employees;

4. that in reference to his last statement dated 30.11.11 that Shri B.M. Shukla, Authorized Signatory of the factory who looked after the work of issue of excise invoice at that time and used to sign them after preparing the invoice, and in reference to a question where Shri B.M. Shukla was; and as per his records what is his residential address, he answered that Shri
B.M. Shukla was also his temporary worker who was residing at Chowk, Sultanpur and he telephonically informed that he could not come in the factory for his personal reasons, and after that it was not known tohim where he had gone;

5. that in the year 2011-12, raw material viz. sponge iron & scrap, was mainly obtained from (1) M/s Bharat Sponge & Iron Scrap, Sultapur; (2) M/s R.L.J. Concast Pvt. Ltd., Varanasi; and (3) M/s S.A. Iron Alloys, Varanasi. A chart containing all the details of such purchases was also provided by him;

6. that he purchases raw material directly from the factories and no commission agent was involved in the deals;

7. that freight regarding sponge iron was paid according tothe bilty, freight regarding scrap is paid by the supplier himself; and ledger regarding freight of sponge iron will be produced;

8. that the papers/documents as desired in the schedule to the summons dated 02.12.11/08.12.11 viz. sale record (upto 30.11.11), purchase record (upto 30.11.11), parties' ledger (upto 30.11.11) and copy of ST-2 are provided; and for freight & transporter bill, a letter was sent to the transporters and as soon as it is received the same will be provided; that he will provide the name, address & mobile nos. of the transporters within 15 days' of time / on the next date;

9. that FOR basis sale of M.S. Ingots was effected and managed by the seller ie M/s Mamta, on the basis of bilty, and freight was paid by the factory i.e. the seller,

10. that sale amount is received in the bank account through any mode of transaction including RTGS;

11. On being shown ER-1 returns for the months of April,2011 to October,2011 submitted by the party before the Superintendent, Central Excise Range,Jagdishpur, he confirmed that the same were prepared by Shri B.M. Shukla and also signed by him. Though, ER1 for the month of April,2011 was signed by Shri Singh himself,

12. that since the factory was started in the month ofMay,2011 and it being new, Shri B.M. Shukla was appointed as a temporary worker to look after the maintenance of office papers;

13. As soon as he gets the permanent address of Shri B.M. Shukla, he will inform to the department; Subsequent to above, Invoice No.26 dated 06.11.2011 contained in Book No.1 mentioned at SI.No.6 of the 'Resumption Memo' to the panchnama dated 30.11.2011, on which signature of Shri Singh was available, was shown to him; and in reply to question no.16 of the statement, he replied that prima-facie the shown bill appears to be related to M/s Mamta Steel India Pvt. Ltd.; he further added that he was not havingtechnical knowledge and he was not aware of the contents of the invoice as above shown to him. However, he narrated that the bill was very old in whichdate 06.11.11 was printed;

14. On being raised few questions regarding issue of Form-

21 related to trade tax, he again avoided to answer these questions for the reason that he was not having technical knowledge; and on being asked about theregister which he or his staff should have prepared; he stated that he could answer to these questions onlyafter consultation of his advocate;

15. that further to above, triplicate copy of Invoice No.27 dated 15.11.11 (Book No.1) mentioned at Sl.No.9 ofthe 'Resumption Memo' to the Panchnama dated 30.11.2011, on which signature of Shri Lal Padmakar Singh was available, was shown to him; and on being asked who had prepared or written on that invoice, ShriSingh stated that signatures available in the invoice appears to have been signed by him; he didn't reveal the name of the person who had written or filled up thatinvoice;

16. After this, Invoice No.30 dated 27.11.2011 (Book No.1) mentioned at SI.No.9 of the

resumption memo to the panchnama dated 30.11.2011 was shown to Shri Singh alongwith the signatures of Shri B.M. Shukla whoseattested signatures were submitted to the Central Excise Range-Jagdishpur, and on being asked to verify the signature of Shri B.M. Shukla, he avoided and escaped himself to answer that question;

Apart from above, Shri Lal Padmakar Singh avoided toanswer many a questions raised by the designated authorityand his behaviour remained non- cooperative while tendering his statement. Statement speaks very well in this regard. Further, he requested for some other date for further inquiry. However, from his replies it is very much established that he admitted to have signed on the forged invoice no.26 dated 06.11.11 contained in the bound book at Sl.No.6 of the Resumption Memo dated 30.11.11. He has also identified his signatures on the genuine invoice no.27 dated 15.11.11 contained in the bound book at SI.No.9 of the Resumption Memo. However, on both the occasions he denied to have knowledge of the contents thereof. It maybe noted that all invoices were mostly signed by Shri B.M. Shukla, the Authorized Signatory and sometimes by Shri LalPadmakar Singh, the director, himself, as issuing authority. It is, thus, amply clear that all the invoices issued either from the forged invoice books at S.No.6 & 8 of the Resumption Memo or from the genuine invoice book atS.No.9 of the Resumption Memo have been issued from the factory either from Shri B.M. Shukla, the then Authorized Signatory of the party, or Shri Padmakar Singh, himself andthis fact was very much in personal knowledge of Shri Lal Padmakar Singh, director of the company.

The 6th summons was sent to Shri Singh on 08.05.12 by theAssistant Commissioner, Central Excise & Service Tax, Lucknow through 'speed post' / 'email' for appearing on 16.05.12 alongwith the documents mentioned in the schedule to the summons as above. In his reply to above, Shri Singh submitted a letter dated 16.05.12 (received on 17.05.12) stating that the documents required by this officewere being prepared and located, and for the reasons, he was unable to appear on 16.05.12. He requested for one month's time. It was also requested not to deliver any letter / or communication through the Assistant Commissioner, Central Excise Division, Raebareli. The Assistant Commissioner (Prev.), Central Excise & Service Tax, Lucknow, replied the above said letter dated 16.05.12, vide this office even C.No.4808 dated 18.05.12, that the documents mentioned from SI.No.1 to 4 were readily available with him and usually maintained by a company and the documents from Sl.No.5 to 7 were those in respect of which he himself during the course of statement on 01.05.12 undertook to provide within fifteen days. It was also observed that all the documents were readily available records which did not require any preparation. It was not understood as to what records were 'under preparation'. Nevertheless, he was granted time upto 31.05.12 for production / preparation of the said records. Further, it was also made clear that the letters/ communications sent from the Preventive Branch were not received / delivered at his factory for one or the other reason. Copies of two communications which were received in this office undelivered with the remarks of the postal authorities on envelops were also sent to him as being instances. In situations narrated above, it was also made clear that the department had no option but to send the communication through the divisional office to ensure proper and timely delivery to him. It was also informed that as per his requestduring the statement on 01.05.12, the information of summons was also sent to him on the 'e-mail ID' as given during the said statement but he had not bothered to respond even by email. Moreover, the above said letterdated 17.05.12 was sent to him through 'speed post' as wellas through his 'email I D^ , alongwith the 7th summons dated 18.05.12 through 'speed post' / 'email' requesting him to appear before the Assistant Commissioner (Prev.), Central Excise & Service Tax, Lucknow for tendering his statement under section-14 on 31.05.12. Attested copy of the summons was also sent to the Assistant Commissioner, Central Excise & Service Tax, Raebareli on 18.05.12 for service upon the party.

In compliance to above, Shri Singh appeared before the Assistant Commissioner (Prev.), Central Excise & Service Tax, Lucknow, on 31.05.12 but stated that he was not well that day, and therefore, unable to record his written statement. Though, he submitted the papers as follows - (i) Memorandum of Article of Association of M/s Mamta Steel India Pvt. Ltd., Amethi; (ii) Input freight transportationledger for the period 03.04.11 to 31.03.11; (iii) Outputfreight transportation ledger for the period 09.05.11 to 31.03.12; (iv) Sale ledger of M.S. Ingot 09.05.11 to 31.03.12; (v) Letter dated 25.04.12 issued to M/s Gayatri Transport Co., Pratapgarh; (vi) Copies of bilties received from M/s Gayatri Transport Co., Pratapgarh; and (vii) Copy of register relating to Form-21. Further, he proposed a date

i.e. 05.06.12 to tender his statement, but he didn't appear in the office.

12. Due to compelling circumstances as already elaborated above as well as non-cooperation of Shri Lal PadmakarSingh, 8th summons dated 27.06.12 was again issued to appear on 06.07.12 alongwith the documents mentioned in the schedule to the summons. In addition to above, summons dated 27.06.12 were also issued to (i) M/s Gayatri Transport Co., Pratapgarh; (ii) Shri Brajesh, Munshi

- M/s Mamta; (iii) Shri Sanjeev Mishra of M/s Mamta; (iv) Shri Virendra, Supervisor of M/s Mamta; and (v) Shri Ram Karan Maurya, Melter - M/s Mamta No one appeared on 06.07.12. Instead a letter Ref.no.Mamta Steel / 2012 -13/13 dated 06.07.12 was received from Shri Singh stating that he would not be able to attend the office on 06.07.12 due to some personal and family problems. However, he informed that he would be attending the office on 11.07.12, and accordingly, he appeared on 11.07.12 and recorded his statement stating interalia: -

- *that in reference to the answer to question no.22 of statement dated 01.05.11, Shri Singh reiterated his answer and stated that Form-21 was sent alongwith the vehicle (goods career), a copy of which remainedwith the party receiving the goods; another copy of Form-21 was submitted in sale tax department; and number of Form-21 is written on the invoice when it was sent to the party;*
- *that in reference to the answer to the question no.26of statement dated 01.05.11, Shri Singh reiterated his answer that invoice was prepared by S/Shri Sanjeev Mishra & Sonu Gupta. Shri Sanjeev Mishra had left the job from the factory w.e.f. 30.11.11whereas Shri Sonu Gupta is still working in the factory;*
- *that in reference to the question no.27 of statement dated 01.05.11 whether it has been enquired about the handwriting & signature of Shri B.M. Shukla available on the Invoice No.27 dated 27.11.11 (Book No.1 at Sl.No.9 of the 'Resumption Memo'); ShriSingh replied that he was not in a position to reply tothis because he had not seen his (Shri B.M. Shukla) signature as yet; however on being shown a copy of letter dated 11.07.12 in the pad of M/s Mamta wherein signature of Shri B.M. Shukla was attestedby Shri Singh, he answered in affirmative in a manner had it been correct then signature of Shri*
  B.M. Shukla might also have been correct;
- *On scrutiny of records resumed on 30.11.11 from hisfactory premises it has been observed that raw material as sponge iron was purchased from M/sBharat Sponge & Iron Scrap Suppliers, C.S.M. Nagar which appears to be a dealer, on being asked as to how an order was placed to M/s Bharat Sponge &* Iron Scrap Suppliers and by whom; who was contacted regarding purchase of sponge iron and in what manner the delivery of raw material was done; Shri Singh stated that he was the owner of that firm
  i.e. M/s Bharat Sponge & Iron Scrap Suppliers, himself; further he clarified that after collecting scrapwhatever he was having in loose quantities, he used to supply the same to M/s Mamta under the cover of a bill raised by him; and accordingly sale tax was deposited;
- *On being asked where that firm (M/s Bharat Sponge & Iron Scrap Suppliers) was situated / located and what was the Registration No. of that firm; whether the goods (sponge iron) was supplied to some others; it was clarified by Singh that firm is situated in 'Sanha' itself on his own land & he could notremember the Registration No. of that firm; further he assured that he would provide the registration no.telephonically; and he revealed that he had not sold the goods to any other party from M/s Bharat Sponge;*
- *On scrutiny of records it has been observed that raw material as scrap was transported through the trucksof M/s Tiwari Road Lines, Ramganj, C.S.M. Nagar; Shri Singh was asked where that transport company is situated and where its office is located; In his replyto above Shri Singh stated that M/s Tewari RoadLines is situated in Ram Nagar, C.S.M. Nagar and his staff used to contact them for transport; to whom hisstaff members have contacted he would be able to submit any information in this regard only after obtaining the same from them;*
- *On being asked as to how the freight was paid in respect to the goods transported through M/s Tiwari Road Lines from M/s Bharat Sponge & Iron Scrap Suppliers; it was stated that freight was paid by M/s*

Mamta Steel and service tax due on it was paid by the company itself;

- *On being asked as to how quality & value of scrap was checked; and name of the person who was deputed for that work; it was stated that the work looked after by Shri Sunil Singh; and prior to*
  30.11.11 that work was looked after by Shri Sanjeev Mishra;
- *On perusal of records resumed on 30.11.11 from the factory, it has been observed that removal of M.S. Ingot was done through the bilty of M/s GayatriTransport Company and the freight of that material was borne by M/s Mamta; on being asked as towhom they contacted in M/s Gayatri Transport Company for transportation of M.S. Ingot as above and whether the trucks used by them were owned bythe transporter; name & address of that person was also demanded from Shri Singh; In this regard Shri Singh stated that this work was done by his staff andall the details would be supplied to theSuperintendent (Prev.), Central Excise, Lucknow telephonically;*
- *On being asked about number of supervisors in the factory, Shri Singh stated that no such type of post as supervisor is there in the factory and all the work was being looked after by all the persons;*
- *On being asked about number of meltors, Shri Singh stated that Shri Ram Karan Verma was the onlymeltor in his factory but his address was not knownto him as he was the man of contractor named Shri Ravi; he worked for 8 hrs. for melting purposes; he was to report to the contractor as well as to him;*
- *That purchase of raw materials and sale of finished goods was being looked after by him and other purchases are being looked after by Sonu Gupta and Vijay Singh;*
- *That the system of issuing of "gate pass" was startedsince beginning but 'due to its improper working, the same was discontinued by last 10 months;*
- *That the register resumed under entry no.5 of resumption memo dated 30.11.11 indicating therein Shri Virendra & Shri Brajesh were supervisor in his factory; he informed that that register belongs to contractor Ravi and both the supervisors were his men to control work and workmen and they had no business with the factory;*
- *That Shri Ravi was the labour contractor, the labourers who worked at the furnace belonged to him, he was being paid a fixed sum against theproduction of Ingots per tonne;*
- *That he had no written contract with Shri Ravi, the contract was verbal, he was being paid Rs.220/- per ton; and he was the resident of Delhi and 'his full address is not known to him; his mobile no. is 07376519528;*
- *That on being asked about the records - "scrap sorting book" (resumption memo no.11) being maintained by Shri Sanjeev, he said that this book belonged to M/s Bharat Sponge & Scrap Suppliersand he is the proprietor of this firm, that's why the invoice of the same was also available in the factory premises; that he had seen & signed no.934 dated*
  23.11.11 of the book, this book was maintained by Shri Sanjeev or any of the staff, this book contains the valuation & details of sorting of scrap purchased by M/s Bharat Spong & Scrap;
- *That on being asked about Shri Sanjeev about an employee of M/s Mamta Steel, how he performed duties for M/s Bharat Sponge and scrap suppliers, Shri Singh stated that being a temporary employee, in the leisure time all the employees perform sorting work also. Since at that period Shri Sanjeev stayed* in the factory itself and he was an educated person so he was used for the purpose of sorting of scrap;
- *That on being asked about the records - "Dharam Kanta Parchi/Book" (resumption memo no.13) is being maintained by Shri Sanjeev, he stated that no such type of record was in his cognizance;*
- *That on being asked about the records - "Gate Pass Book" (resumption memo no.12) being maintainedby Shri Sanjeev / Ashish, he said that this system was started but closed, he was not aware of the fact that who used to issue the gate pass & why; andafter having perused the same he signed on it;*
- *That summons to S/Shri Sanjeev, Virendra, Brajesh& Ram Karan Maurya were issued under section-14 for appearing in the office on 06.07.12, but no one appeared on the day neither anybody replied in this regard; further he was asked to provide their full addresses & to ensure their presence on 20.07.12 and to receive the summons issued by the Superintendent (Prev.), Central Excise, Lucknow; further it was informed to him that the summons would be sent through postal services. He also assured that he would try his best for their appearance on time for tendering their statement; that out of these four, only Ram Karan was working with him, hence, he will give the addresses of the other persons, that's why he had not received the summons.*

13. The summons issued to S/Shri Sanjeev, Virendra, Brajesh & Ram Karan Maurya for appearing in the office on 06.07.12, were got received by one Shri Ashish, Accountant of the factory on 04.07.12 through the divisional staff of Central Excise Division, Raebareli. Summons issued to M/s Gayatri Transport Co. (Commission Agent), Allahabad Faizabad Road, Pratapgarh was also received by Shri Ashishin the factory. Nobody appeared on date 06.07.12. Again summons were issued on 20.07.12 to M/s Gayatri TransportCo., Pratapgarh as well as to Shri Ram Karan Maurya,Melter to appear before the designated authority as on 31.07.12 but nobody appeared on 31.07.12 this time too. Subsequent to above, Shri Lal Padmakar Singh was reminded about his statement dated 11.07.12 that he wouldprovide the addresses of Shri Sanjeev, Shri Virendra and Shri Brajesh, Munshi who had left his factory after 30.11.12.He was again requested vide this office letter even C.No.7939 dated 24.07.12 to provide their addresses for sending summons to them. He was also informed that summons had again been issued to Shri Ram Karan Maurya,Melter - M/s Mamta to appear before the Superintendent (Prev.), Central Excise & Service Tax, Lucknow on 30.07.12 and it was requested to direct him to ensure his presence on 31.07.12 but no one appeared on the said date & time, despite the fact all the summons dated 20.07.12 meant for

- *(1) Shri Lal Padmakar Singh, Director; (2) Shri Brajesh, Munshi; (3) Shri Sanjeev Mishra; (4) Shri Virendra, Supervisor; (5) Shri Ram Karan Maurya, Melter - M/s Mamta; and (6) M/s Gayatri Transport Co., the persons/firmassociated to business of M/s Mamta Steels were already served in the factory and received on 04.07.12 by one Shri Ashish, Accountant of the factory on behalf of them.*

From the above, it could be easily observed that Shri Ashishhad adequate knowledge of their present addresses and that is why he had received the summons on their behalf fordelivery to them. Though the summons meant for M/s Gayatri Transport Co. was got received back undelivered from the postal authorities with the remark that - "apoorna pata-sd/07.08.12". Moreover, Shri Singh was again requested to facilitate the presence of all these persons/firmin the office of the Enquiring Officer on any working day between 16.08.12 to 23.08.12 for tendering their statement/s or otherwise their present addresses be communicated to this office. But no response was given to above request by the party.

14. During the course of thorough investigation, following persons from the staff and other persons/firms who appeared to have colluded on the duty evasion by M/sMamta Steel were summoned several times to record their statement under the provisions of Section 14, of Central Excise Act, 1944: --

1. *Shri Lal Padmakar Singh, Director;*
2. *Shri Brajesh, Munshi;*
3. *Shri Sanjeev Mishra,*
4. *Shri Virendra, Supervisor,*
5. *Shri Ram Karan Maurya, Melter of M/s Steel; and*
6. *M/s Gayatri Transport Company (CommissionAgent, associated to the business of the aboveparty)*

But no body except Shri Lal Padmakar Singh turned up torecord his statement as on 01.05.12 & 11.07.12 u/s 14of the Central Excise Act, 1944. In his statement dated 11.07.12, he assured that he would provide theaddresses of Shri Sanjeev Mishra, Shri Virendra, Shri Brajesh and that he would also ensure the presence of Shri Ram Karan Maurya, Melter - M/s Mamta Steel, before the Superintendent (CP). But no body appeared before the Superintendent (CP), Central Excise, Lucknow,to tender their statements. As the investigation was lingering on unnecessarily due to non co-operation of the party, Shri Amit Prakash, Superintendent, Central Excise Division, Raebareli, was requested, vide office letter dated 25.09.12, to record the statement of the above persons firms pertaining to the case with the help of localstaff for completing the investigation and send a reportto HQ office. In compliance, Shri Amit Prakash, Superintendent, Central Excise Division, Raebareli, visited the factory premises of the said factory on

01.10.12 alongwith the divisional staff for recording the statements of the concerned persons. At the time of visit Shri Lal Padmakar Singh, Director was present in the factory. He informed that the persons namely Brajesh, Sanjeev Mishra and Virendra are not available in the factory. No representative of M/s Gayatri Transport Co. was also stated to be available there. Statements of (i) Shri Lal Padmakar Singh, director; (ii) Shri Ashish Kumar, Accountant; & (iii) Shri Ram Karan Maurya, Melter were recorded on the spot as on 01.10.12 before the Superintendent, Central Excise Division, Raebareli, wherein they have stated inter alia as under :--

Statement of Shri Lal Padmakar Singh

- *that summons issued to S/Shri Sanjiv Mishra, Virendra and Brajesh were handed over by Shri Ashish to me, but thesaid persons belonged to the contractor who was informedin this regard. He further informed since those personsbelonged to the contractor and they left the job in the month of May,2012 whereas Shri Ram Karan Maurya was still working;*
- *that Shri Ashish was not aware of the fact that the above said three persons had left their jobs from the contractor because the persons who worked in the factory under the supervision of contractor got changed from time to time as per the requirement/need; when he enquired about these persons, other labourers told him that those persons hadleft their jobs;*
- *that Shri Ram Karan Maurya, melter - M/s Mamta didn't appear before the designated authority as on 31.07.12 because he was on leave that day; he was informed regarding the summons when he returned to the factory buttill then the day 31.07.12 passed away;*
- *that summons issued to M/s Gayatri Transport Co., was received by the representative (Shri Ashish) of the factory and on being enquired as to why nobody appeared on behalfof them, Shri Singh stated that the persons concerned was* informed telephonically; and after that his number was running off,
- *that Shri K. Ravi was the contractor of labourers who worked in the factory and their labour charges were paid in cash after the work was over; therefore there remained no requirement of more knowledge about them; however, he informed about his phone no. as 07376519528.*

Statement of Shri Ashish, Accountant - M/s Mamta

- *that he has been working in the factory since 16/17thOctober of last year;*
- *he had no fix time to come in the factory, however, he usedto come at least once in a day as per requirement & need ofthe work and maintain records pertaining to Central Excise; further he informed that he work as per the Shri Singh directions and report to him;*
- *that he comes by 10 AM or earlier and completes RG-1about clearances, the director informs him and he prepares the invoices at any time as per the directions of the director but it is signed by the director himself; though he is authorized for Central Excise Work but invoice is signed by the director only; whereas RG-1 register, returns, form-IV etc. are signed by him;*
- *that some staff informs him about last day's production as well as the quantity of raw material used and accordingly,he prepares production report;*
- *that the production report is not in the form of serially numbered bound book. After filling it by hand it is placed in file. He has supplied original copy of production slip for* 28.09.12 & 29.09.12 as sample;
- *that he is not having knowledge of those persons / labours who worked in the induction furnace; he didn't know whereabouts of Shri Virendra, Munshi or Shri Brajesh;*
- *that Shri Sanjeev Mishra & Shri B.M. Shukla were working inthe factory earlier but since December, 11they have left the job;*
- *that Shri B.M. Shukla was also working in the factory earlierbut now he has left the job;*
- *that on being shown the copies of some gate passes it was enquired whether signatures available on them pertains to him; he stated that the signatures appears to be of some Ashish Kumar or Aayush Kumar but does not belong to him;*
- *that on being shown the production report dated 29.11.11 &*

  30.11.11 found in the factory premises as on 30.11.11; andon being enquired whether those were the reports that wereprepared as well as signed by him; he answered that he hadgone outside for two days after a phone call was received byhim; when he came back to his factory

and found it missing,he prepared another report.

Statement of Shri Ram Karan Maurya, Melter - M/s Mamta

- *that he works in the furnace of the factory which runs in oneshift and starts from 8 or 9 A.M.; he joined the factory in September, 11 with one Prabhu, a worker, who had left the job; presently he is working under the contractor Shri Ravi who pay him Rs.8,000/- per month as salary;*
- *that goods in two heats are produced in one shift and each heat takes four hours to complete; in one heat 6 tonsfinished material is produced and it is the maximum capacity of the furnace;*
- *that he didn't maintain any record with respect toproduction of the finished goods. Production might be counted and reported further by the chemist;*
- *that he was not aware of any person or remember anyname who earlier worked as supervisor in the factory; Earlier many Supervisors joined and left the job in thefactory whose names he did not remember; at present one Shri Gupta ji has been working as supervisor for the lastone week;*
- *on being asked whether any Virendra or Brajesh remained there as supervisor, he stated that he was not aware of these names;*

17. Party No. 2 have knowingly colluded with the party No.1 and abetted in the contravention of provisions of Central Excise Rules, 2002, read with the Central Excise Act, 1944 in the intended act of the party No.1 regarding clandestine manufacture and removal of their excisable finished products (M .S. Ingots) without payment of Central Excise duty, as stated above, by the acts of concealing/selling and purchasing
/ dealing with transaction and fraudulently preparing duplicate/forged Invoices, therefore, for this act on the part of the aforementioned party (party No. 2) have rendered themselves liable for penalty under Rule 26 of the Central Excise Rules, 2002. In fact from the foregoing paras it is evident that the party no 2 ie Shri Lal Padmakar Singh, the director of the Company, was not only running and managing the whole show in the factory but also instrumental in the evasion of Central Excise duty. It was at his behest that the evasion was being done and all the employees were taking orders from him only. There was no other director or anyother person at key post who was seen to have been managing the affairs of the factory. It was apparently only he who was the beneficiary of the evasion. It was he who tried every means to delay and scuttle the investigation."

4.11 The Appellant-II was actually involved in the act of evadingthe duty by making clandestine clearances of the goods forAppellant-I. The penalty imposed upon him under Rule 26 is justified and upheld.

5.1 Both the appeals are dismissed.

(Pronounced in open court on- 21/11/2023)

Sd/-

(SANJIV SRIVASTAVA)MEMBER (TECHNICAL)

akp

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70061 of 2020

(Arising out of Order-in-Appeal No.NOI-EXCISE-002-APP-1092-2019-20 dated 13/11/2019 passed by Commissioner (Appeals) Central Excise & Services Tax, Noida)

M/s Sachdeva Holdings Pvt. Ltd., …..Appellant
(Krishna Apra Royal Plaza, 207, Alpha-I, Noida)

VERSUS

Commissioner of Central Excise &

CGST, Noida ….Respondent

(4th Floor, C-56/42, Renu Tower, Sector-62, Noida-201301)

APPEARANCE:

Shri Amit Neogi, Chartered Accountant for the Appellant

Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70084/2023

DATE OF HEARING : 15 September, 2023 DATE OF DECISION : 15 September, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.NOI- EXCISE-002-APP-1092-2019-20 dated 13/11/2019 passed by Commissioner (Appeals) Central Excise & Services Tax, Noida. By the impugned order Commissioner (Appeals) has dismissed the appeal filed by the appellant by observing as follows:-

"6. I find that the appellant had filed the aforesaid refund claim on 09.01.2018. The appellant deposited service tax on 01.06.2016 in the present case. Accordingly, under Section 11B of the Central Excise Act' 1944 the refund claim should have been filed on or before 30.05.2017, but the appellant failed to do so and filed their refund claim on 09.01.2018, after the lapse of more than one year.

2. *I find that the appellant has submitted in the grounds of appeal that *Extra payment of Service Tax is a mere deposit and does not amount to payment of tax; hence time-limit of section 11B and principle of unjust enrichment would not apply to refund thereof. In this regard, I place reliance on the decision of Hon'ble Supreme Court of India in the case of Anam Electrical Manufacturing Company [1997(90) E.L.T. 260 (S.C.)], wherein Apex Court has held that refund application has to be filed within the time limit under Section 11 B of the Central Excise Act' 1944/Section 27 of Customs Act1962 and Statutory time limit not extendable by any authority or Court in case of "illegal levy". Further, Division Bench of the Tribunal in the case of Prabhakar C. Suvarna Vs. CCE&ST, Mangalore [2015-TIOL- 2576-CESTAT-BANG], has held that the refund of service tax paid under mistake, the claim has to be filed within prescribed period of one year and the limitation for claiming the refund cannot be extended in any circumstances including when the payments are made by error of law or under mistake. Accordingly, I find that the aforesaid refund claim is time barred and hit by period of limitation. Further, I also agree with the view of adjudicating authority who clearly held in the impugned order that the burden of service tax paid was not borne by the claimant. Hence, I do not find any reason to intervene in the impugned order passed by the adjudicating authority.*

2.1 *In view of the above discussion and findings, Order-In- Original No.314/R/AC/D-I/N-II/17-18 dated 11.05.2018 passed by the adjudicating authority is upheld and appeal bearing No.779/ST/Noida/Appl/GBN/2018-19 dated 18.07.2018 filed by the appellant is rejected."* Appellant filed a refund claim for Rs.4,99,525/- on 09.01.2018 for the value of taxable services provided by them during the period from 01.04.2016 to 30.09.2016 was disclosed as Rs.40,00,000/- instead of actual taxable services of Rs.5,55,000/- resulting in excess payment of service tax.

2.2 Appellant had received certain advanced payment from M/s Umang Realtech Pvt. Ltd. against which they deposited service tax of Rs.5,80,000/- vide chalan dated 01.06.2016. However, subsequently they had refunded Rs.30,00,000/- + Rs.6,00,000/- to M/s Umang Realtech Pvt. Ltd. on 05.09.2016 and 26.09.2016 leaving in balance of Rs.5,80,000/-, for the actual services provided on which service tax liability as per appellant working out to be Rs.80,475/-. Therefore, appellant claimed that they have paid excess service tax of Rs.4,99,525/- for which the said refund claim is made.

2.3 On scrutiny of refund claim filed on 09.11.2018, it was observed that an amount of Rs.5,80,000/- which appellant had deposed as service tax was not refunded by them to M/s Umang Realtech Pvt. Ltd. Accordingly, them have not bound the burden of excess tax paid. It was also noticed that the refund claim filed on 09.01.2018 was barred by limitation as has been filed after more than one year from the date of payment of the service tax claimed as refund.

2.4 Accordingly, a show cause notice dated 27.03.2018 was issued to the appellant asking them to show cause as to why the refund claim may not be rejected for the above stated reasons. This show cause notice was adjudicated vide the Order-in- Original dated 11.05.2018, rejecting the refund claim of the appellant.

2.5 Aggrieved appellant challenged the Order-in-Original before Commissioner (Appeals), who has rejected the appeal by the impugned order as referred in para-1 above. Hence, appellant has filed this appeal.

3.1 I have heard Shri Amit Neogi, learned Chartered Accountant appearing for the appellant and Shri Manish Raj, learned Authorised Representative appearing for the revenue.

3.2 Arguing for the appellant learned Chartered Accountant submits that they have paid some amount under mistake of law and this Tribunal has not taking the view that in case of payment on the mistake of law, provisions of Section 11B of the Central Excise Act would not be applicable for the refund claim of said amount. The reliance is placed on the decision of this Tribunal in the case of M/s Asl Builders Pvt. Ltd. Vs Jamshedpur Commissionerate (CESTAT-Kolkatta). Accordingly, he argued that refund claim should be allowed in their favour by setting aside the impugned order.

3.3 Learned Authorised Representative reiterates the findings of the impugned order and submits that the appeal needs to be dismissed.

4.1 I have considered the impugned order along with the submissions made in the appeal and during the course of arguments.

4.2 From the facts as stated in the impugned order it is evident that the refund claim has been rejected primarily on the ground of being much beyond the period of one year as prescribed by Section 83 of the Finance Act, 1994 read with Section 11B of the Central Excise Act.

4.3 The law of limitation does not extiguish the right which may have a arisen, but only for the reason of passage of time restricts the enforcement of that right. Admittedly, in the present case the refund claim has been filed much beyond the period of one year as prescribed in law, the same is necessarily time barred as having filed beyond the statutory period of limitation as prescribed in law. Section 83 of Finance Act, 1994 read with Section 11 B of Central Excise Act, 1944 prescribes that refund claim should have been filed within one year from the relevant date. also in view of the judgment Hon'ble Supreme Court in the case of *Mafatlal Industries Ltd vs Union of India [1997 (89) ELT 247 (SC)]*, by holding as follows:-

"**67.** The first question that has to be answered herein is whether Kanhaiyalal has been rightly decided insofar as it says (1) that where the taxes are paid under a mistake of law, the person paying it is entitled to recover the same from the State on establishing a mistake and that this consequence flows from Section 72 of the Contract Act;
(2) that it is open to an assessee to claim refund of tax paid by him under orders which have become final - or to reopen the orders which have become final in his own case
- on the basis of discovery of a mistake of law based upon the decision of a court in the case of another assessee, regardless of the time-lapse involved and regardless of the fact that the relevant enactment does not provide for such refund or reopening; (3) whether equitable considerations have no place in situations where Section 72 of the Contract Act is applicable; and (4) whether the spending away of the taxes collected by the State is not a good defence to a claim for refund of taxes collected contrary to law.

68. *Re. : (I) : Hereinbefore, we have referred to the provisions relating to refund obtaining from time to time under the Central Excises and Salt Act. Whether it is Rule* 11 (as it stood from time to time) or Section 11B (as it obtained before 1991 or subsequent thereto), they invariably purported to be exhaustive on the question of refund. Rule 11, as in force prior to August 6, 1977, stated that "no duties and charges which have been paid or have been adjusted....shall be refunded unless the claimant makes an application for such refund under his signature and lodges it to the proper officers within three months from the date of such payment or adjustment, as the case may be". Rule 11, as in force between August 6, 1977 and November 17, 1980 contained sub-rule (4) which expressly declared: "(4) Save as otherwise provided by or under this rule, no claim of refund of any duty shall be entertained". Section 11B, as in force prior to April, 1991 contained sub-section (4) in identical words. It said : "(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained". Sub- section (5) was more specific and emphatic. It said : "Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim." It started with a non- obstante clause; it took in every kind of refund and every claim for refund and it expressly barred the jurisdiction of courts in respect of such claim. Sub-section (3) of Section 11B, as it now stands, is to the same effect - indeed, more comprehensive and all-encompassing. It says, "(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder or in any law for the time being in force, no refund shall be made except as provided in sub-section".

The language could not have been more specific and emphatic. The exclusivity of the provision relating to refund is not only express and unambiguous but is in addition to the general bar arising from the fact that the Act creates new rights and liabilities and also provides forums and procedures for ascertaining and adjudicating those rights and liabilities and all other incidental and ancillary matters, as will be pointed out presently. This is a bar upon a bar - an aspect

emphasised in Para 14, and has to be respected so long as it stands. The validity of these provisions has never been seriously doubted. Even though in certain writ petitions now before us, validity of the 1991 (Amendment) Act including the amended Section 11B is questioned, no specific reasons have been assigned why a provision of the nature of sub-section (3) of Section 11B (amended) is unconstitutional. Applying the propositions enunciated by a seven-Judge Bench of this Court in Kamala Mills, it must be held that Section 11B [both before and after amendment] is valid and constitutional. In Kamala Mills, this Court upheld the constitutional validity of Section 20 of the Bombay Sales Tax Act (set out hereinbefore) on the ground that the Bombay Act contained adequate provisions for refund, for appeal, revision, rectification of mistake and for condonation of delay in filing appeal/revision. The Court pointed out that had the Bombay Act not provided these remedies and yet barred the resort to civil court, the constitutionality of Section 20 may have been in serious doubt, but since it does provide such remedies, its validity was beyond challenge. To repeat - and it is necessary to do so - so long as Section 11B is constitutionally valid, it has to be followed and given effect to. We can see no reason on which the constitutionality of the said provision - or a similar provision - can be doubted. It must also be remembered that Central Excises and Salt Act is a special enactment creating new and special obligations and rights, which at the same time prescribes the procedure for levy, assessment, collection, refund and all other incidental and ancillary provisions. As pointed out in the Statement of Objects and Reasons appended to the Bill which became the Act, the Act along with the Rules was intended to "form a complete central excise code". The idea was "to consolidate in a single enactment all the laws relating to central duties of excise". The Act is a self-contained enactment. It contains provisions for collecting the taxes which are due according to law but have not been collected and also for refunding the taxes which have been collected contrary to law, viz., Sections 11A and 11B and its allied provisions. Both provisions contain a uniform rule of limitation, viz., six months, with an exception in each case. Sections 11 and 11B are complimentary to each other.

To such a situation, Proposition No. 3 enunciated in Kamala Mills becomes applicable, viz., where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf and provides further that all questions about the said right and liability shall be determined by the Tribunals so constituted, the resort to civil court is not available - except to the limited extent pointed out therein. Central Excise Act specifically provides for refund. It expressly declares that no refund shall be made except in accordance therewith. The Jurisdiction of a civil court is expressly barred - vide sub- section (5) of Section 11B, prior to its amendment in 1991, and sub-section (3) of Section 11B, as amended in 1991. It is relevant to notice that the Act provides for more than one appeal against the orders made under Section 11B/Rule 11. Since 1981, an appeal is provided to this Court also from the orders of the Tribunal. While Tribunal is not a departmental organ, this court is a civil court. In this view of the matter and the express and additional bar and exclusivity contained in Rule 11/Section 11B, at all points of time, it must be held that any and every ground including the violation of the principles of natural justice and infraction of fundamental principles of judicial procedure can be urged in these appeals, obviating the necessity of a suit or a writ petition in matters relating to refund. Once the constitutionality of the provisions of the Act including the provisions relating to refund is beyond question, they constitute "law" within the meaning of Article 265 of the Constitution. lt follows that any action taken under and in accordance with the said provisions would be an action taken under the "authority of law", within the meaning of Article 265.

In the face of the express provision which expressly declares that no claim for refund of any duty shall be entertained except in accordance with the said provision, it is not permissible to resort to Section 72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions. In other words, it is not permissible to claim refund by invoking Section 72 as a separate and independent remedy when such a course is expressly barred by the provisions in the Act, viz., Rule 11 and Section 11B. For this reason, a suit for refund would also not lie. Taking any other view would amount to nullifying the provisions in Rule 11/Section 11B, which, it needs no emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with Rule 11 or Section 11B, as the case may be, in the forums provided by the Act. No suit can be filed for refund of duty invoking Section 72 of the Contract Act. So far as the jurisdiction of

the High Court under Article 226 - or for that matter, the jurisdiction of this court under Article 32 - is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.

69. *There is, however, one exception to the above proposition, i.e., where a provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not contemplated by the Act. The Act does not contemplate any of its provisions being declared* unconstitutional and therefore it does not provide for its consequences. Rule 11/Section 11B are premised upon the supposition that the provisions of the Act are good and valid. But where any provision under which duty is levied is found to be unconstitutional, Article 265 steps in. In other words, the person who paid the tax is entitled to claim refund and such a claim cannot be governed by the provisions in Rule 11/Section 11B. The very collection and/or retention of tax without the authority of law entitles the person, from whom it is collected, to claim its refund. A corresponding obligation upon the State to refund it can also be said to flow from it. This can be called the right to refund arising under and by virtue of the Constitutional provisions, viz., Article 265. But, it does not follow from this that refund follows automatically. Article 265 cannot be read in isolation. It must be read in the light of the concepts of economic and social justice envisaged in the Preamble and the guiding principles of State Policy adumbrated in Articles 38 and 39 - an aspect dealt with at some length at a later stage. The very concept of economic justice means and demands that unless the claimant (for refund) establishes that he has not passed on the burden of the duty/tax to others, he has no just claim for refund. It would be a parody of economic justice to refund the duty to a claimant who has already collected the said amount from his buyers. The refund should really be made to the persons who have actually borne its burden - that would be economic justice. Conferring an unwarranted and unmerited monetary benefit upon an individual is the very anti-thesis of the concept of economic justice and the principles underlying Articles 38 and 39. Now, the right to refund arising as a result of declaration of unconstitutionality of a provision of the enactment can also be looked at as a statutory right of restitution. It can be said in such a case that the tax paid has been paid under a mistake of law which mistake of law was discovered by the manufacturer/assessee on the declaration of invalidity of the provision by the court. Section 72 of the Contract Act may be attracted to such a case and a claim for refund of tax on this score can be maintained with reference to Section 72. This too, however, does not mean that the taxes paid under an unconstitutional provision of law are automatically refundable under Section 72. Section 72 contains a rule of equity and once it is a rule of equity, it necessarily follows that equitable considerations are relevant in applying the said rule - an aspect which we shall deal with a little later. Thus, whether the right to refund of taxes paid under an unconstitutional provision of law is treated as a constitutional right flowing from Article 265 or as a statutory right/equitable right affirmed by Section 72 of the Contract Act, the result is the same - there is no automatic or unconditional right to refund.

70. *Re : (II) : We may now consider a situation where a manufacturer pays a duty unquestioningly - or he questions the levy but fails before the original authority and keeps quiet. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second appeal/revision, fails and then keeps quiet. The orders in any of the situations have become final against him. Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision is rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case. (We must reiterate and emphasise that while dealing with this situation we are keeping out the situation where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation. In other words, we are dealing with a case where the duty was paid on account of mis-construction, mis-application or wrong* interpretation of a provision of law, rule, notification or regulation, as the case may be.) Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the ease may be, in the case of another person has made him aware of the mistake of law and,

therefore, he is entitled to refund of the duty paid by him? Can he invoke Section 72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading Section 72 of the Contract Act along with Section 17(1)(c) of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? Kanhaiyalal is understood as saying that such a course is permissible. Later decisions commencing from Bhailal Bhai have held that the period of limitation in such cases is three years from the date of discovery of the mistake of law. With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well-accepted concepts of law. One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law.

So long as that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. But what is happening now is that the duty which has been paid under a proceeding which has become final long ago - may be an year back, ten years back or even twenty or more years back - is sought to be recovered on the ground of alleged discovery of mistake of law on the basis of a decision of a High Court or the Supreme Court. It is necessary to point out in this behalf that for filing an appeal or for adopting a remedy provided by the Act, the limitation generally prescribed is about three months (little more or less does not matter). But according to the present practice, writs and suits are being filed after lapse of a long number of years and the rule of limitation applicable in that behalf is said to be three years from the date of discovery of mistake of law : The incongruity of the situation needs no emphasis. And all this because another manufacturer or assessee has obtained a decision favourable to him. What has indeed been happening all these years is that just because one or a few of the assessees succeed in having their interpretation or contention accepted by a High Court or the Supreme Court, all the manufacturers/Assessees all over the country are filing refund claims within three years of such decision, irrespective of the fact that they may have paid the duty, say thirty years back, under similar provisions - and their claims are being allowed by courts. All this is said to be flowing from Article 265 which basis, as we have explained hereinbefore, is totally unsustainable for the reason that the Central Excise Act and the Rules made thereunder including Section 11B/Rule 11 too constitute "law" within the meaning of Article 265 and that in the face of the said provisions - which are exclusive in their nature - no claim for refund is maintainable except under and in accordance therewith. The second basic concept of law which is violated by permitting the above situation is the sanctity of the provisions of the Central Excises and Salt Act itself. The Act provides for levy, assessment, recovery, refund, appeals and all incidental/ancillary matters. Rule 11 and Section 11B, in particular, provide for refund of taxes which have been collected contrary to law, i.e., on account of a mis-interpretation or mis-construction of a provision of law, rule, notification or regulation. The Act provides for both the situations represented by Sections 11A and 11B. As held by a seven - Judge Bench in Kamala Mills, following the principles enunciated in Firm & Illuri Subbaiya Chetty, the words "any assessment made under this Act" are wide enough to cover all assessments made by the appropriate authorities under the Act whether the assessments are correct or not and that the words "an assessment made" cannot mean an assessment properly and correctly made. It was also pointed out in the said decision that the provisions of the Bombay Sales Tax Act clearly indicate that all questions pertaining to the liability of the dealer to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct and whether a transaction is exigible to tax or not are all matters to be determined by the authorities under the Act. The argument that the finding of the authority that a particular transaction is taxable under the Act is a finding on a collateral fact and, therefore, resort to civil court is open, was expressly rejected and it was affirmed that the whole activity of assessment beginning with the filing of the return and ending with the order of assessment falls within the jurisdiction of the authorities under the Act and no part of it can be said to constitute a collateral activity not specifically or expressly included in the jurisdiction of the authorities under the Act. It was clarified that even if the authority under the Act holds

erroneously, while exercising its jurisdiction and powers under the Act that a transaction is taxable, it cannot be said that the decision of the authority is without jurisdiction. We respectfully agree with the above propositions and hold that the said principles apply with equal force in the case of both the Central Excises and Salt Act and the Customs Act. Once this is so, it is un-understandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. We must reiterate that the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said article.

In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. It is, however, suggested that this result follows only in tax matters because of Article 265. The explanation offered is untenable as demonstrated hereinbefore. As a matter of fact, the situation today is chaotic because of the principles supposedly emerging from Kanhaiyalal and other decisions following it. Every decision of this Court and of the High Courts on a question of law in favour of the assessee is giving rise to a wave of refund claims all over the country in respect of matters which have become final and are closed long number of years ago. We are not shown that such a thing is happening anywhere else in the world. Article 265 surely could not have been meant to provide for this. We are, therefore, of the clear and considered opinion that the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee. (See the pertinent observations of Hidayatullah, CJ. in Tilokchand Motichand extracted in Para 37). The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith."

4.4 This decision of the Hon'ble Supreme Court has been followed constantly by the various courts and tribunal holding that the refund claims filed beyond statutory period of limitation as prescribed by the statute (Section 11 B of Central Excise Act, 1944 or Section 27 of the Customs Act, 1962) are barred by limitation. Some of the decisions are reproduced below:

A. Hon'ble Supreme Court in the case of Anam Electricals [1997 (90) ELT 260 (SC)] stated as follows:

Pursuant to the directions given in Mafatlal Industries v. Union of India - 1997 (89) E.L.T. 247 (S.C.) = 1996 (9)
SCALE 457, the appeals/Special Leave Petitions coming up for disposal shall be disposed of in terms of one or the other of the clauses below :

(1) Where a refund application was filed by the manufacturer/purchaser beyond the period prescribed by the Central Excise Act/Customs Act in that behalf, such petition must be held to be untenable in law. Even if in any appeal, suit or writ petition, direction has been given that the refund application shall be considered with reference to the period of limitation prescribed in the Central Excise Act/Customs Act - or that the period of limitation shall be taken as three years - such a direction of the Appellant Court/Civil Court/High Court shall be deemed to be unsustainable in law and such direction shall be set aside. The period prescribed by the Central Excise Act/Customs Act for filing a refund application in the case of "illegal levy" cannot be extended by any Authority or Court.

(2) …."

B. Hon'ble Bombay High Court has in case of Orkay Silk Mills Ltd. [1998 (98) E.L.T. 310 (Bom.)] held as follows:

"2. In view of the decision of the Supreme Court reported in 1997 (89) E.L.T. 247 (S.C.) as per Section 27, application claiming refund as such, should be presented within a period of six months as envisaged. In the present case, the claim is barred by limitation.

3. The learned Counsel for Petitioner vehemently urged before us, that since the levying of duty itself was without any authority of tariff, Section 27 as such has no application. In the submission of learned Counsel normal period of limitation for recovery as described is 3 years. The submission is that the application of refund presented on 22-2-1987 (sic) was within the period of limitation of 3 years from the date of payment of duty and as such, it is not barred, in view of the period of limitation.

4. The Limitation Act provides a period of limitation for initiating the proceedings for any recovery of claim in the Court of law. Making of such application for refund of customs duty would not be such a proceeding as envisaged of Limitation Act. As such, the period prescribed under the said Act has no application. Alternatively, the learned Counsel urged before us that the instant petition is within the period of limitation.

5. Proceedings under Article 226 are not envisaged by the Limitation Act. The period of limitation prescribed under Limitation Act has no application to the extra ordinary jurisdiction of this Court exercisable under Article 226 of the Constitution of India writ of this Court. The submissions in this behalf are devoid of any merit. Even otherwise, the Authorities under the Customs Act duly empowered to collect the duty, could make a mistake or error in exercise of their power. However, it cannot be successfully argued that erroneous act to which the Petitioner has questioned is without any jurisdiction. Even in view of this matter, the provisions of Section 27 of the Act has application as laid down by the Supreme Court in the case cited supra. Since application is beyond the period of limitation, the same cannot be entertained."

C. In case of Kirloskar Pneumatic Co. Ltd. [1999 (105)

E.L.T. 277 (Bom.)] Hon'ble Bombay High Court held as follows:

"2. In view of the decision laid down by the Supreme Court in case of Mafatlal Industries Ltd. v. Union of India - 1997 (89) E.L.T. 247 (S.C.), petition cannot be entertained as the claim was not preferred within the statutory period as envisaged by Section 27 of the Act.

3. Our attention is particularly invited to observation recorded in para 100 of the report of the judgment. The Supreme Court to mitigate the situation, owing to law as declared, observed that Petitioner who filed Writ Petition or suit is at liberty to present claim for refund within 60 days from the date of the judgment i.e., 19th December, 1996. However, the Petitioners have not availed the opportunity as such and therefore cannot now take the advantage.

4. Another decision referred to us is reported in the case of Assistant Collector of Customs v. Anam Electrical Manufacturing Co. - 1997 (90) E.L.T. 260 (S.C.) wherein it is observed that even if the claim is not instituted within a stipulated period but petition or suit filed within the period prescribed, the parties according to law are entitled to the relief of refund. Even this observation is of no avail since the instant Petition is filed beyond the period of limitation as envisaged by Section 27.

5. The learned Counsel Mr. Nankani then urged that observation of the Supreme Court needs to be interpreted liberally. Even acceding to the submission, the words which are deployed are plain, unambigous and cannot be stretched beyond what they convey in common parlance. The Supreme Court as discussed has stated that 60 days from the date of the judgment "(To-day)"; this phraseology by no stretch of imagination cannot be interpreted to convey something else."

D. Hon'ble Karnataka High Court has in case of N.G.E.F. Limited [1998 (104) E.L.T. 628 (Kar.)] observed as follows:

"5. Section 27 of the Customs Act 1962, inter alia provides that any person claiming refund of any duty paid by him in pursuance of an order of assessment made by an officer of Customs

lower in rank than an Assistant Collector of Customs may make an application for refund of such duty to the Assistant Collector of Customs within the time stipulated therein. Sub-section (4) of Section 27 stipulates that save as provided in Section 26, no claim for refund of any duty shall be entertained except in accordance with the provisions of the said Section. On a plain reading of the provision therefore it would appear that refunds if any arising under the Act, are regulated by the provisions of Section 27, and that the Scheme of the Act does not envisage any such refunds except in accordance with the procedure prescribed thereunder. The question whether an amount paid by the assessee which was not otherwise due and recoverable from the assessee could be claimed by way of a refund even outside the provision of Sec. 27 and beyond the period prescribed therein fell directly for consideration of the Supreme Court in Mafatlal Industries Case (Supra). On a review of the entire case law on the subject the Court summed up the legal position thus :-

"Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/ plaintiff - whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter by mis-interpreting or mis-applying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 - and of this Court under Article 32 - cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

xxx xxx xxx xxx

All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal - which is not a departmental organ - but to this Court, which is a civil court."

6. *The above in my opinion provides a complete answer to the petitioner's case. The decisions unequivocally declares that refunds under the Act can be claimed only in* accordance with the provisions of Section 27 which has been held to constitute `law' within the meaning of Article
265 of the Constitution of India. The court has declared this at page-30 of the majority Judgment in the following words :-

"We must reiterate that the provisions of the Central Excise Act also constitute `law' within the meaning of Art. 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under `the authority of law' within the meaning of the said article."

It follows that if a request for refund is not made by the person affected within the period prescribed under Section
27 his remedy to claim return of the amount even when the same may not have been recoverable from him is lost. The failure to claim refund within the period stipulated has the effect of legitimising what may have been in the inception either irregular or illegitimate. Section 27 of the Act having been declared to be a valid piece of legislation within the meaning of Article 265 of the Constitution, the result is that the recovery and retention of the money although strictly speaking not recoverable from the citizen concerned shall be treated to be a recovery with the authority of law. There is as is apparent from a reading of the conclusions extracted above only one exception to that general Rule namely where the recovery is made in terms of a provision which is declared constitutionally invalid. In any such case, the refund would fall

outside the purview of the enactment and would therefore be immune from the rigors of Section 27. To the same effect is the view taken by the Apex Court in Kirloskar's case (supra) also. In that case the argument that the High Court could under Article 226 of the Constitution direct the Authorities to grant refund was repelled in no uncertain terms. The Court observed that the provisions of Article 226 of the Constitution could not be invoked to direct the Officers to ignore a validly made provision of law like Section 27 of the Customs Act. The jurisdiction under Article 226 could on the contrary be invoked only to direct the authorities to act in accordance with law and not in defiance thereof. In the Division Bench, decision of this Court, relied upon by the respondent, a similar view has been taken relying upon the decision of the Supreme Court in Collector of Central Excise v. Sugar Mills - 1988 (37) E.L.T. 478. In the light of the above pronouncements therefore the contrary view taken by the Division Bench of this Court in Assistant Commissioner C.C. Ex. v. Kashyap Engineering & Metallurgicals (P) Ltd. - 1990 (45) E.L.T. 375 (Kar.) must be deemed to have been impliedly over-ruled."

E. Hon'ble Supreme Court has in case of Sansera Engineering Ltd.[2022 (382) E.L.T. 721 (S.C.)] observed as follows:

12. As such, the issue involved in the present appeal is squarely covered by the decision of this Court in the cases of Mafatlal Industries Ltd. (supra) and Uttam Steel Limited (supra). After taking into consideration Section 11B of the Act and the notification and procedure under Rule 12, it is specifically observed and held that rebate of duty of excise on excisable goods exported out of India would be covered under Section 11B of the Act. After referring to the decision of this Court in the case of Mafatlal Industries Ltd. (supra), it is further observed in the case of Uttam Steel Limited (supra) that such claims for rebate can only be made under Section 11B within the period of limitation stated therefor.

On the argument based on Rule 12, this Court has specifically observed that such argument has to be discarded as it is not open to subordinate legislation to dispense with the requirements of Section 11B. The aforesaid observations made by this Court in the case of Uttam Steel Limited (supra) clinches the issue. The said decision has been subsequently rightly followed by the Madras High Court in the case of Hyundai Motors India Limited (supra).

F. In case of Uttam Steel [2015 (319) E.L.T. 598 (S.C.)] Hon'ble Supreme Court has held as follows:

"10. We have heard learned counsel for the parties and Shri Bagaria, the learned Amicus Curiae at some length. There is no doubt whatsoever that a period of limitation being procedural or adjectival law would ordinarily be retrospective in nature. This, however, is with one proviso super added which is that the claim made under the amended provision should not itself have been a dead claim in the sense that it was time barred before an Amending Act with a larger period of limitation comes into force. A number of judgments of this Court have recognized the aforesaid proposition. Thus, in S.S. Gadgil v. Lai and Company, AIR 1965 S.C. 171, this Court stated :-

"13. As we have already pointed out, the right to commence a proceeding for assessment against the assessee as an agent of a non-resident party under the Income Tax Act before it was amended, ended on March 31, 1956. It is true that under the amending Act by Section 18 of the Finance Act, 1956, authority was conferred upon the Income Tax Officer to assess a person as an agent of a foreign party under Section 43 within two years from the end of the year of assessment. But authority of the Income Tax Officer under the Act before it was amended by the Finance Act of 1956 having already come to an end, the amending provision will not assist him to commence a proceeding even though at the date when he issued the notice it is within the period provided by that amending Act. This will be so, notwithstanding the fact that there has been no determinable point of time between the expiry of the time provided under the old Act and the commencement of the amending Act. The legislature has given to Section 18 of the Finance Act, 1956, only a limited retrospective operation i.e. up to April 1, 1956, only. That provision must be read subject to the rule that in the absence of an express provision or clear implication, the legislature does not intend to attribute to the amending provision a greater retrospectivity than is expressly mentioned, nor to authorise the Income Tax Officer to

commence proceedings which before the new Act came into force had by the expiry of the period provided, become barred."

To similar effect is the judgment in J.P. Jani, Income Tax Officer v. Induprasad Devshanker Bhatt, AIR 1969 SC 778. The Court held :

"6. In our opinion, the principle of this decision applies in the present case and it must be held that on a proper construction of Section 297(2)(d)(ii) of the new Act, the Income Tax Officer cannot issue a notice under Section 148 in order to re-open the assessment of an assessee in a case where the right to re-open the assessment was barred under the old Act at the date when the new Act came into force. It follows therefore that the notices dated 13-11-1963 and 9-1-1964 issued by the Income Tax Officer, Ahmedabad were illegal and ultra vires and were rightly quashed by the Gujarat High Court by the grant of a writ."

In New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 SCC 840, this Court said :

"The new law of limitation providing a longer period cannot revive a dead remedy. Nor can it suddenly extinguish vested right of action by providing for a shorter period of limitation."

Similarly in T. Kaliamurthi v. Five Gori Thaikkal Wakf, (2008) 9 SCC 306, this Court said :
"40. In this background, let us now see whether this section has any retrospective effect. It is well settled that no statute shall be construed to have a retrospective operation until its language is such that would require such conclusion. The exception to this rule is enactments dealing with procedure. This would mean that the law of limitation, being a procedural law, is retrospective in operation in the sense that it will also apply to proceedings pending at the time of the enactment as also to proceedings commenced thereafter, notwithstanding that the cause of action may have arisen before the new provisions came into force. However, it must be noted that there is an important exception to this rule also. Where the right of suit is barred under the law of limitation in force before the new provision came into operation and a vested right has accrued to another, the new provision cannot revive the barred right or take away the accrued vested right."

For the latest exposition of the same Rule see: Thirumalai Chemicals Ltd. v. Union of India, (2011) 6 SCC 739 = 2011 (268) E.L.T. 296 (S.C.) at para 29.

11. The effect of the amendment of Section 11B on 12th May, 2000 is that all claims for rebate pending on this date would be governed by a period of one year from the date of shipment and not six months. This, however, is subject to the rider that the claim for rebate should not be made beyond the original period of six months. On the facts of the present case, since the claims for rebate were made beyond the original period of six months, the respondents cannot avail of the extended period of one year on the subsequent amendment to Section 11B.

The effect of Section 11B, and in particular, applications for rebate being made within time, has been laid down in Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 = 1997 (89) E.L.T. 247 (S.C.), thus :
"108. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff - whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter - by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 - and of this Court under Article 32 - cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance

with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act do constitute “law” within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and given effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal - which is not a departmental organ - but to this Court, which is a civil court.”

From the law laid down by this decision it is clear that all claims for rebate/refund have to be made only under Section 11B with one exception - where a statute is struck down as unconstitutional. Further, the limitation period of six months has to be strictly applied.”

4.5 Interestingly in case of ASL Builders [Final Order No. 75043/2020 dated 09.01.2020 of Kolkata Bench] referred to by the counsel for appellant, following has been held:

“10. The constitutional Bench of the nine Hon'ble Judges of the Hon'ble Supreme Court in the case of Mafatlal Industries Limited Vs. Union of India reported in 1997 (89) ELT 247 extensively considered the nuances of Section 11B of the Act. While summarizing the propositions, the Hon'ble Court at para 99(ii) held as follows:-

"(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception : where a person approaches the High Court or Supreme Court challenging the Excise Appeal No.78558 of 2018 constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it.

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying Clause (c) of sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview."

11. Further, at paragraph 113 of the said judgement, the Hon'ble Court classified the various refund claims into three groups or categories:-

"(I) The levy is unconstitutional - outside the provisions of the Act or not contemplated by the Act.

(II) The levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act, Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the fundamental principles of judicial procedure.

(III) Mistake of law - the levy or imposition wasunconstitutional or illegal or not exigible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court or the Supreme Court, and as soon as the assessee came to know of the Excise Appeal No.78558 of 2018 judgment (within the period of limitation), he initiated action for refund of the tax paid by him, due to mistake of law."

After referring several judgments and provisions of Section 11A & 11B of Central Excise Act, at paragraph 137 of the said judgement, their Lordships have concluded as under:-

"137. Applying the law laid down the decisions aforesaid, it is not possible to conclude that any and every claim for refund of illegal/unauthorised levy of tax, can be made only in accordance with the provisions of the Act (Rule 11, Section 11B etc. as the case may be), and an action by way of suit or writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the Constitution is maintainable to assail the levy or order which is illegal, void or unauthorised or without jurisdiction and/or claim refund, in cases covered by propositions No. (1), (3) (4) and (5) in Dulabhai's case, as explained hereinabove, as one passed outside the Act and ultra vires. Such action will be governed by the general law and the procedure and period of limitation provided by the specific statute will have no application. [Collector of Central Excise, Chandigarh v. M/s. Doaba Co-operative Sugar Mills Ltd., Jalandhar [1988 (37) E.L.T. 478 (SC) = 1988 Supp. SCC

683); Escorts Ltd. v. Union of India & Ors. [1994 Supp. (3) SCC

86)] Rule 11 before and after amendment, or Section 11B cannot affect Section 72 of the Contract Act or the provisions of Limitation Act in such situations. My answer to the claims for refund broadly falling under the three groups or categories enumerated in Paragraph 5 of this judgment is as follows :

where the levy is unconstitutional - Outside the Category

(I) provisions of the Act or not contemplated by the Act :-

In such cases, the jurisdiction of the civil courts is not barred. The aggrieved party can invoke Section 72 of the Contract Act, file a suit or a petition under Article 226 of the Constitution, and pray for appropriate relief inclusive of refund within the period of limitation Excise Appeal No.78558 of 2018 provided by the appropriate law. [Dulabhai's case (supra) - Para 32 - Clauses (3) and (4)]."

12. The Hon'ble Supreme Court in the case of Mafatlal (supra) at para 137 reiterated the proposition as laid down in Doaba Cooperative Sugar Mills case wherein the Supreme Court held that in applying Section 11B, an exception has been culled out in cases where the payment of duty was under a mistake of law (37 ELT 478 (SC), Para- 6-Last 4 lines).

13. The aforesaid propositions reveal that what one has to see is whether the amount paid by the assessee under a mistaken notion was payable or not. In other words, if the assessee had not paid those amounts, the authority could not have demanded from the assessee to make such payment. In other words, the department lacked authority to levy and collect such tax. In case, the department was to demand such payment, the assessee could have challenged it as unconstitutional and without authority of law. When once there is lack of authority to demand service tax or excise duty from the assessee, the department lacks authority to levy and collect such amount and the said amount is not "Service Tax" or "Excise duty" and Section 11B of the Act has no application in such cases."

The above decision refers to para 113 and 137 of the decision in case of Mafatlal Industries, for coming at this conclusion. Para 113 and 137 are not the majority view, in the aforesaid decision of the Hon'ble Supreme Court, the majority decision has concluded in para 99 of the said

decision. Accordingly the findings recorded by relying on the minority view in the said decision cannot create a binding precedence. In case of Orient Fabrics Pvt Ltd [2003 (158) E.L.T. 545 (S.C.)] Hon'ble Supreme Court has observed as follows:

"9. The Gujarat High Court in Ashok Fashion Ltd. (supra) although took notice of the fact that the cause of action therein arose in the year 1993, but inadvertently or otherwise noticed the amended provisions of sub-section
(3) of Section 3 of the Act. It furthermore although noticed the decision of M/s. Khemka & Co. (Agencies) Pvt. Ltd. (supra), as would appear from the discussion made hereinafter, but chose to follow the minority decision and not the majority one.

10. In M/s. Khemka & Co. (Agencies) Pvt. Ltd. (supra), this Court categorically laid down Paras 25 and 26, which runs as under :

"25. Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Reference may be made to Section 28 of the Indian Income-tax Act, 1922 where penalty is provided for concealment of income.
Penalty is in addition to the amount of income-tax. This Court in Jain Brothers v. Union of India., 1970 (77) ITR
107 : 1969 (3) SCC 311, said that penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax.

26. The Federal Court in Chatturam v. C.I.T., Bihar, 1947

(15) ITR 302, said that liability does not depend on assessment. There must be a charging section to create liability. There must be first a liability created by the Act. Second, the Act must provide for assessment. Third, the Act must provide for enforcement of the taxing provisions. The mere fact that there is machinery for assessment, collection and enforcement of tax and penalty in the State Act does not mean that the provision for penalty in the State Act is treated as penalty under the Central Act. The meaning of penalty under the Central Act cannot be enlarged by the provisions of machinery of the State Act incorporated for working out the Central Act."

11. Beg, J. in his concurring opinion held Paras 37 and 38, which runs as under :

"37. I also find from the Mysore Act of 1957, that Section 13 of the Act was entirely re-cast in 1958. It would, I think be carrying the theory of referential legislation too far to assume that Section 9(2) of the Central Act, 1956, purported to authorise the State Legislatures to impose liabilities in the nature of additional tax or penalties leaving their rates and conditions for their imposition also to be determined by the State Legislatures as and when the State Legislatures decided to impose or amend them. It is evident that these differ from State to State, and, in the same State, at different times. A conferment of such an uncontrolled power upon the State Legislatures could, if it was really intended, be said to travel beyond the provice of permissible delegated Legislation on the principles laid down long ago by this Court in Re Delhi Laws's case (supra) as no guidelines are given in Section 9(2) about the nature, conditions, or extent of penalties leviable. If such a power was really conferred would it not amount to an abdication of an essential legislative function with respect to a matter found as Item 92A of the Union List I of the Seventh Schedule so that, according to Article 246(1) of our Constitution, Parliament has exclusive power to legislate on a topic covered by it? As this question was not argued before us I would only say that the correct canon of construction to apply in such a case is that we should so interpret Section 9(2) of the Central Act, if possible, that no part of it may conceivably be invalid for excessive delegation. The well known maxim applicable in such cases is : ut res magis valeat quam pereat.

38. It is evident from Section 16(4) of the Bombay Act of 1953 that there is a particular percentage of the amount of tax levied which is prescribed as penalty to be paid as an "addition to the amount of tax for every month after the expiry of the prescribed period of default". In other words it is a liability in the nature of an additional or penal tax. Section 13(3)(b) of the Mysore Act also makes it clear that, on an application made to the Magistrate, such as the one

made in the case which has come up before us from Mysore, the penalty may be equated with a fine. Section 63 of the Bombay Act of 1959 speaks of certain "offences and penalties". Indeed, Chapter 8 of that Act is itself headed as "Offences and Penalties".

12. *Mathew, J., however, in his dissenting opinion, inter alia, held that penalty can be levied as incidental to the levy and recovery of tax stating as under :*

"As the power to impose penalty is specifically provided for in Section 16 of the Bombay Sales Tax Act for enforcing payment of tax payable under it, it is unnecessary to speculate whether, but for the express provision in that Act, a power to impose penalty for enforcement of tax payable under that Act would have been implied. The object of the provision for the imposition of penalty in Section 16 of the Bombay Sales Tax Act is to provide a stimulant to the dealer to observe the mandate of the section directing the payment of the tax within the prescribed time. In other words, the provision for imposition of penalty in Section 16 of the Bombay Sales Tax Act facilitates the collection of tax as it is a sanction for non-observance of the duty to pay the tax within the prescribed time. It operates as a deterrent against the commission of breach of that duty, and is a means to enforce the payment of tax within the time prescribed."

13. *The Gujarat High Court, in Ashok Fashion (supra), adopted the minority view holding :*

"9.3 It will thus be seen that penalty provisions are an integral part of assessment and collection of duties of which the necessary adjuncts are confiscation and penalty without which the imposition of taxes will lack teeth and become ineffective. If power to impose penalty for violation of the obligation to pay additional duty of excise is excluded in respect of the goods enumerated in the First Schedule of the Additional Duties Act, then these taxation provisions would be reduced to a donation drive in respect of these very items for which duty of excise is also imposed under the Central Excise Act, 1944 and the Rules made thereunder and violation of which would entail both confiscation and penalty."

14. *It further referred to the amended provisions of the said Act, as would appear from the following :*

"7. It will be noticed from sub-section (3) of Section 3 of the Additional Duties Act that all the provisions of the Central Excise Act, 1944 and the Rules made thereunder including those relating to refunds and exemptions are made applicable, so far as may be, in relation to the levy and collection of additional duty of excise. The provisions of the Central Excise Act, 1944 and the Rules made thereunder are made applicable to the additional duty of excise in the same manner and extent to which they apply in relation to the levy and collection of the duties of excise on the goods specified in column 3 of the First Schedule referred to in Section 3(1) of the Additional Duties Act. This is so stated, because, all the goods specified in the said First Schedule were also subjected to duties of excise at the rates set forth in the Schedule to the Central Excise Tariff of 1985, under Section 3 of Central Excise Act, 1944, which provision also lays down that such duties of excise shall be 'levied and collected' in such manner as may be prescribed."

15. *The decision in Ashok Fashion (supra) was, therefore, rendered on total misapplication of the law laid down by the Constitution Bench decision by M/s. Khemka & Co. (Agencies) Pvt. Ltd. (supra).*

16. *We are bound by the Constitution Bench decision in M/s. Khemka & Co. (Agencies) Pvt. Ltd. (supra)."*

4.6 In view of the above, I do not find any merits in this appeal.

5.1 Appeal is dismissed.

(Operative part of the order pronounced in open court)

Sd/-

(SANJIV SRIVASTAVA) MEMBER (TECHNICAL)

akp

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70069 of 2020

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-1129-2019-20 dated 29/11/2019 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida)

M/s Simbhaoli Sugar Ltd., **….Appellant**

(Simbhaoli, Distt. Hapur)

VERSUS

Commissioner of Central Excise, Noida **….Respondent**

(Asstt. Comm. Central GST Division-Hapur)

APPEARANCE:

Shri Kartikeya Narain, Advocate for the Appellant

Shri Manish Raj, Authorised Representative for the Respondent

CORAM: **HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO.70116/2023

DATE OF HEARING : 22 September, 2023 DATE OF PRONOUNCEMENT : 11 October, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.NOI- EXCUS-001-APP-1129-2019-20 dated 29/11/2019 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida. By the impugned order Commissioner (Appeals) has held as follows:-

"B. I proceed to the second issue regarding CENVAT credit on purchase of cartridge and on capital goods (printers) used in office and in one case taken without having original/duplicate invoices. The definition of capital goods during the relevant period ie 2015-16 is as under;
RULE 2. *"(a) "capital goods" means:-*

….

B1 The definition of capital goods under Rule 2(a)(A) indicates that the capital goods used by a manufacturer of final product will not include any equipment or appliance used in an office. I find that this item was excluded from the definition of capital goods at the material time. Further, the said goods also do not fall within the ambit of definition of inputs. I find that in view of the specific exclusion of "office equipments/appliances" from the coverage of 'capital goods' defined under Rule 2(a)(A)during the relevant period CENVAT credit on printers and cartridges is not admissible to the appellant. Further, it hasbeen contended by the appellant that in the SCN, noevidences are placed on record to show that the said goodshave been used directly or indirectly in the manufacture of final product. In this regard I find that Rule 9(5) of the CENVAT credit Rules 2004 provide that "the burden of proof regarding the admissibility of the CENVAT credit shalllie upon the manufacturer or provider of output service taking such credit." In view of the discussions supra, Ihave no substantive reason to interfere in the decision of the adjudicating authority in this issue.

C. Regarding third issue. CENVAT credit on corrugatedboxes which were delivered at Lawrence Road, Delhiinstead of their factory premises amounting to Rs 41,078/-C1. The provisions of Rule 3 of CENVAT credit Rules 2004, clearly provide that the credit is admissible in respect of duty paid on inputs received in the factory
of the manufacture of final product. The relevant portion of the said rule is placed hereunder:
"RULE 3. CENVAT credit. - (l) A manufacturer or producer of final products or a [provider of output service] shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of-

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the ExciseAct:
paid on -

(i) any input or capital goods received in the factory of manufacture of final product or [by] the provider of output service on or after the 10th day of September, 2004;"

C2 In the instant case the fact is not disputed that the inputs/goods in question were delivered at Lawrence Road, Delhi and not in the factorypremises of the appellant. Further, there are no evidences to show that the same have been used for the manufacture of the final products. Therefore no CENVAT credit is admissible on the same, as rightly denied by the adjudicating authority."

2.1 A Show cause notice was issued to the appellant demanding wrongly availed Cenvat credit amounting to Rs.11,44,443/-.

2.2 Adjudicating Authority by his order allowed the credit of Rs.2,51,277/- and disallowed the credit of Rs.9,33,166/- along with interest and imposed penalty equivalent to the amount of credit disallowed.

2.3 On appeal Commissioner (Appeals) vide the impugned order allowed the credit of Rs.8,39,137/- and upheld the impugned order to the extent of Rs.94,029/- in respect of the goods as referred in para 1 above.

3.1 I have heard Shri Kartikeya Narain learned Counsel appearing for the appellant and Shri Manish Raj learned Authorized Representative appearing for the Revenue.

3.2 Arguing for the appellant learned Counsel submits that

- The issue involved in the present case for the denial of Cenvat Credit in respect of printers used in the office and corrugated boxes that were delivered to the warehouses outside the factory premises. He submits that Hon'ble Allahabad High Court in the case of M/s Kores (India) Ltd. Vs Commissioner of Trade Tax, UP 2020-VIL-64-ALH has held that Printer, toner and cartridge would be considered as a part of printer without which printer cannot function.
- He further submits that definition of capital goods is quite enough to include components, spares and accessories of goods of Chapter 82, 84, 85 and 90 of the Central Excise Tariff Act. Computer printer classifiable under Chapter 84 so its parts i.e. cartridge being components accessories or printers also is to be treated as capital goods. He refers to CBEC Circular No.943/04/2011-CX dated 29.04.2011. He further submits that credit of capital goods used in the factory is to be allowed without any relationship with the process of manufacture of the finalized products.
- In any case these printers are used for maintaining the essential documents, generation of invoices for theclearance of the goods and hence are used in or in relationto the manufacture of the finished products.
- The packing materials which is delivered to the warehouses at Lawrence Road, Delhi were used

for packing the finished goods i.e. sugar initially cleared by them in small packets packed in corrugated boxes.

- Hon'ble Supreme Court has in case of Vikram Cement Vs CCE, Indore 2006 (194) ELT 3 (SC) held that explosives for blasting mines to produce limestone for use in the manufacture of cement/clinkers in the premises situated atsome distance from the mines are eligible for credit in the factory of cement manufacturer. In the case of Hawkins Cookers Ltd. Vs CCE, Mumbai-III-2014 (299) ELT 103(Tri.-Mum) credit has been allowed on packing material purchased and used by the assessee at the depot.

3.3 Learned Authorised Representative appearing for the revenue submits that-

- During the relevant period the cartridge and printers used in the office were not included in the definition of capital Goods, and were specifically excluded;
- Further there is no evidence that these goods were directly or indirectly used in the manufacture of final product;
- As per Rule 9 (5) of CENVAT Credit Rules, 2004 the onusto establish the admissibility of CENVAT Credit has been cast on the manufacturer or the provider of output service taking the credit;
- Undisputedly the corrugated boxes were not received in the factory premises of the appellant and no evidence has been produced to show that the same were used in manufacture of finished goods;
- For the reasons as stated above the impugned order cannot be faulted and the appeal be dismissed.

4.1 I have considered the impugned order along with the submissions made in the appeal and during the course of arguments.

4.2 Commissioner (Appeals) in his order relied on the exclusion clause under Rule 2(a)(A)(i) to deny the Cenvat credit in respect of the printer and cartridges.

4.3 Adjudicating Authority in his order has observed as follows:-

"5.6 The party has stated that at the time of audit they could not produce original copy of invoices. However, later on they traced out almost all the invoices. In this regard, …. During the course of verification it was observed that the aprty has purchased corrugated boxes vide six bills and taken credit of Rs 41,078/- but the materials were delivered at Lawrence Road, Delhi instead of the factory. Similarly the aprty has purchased cartridge under six invoices for office use and taken credit of Rs 23,610/- but since these are not used in or in relation tpomanufacturing activity, credit has been wrongly availed by the party. Thus the total credit of Rs 64,688/- is not admissible tothe party."

4.4 It seems that Original Authority has not rendered anyfinding in respect of the printers on which credit has been deniedamounting to Rs.29,341/-.

4.5 Challenging the findings recorded in the impugned order for denial of the credit in respect of printers and cartridge counsel for appellant submits that these goods were essential for the production of the finished goods. Further these are part and accessories of the goods classifiable under Chapter 84 of the Central Excise Tariff Act, 1985 and hence the credit in respect of these goods is admissible. He relied on the clarification given by the board at Sr. No.3. The same is reproduced bellow:-

S. No.	Issue	Clarification
1	…… ….	…….
2	……..	…….
3	How is the "no relationship whatsoever with	Credit of all goods used in the factory is allowed except in so far as it is specifically denied. The expression "no relationship

	the manufacture of a final product" to be determined?	whatsoever with the manufacture of a final product" must be interpreted and applied strictly and not loosely. The expression does not include any goods used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not. Only credit of goods used in the factory but having absolutely no relationship with the manufacture of final product is not allowed. Goods such as furniture and stationary used in an office within the factory are goods used in the factory and are used in relation to the manufacturing business and hence the credit of same is allowed.

4.6 Rule 2 (a) of the Cenvat Credit Rules, 2004 read as follows:

RULE 2. *"(a) "capital goods" means:-*

(A) the following goods, namely:-

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading 6805. grinding wheels and the like, and parts thereof falling under heading 6804 and wagons of sub-heading 860692 of the First Schedule to the Excise Tariff Act;

(ii) ....

(iii) components, spares and accessories of the goods specified at (i) and (ii);
to (viii)...

used-

(1) in the factory of the manufacturer of the final products, but does not include any equipment orappliance used in office or: ".

The items namely printers and the printer cartridges though covered by the definition of capital goods as argued by the appellant have not been used in the manufacturing premises but in the office of the appellant located within the premises of the appellant. Commissioner (Appeals) has referred to the exclusion clause. Exclusion Clause specifically excludes equipment or appliances used in the offices, definitely printer and its cartridgesnothing but the equipment of appliance and not the furniture in respect of which board has issued the clarification since these equipments or appliances are used in office, they fall within the exclusion clause of the definition and hence credit in respect of these would not be permissible. Similar view has been expressedby Mumbai Bench in case of Bharti Airtel Ltd [2013 (29) STR 401(T-Mumbai) observing as follows:

"43. The appellant has also claimed CENVAT credit on printers which are office equipments. The definition ofcapital goods under Rule 2(a)(A) indicates that the capital goods used by a manufacturer of final product will not include any equipment or appliance used in an office. The learned counsel for the appellant has argued that this exclusion does not apply to a provider of output service and, therefore, the printers used by the appellant are liableto be treated as 'capital goods'. The learned JCDR has argued that, though the item is covered by Chapter 84 specified in sub-clause (i) of Rule 2(a)(A), it will not fall within the ambit of the definition of 'capital goods' as thereis no direct nexus between this item and the output serviceprovided by the appellant. The appellant has not established sufficient nexus between printers and theiroutput service. There is substance in this submission. The appellant has not proved that the printers were used forthe purpose of providing mobile telephone

service."

Affirming this decision Hon'ble Bombay High Court held as follows:

"21. A plain reading of the definition of 'capital goods' as defined under Rule 2(a)(A) of the Credit Rules show thatall goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, Heading No. 6805, grinding wheels andthe like, and parts thereof falling under Heading 6804 of the First Schedule to the Central Excise Tariff Act; pollutioncontrol equipments; components, spares and accessoriesof the goods specified at sub-clauses (i) and (ii) which are used either in the factory for manufacture of final productsbut does not include any equipment or appliance used in the office and those used for providing output service. A combined reading of sub-clause (a)(A)(i) and (iii) and sub-rule (2) indicates that only the category of goods in Rule 2(a)(A) falling under clauses (i) and (iii) used for providingoutput services can qualify as capital goods and noneother.

...

31. In the light of the aforesaid discussion we examine whether on the rules as they stand the appellants would beentitled to the credit of the duty paid on the item inquestion on the output service namely the cellular service.

We may observe that a plain reading of the definition of 'capital goods' as defined under Rule 2(a)(A) of the Credit Rules show that all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, Heading No. 6805, grinding wheels and the like, and parts thereof fallingunder Heading 6804 of the First Schedule to the Central Excise Tariff Act; pollution control equipments; components, spares and accessories of the goods specifiedat sub-clauses (i) and (ii) which are used either in the factory for manufacture of final products but does notinclude any equipment or appliance used in the office and those used for providing output service. Further in the CKDor SKD condition the tower and parts thereof would fall under the Chapter Heading 7308 of the Central ExciseTariff Act. Heading 7308 is not specified in clause (i) or clause (ii) of Rule 2(a)(A) of the Credit Rules so as to be capital goods. Further the appellants contention that they were entitled for credit of the duty paid as the Base Transreceiver Station (BTS) is a single integrated system consisting of tower, GSM or Microwave Antennas, Prefabricated building, isolation transformers, electrical equipments, generator sets, feeder cables etc. and that these systems are to be treated as "composite system" classified under Chapter 85.25 of the Tariff Act and be treated as 'capital goods' and credit be allowed, also is not acceptable. It is clear that each of the component had independent functions and hence, they cannot be treated and classified as single unit. It is clear that all capitalgoods are not eligible for credit and only those relatable to the output services would be eligible for credit. The goods in question in any case cannot be held to be capital goods for the purpose of Cenvat credit as they are neither components, spares and accessories of goods falling under any of the chapters or headings of the Central Excise TariffSchedule as specified in sub-clause (i) of the definition of capital goods. Hence a combined reading of sub-clauses *(a)(A) (i) and (iii) and sub-rule (2) indicates that only the category of goods in Rule 2(a)(A) falling under clause (i) and (iii) used for providing output services can only qualifyas capital goods and none other.* ***Admittedly the goodsin question namely the tower and part thereof, the PFB and the printers do not fall within the definition of capital goods and hence the appellants cannotclaim the credit of duty paid on these items. Even applying the ratio of the judgments as relied upon bythe appellants as observed above the said goods in the present context cannot be classified as capital goods.***

32. As regards second contention of the appellants that the tower and part thereof, the PFB and the printers would also falls under the definition of 'input' as defined under Rule 2(k) also cannot be sustained. The definition of inputsas defined under Rule 2(k) includes all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production, and as provided in sub-clause (ii) all goods except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service.Explanation (2) of sub-rule (k) is also which provides that input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer. A plain reading of the definition of input indicates

that in the present context, clause (i) of Rule2(k) may not be of relevance as same pertains to manufacturing activity and pertains to goods used in relation to manufacture of final product or any other purpose within the factory of production. Sub-clause (ii) has been referred to as relevant by the appellant as the same pertains to goods except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service.Tower and parts thereof are fastened and are fixed to the earth and after their erection become immovable and therefore cannot be goods."

Thus in view of the above decisions of the Hon'ble Bombay High Court I do not find any merits in the arguments advanced by theappellant for challenging the disallowance of CENVAT Credit of Rs 52,951/- in respect of the printer and cartridges. The reference made to the board clarification cannot be justified in view of the specific decision of the Hon'ble High Court referred above. In case of Ratan Melting and Wire Industries [2008 (231)

E.L.T. 22 (S.C.)] Hon'ble Supreme Court observed as follows:

"6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and notthe view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government areconcerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

4.7 In respect of the Cenvat credit on the packing material which was delivered at the warehouses located at Lawrence Road, Delhi. I do not find much justification in the order, it is settled principle in law till the time it can establish that the inputs were used in or in relation to manufacture and clearanceof the finished products. The Cenvat credit in respect of thesame cannot be denied. It is also the depot has been considered as the place of the clearance for the excisable goods, warehouse where these boxes were delivered is a depot of the appellant from where sugar was cleared after being repacked in these corrugated boxes, these facts are not in dispute."

4.8 I do not find any merits in denying the credit in respect of the packing materials so used in case of Hawkins Cookers Ltd.Vs CCE Mumbai-III 2014 (299) ELT 103 (Tri-Mum) following has been held:-

"3. The case of the department is that the packing material (extra carton, etc.) was not used in the factory of production and hence Cenvat credit of duty paid on such packing material was not available to the appellant interms of Cenvat Credit Rules, 2004. In the year 2004, in the course of audit for the period 2001-05, it was pointed out by the department that the Cenvat credit taken on the extra (master or single) cartons would not be allowed as the same was not used in the factory of production, butare used in the depot of the appellant for packing of the cookers. On this objection being raised by the Revenue,the assessee immediately reversed the credit availed under protest totaling Rs. 6,25,561/- (duty of Rs.4,73,859/- vide Entry No. 956, dated 29-12-2004 for the period from April, 2001 to Sept., 2004 and Rs. 1,51,702/- vide Entry No. 216, dated 16-6-2005 for the period October, 2004 to May, 2005). After such reversal of duty, the department issued two show cause notices, first dated 8-2-2005 for the period April, 2001 to Sept., 2004 for an amount of Rs. 4,73,859/- and the second show causenotice dated 7-11-2005 for the period October, 2004 to May, 2005.

10.1 So far the merits of eligibility of the Cenvat credit of the input material (packing materials) in question is concerned, the issue is settled by this Tribunal in view of the ruling of the Apex Court in the case of Vikram Cement (supra), which has been followed by this Tribunal in the case of Clariant (India) Ltd. v. Commissioner of Central Excise, Thane - 2006 (196) E.L.T. 353…"

4.9 In result, Cenvat credit of Rs.41,078/- taken in respect of these packing materials is held to be admissible and remaining credit of Rs.29,341/- + Rs.23,610/- =Rs.52,951/- is held to be not admissible to the appellant. In the respect of credit disallowed the demand of interest also needs to be upheld.Penalty under Rule 15 (2) read with Section 11AC of the Central Excise Act, 1944 is upheld to the extent of Cenvat credit disallowed.

5.1 Appeal is partially allowed as indicated in para-4.9.

(Pronounced in open court on-11/10/2023)

Sd/-
(SANJIV SRIVASTAVA)MEMBER (TECHNICAL)

akp

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70676 of 2016With

Excise Miscellaneous Application No.70140 of 2020

(Arising out of Order-in-Original No.33/Commr./C.Ex./GZB/2015-16 dated29/02/2016 passed by Commissioner of Central Excise & Service Tax, Ghaziabad)

Shri Pintu Tyagi, **…..Appellant**

(S/o Shri Rajbal Tyagi, H.No.873,Gali No.14, Mandoli Extension,

Near National Flower School, Delhi-110093)

VERSUS

Commissioner of Central Excise &

Service Tax, Ghaziabad **….Respondent**

(Commissionerate, Ghaziabad-201002)

APPEARANCE:

Shri Abhas Mishra, Advocate for the Appellant

Shri Manish Raj, Authorised Representative for the Respondent

CORAM: **HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)**
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70137/2023

DATE OF HEARING : 04 October, 2023DATE OF PRONOUNCEMENT : 19 October, 2023

SANJIV SRIVASTAVA:

This appeal is directed against order in original No.33/Commr/C.Ex./ GZB/ 2015-16 dated 29.02.2016 of theCommissioner Central Excise, Customs and Service Tax Ghaziabad. By the impugned order following has been held:

ORDER

1. *I confirm the demand of Central Excise duty amounting to Rs 1,14,85,955/- [Rs 1,11,51,412/- BED + Rs 2,23,028/- Ed Cess + Rs 1,11,514 SHE cess] [Rupees one crore*eleven lakhs eighty five thousand nine hundred and fifty five only)] and order its recovery from Shri Pintu Tyagi andShri Pradeep Tyagi having factory at 15, Krishna Vihar Phase – I Sevadham, Loni, Distt Ghaziabad, under the provisions of Section 11A (4) of the Central Excise Act, 1944.
2. *I order to charge and recover interest at the applicablerate on the aforesaid demand of Central Excise duty amounting to Rs 1,14,85,955/- till the date of payment of the said central excise duty under Section 11AA/ 11AB of the Central Excise Act, 1944.*
3. *I impose penalty of Rs 1,14,85,955/- upon Shri Pintu Tyagiand Shri Pradeep Tyagi having factory at 15, Krishna ViharPhase – I Sevadham, Loni, Distt Ghaziabad, under Rule 25 of the Central Excise Rules, 2002 read with Section 11ACof the Central Excise Act, 1944.*
4. *I impose penalty of Rs 5,00,000/- upon Shri Pintu Tyagi under Rule 26 of the Central Excise Rules, 2002.*
5. *I impose penalty of Rs 5,00,000/- upon Shri Pradeep Tyagiunder Rule 26 of the Central Excise Rules, 2002.*

2.1 Intelligence was received that Appellant (Shri Paresh Tyagi) and his brother Shri Pintu Tyagi (Expired on 17.06.2013) were operating a factory located at Gali No 15, Krishna Vihar Phase – I Sevadham, Loni, Distt Ghaziabad and were engaged in casting/ forging (commonly known as "Dhalai") of LPG stove valve of brass and bar of brass (Saria). Their turnover was more than Rs 10 Crores but they had neither taken registration nor were paying any central excise duty on the excisable goods manufactured and cleared by them. It was also gathered that they were residing at House No 873 Gali No 14 Mandoli Extension, Near National Flower School, Delhi and their/ two relatives namely Shri Ashok Tyagi and Shri Gajendra Tyagi residing nearby in the same gali are also carrying out finishing work of the said forged brass coke/ valve at the first floor oftheir residential premises.

2.2 Acting on the intelligence the factory premises of the appellant and his brother was searched on 23.01.2012. Since appellant was not maintaining any record of production of clearance of the excisable goods manufactured and cleared by them the physical stock of goods totally valued at Rs22,23,052/- found in the factory premises was verified and seized under the provisions of Section 110 of Customs Act, 1962 as made applicable to Central Excise in terms of Section 12 of Central Excise Act, 1944. Various records found during the search were resumed. All the proceedings were undertaken inthe presence of Pancha witnesses and recorded under proper panchnama. Simultaneously the residential premises of the two and the factory cum residential premises of Shri Ashok Tyagi andShri Gajendra Tyagi also searched. Incriminating documents found there from were also resumed and proper panchnama drawn at this premises. Statements of Shri Raju Yadav Accountant of the unit of Shri Pintu Tyagi and Shri Pradeep Tyagi, Shri Ashok Tyagi and Shri Gajendra Tyagi were alsorecorded on the spot under Section 14 of the Central Excise Act,1944.

2.3 On the basis of the investigation done and examination of records resumed from the

factory and residential premises, itwas evident that the unit of Shri Pintu Tyagi and Shri Pradeep Tyagi evaded central excise duty mounting to Rs 1,14,85,955/- [Rs 1,11,51,412/- BED + Rs 2,23,028/- Ed Cess + Rs 1,11,514 SHE cess] which is to be demanded from the unit of Shri Pintu Tyagi and Shri Pradeep Tyagi in terms of Section 11 A (4) of the Central Excise Act, 1944. along with the interest at applicable rate in terms of Section 11AA/11AB of the Central Excise Act, 1944. The unit of Shri Pintu Tyagi and Shri Pradeep Tyagi is also liable for penalty under Rule 25 of Central Excise Rules, 2002 read with Section 11 AC of the Central Excise Act, 1944. Shri Pintu Tyagi and Shri Paresh Tyagi who were engaged in the day to day operation of the unit and were have by their act of omission and commission leading to the evasion of said duty were liable to penalty under Rule 26 of the Central Excise Rules,2002.

2.4 A show cause notice dated 05.02.2015 was issued to-

I. the unit of Shri Pintu Tyagi and Shri Pradeep Tyagi calling it to show cause as to why:

a) The central excise duty amounting to Rs1,14,85,955/- [Rs 1,11,51,412/- BED + Rs 2,23,028/- Ed Cess + Rs 1,11,514 SHE cess] [Rupees one crore eleven lakhs eighty five thousand nine hundred and fifty five only)] should not be demanded and recovered fromthem under the provisions of Section 11A (4) of the Central Excise Act, 1944.

b) Interest on the amount as at S No (I) supra, should not be recovered till the date of payment of the said central excise duty under Section 11AA/ 11AB of Central Excise Act, 1944

c) Penalty should not be imposed upon them underRule 25 of Central Excise Rules, 2002 read with Section 11 AC of the Central Excise Act, 1944.

II. Shri Pintu Tyagi and Shri Paresh were asked to show cause as to why the penalty be not imposed uponthem under Rule 26 of the Central Excise Rules, 2002.

2.5 This show cause notice was adjudicated as per the impugned order. Aggrieved by the impugned order Shri Pintu Tyagi has filed this appeal. No appeal has been filed by the unit of Shri Pintu Tyagi and Shri Pradeep Tyagi and Shri Pradeep Tyagi.

3.1 We have heard Shri Abhas Mishra, Advocate for the Appellant and Shri Manish Raj for the revenue.

3.2 Arguing for the appellant learned counsel submits that:

- The proceedings initiated by the Show Cause Notice and adjudged by the impugned order are bad in law to the extent it pertains to his client.
- The impugned order was passed in gross violation of the principles of natural justice.
- The appellant is not at all concerned with any of theactivities of factory of Lat Shri Pradeep Tyagi.
- RUD-6 which is the statement of Lt. Shri Pradeep Tyagi, clearly identifies Shri Pradeep Tyagi as the owner of the unit.
- As the appellant is not concerned with the activities of the unit, penalty imposed upon him under Section 11AC cannot be justified.
- For the same reason penalty under Rule 25 too cannot be justified.
- Since the appellant was not the manufacturer of any excisable goods in the factory of his younger brother LtShri Pradeep Tyagi, no submissions can be made by him regarding the sustainability of the demand of duty.
- He filed the list of dates.

3.3 Arguing for the revenue learned authorized representative reiterates the findings recorded in the adjudication order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Appellant first contention is that order has been passed in the violation of principal of natural justice. Commissioner has in para 3 of the impugned order recorded as follows:

"3. <u>CASE FOR THE NOTICEES:</u> The Show Cause Notice No 33/ Commr/ CEX/ GZB/14-15 dated 05.02.2015 was issued by the Commissioner Central Excise Ghaziabad under C No V(15) Adj. /Pintu Tyagi / Gzb / Comm /166/ 14/ 1019-1021 dtd 05.02.2015 to all the three notices i.e. Factory of Shri Pintu Tyagi and Shri Pradeep Tyagi, 15 Krishna Vihar Phase I

Sevadham. Loni, Distt Ghaziabad.; Shri Pintu Tyagi and Shri Pradeep Tyagi, both S/o Shri Rajbal Tyagi House No 873, Gali No 14 Mandoli Extension, Near National Flower School, Delhi. Since nobody was found present at the factory address hence the notices were sent through speed post on 16.02.2015. The show cause sent to House No 873, Gali No 14 Mandoli Extension,Near National Flower School, Delhi returned undelivered on27.02.2015. Therefore the same were served by pasting atthat address under panchnama dtd 02.03.2015. None of the notices filed any written reply to the notice. They were also granted the opportunity of personal hearing on 15.02.2016 and 26.02.2016 vide C No V(15) Adj. /Pintu Tyagi / Gzb / Comm /166/ 14/ 552 to 554 dtd 05.02.2016 and even C No 848 to 852 dtd 17.02.2016. None of the noticee appeared on the aforesaid dates scheduled forpersonal hearing. Hence, I decide the case ex parte."

4.3 From the perusal of the show cause notice it is observed that the show cause notice was issued to three persons namely:

1. Factory of Shri Pintu Tyagi and Shri Pradeep Tyagi,
Gali No 15 Krishna Vihar Phase I Sevadham. Loni, Distt Ghaziabad.

2. Shri Pintu Tyagi (S/o Rajbal Tyagi)House No 873, Gali No 14
Mandoli Extension, Near National Flower School,Delhi.

3. Shri Pradeep Tyagi (S/o Rajbal Tyagi)House No 873, Gali No 14
Mandoli Extension, Near National Flower School,Delhi.

As no one was available to receive the show cause notice at the premises/ addresses indicated the show cause notice was servedby pasting the same at the addresses indicated underpanchnama dated 02.03.2015.

4.4 Similarly the hearing notices were not being received and hence pasted at the residential premises of the appellant. The text of the two panchnama is reproduced below:

"PANCHNAMA DATED 09.02.2016

Drawn At Gali No 15 Krishna Vihar Phase ISevadham. Loni, Ghaziabad.

Panch1: Shri Ranjeet Kumar, Aged 21 Years S/o Shri Sudhir Kumar, R/o H No 137 Sector 6, Rajendra nagar, Sahibabad, Gahziabad (U P).

Panch2: Shri Satish Kumar, Aged 45 Years S/o Shri Rajendra Singh, R/o H No 38/5 Hindan Vihar, Gahziabad (U P).

"We the above named panchas having been called upon bythe officers of Anti Evasion, Central Excise & Service Tax Commissionerate Ghaziabad (hereinafter referred to as 'officers') presented ourselves today i.e. on 9th February' 206 at about 12.00 Hrs near Gali 15 Krishna Vihar Phase I Sevadham. Loni, Distt Ghaziabad. The officers introduced themselves by displaying their identity cards and requested us to witness the proceedings to serve a letter CNo V(15) Adj. /Pintu Tyagi / Gzb / Comm /166/ 14/ 552dtd 05.02.2016 issued by Superintendent (Adj), Central Excise Ghaziabad to Shri Pijntu Tyagi and Shri Pradeep Tyagi at Gali No 15 Krishna Vihar Phase I Sevadham. Loni, Ghaziabad., for which we gave our consent. Thereafter,the officers and we moved towards the aforesaid address. On entering at Gali No 15 Krishna Vihar Phase I Sevadham. Loni, Ghaziabad in our presence, the officers inquired from various persons available in that gali No 15 about the aforesaid Shri Pintoo Tyagi and Shri Pradeep Tyagi. But all of them show their inability to identify assuch person (s) in that locality. Therefore the officersaffixed the letter C No V(15) Adj. /Pintu Tyagi / Gzb / Comm /166/ 14/ 552 dtd 05.02.2016 at a conspicuous place of main gate of at Gali No 15 Krishna Vihar Phase I Sevadham. Loni, Ghaziabad..

All the proceedings were conducted peacefully in our presence without causing any damage either to property orto persons. The proceedings were recorded by one of the officers on his laptop on our request and as dictated by us.The contents of this Panchnama were read over to us in our vernacular and we have understood the same well. ThePanchnama concluded at 16.30 Hrs on the same day i.e. 09.02.2016. We are satisfied with the proceedings conducted by the officers."

"PANCHNAMA DATED 09.02.2016

Drawn At House No 873, Gali No 14 Mandoli Extension, Near National Flower School, Delhi

Panch1: Shri Vikram Gautam, Aged 19 Years S/o Shri Sher Singh, R/o Village Rajapur, Shastri Nagar, Gahziabad (U P).

Panch2: Shri Vijay Kumar, Aged 21 Years S/o Shri Puran Singh, R/o Baghwali Gali, Rajapur, Shastri Nagar, Gahziabad (U P).

"We the above named panchas having been called upon bythe officers of Anti Evasion, Central Excise & Service Tax Commissionerate Ghaziabad (hereinafter referred to as 'officers') presented ourselves today i.e. on 9th February'
206 at about 15.00 Hrs near Gali No 14, Mandoli Extension, Delhi. The officers introduced themselves by displaying their identity cards and requested us to witness the proceedings to serve a letter C No V(15) Adj. /Pintu Tyagi / Gzb / Comm /166/ 14/ 553 dtd 05.02.2016 issued by Superintendent (Adj), Central Excise Ghaziabad to Shri Pijntu Tyagi/ Shri Pradeep Tyagi S/o Shri Rajbal Tyagi at House No 873, Gali No 14 Mandoli Extension, Delhi, for which we gave our consent. The officers informed that their earlier attempts to serve the letter were failed.

Thereafter, the officers and we moved towards the aforesaid address. On reaching the gate of the premisesthe officers knocked the door which was opened by a lady who refused to divulge her full name and identity. The officers gave their introduction to the lady and apprisedher of the purpose of their visit and asked her about Shri Pintu Tyagi and Shri Pradeep Tyagi. The lady told that Shri Pintu Tyagi and Shri Pradeep Tyagi do not reside at this address, She informed that she has no idea about said persons & has no relation with them and refused to receiveany letter on behalf of Shri Pintu Tyagi and/or Shri Pradeep Tyagi. When officers tried to convince the lady,she shut the door and went inside. Therefore the officers affixed the letter C No V(15) Adj. /Pintu Tyagi / Gzb / Comm /166/ 14/ 553 dtd 05.02.2016 at a conspicuous place of main gate of at House No 873, Gali No 14 Mandoli Extension, Delhi.

All the proceedings were conducted peacefully in our presence without causing any damage either to property orto persons. The proceedings were recorded by one of the officers on his laptop on our request and as dictated by us.The contents of this Panchnama were read over to us in our vernacular and we have understood the same well. ThePanchnama concluded at 16.30 Hrs on the same day i.e. 09.02.2016. We are satisfied with the proceedings conducted by the officers."

पंचनामा दिनांक *19/02/2016*

(मकान नं॰ *873*, गली नं॰ *14* मंडोली एक्सटेंशन दिल्ली)

पंच - 1 श्री सुखबीर ससंह उम्र ४२ वर्ष, पुत्र श्री राजबीर ससंह सिवासी मं॰ ि॰

108 गली ि॰ *06* सीलमपुर सिल्ली

पंच - 2 श्री राजकुमार उम्र ३० वर्ष, पुत्र श्री कृपाल ससंह सिवासी ग्राम झण्डेपुर, सासहबाबाि, गासजयाबाि

हम पंच केंद्रीय उत्पाि शुल्क गासजयाबाि के असिकारीयं द्वारा बुलाये जाि पर आज सि ांक *19/02/2016* क अपराह्न लगभग *3.30* बजे गली ि १५ कृष्णा सवहार फे ज से वाि ाम ल ि ी गासजयाबाि मेंं उपस्थित हुए । असिकाररयं ि े अपि पररचय पत्र सिखाकर अपिा पररचय सिया ति बताया की वह यहां श्री सपंटू त्यागी और श्री प्रिीप त्यागी क पत्र स V (Adj)/ Pintu */GZB/166/14/849* सि ांक *17 .02.2016* हमसे अिुर ि सकया हम उि के द्वारा श्री सपंटू त्यागी एवं श्री प्रि ीप त्यागी पुत्र श्री राजबल त्यागी मकाि ि॰ *873*, गली ि॰ *14* मंड ली एक्सटेंशि सिल्ली क सवभाग के पत्र स *V (*Adj*)/ Pintu /GZB/166/14/849* सि ांक *17 .02.2016* क प्राप्त कराि े हेतु की जाि े वाली कायवाही मेंं गवाह बि ेंं क्स्क पूव मेंं इस तरह के पत्र उन्हेंं प्राप्त ि हीं कराये जा सके । असिकारीयं के अिुर ि क स्वीकार करते हुए हम

ि ि ं ि अपिी सहमसत प्रि ाि कर ि ी। इसके पश्चात असि कारीय ं ि े हम ारी उपस्थ ि सत मे ं मक ाि ि 873 क ा ि रवाज़ा खटखटाया ।ि रवाजा एक अि ेड़ उम्र की मसहल ा ि े ख ल ा ।असि कारीय ं ि े जब उस मसहल ा क अपि े आि े क ा उद्देश्य बताय ा त उस ि े यह कहत े हुए ि रवाज़ा ब ं ि कर स िय ा सक "मै ं ि े पहल े भी आप ल ग ं क बताय ा ि ा सक सप ं ट ू त्य ागी व प्रि ीप त्य ागी स े ि त हम ारा क ई सम्बन्ध है और ि ह ी हम उन्ह े ं जाित े ह ै ं"। इसके ब ाि कई ब ार ि रवाज़ा खटखटाि े पर भी ि रवाजा ि ह ी ं ख ल ा गय ा । अत ः असि कारीय ं हम ारी उपस्थ ि सत मे ं पत्र स *V (*Adj*)/ Pintu /GZB /166/14/849* स ि ि ा ं क *17 .02.2016* क उस घर क ी ि ीवार पर ि रवाज े के सम ीप सचपक ा स िय ा तासक घर मे ं आि े जाि े वाल े उस े पढ़ सक े ं । समस्त क ायवाही श ा ं सतपू वक व सवसिपू वक लगभग साय ं 4. 30 बज े तक सम ाप्त ह गय ी और असि कारी वह ा ं स े चल े गए । हम असि कारीय ं की क ायवाही स े प ू णत ः स ं त ु ष्ट ह ै ं ।

पंचनामा दिनांक *19/02/2016*

(स े वाधाम, लोनी गाद ि याब ाि)

पं च - 1 श्री अम ि मावी उम्र 21 वर्ष, पु त्र श्री ि रे न्दर मावी ग्र ाम ग पालपु र (म ि 220) सिल्ली 09

पं च - 2 श्री प्र ि ीप सतवारी उम्र 21 वर्ष, पु त्र श्री स ि ि े श कु मार सतवारी आई 89 शास्त्र ी ि गर , ग ासजयाब ाि

हम उपर क्त पं च गण क े ं द्र ीय उत्प ाि शु ल्क ग ासजयाब ाि के असि कारीय ं क ब ुल ाि े पर पर आज स ि ि ा ं क 19/02/2016 क गल ी ि 15 कृ ष्ण ा सवहार फे ज 1 स े वाि ाम ल ि ी ग ासजयाब ाि मे ं उपस्थ ित हुए । असि कारर य ं ि े अपि े पहच ाि पत्र स िखाकर अपि ा पररचय ि े त े हमस े अि ुर ि सकय ा हम उि के द्व ारा श्री सप ं ट ू त्यागी एवं श्री प्रिीप त्यागी क सवभाग के पत्र स V (एड्ज)/ Pintu

/GZB/166/14/849 स ि ि ा ं क *17 .02.2016* ज सक अि ीक्षक *(*न्याय सिणय*)* क े ं द्र ीय उत्प ाि शु ल्क के द्व ारा जारी सकय ा गय ा ह ै क प्राप्त कर ाि े ह े त ु आय े ह ै ति ा इस प्रस िय ा मे ं हम ि ि ं क गवाह ब ि ा ि ा चाहत े ह ै ं । क ाय के महत्व क ि े खत े हुए हम ि ि ं ि े अपि ी सहमसत प्रि ाि कर ि ी । तत्पश्चात असि कारीय ं ि े गली ि 15 कृ ष्ण ा सवहार फे ज 1 सेवाि ाम ल ि ी गासजयाबाि ति ा आसपास जगह ं पर श्री सप ं ट ू त्य ागी ति ा श्री प्रि ीप त्य ागी के ब ार े मे ं अि ेक ल ग ं स े प ू छत ाछ क ी । सकन्त ु व े सभी ल ग ं ि े इ ि के ब ार े मे ं क ई भी जाि कार ी ह ि े स े स्प ष्ट मि कर स िय ा । हर स ं भव प्रय ास के ब ावजू ि भी जब उक्त ि ि ं व्यस्क्तय ं क ि ह ी ं ख ज ै जा सक ा त असि कारीय ं हम ारी उपस्थ ि सत मे ं पत्र स *V (*एड् ज*)/ Pintu /GZB*

/166/14/849 स ि ि ा ं क 17 .02.2016 क गल ी ि 15 कृ ष्ण ा सवहार फे ज 1 स े वाि ाम ल ि ी ग ासजयाब ाि मे ं गल ी के म ुह ाि े पर सचपक ा स िय ा तासक गल ी मे ं आि े जाि े वाल ं क ी ि ज़र उस पर पड़ सक े । इस प्रस िय ा के ि ौराि सकसी भी व्यक्त अि वा सम्पसत क क ई क्षस ि ह ी ं पहु ं च ी । हम असि कारीय ं क ी क ायवाही स े प ू णत ः स ं त ु ष्ट ह ै ं ।समस्त क ायवाही प्रात ः 10.40 पर श ु रू ह कर ि पहर 12.00 बजे समाप्त ह गयी और असिकारी वहां से चले गए ।

4.5 From the above panchnamas it is evident that the appellant was not available to receive the hearing notice at theknown address of their/ his residence or factory premises.Therefore the service of hearing notices was effected by way ofpasting the same at residential and factory premises underproper panchnama. That being so appellant cannot complainabout non receipt of show cause notice or the hearing notice. Hechose to abstain from the proceedings by not responding to thenotices given. For the above reason we are of the view thatprinciples of natural justice have been sufficiently complied withand the

appellant cannot claim any violation of the same. JusticeKrishna Iyer has in landmark decision in case of Chairman,Board of Mining Examination Vs. Ramjee, AIR 1977 SC 965 observed as under:

"Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision- maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstancesof each situation, no breach of natural justice can becomplained of. Unnatural expansion of natural justice without reference to the administrative realities and other factors of a given case, can be exasperating. We canneither be financial nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt
– that is the conscience of the matter."

4.6 In case DHARAMPAL SATYAPAL LTD. [2015 (320) E.L.T. 3 (S.C.)] Hon'ble Apex Court has observed as follows:

"30) But that is not the end of the matter. While the lawon the principle of audi alteram partem has progressed in the manner mentioned above, at the same time, the Courts have also repeatedly remarked that the principlesof natural justice are very flexible principles. They cannot be applied in any straight-jacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the Courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination ofwitnesses is treated as necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action,the requirement is very strict and full-fledged opportunityis envisaged under the statutory rules as well. On theother hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the Courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.

31. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasizing that the principles ofnatural justice cannot be applied in straight-jacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to theprinciples of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason - perhapsbecause the evidence against the individual is thought tobe utterly compelling - it is felt that a fair hearing 'would make no difference' - meaning that a hearing would not change the ultimate conclusion reached by the decision- maker - then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in Malloch v. Aberdeen Corporation - (1971) 1 WLR 1578 at 1595, who said that a 'breach of procedure...cannot give (rise to) a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court dos not act in vain'. Relying on these comments,Brandon LJ opined in Cinnamond v. British Airports Authority - (1980) 1 WLR 582 at 593 that 'no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing'. In such situations, fair procedures appear to serve no purpose since 'right' result can be secured without according such treatment to the individual. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the Courts. Even if it is found by the Court that there is a violation of principles of natural justice, the Courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused anyprejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that order passed is always null and void. The validity of the order has to be decided on thetouchstone of 'prejudice'. The ultimate test is always the same, viz., the test of prejudice or the test of fair hearing.

32) In Managing Director, ECIL (supra), the majority opinion, penned down by Sawant, J.,

while summing upthe discussion and answering the various questions posed, had to say as under qua the prejudice principle:

"30. Hence the incidental questions raised above may be answered as follows:

xx xx xx

(v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiryofficer is not furnished to the employee and what relief should be granted to him in such cases. The answer to thisquestion has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is notfurnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimatepunishment awarded to him. Hence to direct reinstatementof the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justicehave been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the conceptof justice to illogical and exasperating limits. It amounts toan "unnatural expansion of natural justice" which in itself is antithetical to justice."

Applying the above tests as laid down in the above said decisionsof the Hon'ble Supreme Court we are of the view that theimpugned order do not violates the principle of natural justice as sufficient notice and opportunity was given to the appellant to reply to the show cause notice and appear for personal hearing.

4.6 We have observed in para 4.3 show cause notice has been issued in the present case to three persons namely, i. Factory of Shri Pintu Tyagi and Shri Pradeep Tyagi; ii. Shri Pintu Tyagi (S/o Shri Rajbal Tyagi); iii. Shri Pradeep Tyagi (S/o Rajbal Tyagi). Notices were served on there persons separately and the matter has been adjudicated against the said three persons holding them responsible for their acts on the basis of theevidence available on record. From the facts as available on record, the factory of Shri Pintu Tyagi and Shri Pradeep Tyagi isa benaami firm, having no separate name. Both Shri Pintu Tyagi and Shri Pradeep Tyagi were operating the benaami firm to which no name was given and no registration under Central Excise Act, 1944 or under any other Act for the time being in force, was taken. Also as per the statements available on record it is evident that the appellant and his brother have not entered into any partnership deed for operating this factory. Interestinglythe clandestine turnover of the factory was more than Rs 12,00,00,000/- (Rupees Twelve Crore) and all the transactions were undertaken in name of this benaami firm Pintu Tyagi and Pradeep Tyagi being the beneficiary of the transactions.

4.7 The entire chronology of the events leading to the confirmation of demand and imposition of penalty on the appellant is as follows:

-	Appellant was engaged in the business of Trading of Brass Parts of LPG Gas
01.04.2011	Younger brother of Appellant i.e. Late Shri Pradeep Tyagi also started the same business of trading of LPG Gas stove parts and the Appellant only looked after the business in his absence and helped him in marketing
23.01.2012	Officers of Central Excise caused a search at the factory premises and residential premises of the appellant.

09.02.2012	Statement of App ellan t and Shri Pra dee p Tyagi were recorded
19.07.2012	Show Cause notice in respect of the seized goods was issued was received 20.07.2012. No response was filed in reply and the matter got adjudicated ex-parte.
17.06.2013	Shri Pradeep Tyagi expired. Death certificate issued by MCD on 13.02.2014
05.02.2015	Show cause notice for present proceedings issued.
09.02.2016	Notice for hearing on 15.02.2016 was pasted on the residential premises of Shri Pintu Tyagi and ShriPradeep Tyagi & alos on the factory of Shri Tyagi and Shri Pradeep Tyagi as all other modes of service had failed.
15.02.2016	Appellant chose not to respond to the notices by appearing before the adjudicating authority, norsought any adjournment.
19.02.2016	Notice of Hearing o 26.02.2016 was pasted pasted on the residential premises of Shri Pintu Tyagi and Shri Pradeep Tyagi & alos on the factory of Shri Tyagi and Shri Pradeep Tyagi as all other modes of service had failed.
26.02.2016	Appellant chose not to respond to the notices by appearing before the adjudicating authority, nor sought any adjournment.
28.02.2016	Impugned Order passed

4.8 The claim made by the appellant that he is not concerned with the factory which was owned by his younger brother who has expired is without any basis and is contrary to his own statement recorded on 09.02.2012. In this statement inter-alia Appellant has stated as follows:

- His work is of casting of brass and his factory is situated at15, Krishna Vihar Phase – I Sevadham, Loni.
- They procure raw material i.e. Brass powder (burada),scrap, purja and zinc and after melting the same, they castbrass rods. Some of the brass rods are sold by them and remaining are used by them in their factory for forging of brass valve and brass cocks, which are sold by them.
- His brother Shri Pradeep Tyagi is working with him in the factory. There is no written partnership deed betweenhimself and his brother.
- The factory along with some machines installed in thefactory were taken on rent of Rs 75000/- from Shri Gajendra Tyagi (Mama) from September 2010. Some machines have also been fabricated by them in the factory.No rent has been paid for the reason of some disputes. No written rent agreement has been made except the agreement made on plain paper.
- For melting raw material they have two furnaces. One furnace is used for heating raw material and other is used for brass rods. Three forgings machines are installed in thefactory. Out of three forging machines only two are in use.
- They have electricity connection and the electricity the forging and casting machines are

electricity operated. Theyalso have generator back up. Electricity connection is inthe name of brother of Shri Gajendra Tyagi and electricity bills are paid by them.

- For melting in their furnace they use coal and gas cylindersfor heating the material. Coal is purchased from Shri Anil and Shri Pramod having their godown in Sevadham. Gas cylinder is purchased from local vendors.
- They employ about 35 laborers depending on the work load. Laborers are deputed to look after the work at furnace.
- Main raw material is brass powder (burada), brass scrap and brass parts (purja). Other raw materials are zinc, sodasuhaga etc. Brass scrap is melted first. During meltingzinc, soda, suhaga etc. is added and out of it brass rods are manufactured. These brass rods are then forged into brass valves and brass cocks. No finishing is done.
- They are working for small workers namely Shri Ashok Tyagi, Shri Shravan Tyagi, Shri Adesh Tyagi, ShriRameshji, Shri Rajesh Sharma, Shri Dhanprakash Tyagi, Shri Manoj Tyagi, Shri Masterji, Shri Sachinji, Shri Amit Tyagi, Shri Bobby, Shri Naresh and Shri Kuldeep Tyagi from whom they procure the raw material and sell the finished goods. He is not aware of the addresses of these persons who use to deliver the raw material at their factory premises and collect the finished products from there itself.
- They were only working for the person who provided the raw material and procured te finished goods from them.
- The records were maintained in small copies for receipt of raw material and supply of finished goods. Record was maintained for each person separately.
- Material was received by them without any bill and they used to supply material on kachhi slips without any invoiceor bill. On the slip the raw material received was also mentioned. These slips were used to maintain the accountswith these persons. On seeing the slips he put his signature on them as token of seeing them and admitted that these slips are the slips against which they use to receive the raw material and supply the finished goods.
- The value of the raw material was adjusted against the value of the finished goods supplied. They use to receive the differential labor charges. Some of parties would payby cheque which were not crossed/ account payee and were en-cashed by them.
- They have bank account in Bank of Baroda Mandoli Branch, but no transaction of the units was undertaken through this account. No cash book was maintained and allthe cash entries were made in the register maintained for receiving raw material and sending finished goods.
- All registers were maintained by Shri Raju Yadav S/o Shri Ramvrat Yadav.
- They have never purchased or sold any material to Shri Vinod Tyagi and Shri Gajendra Tyagi. Some tarnscations have been done with Shri Ashok Tyagi and details are available in registers.
- 1400 to 1500 Kgs of material valued about Rs 4,00,000/- is cast daily. They were getting about Rs 25-30/- per kg. Raw material would be valued around Rs 290-300/- per kgand finished good was valued around Rs 315-325/- per kg.
- They are not registered with sales tax department or any other department.
- The unit has been not named by them as they were not aware that for undertaking said works they had to form company or get registered with the government department.

4.9 In his statement record on the date of search, the Accountant/ Foreman of the unit Shri Raju Yadav stated that:

- He is working as foreman in the unit and maintains all the records of production and clearance of the goods in the factory. The unit is engaged in manufacture of castingsand forgings of LPG brass coke & valve and bar of brass, for last one year and three months and employs thirty five laborers.
- There are three furnaces and they cast about 1400 kg to 1500 kg scrap at one time in each furnace.
- They do not maintain any bill/ invoice book for removal/ sale of the goods from their factory. Goods are removedon the basis kacchi slips after receiving directions from Shri Pintu Tyagi on phone.
- The record of removals is maintained in kachha register resumed by the officer during search.

The receipt of raw material i.e. brass scrap is also on kachhi slip without any bill/ invoice.

- He has seen the various records – small note books & stock book and signed them. These books are maintained for removal of the finished goods and contain the details ofitems & their quantity. The register contains the detail of receipt of raw material and removal of finished goods and stock balance.
- **Unit is owned by Shri Pintu Tyagi and Shri Pradeep Tyagi residing in Mandoli Delhi. Shri Ashok Tyagi andShri Gajendra Tyagi are their relatives.**
- This factory premises are taken on rent (@ Rs 30,000/-per month) from Shri Gajendra Tyagi.
- Rate of finished goods is Rs 300/- per kg and coal is usedin the furnace.

4.10 Shri Pradeep Tyagi in his statement recorded on the dateof search while agreeing with the contents of the statement of Raju Yadav also stated that

"मेंं बयाि करता हूूँ सक मैं उपर क्त कसित पते पर ज फै क्ट्री चल रही है मैं उसका मासलक हूूँ। इस फै क्ट्री द्वारा ज भी काय सकया जाता है वह या त मेरे द्वारा सकये जाते हैं या मेरे आिेश पर कमचारी द्वारा सकये जाते हैं। ज मैं फै क्ट्री चलाता हूूँ इसका क ई िाम िहीं है। यह फै क्ट्री मेरे द्वार सबिेा सकसी िाम केचलायी जा रही है। यह फै क्ट्री सकसी भी सवभाग मेंं पंजीकृ त िहीं है। हमारी फै क्ट्री मेंं फै क्ट्री मेंं पीतल की छड़ और गैस चूल्हे की बॉल की फ सजग बिाते हैं। श्री राजू यादव हमारी फै क्ट्री मेंं फ रमैि है और सारे ररकॉड वही बिता है।

मैं श्री राजू यादव के द्वारा सिए गए आज सिांक *23/1/2012* के बयाि क पढ़ चूका हूूँ और उससे सहमत हूूँ ।हमारी फै क्ट्री मेंं *2* भट्ठी हैं सजससे प्रसतसि *1400* से *1500* सकल माल बिता है ।हमारे यहाूँ *35* आिमी काम करते हैं। हम कच्ची पची पर ही माल मंगाते हैं और भेजते हैं।"

4.11 Shri Pradeep Tyagi in his statement recorded on 09.02.2012 stated that:

"असिकारीय ं के पूछिे पर मेंं बयाि करता हूूँ की मैं गली ि 15 कृ ष्णा सवहार फे ज -1 सेवाि ाम ल ि ी गासजयाबाि मेंं ब्रास सररया व ब्रास फ सजग बिाि े का काय करता हूूँ। यह फै क्ट्री बड़े श्री सपंटू त्यागी श्री राजपाल त्यागी िे मेरे काम करिे के सलए श्री गजेंद्र त्यागी जी से सिलवाई ि ी। यहाूँ पर फै क्ट्री का काय मैं और मेरे बड़े भाई िे खते हैं। मुख्यता मैं सारा काय करता हूूँ लेसकि माके सटंग केकाय मेंं मेरे बड़े भाई समि करते हैं। मेरे बड़े भाई श्री सपंटू त्यागी िे ज आज बयाि सिया है उसे मेिे पढ सलया है ति मैं उससे पूरी तरह सहमत हूूँ। इससे असिक मुझे कु छ िहीं कहिा है।"

4.12 Shri Ashok Tyagi in his statement recorded on 27.02.2012 stated that:

- He is working for last two years and is engaged in machining and finishing of casted/ forged (Dhalai) valves.
- They do not purchase Dhalai material but instead do machining and finsihing on job work basis. **They used to take Dhalai material for job work from the factory of Shri Pintu Tyagi situated at Sevadham Loni and machined and finished them.** For last 6-7 months he had taken Dhalai from Shri Manoj Tyagi, Shri Pankaj and Shri Biloo.
- The finished material is sent various shopkeepers in Sadar Bazar Delhi. The Dhalai material is received by him from various persons of shop keepers and after machining is returned back to same person after receiving job charges. The scrap generated is also returned to the same person.
- The rate of Dhalai received by them varies and for some time it is between Rs 300-330/- per kg. Similarly the rate of scrap was Rs 280-300/- per kg.
- The record of materials received by them in a copy and after job is completed the same is handed over to the party after receiving the job charges. Besides the record incopy no other bill/ invoice is not prepared by them. Thejob charges are fixed with parties on per piece basis or perkg basis.
- Their business is very small and they do not purchase or sell any material hence are not registered

with any authority.

The reply as recorded in the statement to question 3 is reproduced below:

प्रश्न 3 आप ज ढलाई खरीिते हैं वह कहाूँ से ति सकि पसटय ं से खरीिते हैं

उत्तर हम ढलाई का माल िहीं खरीिते हैं। हम के वल मशीसिंग व सफसिसशंग का काम जॉब वक पर करते हैं। **पहले हम के वल दपंटू त्यागी दिनकी फै क्ट्री सेवाधाम लोनी मेंं है के द्वार ढलाई दकये गए माल की ही दफदनदशंग का काम करते थे**। हम अब सपछले ६ महीिे से मि ज त्यागी और पंकज व सबल्लू की ढलाई की सफसिसशंग का काय भी कर रहे हैं।

4.13 From the facts as admitted by the appellant and other in their statement recorded under Section 14 of the Central Excise Act, 1944 it is quite evident that factory at Gali No 15 Krishna Vihar Phase 1, Sevadham, Loni Gaziabad, is a factory jointly owned by the Appellant and his younger brother, without entering into any formal partnership. The factory has not been given any name nor has been registered with any of the government departments either centre or state. The entire activities undertaken in the factory were done clandestinely and no formal records were maintained about the operation. Then factory was having sufficient machines/ furnaces & equipmentsto produce 1400-1500 kgs of finished goods i.e. Brass Rods and Brass Forgings for gas stoves in a day. All the receipt of raw material and dispatch of finished goods was done on kachha slips. Sufficient evidences have been adduced to allegeclandestine removal and demand duty on these removals in the show cause notice and impugned order. When the officers visitedthe factory it was running and had stock of finished goods and raw material which has been seized by the officers. These goods have been confiscated by the Additional Commissioner in separate proceedings without any appeal being filed against the order. Commissioner has also relied upon the decision in case of D Bhoormal [1983 (13) ELT 1546 (SC)] holding as follows:

"30. It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, or universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, inall human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it-"all exactness is a fake". El Doradoof absolute Proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, onits basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. *The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in Blatch v. Archar (1774) 1 Cowp. 63 at p. 65 "According to the Proof which* it was in the power of one side to prove and in the powerof the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32. *Smuggling is clandestine conveying of goods to avoidlegal duties. Secrecy and stealth being its covering guards,it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of theperson concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned : and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptiveevidence adduced by the prosecution or the Department would rebut the initial*

presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in `Law if Evidence' (12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, presumptio juris : but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property," though the latter is only a presumption of fact. Thus the burden on the prosecution orthe Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. Itwill only alleviate that burden to discharge which veryslight evidence may suffice.

33. *Another point to be noted is that the incidence, extent and nature of the burden of proof for proceedings for confiscation under the first part of the entry in the 3rd column of clause (8) of Section 167 may not be the same as in proceedings when the imposition of the other kind of penalty under the second part of the entry is contemplated. We have already alluded to this aspect of the matter. It will be sufficient to reiterate that the penaltyof confiscation is a penalty in rem which is enforced against the goods and the second kind of penalty is one in personam which is enforced against the person concerned in the smuggling of the goods. In the case of the former, therefore, it is not necessary for the Customs authorities toprove that any particular person is concerned with their illicit importation or exportation. It is enough if the Department furnishes prima facie proof of the goods being smuggled stocks. In the case of the latter penalty, the Department has to prove further that the person proceeded against was concerned in the smuggling."*

4.14 Commissioner has also relied upon the following decisions to hold against the appellant:

- Shah Guman Mal [1983 (13) ELT 1631 (SC)]
- Lalchand Dhanpat Sing Jain [(1975) 2 SCR 907]
- Balumal Jamnadas Batra [(1976) 1 SCR 539]
- Gulabchand Silk Mills [2005 (184) ELT 263 (T-Bang)]
- Carpenter Classic Exim Pvt Ltd. [2006 (200) ELT 593(T-Bang)]
- International Cylinders Pvt Ltd. [2010 (255) ELT 68(HP)]
- A G Incorporation [2013 (287) ELT 357 (T-Del)]
- Mohan Lal [2009 (237) ELT 435 (SC)]
- Indian Cork Mills Ltd [1984 (017) ELT 0513 (T)]
- Shreeji Aluminium Pvt Ltd. [2012 (282) ELT 234 (T)]
- Shalu dyeing & Printing Mills [2003 (152) ELT 352(T)]
- Gopal Industries Ltd [2007 (214) ELT 19 (T-LB)]

4.15 in case of Gopal Industries referred by the Commissionerin the impugned order, following has been held:

"17. It is not in dispute that the show cause notice dated 10-8-2001 was sent not only in the name of the partnership firm, but to all the partners of the firm. The learned Commissioner has for valid reasons, recorded in paragraph 25 of the impugned order, held that the show cause notice was to be treated as properly served. It is evident from the record that when the service of the show cause notice was questioned before the Hon'ble High Courtof Madhya Pradesh, the Hon'ble High Court, whiledisposing of the writ petition of the partners ordered the noticees to file their reply on 24-3-2003 and participate in the proceedings. Accordingly, the partners have participated in the proceedings and, in fact, the present appeal has been filed in the firm name by one of the partners for challenging the impugned order.

18. *It is not in dispute that two note books being private record, namely, "daily report tin factory" and "Daily production report" were seized from the factory premisesof the appellant on 1-8-1998 under a panchnama in the presence of the authorized signatory of the appellant and two panch witnesses. The authenticity of these two note- books is not disputed, but*

a contention is canvassed that reliance cannot be placed on such private record in the absence of corroborative evidence to show clandestine removal of the excisable goods.

18.1 The "Daily report tin factory" note-book contained details of production and issue of tin containers by the appellant, which did not reflect in the statutory record. Thedetails of production and clearance of tin containers were also shown in the note-book 'Daily production report' separately in respect of the appellant firm which talliedwith the figures shown in the 'Daily report tin factory' which contained figures both for the 'new' tin factory as well in the name of the appellant. In this context, it will be noticed that the managing partner Shri Yogesh Garg confirmed in his statement recorded on 29-9-1998 that thedocuments recovered under the panchnama on 1-9-1998 were pertaining to production and clearance of tin containers by their factory. He stated that these documents consisted of daily production reports written in note-books, delivery challans, stock record of tins etc. The documents recovered pertained to production and clearance of tin containers. He also stated that amongst other supervisors, even Awadesh Kumar Saxena, Electronics Engineer looked after the production and clearance of the goods of the factory. The authorized signatory of the appellant Girijesh Kumar Rai, confirmed in his statement recorded on 28-9-1998 that the recordsshown to him were withdrawn from the factory of the appellant in his presence and that he had put his signatures on the said documents at the time ofwithdrawal on 1-9-1998. The Electronics Engineer, Shri Awadesh Kumar Saxena in his statement dated 28-9-1998 admitted that the portion of daily production reports note- book pertaining to the appellants was prepared by him andthat challans and daily production reports which bear his signatures, were prepared by him and they were of the appellant firm. According to him, the daily production report depicted the number of tin containers produced/ manufactured on a specific day. Whenever, he prepared the daily production report/challan he submitted the original copy to the Managing Director. The facts revealed by the Managing Director, Shri Yogesh Garg, the authorized signatory, Shri Girijesh Rai and Shri Awadesh Kumar Saxena make it clear that the said private documents recovered from the appellant premises on 1-9- 1998 were maintained by the appellant and that the record, namely, the daily production reports, challans etc. were pertaining to the clandestine production and removal of tin containers without payment of duty. We have perused copies of these two note-books containing theprivate record and we find that there were signatures of Awadesh Kumar Saxena, Electronics Engineer at various places. The daily report showed particulars of the opening stock, production and the closing stock of the said excisable goods. Admittedly, the production of the tin containers, which was recorded in these daily record booksand which were removed, did not appear in the statutory record i.e. RG. 1 register of the appellant. This not a case where mere private record without anything more is relied upon. The private record was recovered from the factory of the appellant, and it is established beyond doubt and not even disputed that it was so recovered and that it belonged to the appellant. The nature of particulars contained in this private record clearly go to show their intrinsic authenticity about the clandestine production and removal of the excisable goods by the appellants who had obtained the excise registration for the manufacture of such goods in the firm name. There cannot be more authentic evidence than recovery of the said private recordfrom the appellant's factory which admittedly was prepared and bears the signatures of the supervisors ofthe appellant, and which is proved to have beenmaintained in the factory, from the statements of thepartner Shri Yogesh Garg, the Electronics Engineer, Shri Awadesh Kumar Saxena who has made several daily reports in the said book, and the authorized signatory, ShriGirijesh Rai in whose presence the note-books were recovered under a panchnama. In answer to question No. 18, Shri Awadesh Kumar Saxena who was shown the Daily production reports, stated in his statement dated 29-9- 1998 that all these pertained to the appellants who manufactured the tin containers and that these contained information regarding production and clearance. He also stated in reply to question No. 19 that all challans were prepared by Shri Rajeev Agarwal and others whose signatures he recognized. The authenticity of the recovered documents was admitted by the partner Yogesh Garg [noticee No. (2)] and noticee No. (6) (Girijesh Rai) who also admitted that the record pertained to unaccounted for production and clearance of the tin containers by the appellant. Any subsequent retraction by Shri Awadesh Kumar Saxena has been rightly held to bean afterthought to protect the noticees. This is not a case where any defence was taken up about less consumptionof electricity that would have impelled the Revenue Officers to examine consumption of electricity. When production and removal of excisable goods in a clandestinemanner is established by such positive documentary evidence and the oral evidence of the managing partner and the supervisor, it cannot be said that the

Commissioner committed any error in holding that theappellant had manufactured and cleared tin containers in aclandestine manner. The quantum of liability which is worked out, has not been disputed before us. We find ourselves in complete agreement with the reasoning and findings of the learned Commissioner in holding that the charge of clandestine removal of tin containers by theappellants was established beyond doubt. No further corroboration was required in view of the clinching nature of the oral and documentary evidence establishingclandestine production and removal of tin containers bythe appellant. It is evident that Shri Yogesh Garg, noticee No. (2), partner of the appellant, was in charge of the unit and was having overall control of the affairs of the unit. It was, therefore, rightly held that he was aware that the goods clandestinely manufactured and removed in the name of his partnership firm were liable to be confiscated."

4.16 Appellant has not challenged any of the findings recorded by the Commissioner in the impugned order. When the appellant has in his statement recorded under section 14 while giving the details of working of the unit have admitted that he was actively involved in the working of the unit the grounds taken in the appeal which are in nature of alibi do not merit any consideration. Hon'ble Supreme Court has in case of KamalPrasad & Ors [order dated 10th October 2023 in Criminal Appeal No.1578 Of 2012] rejecting such pleas held as follows:

19. *The principles regarding the plea of alibi, as can be appreciated from the various decisions [Dhananjoy Chatterjee v. State of W.B., (1994) 2 SCC 220; Binay Kumar Singh (supra) Jitender Kumar v. State of Haryana (2012) 6 SCC 204; Vijay Pal v. State (Govt. of NCT of Delhi) (2015) 4 SCC 749; Darshan Singh v. State of Punjab (2016) 3 SCC 37; Mukesh v. State (NCT of Delhi) (2016) 6 SCC 1; Pappu Tiwari v. State of Jharkhand 2022 SCC OnLine SC 109.] of this Court, are:*

19.1 It is not part of the General Exceptions under the IPC and is instead a rule of evidence underSection 11 of the Indian Evidence Act, 1872.

19.2 This plea being taken does not lessen the burden of the prosecution to prove that the accused was present at the scene of the crime and had participated therein.

19.3 Such plea is only to be considered subsequent to the prosecution having discharged, satisfactorily, its burden.

19.4 The burden to establish the plea is on theperson taking such a plea. The same must be achieved by leading cogent and satisfactory evidence.

19.5 It is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the spot of the crime. In other words, a standard of 'strict scrutiny' is required whensuch a plea is taken.

22. We find that for the plea of alibi to be established, something other than a mere ocular statement ought to have been present. After all, the prosecution has relied on the statement of eyewitnesses to establish its case againstthe convict-appellants leading to the unrefuted conclusion that convict-appellants were present on the spot of the crime and …."

4.17 His active involvement in the clandestine activities is an admitted fact and penalty imposed on him under Rule 26 is total justified.

4.18 In view of the discussions as above we do not find any merits in this appeal.

5.1 Appeal is dismissed.

(Pronounced in open court on-19/10/2023)

Sd/-

(P.K. CHOUDHARY)MEMBER (JUDICIAL)

Sd/-

(SANJIV SRIVASTAVA)MEMBER (TECHNICAL)

akp

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70742 of 2019

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-945-19-20 dated 12/09/2019 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida)

Shri Sumit Nagrath **…..Appellant**

(R/o F-140, Sector-41, Noida)

VERSUS

Commissioner (Appeals) Customs,

Central Excise & Service Tax, Noida **….Respondent**

(Noida, U.P.)

APPEARANCE:

Shri Deepak Kumar Singh, Advocate for the Appellant

Shri Sandeep Pandey, Authorised Representative for the Respondent

CORAM: **HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO. - 70028/2023

DATE OF HEARING : 09 August, 2023 DATE OF DECISION : 09 August, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.NOI- EXCUS-001-APP-945-19-20 dated 12.09.2019 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida. By the impugned order Commissioner (Appeals) held as follows:-

"7. I find that the appellant is end use consumer who is not registered with the department. The appellant had booked a under construction flat and paid an amount of Rs.31,64,162/-(including Service Tax) against the Unit No.AMN010105 in AMAN-N01 to M/s Jaypee Infratech Ltd. Further, on request of appellant, M/s Jaypee Inftratech

Ltd. re-allotted a new Unit No.AMN0171203 in AMAN-N17 to them and adjusted Rs.30,04,823/- against the new allotted unit No. AMAN0171203 from previous unit No.AMN010105. The appellant has claimed that the balance amount of Rs.1,59,339/- (i.e. Rs.3164162- Rs.3004823) was paid by them as Service Tax which was not adjusted by M/s Jaypee Infratech Ltd. against the sale consideration of their new flat and the same was deposited with the government exchequer as Service Tax, for which the appellant has applied for refund.

2. *I find that the Adjudicating authority has held that "the tax was paid by Shri Nagrath to builder of the flat i.e. M/s Jaypee Infratech Ltd. not to the government Exchequer. There is no documentary proof available on record that M/s Jaypee Infratech Ltd. have deposited the said tax to the Government Exchequer." Further, I find that the Adjudicating Authority has held that "I observe that the Service Tax was statedly paid by Shri Sumit Nagrath in 2017, to M/s Jaypee Infratech Ltd. and later on the same was adjusted by M/s Jaypee Infratech Ltd. against another unit." From the above, I find that the Service Tax amount paid by the Shri S. Nagrath has already been adjusted by M/s Jaypee Infratech Ltd. against another unit. Hence no question of refund of Service Tax amount arises from the department which was paid by the appellant to M/s Jaypee Infratech Ltd.*

3. *I also find that Service Tax paid by the appellant was later on adjusted by the M/s Jaypee Infratech Ltd. against other unit on 30.06.2017, whereas the refund claim was filed on 06.09.2018 by the appellant. Even if the amount would have been deposited with the government exchequer the refund claim would be time barred as per provision of section 11 B of the Central Excise Act, 1944 (which is also applicable to Service Tax) as the refund claim was filed after lapse of more than 01 year from the date of payment of Service Tax.*

4. *In view of the above discussions and findings, the appeal bearing No.208/ST/Noida/APPL/NOI/2019-20 filed by M/s Shri Sumit Nagrath, F-140, Sector-41, Noida (UP) is rejected."*

2.1 The appellant has filed a refund claim seeking refund of Rs.1,59,339/- claiming the same to be service tax paid by him against the flat booked at M/s Jaypee Infratech Ltd. Sector-128, Noida.

2.2 The appellant had booked a flat under construction project on M/s Jaypee Infratech Ltd. and was allotted unit bearing No.AMN010105 in AMAN-N01 letter dated 30.06.2017 issued by the Builder for sale consideration of Rs.35,40,874/-.

2.3 On request of appellant another unit was reallocated by the builder to the appellant for which Occupancy Certificate had already been issued by the Competent Authority on 20.02.2018.

2.4 Against the amount of Rs.31,64,162/- deposited by the appellant against first allocated unit and amount of Rs.30,04,823/- was transferred to the account of reallocated flat this leaving a balance of Rs.1,59,339/- in the account of books of the builder. Appellant has filed this refund claim claiming this amount to be service tax paid by him to the builder.

2.5 A show cause notice dated 18.03.2019 was issued to the appellant asking him why the refund claim should not be rejected for the reason stated in the show cause notice.

2.6 The show cause notice was adjudicated by Order-in- Original No.11/R/AC/CGST/D-I/2018-19 dated 25.04.2019 rejecting the refund claim filed by the appellant. Aggrieved appellant have filed an appeal before Commissioner (Appeals) which as per the impugned order has been dismissed upholding the rejection of refund claim.

2.7 Aggrieved appellant have filed this appeal before the Tribunal.

3.1 I have heard Shri Deepak Kumar Singh, Advocate for the appellant and Shri Sandeep Pandey, Authorized Representative for the Revenue.

3.2 Arguing appellant for the counsel submits that:-

- the refund claim has been primarily rejected on the ground of limitation holding that the claim has been made after the expiry of one year from the relevant date as per Section 11B
- This issue has been settled by the various decisions of this Tribunal and High Court holding that refund claim of service tax which have been paid under mistake of law are not hit by the limitation as provided under section 11B of Central Excise Act. He placed on record two decisions i
  - Techno Power Enterprises Pvt. Ltd. [Final Order No.75530/2022 dated 16.09.2022 (Tri.-Kol.)]
  - M/s Bellatrix Consultancy Services [Order dated 30.06.2022 in C.E.A. No.49 of 2019 of Hon'ble Karnataka High Court]
- As the issue is squarely decided by the above orders in favour of the appellant the appeal to be allowed.

3.3 Arguing for revenue learned Authorized Representative while reiterating the findings recorded in the impugned order submits that

- There is no evidence available by which it can be said that this amount for which refund claim has been filed was deposited under the head service tax.
- Appellant has not deposited the service tax, there is no deposit in this refund claim with the exchequer.
- Refund cannot be made by him unless proper documents evidencing the payment of this amount to the exchequer are produced.
- The claim of the appellant that this amount was paid to exchequer as service tax under mistake of law is also not substantiated.
- The reliance placed by the appellant on the two decisions is totally erroneous.
- The refund claim not only on merits but also on limitation is not admissible to the appellant.
- Accordingly appeal may be dismissed.

4.1 I have considered the impugned order along with the submissions made in the appeal and during the course of argument.

4.2 The entire ground taken by the appellant is that as this has been paid under mistake of law refund claim could not have been hit by the limitation as provided under section 11B of Central Excise Act. For this proposition, the appellant relies upon two decisions referred. I do not agree that in case of mistake of law refund claim could be allowed beyond the period of limitation provided by the section 11B of Central Excise Act, 1944. A nine judge bench Hon'ble Supreme Court has in case of Mafatlal Industries [1997 (89) E.L.T. 247 (SC)] held as follows:-

"67. The first question that has to be answered herein is whether Kanhaiyalal has been rightly decided insofar as it says (1) that where the taxes are paid under a mistake of law, the person paying it is entitled to recover the same from the State on establishing a mistake and that this consequence flows from Section 72 of the Contract Act; (2) that it is open to an assessee to claim refund of tax paid by him under orders which have become final - or to reopen the orders which have become final in his own case - on the basis of discovery of a mistake of law based upon the decision of a court in the case of another assessee, regardless of the time-lapse involved and regardless of the fact that the relevant enactment does not provide for such refund or reopening; (3) whether equitable considerations have no place in situations where Section 72 of the Contract Act is applicable; and (4) whether the spending away of the taxes collected by the State is not a good defence to a claim for refund of taxes collected contrary to law.

68. *Re. : (I) : Hereinbefore, we have referred to the provisions relating to refund obtaining from time to time under the Central Excises and Salt Act. Whether it is Rule 11 (as it stood from time to time) or Section 11B (as* it obtained before 1991 or subsequent thereto), they invariably purported to be exhaustive on the question of refund. Rule 11, as in force prior to August 6, 1977, stated that "no duties and charges which have been paid or have been adjusted....shall be refunded unless the claimant makes an application for such refund under his signature and lodges it to the proper officers within three months from the date of such payment or adjustment, as the case may be". Rule 11, as in force between August 6, 1977 and November 17, 1980 contained sub-rule (4) which expressly declared: "(4) Save as otherwise provided by or under this rule, no claim of refund of any duty shall be entertained". Section 11B, as in force prior to April, 1991 contained sub-section (4) in identical words. It said : "(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained". Sub- section (5) was more specific and emphatic. It said : "Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim." It started with a non-obstante clause; it took in every kind of refund and every claim for refund and it expressly barred the jurisdiction of courts in respect of such claim. Sub-section (3) of Section 11B, as it now stands, is to the same effect - indeed, more comprehensive and all-encompassing. It says, "(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder or in any law for the time being in force, no refund shall be made except as provided in sub-section".

The language could not have been more specific and emphatic. The exclusivity of the provision relating to refund is not only express and unambiguous but is in addition to the general bar arising from the fact that the Act creates new rights and liabilities and also provides forums and procedures for ascertaining and adjudicating those rights and liabilities and all other incidental and ancillary matters, as will be pointed out presently. This is a bar upon a bar - an aspect emphasised in Para 14, and has to be respected so long as it stands. The validity of these provisions has never been seriously doubted. Even though in certain writ petitions now before us, validity of the 1991 (Amendment) Act including the amended Section 11B is questioned, no specific reasons have been assigned why a provision of the nature of sub-section (3) of Section 11B (amended) is unconstitutional. Applying the propositions enunciated by a seven-Judge Bench of this Court in Kamala Mills, it must be held that Section 11B [both before and after amendment] is valid and constitutional. In Kamala Mills, this Court upheld the constitutional validity of Section 20 of the Bombay Sales Tax Act (set out hereinbefore) on the ground that the Bombay Act contained adequate provisions for refund, for appeal, revision, rectification of mistake and for condonation of delay in filing appeal/revision. The Court pointed out that had the Bombay Act not provided these remedies and yet barred the resort to civil court, the constitutionality of Section 20 may have been in serious doubt, but since it does provide such remedies, its validity was beyond challenge. To repeat - and it is necessary to do so - so long as Section 11B is constitutionally valid, it has to be followed and given effect to. We can see no reason on which the constitutionality of the said provision - or a similar provision - can be doubted. It must also be remembered that Central Excises and Salt Act is a special enactment creating new and special obligations and rights, which at the same time prescribes the procedure for levy, assessment, collection, refund and all other incidental and ancillary provisions. As pointed out in the Statement of Objects and Reasons appended to the Bill which became the Act, the Act along with the Rules was intended to "form a complete central excise code". The idea was "to consolidate in a single enactment all the laws relating to central duties of excise". The Act is a self-contained enactment. It contains provisions for collecting the taxes which are due according to law but have not been collected and also for refunding the taxes which have been collected contrary to law, viz., Sections 11A and 11B and its allied provisions. Both provisions contain a uniform rule of limitation, viz., six months, with an exception in each case. Sections 11 and 11B are complimentary to each other.

To such a situation, Proposition No. 3 enunciated in Kamala Mills becomes applicable, viz., where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf and provides further that all questions about the said right and liability shall be determined by the Tribunals so constituted, the resort to civil court is not available - except to the limited extent pointed out therein. Central Excise Act specifically provides for refund. It expressly declares that no refund shall be made except in accordance therewith. The Jurisdiction of a civil court is expressly barred - vide sub- section (5) of Section 11B, prior to its amendment in 1991, and sub-section (3) of Section 11B, as amended in 1991. It is relevant to notice that the Act provides for more than one appeal against the orders made under Section 11B/Rule 11. Since 1981, an appeal is provided to this Court also from the orders of the Tribunal. While Tribunal is not a departmental organ, this court is a civil court. In this view of the matter and the express and additional bar and exclusivity contained in Rule 11/Section 11B, at all points of time, it must be held that any and every ground including the violation of the principles of natural justice and infraction of fundamental principles of judicial procedure can be urged in these appeals, obviating the necessity of a suit or a writ petition in matters relating to refund. Once the constitutionality of the provisions of the Act including the provisions relating to refund is beyond question, they constitute "law" within the meaning of Article 265 of the Constitution. lt follows that any action taken under and in accordance with the said provisions would be an action taken under the "authority of law", within the meaning of Article 265.

In the face of the express provision which expressly declares that no claim for refund of any duty shall be entertained except in accordance with the said provision, it is not permissible to resort to Section 72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions. In other words, it is not permissible to claim refund by invoking Section 72 as a separate and independent remedy when such a course is expressly barred by the provisions in the Act, viz., Rule 11 and Section 11B. For this reason, a suit for refund would also not lie. Taking any other view would amount to nullifying the provisions in Rule 11/Section 11B, which, it needs no

emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with Rule 11 or Section 11B, as the case may be, in the forums provided by the Act. No suit can be filed for refund of duty invoking Section 72 of the Contract Act. So far as the jurisdiction of the High Court under Article 226 - or for that matter, the jurisdiction of this court under Article 32 - is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.

5. *There is, however, one exception to the above proposition, i.e., where a provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not contemplated by the Act. The Act does not contemplate any of its provisions being declared unconstitutional and therefore it does not provide for its consequences. Rule 11/Section 11B are premised upon the supposition that the provisions of the Act are good and valid. But where any provision under which duty is levied is found to be unconstitutional, Article 265 steps in. In other words, the person who paid the tax is entitled to claim refund and such a claim cannot be governed by the provisions in Rule 11/Section 11B. The very collection and/or retention of tax without the authority of law entitles the person, from whom it is collected, to claim its refund. A corresponding obligation upon the State to refund it can also be said to flow from it. This can be called the right to refund arising under and by virtue of the Constitutional provisions, viz., Article 265. But, it does not follow from this that refund follows automatically. Article 265 cannot be read in isolation. It must be read in the light of the concepts of economic and social justice envisaged in the Preamble and the guiding principles of State Policy adumbrated in Articles 38 and 39 - an aspect dealt with at some length at a later stage. The very concept of economic justice means and demands that unless the claimant (for refund) establishes that he has not passed on the burden of the duty/tax to others, he has no just claim for refund. It would be a parody of economic justice to refund the* duty to a claimant who has already collected the said amount from his buyers. The refund should really be made to the persons who have actually borne its burden - that would be economic justice. Conferring an unwarranted and unmerited monetary benefit upon an individual is the very anti-thesis of the concept of economic justice and the principles underlying Articles 38 and 39. Now, the right to refund arising as a result of declaration of unconstitutionality of a provision of the enactment can also be looked at as a statutory right of restitution. It can be said in such a case that the tax paid has been paid under a mistake of law which mistake of law was discovered by the manufacturer/assessee on the declaration of invalidity of the provision by the court. Section 72 of the Contract Act may be attracted to such a case and a claim for refund of tax on this score can be maintained with reference to Section 72. This too, however, does not mean that the taxes paid under an unconstitutional provision of law are automatically refundable under Section 72. Section 72 contains a rule of equity and once it is a rule of equity, it necessarily follows that equitable considerations are relevant in applying the said rule - an aspect which we shall deal with a little later. Thus, whether the right to refund of taxes paid under an unconstitutional provision of law is treated as a constitutional right flowing from Article 265 or as a statutory right/equitable right affirmed by Section 72 of the Contract Act, the result is the same - there is no automatic or unconditional right to refund.

6. *Re : (II) : We may now consider a situation where a manufacturer pays a duty unquestioningly - or he questions the levy but fails before the original authority and keeps quiet. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second* appeal/revision, fails and then keeps quiet[1]. The orders in any of the situations have become final against him. Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision is rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case. (We must reiterate and emphasise that while dealing with this situation we are keeping out the situation where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation. In other words, we are dealing with a case where the duty was paid on account of mis-construction, mis-application or wrong interpretation of a provision of law, rule, notification or regulation, as the case may be.) Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the ease may be, in the case of another person has made him aware of the mistake of law and, therefore, he is entitled to refund of the duty paid by him? Can

he invoke Section 72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading Section 72 of the Contract Act along with Section 17(1)(c) of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? Kanhaiyalal is understood as saying that such a course is permissible. Later decisions commencing from Bhailal Bhai have held that the period of limitation in such cases is three years from the date of discovery of the mistake of law. With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well-accepted concepts of 1 law. One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law.

So long as that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. But what is happening now is that the duty which has been paid under a proceeding which has become final long ago - may be an year back, ten years back or even twenty or more years back - is sought to be recovered on the ground of alleged discovery of mistake of law on the basis of a decision of a High Court or the Supreme Court. It is necessary to point out in this behalf that for filing an appeal or for adopting a remedy provided by the Act, the limitation generally prescribed is about three months (little more or less does not matter). But according to the present practice, writs and suits are being filed after lapse of a long number of years and the rule of limitation applicable in that behalf is said to be three years from the date of discovery of mistake of law : The incongruity of the situation needs no emphasis. And all this because another manufacturer or assessee has obtained a decision favourable to him. What has indeed been happening all these years is that just because one or a few of the assessees succeed in having their interpretation or contention accepted by a High Court or the Supreme Court, all the manufacturers/Assessees all over the country are filing refund claims within three years of such decision, irrespective of the fact that they may have paid the duty, say thirty years back, under similar provisions - and their claims are being allowed by courts. All this is said to be flowing from Article 265 which basis, as we have explained hereinbefore, is totally unsustainable for the reason that the Central Excise Act and the Rules made thereunder including Section 11B/Rule 11 too constitute “law” within the meaning of Article 265 and that in the face of the said provisions - which are exclusive in their nature - no claim for refund is maintainable except under and in accordance therewith. The second basic concept of law which is violated by permitting the above situation is the sanctity of the provisions of the Central Excises and Salt Act itself. The Act provides for levy, assessment, recovery, refund, appeals and all incidental/ancillary matters. Rule 11 and Section 11B, in particular, provide for refund of taxes which have been collected contrary to law, i.e., on account of a mis-interpretation or mis-construction of a provision of law, rule, notification or regulation. The Act provides for both the situations represented by Sections 11A and 11B. As held by a seven - Judge Bench in Kamala Mills, following the principles enunciated in Firm & Illuri Subbaiya Chetty, the words “any assessment made under this Act” are wide enough to cover all assessments made by the appropriate authorities under the Act whether the assessments are correct or not and that the words “an assessment made” cannot mean an assessment properly and correctly made. It was also pointed out in the said decision that the provisions of the Bombay Sales Tax Act clearly indicate that all questions pertaining to the liability of the dealer to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct and whether a transaction is exigible to tax or not are all matters to be determined by the authorities under the Act. The argument that the finding of the authority that a particular transaction is taxable under the Act is a finding on a collateral fact and, therefore, resort to civil court is open, was expressly rejected and it was affirmed that the whole activity of assessment beginning with the filing of the return and ending with the order of assessment falls within the jurisdiction of the authorities under the Act and no part of it can be said to constitute a collateral activity not specifically or expressly included in the jurisdiction of the authorities under the Act. It was clarified that even if the authority under the Act holds erroneously, while exercising its jurisdiction and powers under the Act that a transaction is taxable, it cannot be said that the decision of the authority is without jurisdiction. We respectfully agree with the above propositions and hold that the said principles apply with equal force in the case of both the Central Excises and Salt Act and the Customs Act. Once this is so, it is un-understandable how an

assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. We must reiterate that the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said article.

In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. It is, however, suggested that this result follows only in tax matters because of Article 265. The explanation offered is untenable as demonstrated hereinbefore. As a matter of fact, the situation today is chaotic because of the principles supposedly emerging from Kanhaiyalal and other decisions following it. Every decision of this Court and of the High Courts on a question of law in favour of the assessee is giving rise to a wave of refund claims all over the country in respect of matters which have become final and are closed long number of years ago. We are not shown that such a thing is happening anywhere else in the world. Article 265 surely could not have been meant to provide for this. We are, therefore, of the clear and considered opinion that the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee. (See the pertinent observations of Hidayatullah, CJ. in Tilokchand Motichand extracted in Para 37). The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith."

4.4 On the basis of above Hon'ble Supreme Court in case of Anam Electricals [1997 (90) E.L.T. 260 (SC)] issued the format order stating as follows:-

"FORMAT ORDER

Pursuant to the directions given in Mafatlal Industries v. Union of India - 1997 (89) E.L.T. 247 (S.C.) = 1996 (9) SCALE 457, the appeals/Special Leave Petitions coming up for disposal shall be disposed of in terms of one or the other of the clauses below :

(1) Where a refund application was filed by the manufacturer/purchaser beyond the period prescribed by the Central Excise Act/Customs Act in that behalf, such petition must be held to be untenable in law. Even if in any appeal, suit or writ petition, direction has been given that the refund application shall be considered with reference to the period of limitation prescribed in the Central Excise Act/Customs Act - or that the period of limitation shall be taken as three years - such a direction of the Appellant Court/Civil Court/High Court shall be deemed to be unsustainable in law and such direction shall be set aside. The period prescribed by the Central Excise Act/Customs Act for filing a refund application in the case of "illegal levy" cannot be extended by any Authority or Court.

..."

4.5 Hon'ble Bombay High Court has in case of Orkay Silk Mills [1998 (98) E.L.T. 310 (Bom)] held as follows:-

"2. In view of the decision of the Supreme Court reported in 1997 (89) E.L.T. 247 (S.C.) as per Section 27, application claiming refund as such, should be presented within a period of six months as envisaged. In the present case, the claim is barred by limitation.

3. *The learned Counsel for Petitioner vehemently urged before us, that since the levying of duty itself was without any authority of tariff, Section 27 as such has no application. In the submission of learned Counsel normal period of limitation for recovery as described is 3 years. The*

submission is that the application of refund presented on 22-2-1987 (sic) was within the period of limitation of 3 years from the date of payment of duty and as such, it is not barred, in view of the period of limitation.

The Limitation Act provides a period of limitation for initiating the proceedings for any recovery of claim in the Court of law. Making of such application for refund of customs duty would not be such a proceeding as envisaged of Limitation Act. As such, the period prescribed under the said Act has no application. Alternatively, the learned Counsel urged before us that the instant petition is within the period of limitation.

4. *Proceedings under Article 226 are not envisaged by the Limitation Act. The period of limitation prescribed under Limitation Act has no application to the extra ordinary jurisdiction of this Court exercisable under Article 226 of the Constitution of India writ of this Court. The submissions in this behalf are devoid of any merit. Even otherwise, the Authorities under the Customs Act duly empowered to collect the duty, could make a mistake or error in exercise of their power. However, it cannot be successfully argued that erroneous act to which the Petitioner has questioned is without any jurisdiction. Even in view of this matter, the provisions of Section 27 of the Act has application as laid down by the Supreme Court in the case cited supra. Since application is beyond the period of limitation, the same cannot be entertained."*

4.6 A larger bench of tribunal has in case of Veer Overseas Ltd. [2018 (15) G.S.T.L. 59 (Tri. - LB)] held as follows:-

"8. Here it is relevant to note that in various cases the High Courts and the Apex Court have allowed the claim of the parties for refund of money without applying the provisions of limitation under Section 11B by holding that the amount collected has no sanctity of law as the same is not a duty or a tax and accordingly the same should be returned to the party. We note such remedies provided by the High Courts and Apex Court are mainly by exercising powers under the Constitution, in writ jurisdiction. It is clear that neither the jurisdictional service tax authority nor the Tribunal has such constitutional powers for allowing refund beyond the statutory time-limit prescribed by the law. Admittedly, the amount is paid as a tax, the refund has been claimed from the jurisdictional tax authorities and necessarily such tax authorities are bound by the law governing the collection as well as refund of any tax. There is no legal mandate to direct the tax authority to act beyond the statutory powers binding on them. The Hon'ble Supreme Court in Mafatlal Industries Ltd. (supra) categorically held that no claim for refund of any duty shall be entertained except in accordance with the provisions of the statute. Every claim for refund of excise duty can be made only under and in accordance with Section 11B in the forms provided by the Act. The Apex Court further observed that the only exception is where the provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not contemplated by the Act. We note in the present case there is no such situation of the provision of any tax levy, in so far as the present dispute is concerned, held to be unconstitutional. As already held that the appellant is liable to pay service tax on reverse charge basis but for the exemption which was not availed by them. We hold that the decision of the Tribunal in Monnet International Ltd. (supra) has no application to decide the dispute in the present referred case. We take note of the decision of the Tribunal in XL Telecom Ltd. (supra). It had examined the legal implication with reference to the limitation applicable under Section 11B. We also note that the said ratio has been consistently followed by the Tribunal in various decisions. In fact, one such decision reached Hon'ble Supreme Court in Miles India Limited v. Assistant Collector of Customs - 1987 (30) E.L.T. 641 (S.C.). The Apex Court upheld the decision of the Tribunal to the effect that the jurisdictional customs authorities are right in disallowing the refund claim in terms of limitation provided under Section 27(1) of the Customs Act, 1962. We also note that in Assistant Collector of Customs v. Anam Electrical Manufacturing Co. - 1997 (90) E.L.T. 260 (S.C.) referred to in the decision of the Tribunal in XL Telecom Ltd. (supra), the Hon'ble Supreme Court

held that the claim filed beyond the statutory time limit cannot be entertained.

9. The Apex Court in Mafatlal Industries Ltd. (supra) observed that the Central Excise Act and the Rules made thereunder including Section 11B too constitute "law" within the meaning of Article 265 and that in the face of the said provisions - which are exclusive in their nature no claim for refund is maintainable except and in accordance therewith. The Apex Court emphasized that "the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said Article".

10. Having examined various decided cases and the submissions of both the sides, we are of the considered view that a claim for refund of service tax is governed by the provision of Section 11B for period of limitation. The statutory time limit cannot be extended by any authority, held by the Apex Court."

4.7 Hon'ble Madras High Court has in case of M.G.M. International Exports Ltd. [2022 (61) G.S.T.L. 565 (Mad.)] held as follows:

"20. Admittedly, collection of service tax by IMC Ltd. during the material period in dispute was contrary to law as was clarified by the Central Board of Excise and Customs vide its Circular dated 24-4-2002. Thus, the collection of the amount was contrary to Article 265 of Constitution of India and therefore, the amount collected ought to have been refunded back, if a refund claim was filed in time from the date of payment under Section 11B of the Central Excise Act, 1944.

21. Thus, collection of tax by IMC Ltd. was not only contrary to the provisions of the Finance Act, 1994 but also the appropriation of such amount by the service tax department contrary to Article 265 of the Constitution of India. However, payment of tax by IMC Ltd. and appropriation and collection by service tax department at best was on account of misconstruction of the provisions of the Finance Act, 1994 as it stood and therefore, any refund of such tax paid on borne by any person would be governed by the provisions of the Central Excise Act, 1944 as made applicable to refund under Finance Act, 1994 by virtue of Section 83 of the Finance Act, 1994.

22. Therefore, refund of tax if any borne by the petitioner had to be made only within a period of limitation prescribed under Section 11B of the Central Excise Act, 1944 notwithstanding the fact that the petitioner became aware of the wrong payment of tax only after the Central Board of Excise and Customs issued clarification bearing reference Order No.2/1/2002-S.T., dated 24-4-2002. Thus, the period prescribed under Section 11B of the Central Excise Act, 1944 had expired long before the above were clarification was issued.

23. The Hon'ble Supreme Court in Commissioner v. Allied Photographics India (P.) Ltd., 2004 (166) E.L.T. 3 (S.C.) considered the case of distributor who had borne the incidence of tax and posed the following question:-

"The point which still remains to be decided is whether the respondent herein was entitled to refund without complying with Section 11B of the Act on the ground that it had stepped into the shoes of NIIL (manufacturer) which had paid the duty under protest?"

24. The Hon'ble Supreme Court in para 15 has answered the issue as follows:-

15. Mr. Ganesh, Learned Senior Counsel appearing on behalf of the respondent vehemently urged that the issue arising in the present matter is squarely covered by the decision of Division Bench of this Court in the case of National Winder v. Commissioner of Central Excise, Allahabad [2003 (154) E.L.T. 350] in which it has been held that if duty is paid by a manufacturer under protest then limitation of six months will not apply to a claim of refund by a purchaser. For the reasons given hereinabove, we hold that the said judgment is per incuriam. At this stage, it is important to note that the Division Bench judgment [Hon'ble S.N. Variava and B.P. Singh, JJ.] in the case of National Winder (supra) was delivered on 11-3-2003. However, on 13-11-2003, the Division Bench [Hon'ble S.N. Variava and H.K. Sema, JJ.], has referred the matter as stated above to the Larger Bench in the light of conflict which the Division Bench noticed between the earlier judgments of this Court on one hand and Paragraph 104 of the judgment of the Constitution Bench of nine-Judges in the case of Mafatlal Industries Ltd. (supra). Hence, by this judgment, we have clarified the position in law.

25. Though the Learned Counsel for the petitioner has cited few decisions of the Andhra Pradesh High Court, Punjab and Haryana High Court and that of the Karnataka High Court, I am afraid that these decisions have either not considered the decision of the Supreme

Court in Mafatlal Industries Ltd. v. Union of India, 1997 (89) E.L.T. 247 in its proper perspective or have ignored the same altogether. The decision of the Hon'ble Supreme Court in Commissioner v. Allied Photographics India (P) Ltd., 2004
(166) E.L.T. 3 (S.C.) sealed the fate of the refund claim and put the last nail in the coffin and has thereby destroyed all the hopes of the petitioner."

4.8 Hon'ble Kerala High Court has in case of Southern Surface Finishers [2019 (28) G.S.T.L. 202 (Ker.)] held as follows:

9. The Learned Single Judge who referred the matter, rightly noticed the different views expressed, which however on the question of mistake of law and the manner in which refund has to be applied for; we have to concede to the majority view of five Learned Judges. From the above extracts, it has to be noticed that Justice B.P. Jeevan Reddy in his majority judgment; concurred to by a majority of five out of nine, held the refund to be possible only under the provisions of the Act. We need only refer to the category of payment under a mistake of law. We do not agree with the Learned Single Judge that the facts of the case discussed in WP (C) No.18126/2015 do not fall under any of the categories. A payment made on a mistaken understanding of law finding the levy to be exigible for the services rendered, would be a levy made or paid under mistake of law and not one categorized as an unconstitutional levy or illegal levy. We cannot agree with the elastic interpretation made by the Learned Single Judge that the case would be one on account of mistake of fact in understanding the law. The mistake committed by the assessee may be one on law or on facts; the remedy would be only under the statute. Here we are not concerned with a case as specifically noticed in Mafatlal Industries Limited (supra) of an assessee trying to take advantage of a verdict in another case. Here the assessee had paid the tax without demur and later realised that actually there was no levy under the provisions of the statute. However, that again is a mistake of law as understood by the assessee and for refund, the assessee has to avail the remedy under the provisions of the statute and concede to the limitation provided therein.

10. B.P. Jeevan Reddy, J. after elaborate discussion, finds the Excise Act to be a self contained enactment with provisions for collecting taxes which are due according to law and also for refunding the taxes collected contrary to law, which has to be under Sections 11A and 11B. Both provisions were found to contain a uniform rule of limitation, namely six months at that time and then one year and now two years. Relying on the decision in AIR 1965 SC 1942 [Kamala Mills Ltd. v. State of Bombay], it was held that where a statute creates "a special right or a liability and also provides the procedure for the determination of the right or liability, by the Tribunals constituted in that behalf and provides further that all questions above the said right and liability shall be determined by the Tribunal so constituted, the resort to Civil Court is not available, except to the limited extent pointed out in Kamala Mills Ltd. (supra). Central Excise Act having provided specifically for refund, which provision also expressly declared that no refund shall be made except in accordance therewith, the jurisdiction of the Civil Court was found to be expressly barred. It was held that once the constitutionality of the provisions of the Act, including the provisions relating to refund is beyond question, then any and every ground, including violation of principles of natural justice and infraction of fundamental principles of judicial procedure has to be urged under the provisions in the Act, obviating the necessity of a suit or a writ petition in matters relating to a refund. The only exception provided was when there was a declaration of unconstitutionality of the provisions of the Act, in which event, a refund claimed could be otherwise than under Section 11B. We, specifically, emphasise the underlined portion in paragraph 79 of the cited decision as extracted hereinabove. The earlier view that the limitation was three years from the date of discovery of mistake of law was specifically differed from, since the refund had to be under the remedy as provided in the statute, which prescribed a limitation.

11. At the risk of repetition, here, the assessees paid up the tax and later realised that they are entitled to exemption. Going by the majority judgment, in Mafatlal Industries Limited (supra), we have to find such cases being subjected to the rigour of limitation as provided under Section 11B. The limitation, in the relevant period, being one year, there could be no refund application maintained after that period. We, hence, find the order impugned in the writ petitions to be proper and we dismiss the writ petitions. We hold that the judgment dated 6-7-2015 in WP (C) No.18126/2015 [2015 (39) S.T.R. 706 (Ker.)] [M/s.
Geojit BNP Paribas Financial Services Ltd. v. Commissioner of Central Excise] is not good

law, going by the binding precedent in Mafatlal Industries Limited (supra). The writ petitions would stand dismissed answering the reference in favour of the Revenue and against the assessees

4.9 In view of decisions as above I do not find any merits in the arguments advanced by the appellant or on his behalf by his counsel. Even if for a moment the argument advanced is accepted then also has to be shown that the amount claimed as refund was paid under mistake of law. Nothing has been produced in respect of payment of this amount as tax with the exchequer and if paid that tax was paid under mistake of law. Even no objection certificate from the builder who might have paid this tax in the exchequer has been produced. Commissioner (Appeals) and his order has specially recorded the finding in this regard in para 8 and 9 of the impugned order which has been referred to in para 1 above. If the service tax paid in respect of first unit allocated has been adjusted against the tax due in respect of the second unit then where can be a question about refund to the appellant. No evidence to the contrary has been produced by the appellant.

4.10 It is also noticed that it is a dispute between the appellant and the builder, two contracting parties. This dispute has to be resolved between two parties to the contract and no refund can be made treating the disputed amount as tax which was never paid to the exchequer. Refund claim for the reason above is not maintainable.

4.11 However, I am of the view that the appellant even after dismissal of this appeal should be allowed opportunity if he can at any time produce the documents claiming this amount is admissible in refund to him for the reason that this tax was paid under mistake of law. Accordingly, he is at liberty to file a rectification application if he deems fit.

4.1 The appeal is dismissed.

(Operative part of the order pronounced in open court)

LKS

(SANJIV SRIVASTAVA) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

SERVICE TAX APPEAL No. 53517 of 2015

[Arising out of Order in Original No. JAI – EXCUS - 000 – COM – 022 – 15-16dated 17.07.2015 passed by the Commissioner, Central Excise, Jaipur-I]

M/s. Om Sokhal Builders & Constructions Pvt. Ltd. **...Appellant**
105, Ganpati Enclave,Central Spine,
Vidyadhar Nagar, Jaipur.

Versus

The Commissioner ofCentral Excise, Jaipur **....Respondent**

APPEARANCE:

None appeared for the appellant

Mr. Rakesh Kumar, Authorized Representative for the Respondent

CORAM :HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)

HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION: 06/02/2024

FINAL ORDER NO.54521/2024

DR. RACHNA GUPTA

None is present for the appellant. It is perused that appellant has not been appearing in the present matter. Vide order dated 6th November 2019 department was directed to serve notice upon the appellant after verifying its complete and proper address. Ld. Departmental Representative has mentioned that the said order was duly complied with. Infact, there was a request of adjournment received for 25th November, 2022 from the appellant subsequent to service of notice upon appellant. It was also made clear on 25.11.2022 that in case the appellant fails to appear on next date of hearing, the matter shall be decided on merits. These warnings were reiterated vide order dated 15th May, 2023. Ld. Departmental Representative has also mentioned that it has been verified that the appellant has not got any benefitunder SVLDRS Scheme. In view of above observations, the fact that the matter still got adjourned for three more occasions and the fact that the appellant is not present even for today, the appeal is proceeded to be decided on merits in absence of the appellant.

2. Arguments on behalf of the department heard.

3. It is submitted that there is no infirmity in the order under challenge, appeal is therefore prayed to be dismissed.

4. The record of the present appeal memo perused. It is observed that a Show Cause Notice No.698 dated 19.12.2014 wasserved upon the appellant, after observing that appellant has filed

a substantially false declaration under Service Tax Voluntary Compliance Encouragement Scheme of 2013 declaring the tax dues of Rs.58,17,433/- for the period from October, 2011 to December, 2011. Department observed that the appellant isinvolved in the construction activities and has declared their tax dues by wrongly availing the abatement on the value of construction work and on the advance money received for flat booking respectively. They have also not included the amount of their liability under reverse charge mechanism for obtaining legal consultancy and with respect to the remunerations paid to their Director. From the perusal of the documents annexed with VCES application dated 20th December, 2013, Department observed thatthe appellant has failed to mention its income with the service tax liability of Rs.2,28,08,414/- for the period from April, 2011 to December, 2012. The said amount was accordingly proposed to be recovered alongwith the proportionate interest and the appropriate penalties.

5. The said proposal has been confirmed vide the order under challenge/Order-in-Original bearing No.22-15-16 dated 30th June, 2015. Being aggrieved the appellant had filed the present appeal but had failed to pursue the same. We observe that while filing the VCES the appellant has not included the value of following:

1) The amount of Rs.48,59,600/- as has been received bythem against construction of building of four educational Institutes.
2) The total amount of Rs.4,11,59,366/- as involved in 18 to 19 agreements to construct residential houses.
3) The demand of service tax of an amount of Rs.50,40,000/- paid as remuneration to the directors and service tax of an amount of Rs.93,708/- of legal and professional expenses.

6. The demand of service tax for constructing educational institutes has been confirmed by the authority below on the ground that for any organisation or institutions to qualify as having been established solely for educational, religious, charitable, help, sanitation or philanthropic purposes, for non- commercial status, it is required that same fulfils the condition of being run without any profit making. None of the educational Institutes were observed to have a non-commercial status. We have no reason to differ from these findings because there is no denial apparent on record that the educational institutions for whom appellant constructed the complex, were charging feesfrom the students. None of these educational Institutes areGovernment owned institutes. Also there is no evidence to prove that despite collection of fee, there was no profit to these institutes and that these educational institutes were non-profit driven. Hence we confirm the demand of service tax pertaining to construction of educational institute activity.

7. Coming to the second demand with respect to constructionof residential complexes, the adjudicating authority below has submitted that the appellant has not produced any evidence in theform of invoices, detail of payment received from those for whom appellant constructed the houses and any evidence to prove that the amount of 18 agreements (Rs.1,49,63,653/-) relates to the construction services provided during the year 2011-12. From theagreements produced by the appellant, we observe that the appellant had agreed to construct individual residential houses for different person as named in the distinct agreement. There is nothing in agreement to suggest that these houses were the part and parcel of the same complex. Hence there is no evidence produced by the Department that these 18 agreements were 18 different residential units (more than 12 units) in a common area with several common facilities, as is the requirement in terms of section 65(91a) of Finance Act, 1994 which defines the residential complex. Once the construction does not qualify to be called as a residential complex, question of any services rendered for constructing the same to be taxable does not at all arises. Hence, the findings of the adjudicating authority below confirming the demand alleging the construction of individual house as a taxable service, service of construction of Residential Complex areliable to be set aside.

8. Coming to the value of service tax which has been allegedto have been concealed in the VCES by the appellant that is with respect to remuneration paid to the Directors and with respect to the amounts spent for legal and professional consultancy, we are of the opinion that Director remuneration refers to the compensation which a company gives to its Directors for the services rendered by him either in the form of fees, salary or by use of company's assets. But the mere fact of payment ofremuneration is not sufficient to hold that there exists an employer employee relationship between the company and the Director in which situation only the

remuneration paid could have been taxable. The Revenue has not produced any evidence that on the amount of remuneration TDS in terms of section 192 of Income Tax Act was ever deducted. Hence, we hold that there arises no Service Tax liability qua the amount of said remuneration. Order under challenge is liable to be set aside qua this demand.

9. The value for legal and professional services the same is very much taxable, as it qualifies to be called as service for post negative list period it is not covered under the exclusion clause of section 66 D of Finance Act. Hence, we do not find any infirmitywhile the demand on this count, has been confirmed.

10. In view of entire above discussion, following two demandsare confirmed:

1 With respect to construction of Educational InstitutesComplexes

2 With respect to legal and professional consultancy.

The following two demands are set aside:

1. Construction of 18 individual residential houses.

2. With respect to the amount of remuneration paid tothe Directors.

11. As a result, the appeal stands **partly allowed**.

[Pronounced in the open Court]

(DR.RACHNA GUPTA)MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH-COURT NO.1

Service Tax Appeal No. 50931 of 2018

(Arising out of Order-in-Appeal No. 04-ST-APPEAL-1/-EAST-2017 dated 22.01.2018 passed by The Commissioner (Appeal-I) Central Tax/GST Delhi)

Agriculture Produce Marketing Committee **….Appellant**
Shahdra, Fruit and Vegetable MarketGazipur, Delhi-110096

Versus

Commissioner (Appeals-I) Central Tax/GST Delhi

….Responden t

Room No. 134, Kendriya Rajasva BhavanIP Estate, New Delhi-110002

APPEARANCE:

Shri Abhimanyu Garg, Advocate for the Appellant

Shri Harshvardhan, Authorized Representative of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Final Order No. 51133/2023

Date of Hearing: AUGUST 23, 2023

JUSTICE DILIP GUPTA

This appeal is directed against the order dated 22.01.2018 passed by the Commissioner (Appeals) dismissing the appeal filed to assail the order dated 30.01.2017 passed by the AssistantCommissioner solely for the reason that it was filed beyond the time prescribed under section 85(3) of the Finance Act, 1994[1].

2. It transpires from the records of the appeal that against the order dated 30.01.2017 passed by the adjudicating authority, which order was admittedly received by the appellant on 06.02.2017, the appellant filed the appeal before the Commissioner(Appeals) on 27.07.2017.

3. In terms of section 85(3A) of the Finance Act an appeal to the Commissioner of Central Excise (Appeals) was required to be presented within two months from the date of receipt of the decision but the Commissioner of Central Excise (Appeals), if he was satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of twomonths, allow it to be presented within a further period of one month.

4. The Commissioner (Appeals) after noticing that the appeal was not presented even during the extended period of one month after the expiry of two months from the date of receipt of the decision of the adjudicating authority, dismissed the appeal.

5. Shri Abhimanyu Garg, learned counsel for the appellant submitted that the appellant was prevented by sufficient cause from preferring the appeal within the period stipulated under section 85(3) of the Finance Act and, therefore, the Commissioner (Appeals) should have condoned the delay.

6. Learned authorized representative of the Department has, however, placed reliance on the decision of the Supreme Court in **Singh Enterprises** V/s **Commissioner of Central Excise, Jamshedpur**[2] and has contended that in view of the provisions of Section 85(3A) of the Act, the Commissioner (Appeals) could not have condoned the delay of any period beyond the period of one month after the expiry of the statutory period of two months.

7. The submissions advanced by the learned counsel for the appellant and the learned authorized representative of the department have been considered.

8. In order to appreciate the contentions, it would be appropriate to reproduce section 85(3A) of the Finance Act and itis as follows:

"85. Appeals to the Commissioner of Central Excise(Appeals)-

(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to Service Tax, interest or penaltyunder this Chapter :

Provided that the Commissioner of Central Excise(Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within theaforesaid period of two months, allow it to be presented within a further period of one month."

9. A perusal of sub-section (3A) of Section 85 clearly indicates that an appeal shall be presented within two months fromthe date of receipt of the order of the adjudicating authority in relation to Service Tax, interest or penalty. It further provides that the Commissioner of Central Excise (Appeals) may, if he is satisfiedthat the appellant was prevented by sufficient cause frompresenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month. The discretion of the Commissioner to condone the delay is, therefore, circumscribed by the condition set out in proviso and the delaycan be condoned only if the appeal is presented within a further period of one month after the expiry of the statutory period of two months, provided of course, he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within a period of two months.

10. In the present case, admittedly, the order dated30.01.2017 of the adjudicating authority was received by the appellant on 06.02.2017, but the appeal was presented before the Commissioner on 27.07.2017. It was clearly not presented within the period of two months nor within the extended period of one month. The Commissioner (Appeals) dismissed the appeal after placing reliance on the decision of Supreme Court in **Singh Enterprises**.

11. The provisions of section 35 of the Central Excise Act, 1944 relating to appeals before Commissioner (Appeals) hadcome up for consideration before the Supreme Court in **Singh Enterprises**. Section 35 of the Central Excise Act provides that any person aggrieved by any decision or order passed under the Act, may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days. The provisions of section 35 of the Central Excise Act are paramateria with section 85(3A) of the Finance Act. The Supreme Court held that the period upto which the prayer for condonation can beaccepted is limited by the proviso to sub section (1) of section 35 of the Central Excise Act and the position is crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of thirty days after the expiry period of sixty days. In other words, the appellate authority can entertain the appeal by condoning the delay only upto 30 days beyond the normal period for preferring the appeal, which is 60 days.

12. The Commissioner (Appeals), therefore, did not commit any illegality in dismissing the appeal. The present appeal is, accordingly, dismissed.
(Order dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

Rekha

(P.V. SUBBA RAO)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 53668 of 2018 [DB]

[Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-249-18-19 dated 26.07.2018 passed by the Commissioner of Customs, Central Goods & Service Tax and Central Excise (Appeals), Indore]

Commissioner of C.G.ST. &
Central Excise, Indore **…Appellant**

Post Box No. 10, Manik BaghRoad, Manik Bagh Palace, Indore, M.P.-452001

VERSUS

M/s. Carry Fast Agency **…Respondent**
418, 419 Lasudia Mori, Dewas Naka,Indore, M.P.-453771

APPEARANCE:

Shri Harshvardhan, Authorized Representative for the DepartmentShri Krishan Garg, Chartered Accountant for the Respondent

CORAM: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL) HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 28.07.2023DATE OF DECISION: **15.09.2023**

FINAL ORDER No. 51302/2023

DR. RACHNA GUPTA

The department has filed the impugned appeal pursuant to Review Cum Authorization Order No. 115/2018-19 dated 08.10.2018, wherein, it has been opined that the order passed by the Commissioner (Appeals) is not legal and proper. The facts leading to impugned appeal are as follows:

Assessee-respondent is engaged in providing "Clearing and Forwarding Agents Services"[1] and has been registered for the same. During the course of audit of their record for the period from 2011-12 to 2014-15, it was observed that while discharging the taxliability of C & F Agent Service, the assessee-respondent has notincluded the freight value received by him in the taxable valueaccount. Resultantly, it was found that assessee-respondent hasshort paid the service tax of an amount of Rs.57,50,912/- while discharging their tax liability for providing Clearing and ForwardingAgent Service.

The said deficient amount was proposed to berecovered from the assessee-respondent along with the interestand the penalties vide Show Cause Notice No. 23438 dated 13.12.2016. The said proposal was confirmed vide Order-in-Original No.08/2017-18 dated 28.09.2017, when the appealagainst the said order was filed, the Commissioner (Appeals) hasallowed the appeal. The Review Committee of the departmenthowever opined the said findings to be illegal and improper.Pursuant whereto, the impugned appeal has been filed by thedepartment praying for setting aside the said order of Commissioner (Appeals).

1. None had appeared on 27.03.2023 for the assessee-respondent. It was observed from order sheets that the assessee- respondent has not appeared even for once despite that the assessee-respondent was time and again been served with thenotice of hearing. Even fresh notices of hearing, as were issued, were reported to have been served. Initially vide report of December, 2012 about date of hearing on 25.01.2023 and subsequently vide report of March 2023 for the date of hearing on 27.03.2023. Due to the continued absence of the respondent-assessee in the appeal, of the year 2018, it was opined, on 27.03.2023, that the assessee-respondent has been negligent in pursuing the matter despite several opportunities afforded. Hence the assesse-respondent was proceeded ex parte and the argumentson behalf of the appellant-department were heard and the matter was reserved for orders.

2. On 24.05.2023, prior the order could be pronounced, a miscellaneous application was filed by the respondent-assessee seeking an opportunity of being heard. The application was allowedvide Miscellaneous Order No. 50220/2023 dated 28.07.2023 and the arguments on behalf of respondent-assessee were heard about the merits of this appeal.

3. Learned DR had submitted a written synopsis for department-appellant on 27.03.2023 itself. It is mentioned that thetransportation charges received by clearing and forwarding agent should form the part of consideration for providing Clearing and Forwarding Agent Service. It is mentioned that Commissioner(Appeals) has wrongly bifurcated the same. Learned DR further submitted that two separate contracts for providing separate set of circumstances is wrongly considered as a valid reason for not considering the freight value in the taxable value of Clearing and Forwarding Agent Service. Learned DR has relied upon the relevant definitions, the applicable circulars and the following case laws with the prayer that order under challenge be set aside and department's appeal be allowed:

(i) Medpro Pharma Pvt. Ltd. Vs. Commissioner of C. Ex.,Chennai reported as 2006 (3) S.T.R. 355 (Tri. – LB.)

(ii) Commissioner of C. Ex., Panchkula Vs. KulcipMedicines (P) Ltd. reported as 2009 (14) S.T.R. 608 (P&H)

(iii) Commissioner Vs. Kulcip Medicines (P) Ltd. reported as 2012 (25) S.T.R. J127 (S.C.)

(iv) M/s. Synergy Baxi Logistics Pvt Ltd Vs. Commissionerof Central Excise, Jaipur-I reported as 2019 (11) TMI 1166 – CESTAT New Delhi

(v) M/s. Gunesh India Pvt Limited Vs. Commissioner,Central Excise & Central Goods, Service Tax, Jaipur-I reported as 2022 (5) TMI 1042-CESTAT New Delhi

(vi) Jai Jawan Coal Carriers Pvt. Ltd. Vs. Commr. of S.T., New Delhi reported as 2015 (37) S.T.R. 509 (Tri.-Del.)

(vii) Singh Trading Company Vs. Commissioner of Central Excise, Bhopal reported as 2018 (9) G.S.T.L. 201 (Tri.-Del.)

(viii) Sri Bhagavathy Traders Vs. Commissioner of Central Excise, Cochin reported as 2011 (24) S.T.R. 290 (Tri.-LB)

4. Learned counsel for respondent-assessee has submitted the copy of agreements with M/s. Dabur India Limited. It is impressed upon that the parties agreed for transportation and C & F servicesto be separate and independent services and therefore, the consideration for both the services cannot be clubbed together to levy services tax under the single service category of C & F service. This will be contrary to the Principle of classification of services

as provided under Section 66 F of the Act. Copies of certificates for service recipients for making payment of tax under Reverse Charge Mechanism (RCM) are also placed on record. Relying upon the decision of **M/s. Synergy Baxi Logistics Pvt. Ltd. of this Tribunal vide Final Order No. 51549/2019 dated 26.11.2019**,learned counsel has requested for order under challenge to beupheld and appeal as filed by the department to be dismissed.

5. Having heard the rival contentions and perusing the case records, We observe and hold as follows:

The only point of adjudication is:

"whether the clearing and forwarding agent is to be assessed separately when he is clearing and transporting the goods under two separate contracts and bills have also been raised separately."

6. To adjudicate the same foremost it is necessary to look into the definition of clearing and forwarding agent and the goods transport agency. Section 65(25) of the Finance Act, 1994 (hereinafter called as Act) defines clearing and forwarding agent to mean:

"Any person who is engaged in providing any service, either directly or indirectly, connected with the clearing and forwarding operations in any manner to any other personand includes a consignment agent"

This taxable service is defined under 65 (105)(j) of the Act as a service provided to any person by a clearing and forwarding agentin relation to clearing and forwarding operation, in any manner.

Trade notice No. 59/99 dated 04.10.1999 clarified the activities undertaken by clearing and forwarding agents. Following are few of them:

(a) Receiving the goods from the factories or premises of theprincipal or his agents;
(b) Warehousing these goods;
(c) Receiving dispatch orders from the principal;
(d) Arranging dispatch of goods as per the directions of the principal by engaging transport on his own or through the authorized transporters of the principal;
(e) Maintaining records of the receipt and dispatch of goods and thestock available at the warehouse;
(f) Preparing invoices on behalf of the principal.

A perusal of the definition above when read in light of the saidtrade notice makes it clear that, in order to attract the levy, the above mentioned activities with similar other services "in relation toclearing forwarding operation" constitute the C&F Service. A Circular of the Board also may be read:

"An essential characteristic of any services, to fall in the category of C&F agent, is that the relationship between the service provider and receiver should be in the nature of principal (owner) and agent. The C&F agent carried out all activities in respect of the goods right from stage of their clearances from the premises of the principal to its storage and delivery to the customers. "

The above Para in the circular makes it clear that when a C&Fagent carries out both clearing and forwarding, the levy will be attracted.

7. Now we need to look into the definition of Goods Transport Agency which is defined under Section 65 (50b) of the Act to mean:

"Any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called".

It is taxable under Section 65(105)(zzp) the service to any person by a goods transport agency, in relation to transport of goods by road in a goods carriage.

The definitions make it clear that for the Goods Transport Service, it is the service for transportation of goods that too by roadprovided by the Goods Transport Agency which issues the consignment note also.

8. From the above discussion, we conclude that C&F Agent Service includes two kinds of service providers i.e. the freightforwarders and the clearing agent. When the C&F himself is providing both the services to the principle, he is liable to tax underSection 65(25) of the Finance Act. However, when C&F agent is engaging a GTA or another agency who are freight forwarders than the levy cannot be raised against the C&F agent for providing C&F agent service.

9. Though, this Tribunal in the case of **Medpro Pharma Pvt.**

Ltd. (supra) had held that even isolated activity of freight forwarding is covered under C & F operations and is taxable as C & F Agent Service. It was held by the Tribunal that segregation of holistic concept of clearing and forwarding into divisible activities is not possible due to presence of word 'and' in between 'clearing' and'forwarding. The relevant para of the decision is as follows:

"Due to their orchestrated nature of work, such isolated activity canalso be covered under "C&F Operations". Merely, because thebassoon was not played in one of the movements of a symphony, itdoes not cease to be otherwise a part of the orchestra. While forming this view, we have certainly not overlooked the fact that while music can be sometimes taxing, a tax can never be musical!"

10. However, we observe that the said findings have been overturned by the High Court of Punjab and Haryana while deciding the appeal of Revenue in the case of **Kulcip Medicines (P) Ltd. (supra),** where while interpreting the definition of Clearing and Forwarding Agent Service it was held that taxable service has been defined to mean any service provided or to be provided to a client by a 'clearing and forwarding agent in relation to clearing and forwarding operations in any manner'. If the clearing operations are separated from forwarding operation, the levy of tax would not be attracted as it only involves one of the two activities. **It was also held that by necessary intendment the expression 'a clearing and forwarding agent in relation to clearing andforwarding operations, in any manner' contemplates onlyone person rendering service as 'clearing and forwardingagent' in relation to 'clearing and forwarding operations'.**

11. This decision though has taken a contrary view than decision in **Medpro Pharma Pvt. Ltd. (supra)** in the sense that clearing & forwarding can be segregated. However, the rationale of the

Kulcip Medicines (P) Ltd. (supra) decision still is that if clearing & forwarding both the operations are undertaken by only one person, the activity shall be clearing & forwarding agent service only. The outcome of this decision therefore is that if one person has rendered service as 'forwarding agent' and also the service as 'clearing agent' then he be deemed to have rendered both services would amount to replacing the conjunctive 'and' by a disjunctive which is not possible. The SLP filed by the assessee against the said decision has been dismissed by Hon'ble Supreme Court of Indiavide decision reported as **2012 (25) S.T.R. J127 (S.C.), while holding that service tax is leviable under the category of clearing and forwarding agent only if an agent renders both clearing and forwarding services.**

12. The conclusion which stands finalized to our understanding is that for the service of clearing and forwarding agent to be taxable, the activities of clearing as well as forwarding shall be performed byone and the same agent. To put it otherwise, the service ofclearing and forwarding agent will not be taxable if:

(i) The agent outsources the activity of forwarding to a goodstransport agency.

(ii) The principle himself hires the GTA to perform forwarding activity and the clearing and forwarding agent is engaged only to perform the clearing activities.

In both the situations the service provider for the forwarding activity since is a person different from C&F agent that the value of freight forwarding shall not be included in the value of taxable C&F Agent Service. If fact, service cannot be taxed as C&F Agent Service.

13. Reverting to the facts of the present case, we observe that irrespective there are two separate agreements between the principle and the agent, one for transportation and another for clearing. In addition, the consideration received is also in two different modes with respect to the invoices of respondent's clearing activity, he is receiving the consideration as commission. Whereas for the invoices about providing forwarding services, he is receiving the contractual payment. But the forwarding activity has been provided by the C&F agent i.e. the assessee and he, himself isclearing the product of his principle. The bifurcation of both the services, there is no doubt, permissible as per the decision in**Kulcip Medicines (P) Ltd. (supra).** However, we also observe that the agent in both these contracts is same i.e. the respondent.It is important here to go through the said two different contracts/agreements:

(i) The agreement dated 20.12.2012 executed between M/s. Dabur India Limited and the respondent is about business of transporting the company's goods from company's warehouses on door delivery basis to the different stockists in state of Madhya Pradesh or delivery of goods to any other place/state as per the request of the company.

We observe that clause 48 of this agreement addresses the carrier i.e. the respondent as C&F agent, who is not allowed to part with the consignment, in any case, without the acknowledgement ofthe receipt of goods by the stockist. We also observe that the agreement is absolutely silent about issuance of consignment notes and admittedly respondent is not registered as Goods Transport Agency.

These observations are sufficient for us to hold that even if respondent is rendering transportation service under a separate contract but said service rendered by him cannot be called asGoods Transport Service.

(ii) The second agreement dated 19.04.2012 between M/s. Dabur India Limited and the respondent is about undertaking the business of clearing, storing and forwarding of company's goods as C&F agent of the company for State of Madhya Pradesh.

We observe from clause 1 that C&F shall transfer stocks toany of the company stockiest/super stockiest or C&F agent located all over India. As per clause 2 of the agreement, appellant as C&F agent is allowed to use the warehouse/godowns of M/s. Dabur IndiaLimited to receive and stock the goods therein & to consign its goods from time to time, as per

requirement, by Road and Rail.

From these clauses of both the agreements, it is clear that respondent is admitted to be the C&F agent. As already observed above respondent only is providing clearing as well as forwarding service. Hence it is not open to respondent to say that service provided by him is different from C&F Agent Service. Irrespective there are two separate contracts executed by the principle but for appointing one and the same person i.e. respondent to rendercarrying as well as forwarding service. This fact distinguishes the present case from **Kulcip Medicines (supra).** Thus, we hold that both the activities rendered by respondent shall constitute one synchronized service of C&F agent. Hence respondent is liable to levy under Section 65(25) of the Finance Act. More so for the reason that appellant is registered as C&F agent and not as GTA.

Thus we answer the above question in negative by holding that when one and the same person is providing service of clearing as well as forwarding irrespective under two separate contracts, it shall not amount to be the bifurcation of C&F Service. The agent has to be assessed for rendering C&F Service 65(25) and 65(105) of the Finance Act.

14. We find that respondent-assessee has relied upon the decision of **M/s. Synergy Baxi Logistics Pvt. Ltd. (supra)**, we notice the decision of Hon'ble Supreme Court in the case of **Coal Handlers Private Limited Vs. CCE reported as 2015 (38) STR 897 (SC)**, wherein while discussing the meaning and scope of forwarding agent, the court held that the transportation service is not part of the forwarding operations. Further the same person canact both in the capacity of C & F agent as well as courier in a separate transportation and different contract. We observe that in **M/s. Synergy Baxi Logistics Pvt. Ltd. (supra)** the C&F himself was not transporter. He had assured that wherever bank approved transporters are available, their services shall be utilized as a first priority. In case, bank approved transporters are not specified for certain places, care shall be exercised to dispatch the said products through registered transporters or through reputed transporters. While entrusting the Products to transporters in the course of forwarding, the C&F shall arrange and ensure that all the required excise gate passes / invoices / documents are carried by the transporters, The relevant invoices / documents / challans shall carry the name of the Company as the consignor and the name of the customer as the consignee. But in the present case as per agreement dated 20.12.2012, the assessee –respondent i.e. M/s. Carry Fast Agency only has been appointed as transporter. For these reasons we are of the opinion that facts of **M/s. Synergy Baxi Logistics Pvt. Ltd. (supra)** are distinguishable.

15. As the result of above discussion we answer the question framed in negative that two separate contracts bifurcating theactivity of clearing and forwarding will not discharge the C&F Agent from his liability of C&F Service taxable under Section 65(105)(i) of the Finance Act. It is for the sole reason that under two separate contracts, the respondent himself is the service provider. We hold that such an arrangement is to camouflage the C&F Agent's liability for providing clearing & Forwarding Agent Service.

16. Accordingly, we hereby set aside the impugned order of Commissioner (Appeals). Consequent thereto, the appeal filed by the department is hereby allowed.

[Order pronounced in the open Court on **15.09.2023**]

(DR. RACHNA GUPTA)MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 50002 of 2016 [DB]

[Arising out of Order-in-Original No. UDZ-EXCUS-000-COM-0010-14-15 dated 18.03.2015 passed by the Commissioner of Central Excise, Udaipur]

M/s. Nagar Parishad …Appellant
Near Collectorate, Chittorgarh, Rajashthan

VERSUS

Commissioner of Central Excise
& C.G.ST – Udaipur …Respondent

142-B, Hiran Magari,

Sector-11, Near Shahi Bagh, Udaipur, Rajasthan-313002

APPEARANCE:

None for the Appellant

Shri Harshvardhan, Authorized Representative for the Respondent

CORAM:

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL) HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 20.07.2023 DATE OF DECISION: **03.11.2023**

FINAL ORDER No. 51493/2023

DR. RACHNA GUPTA

M/s. Nagar Parishad, Chittorgarh is engaged in providing service namely 'Renting of Immovable Property Services.' It came to the notice of the department that local authorities like appellant are not paying service tax in respect of the charges collected under various heads which are covered under Renting of Immovable Property. Hence, the appellant was asked to provide the details of the amount being received by them during the period 2008-09 to 2012-13. From the examination of the information/documents provided by the appellant, the department noticed that during the aforesaid period from 01.04.2008 to 31.3.2013, appellant had received payouts on account of against transfer fee, forfeit charges, tamir izazat, annual lease, rent of shops and other rent amounting to Rs.5,83,46,864/-. As such the appellant was observed to be liable to pay the service tax amounting to Rs.64,16,499/-. Resultantly, vide Show Cause Notice No. 351/2013 dated 22.10.2013, the aforesaid amount of Rs.64,16,499/- along with the proportionate interest and the appropriate penalties under Section 75, 76, 77 and 78 of the Finance Act, 1994 was proposed to be recovered. The said proposal has been confirmed vide the Order-in-Original No. 0010-14-15 dated 18.03.2015. Being aggrieved, the appellant is before this Tribunal.

2. None was present for the appellant. Since it was observed that not even once the appellant had appeared and that several opportunities have been given to await the presence of the appellant after issuance of fresh notices repeatedly. Accordingly, the further adjournment was declined vide Order dated 20.07.2023. The arguments on behalf of the department were

heard and the appeal was reserved for orders.

3. Learned DR while submitting the arguments has mentioned that the issue involved is no more *res integra*. He relied upon the decision of Hon'ble Apex Court in the case of **Krishi Upaj Mandi Samiti Vs. Commissioner of C.Ex. & S.T., Alwar reported as 2022 (58) GSTL 129 (SC).**

4. We have perused the entire records and the decision relied upon by the department. We observe and hold as follows:

From the appeal memo, it is apparent that appellant has mentioned itself to be a local body created under Article 243Q of the Constitution of India to discharge the constitutional obligations and the sovereign duties. One of the grounds of appeal is that the Revenue has failed to consider the fact that the appellant is a municipality and its duties are well covered under the provisions of Section 66D of the Finance Act (the negative list). It has also been submitted that the income generated by the appellant are the compensatory mechanism for which the constitutional powers are given under Article 243W read with Schedule XII of the Constitution of India. The order is prayed to be set aside for the ignorance of the said facts.

5. From the decision as relied upon by learned DR, we observe that initially this Tribunal vide its **Final Order No. 53436- 53500/2017 dated 25.05.2017 in the case of M/s. Krishi Upaj Mandi Samiti** has decided the issue of taxability. The relevant para is as follows:

"14. We have examined the scope of entry in the negative list along with various clarifications issued by the Government. On harmonious construction of all material facts on record, we find that the appellants are not liable to service tax on shops/ sheds/platforms/land leased out in the notified market area for traders for temporary storage of agricultural produce traded in the market. In respect of shops, premises, buildings, etc. rented/leased out for any other commercial purpose other than with reference to agricultural produce (like bank general shop etc.), the same shall not be covered by the negative list and the appellants shall be liable to service tax."

This decision has been upheld by the Hon'ble Apex Court in **Krishi Upaj Mandi Samiti (supra)** of Year 2022. Otherwise also, it is observed that the appellant had admitted their tax liabilities. In view of the said settled provision and the admission of the appellant for his liability, we do not find any infirmity in the order confirming the impugned demand. Since the appellant had never declared the fact of the income received by renting of immovable property which was purely and admittedly for the purposes of commerce, we do not find any infirmity in the order imposing penalties under Section 75, 76, 77 and 78 of the Finance Act. Though the appellant claimed the benefit under Section 80 but we do not find any reasonable cause with the appellant justifying the non-payment of service tax on the income which was being received for a long period of 5 to 6 years from renting of immovable properties, also the amount of service tax as confirmed against the appellant was not paid along with the interest in full within the stipulated time. Hence, we do not find any reason to extend the benefit of Section 80 of the Act to the appellant. With these findings, we uphold the order under challenge. Resultantly, the appeal stands dismissed.

[Order pronounced in the open court on **03.11.2023**]

(DR. RACHNA GUPTA) MEMBER (JUDICIAL)

(P.V. SUBBA RAO) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCPAL BENCH - COURT NO. IV

Service Tax Appeal No. 52279 of 2016

(Arising out of Order-in-Original No. DEL-SVTAX-001-COM-032-15-16 dated 04.04.2016 passed by the Commissioner of Service Tax, Delhi-I)

Commissioner of Service Tax, Delhi-I **Appellant**

VERSUS

M/s Export Inspection Agency, Delhi, **Respondent**
Thakkar Bapa Smarak Sadan,2nd Floor, Dr. Ambedkar Marg,New Delhi-110055

APPEARANCE:

Shri Harshvardhan, Authorized Representative for the Appellant

Shri Alok Yadav and Shri Nilotpal Shyam, Advocates for the Respondent

AND

Service Tax Appeal No. 52477 of 2016

(Arising out of Order-in-Original No. DEL-SVTAX-001-COM-032-20-15-16 dated 04.04.2016 passed by the Commissioner of Service Tax, Audit-I, New Delhi-110002)

M/s Export Inspection Agency, Delhi, **Appellant**
Thakkar Bapa Smarak Sadan,2nd Floor, Dr. Ambedkar Marg,New Delhi-110055

VERSUS

Commissioner of Service Tax, Audit-I **Respondent**
17-B IAEA House, M.G. Marg, I.P. Estate,New Delhi-110002.

APPEARANCE:

Shri Alok Yadav and Shri Nilotpal Shyam, Advocates for the AppellantShri Harshvardhan, Authorized Representative for the Respondent

CORAM :

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL) HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing:27.07.2023 Date of Decision: 05.10.2023
FINAL ORDER NOs. 51391-51392/2023

HEMAMBIKA R. PRIYA

The Department/appellant and the respondent have filed cross appeals against the order-in-original dated 04.04.2016 passed by the Commissioner of Service Tax, wherein the demand of Rs. 11,01,17,328/- + Rs. 4,40,00,00/- wasconfirmed and penalties of Rs. 21,00,000/- under Section 76 and Rs. 20,000/- under Section 77 was imposed. The period ofdispute is between 2008-09 to 2012-13 and April 2013 toNovember 2013. Present in the common order for both the saidappeals.

2. The brief facts of the case are that the appellant is a bodycreated under Section 7 of Export (Quality Control and Inspection) Act, 1963 and works under the administrative and technical control of Export Inspection Council. The appellant is the field organisation of Export Council under Free Trade Agreement executed between India and foreign nation"s products, eligible for Certificate of Origin required for preferential treatment in exporting country. This was subject tothe said product being certified by certifying authority approved by both the countries. In pursuance to the said FTA, theappellant has been recognised as certificating authority for different food products. The Department alleged that theservice provided by the appellant were exigible to service tax. Two show cause notices dated 17.04.2014 and 17.04.2015 were issued for the period 2008-09 to November 2013 wherein service tax of Rs. 11,01,17,328/- was demanded. The first appeal has been filed by the Department for failure of imposition of appropriate penalty by the Commissioner. The assessee who is referred as appellant herein after has filed the appeal against the demand and penalties imposed in the impugned order.

3. The learned counsel for the appellant submitted that the appellant performs sovereign function of the State and thus not liable to pay service tax for collecting fees in discharge of said function. He stated that the CBEC had clarified this issue by way of two circulars: Circular is 89/7/2006-ST dated 18th December 2006, wherein para 2 of the Circular, clearly states that the *activities performed by sovereign/public authoritiesunder the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. Thefee collected by them for performing such activities is in the nature of compulsory levy, as per the provisions of the relevant statute and it is deposited into the Government treasury. Such activity is purely in public interest and it is undertaken asmandatory and statutory function. These are not in the nature of service to any particular function.* The second Circular No. 96/7/2007-ST dated 23rd August 2007 was also similarly worded. Under Section 3 of the Export (Quality Control and Inspection) Act, 1963, the Central Government set up Export Inspection Council (EIC) to ensure sound development of export trade of India through quality control and inspection. Thelearned counsel submitted that the appellant is under the administrative and technical control of EIC and is also the field organization of Export Inspection Council. Therefore, the appellant is nothing but a part of a statutory body i.e. EIC.

4. The learned counsel stated that Section 7 of the 1963 Act,makes it clear that Central Government may, by notification in the Official Gazette, establish or recognize, subject to such conditions, as it may deem fit, agencies for quality control or inspection or both. As per Section 10 of the 1963 Act, for discharging the function the Central Government may after the due appropriation made by the Parliament or law in this behalf, pay to the Council such sums of money as that Government considers necessary by way of grants, loan or otherwise. Section 17 empowers the Central Government to prescribe Feeschargeable for the purpose of examination and also the manner in which the account of the Council shall be maintained and audited. He further submitted that any rule made under the Actshall be laid before the Parliament. The Rules made under the Act clearly defines an agency, which according to the definition in Rule 2(b) means any agency for quality control or Inspection or both established or recognized by Central Government under Section 7 of the Act. It is submitted that all Export Inspection Agencies have been notified by the Central Government by way of issue of a Notification under Section 7 of the 1963 Act. Threesuch Notifications were issued in the years 1966, 1968 and 2003. It was also made clear by the EIC vide their letter dated 29.10.2013 addressed to all Commissioner of Customs that EIA are authorized to issue health certificates in respect of peanut and peanut product. They have reiterated that EIC/EIAs has been recognized as Competent Authority for issuance of health certificate for European Union and Malaysia as they have to implement the responsibilities assigned by Government of India.The learned counsel submitted that it would relevant to stated that the Fee collected by the agencies is fixed by the Government of India.

He relied on the Public Notice No.40/2009-2014 (RE-2010) dated 9th March, 2011, and other similar Notifications issued for other products, which includes specification of fees. All the Notifications mentioned that the fee to be paid is the fee for testing as fixed by the Central Government. Rule 14 specifies how and where the fund given to the Council is to be deposited, and Rule 16, provides that account is to be audited by C & AG, and Rule 17, provides that the Annual Report of the Council/Agencies shall be laid before the House of Parliament nine months from the closing of the accounting year. The learned counsel submitted that the Commissioner has concluded that EIA is an Agency recognised by the Government and not an Agency constituted by the Government. He submitted that this conclusion was wrong as is evident from the copies of the notifications issued by the Government of India. He further contended that the Commissioner has cited certain services which he has presumed are sovereign functions and has concluded that, in those services, invoice is not issued. The learned counsel stated that the Commissioner appears to have not considered Circular No. 96/7/2007-ST wherein it is clearly mentioned that RegionalReference Standard Laboratory (RRSL) executes sovereign function and the fee charged according to provisions of the relevant statute is in the nature of compulsory levy and are deposited in Government account. Similarly, EIA also collects fee as per Government Notification as provided under the statute. The Commissioner had failed to examine whether the EIA was indeed performing a sovereign function. He submitted that CBEC had clarified that "exporters are already exempted from service tax in „testing and analysis service" availed by them, through the „Refund Route". Any exporter who pays service tax on fee collected by EIC/EIA can claim refund of such service tax paid following the procedure prescribed in Notification No. 17/2009. Effectively, mean that if the recipient of a service is eligible to get refund of the service tax charged by the service provider, then there was no need to examine whether the provider was liable to pay service tax.The CBEC abdicated its responsibility to clarify whether service tax was indeed payable by the appellant in this case and whether the appellant were performing a sovereign function.

5. The learned Counsel further submitted that the amount demanded for the period 2008-09 to 2011-12 was barred by limitation as the show cause notice was issued on 17.04.2014, much beyond the normal period of limitation. The sequence of events clearly shows that prior to the issue of clarification dated19.03.2011 by the TRU holding the appellant liable to pay tax on test charges, indicates that there was no clarity on this issueprior to that date. In such circumstances, the appellant had thebona fide belief that they were not liable to pay tax on their income generated from these services based on the previous circulars of the Government. Therefore, the larger period is notliable to be invoked as the non-payment was not with theintention to evade tax. Further, for the same reason, no penalty could be imposed under Section 78 of the Finance Act, 1994. The same was also not imposable as per the provisions of Section 80 ibid. He relied on the Delhi High Court decision which held that the appellant is a statutory body empowered to inspect and issue certificates. Further, the Mumbai Bench ofthe Tribunal while dealing with the issue of levy of service tax on service charges collected by Maharashtra Industrial Development Corporation (MIDC) dismissed department"s appeal observing that it is the statutory obligation of MIDC to provide and maintain amenities in industrial estates and thus, no service tax can be charged for discharging statutory function. The case of appellant is similar to MIDC as theappellant is also discharging statutory function wherein it is obliged to inspect and certify all the notified products for which statutory fees is being charged. Rule 2(d) of EIA Employees Rules, 1978 clearly defines Agency Employee as Agency employee under deputation with the Central Government or local authority and vice versa. The learned counsel relied on the following decisions:

(i) Central GST, Delhi-III Vs Delhi International AirportLtd. [2023 Live Law (SC) 457].

(ii) Commissioner of Central Excise, Nasik Vs MaharashtraDevelopment Corporation [2018 (9) G.S.T.L. 372 (Bom.)].

(iii) Industrial

6. Learned Authorised Representative submitted that under Section 3 of Export (Quality Control and Inspection), Act, the Central Government may by notification establish Export Inspection Council. Similarly, Export Inspection Agencies (EIA) are established or recognised

under Section 7 of the said Act.As per Section 7(1) of the said Act, the Central Government may by notification establish or recognize such agencies.

7. The learned Authorised Representative relied on the Supreme Court‟s judgement in **Krishi Upaj Mandi Samiti,New Mandi Yard, Alwar – 2022 (2) TMI 1113 – Supreme Court** wherein it held as follows:

“9. In the present case, it is the case onbehalf of the appellants that the activity of rent/lease/allotment of shop/land/platform/space is a statutory activity and the Market Committees are performing their statutory duties cast upon them under Section 9 of the Act, 1961 and therefore they are exempted from payment of service taxon such activities.

The aforesaid submission seems to be attractive but has no substance. Section 9(2) is an enabling provision and the words used is “market committee may”. It is to be noted that in so far as sub-section (1) of Section 9 is concerned, the word used is “shall”. Therefore, wherever the legislature intended that the particular activity is a mandatory statutory, the legislature has used the word “shall”. Therefore, when under sub-section (2) of Section 9, the word used is “may”, the activities mentioned in Section 9(2)(xvii) cannot be said to be mandatory statutory duty and/or activity. Under Section 9(2), it is not a mandatory statutory duty cast upon the Market Committees to allot / lease / rent theshop/platform/land/space to the traders. Hence, such an activity cannot be said to be a mandatory statutory activity as contended on behalf of the appellants. Eventhe fees which is collected is not deposited into the Government Treasury. It will go to the Market CommitteeFund and will be used by the market committee(s). Inthe facts of the case on hand, such a fee collected cannothave the characteristics of the statutory levy/statutory fee. Thus, under the Act, 1961, it cannot be said to be a mandatory statutory obligation of the Market Committeesto provide shop/land/platform on rent/lease. If the statute mandates that the Market Committees have to provide the land/shop/platform/space on rent/lease then and then only it can be said to be a mandatory statutory obligation otherwise it is only a discretionary function under the statute. If it is discretionary function, then, it cannot be said to be a mandatory statutoryobligation/statutory activity. Hence, no exemption to pay service tax can be claimed.”

8. The learned Authorised Representative submitted that in the governing section for EIA, the word used is „may‟ and not
„shall‟. Hence, it cannot be said that the appellant were discharging mandatory/statutory obligations.

9. The learned Authorised Representative submitted that Section 10(3) of Export (Quality Control and Inspection), Act lays down that the Council shall have its own fund. Rule 14 of Export (Quality Control and Inspection) Rules, 1964, lays down that it shall consist of income and receipts of the Council from other sources and all moneys belonging to the fund of the council shall be deposited in scheduled banks. He submitted that even after the deposit of money in the banks, the same does not cease to be the Council‟s fund. He further relied on para 10 of the Supreme Court‟s judgement (supra) wherein it was held that as long as the money is deposited in the Market Committee Fund, it will continue to be the Market Committee Fund and could be utilized by the Market Committee for expanding/benefit of the Market Committee etc.

10. He further relied on Allahabad High Court‟s decision in thecase of **Greater Noida Industrial Dev. Authority – 2015 (40) STR 95 (All.)** observed:

“30. It is left open to the appellant to raise all such legal as well as factual issues in respect of the second show cause notice dated 17th October, 2012 during remand *de novo* proceedings.

The plea of the appellant that it is performing statutory duties and is a creation of a statute and therefore cannot be subjected to Service Tax does not appeal to us. Suffice is to mention that the Finance Act, 1994 makesno distinction between a statutory body i.e. a juristic person and an individual.

31. As far as the circular dated 23rd August, 2007 issued by the Government of India, which has been so heavily relied upon by the appellant is concerned, wemay record that under Clause 032.01, it has been provided that the Prasar Bharati Corporation (Doordarshan and All India Radio), which has been constituted under the Prasar Bharati (BroadcastingCorporation of India) Act, 1990 is liable to pay ServiceTax for broadcasting services.

32. Similarly under Clause 999.01 with regard to the sovereign/public duties/functions, it has been clarifiedthat activities assigned to and performed by thesovereign/public authorities under the provisions of any law are statutory duties. The fee or amount collected as per the provisions of the relevant statute for performing such functions is in the nature of a compulsory levy and are deposited into the Government account. Such activities are purely in public interest and are undertaken as mandatory and statutory functions. These are not tobe treated as services provided for a consideration. Therefore, such activities assigned to be performed by a sovereign/public authority under the provisions of any law, do not constitute taxable services. Any amount/fee collected in such cases are not to be treated as consideration for the purposes of levy of Service Tax.

33. However, if a sovereign/public authority provides a services, which is not in the nature of an statutory activity and the same is undertaken for a consideration (not a statutory fee), then in such cases, Service Tax would be leviable as long as the activity undertaken falls within the scope of a taxable service as defined."

11. The learned Authorised Representative concluded his arguments by stating that the adjudicating authority has rightly concluded that the appellant is not discharging sovereign functions. As regards the Department‟s appeal, the learned Authorised Representative submitted that the benefit of reducedpenalty was not available as the show cause notice period is 2008-09 to 2012-13. The entire period is not after 8.4.2011, therefore, the adjudicating authority had erred in extending the benefit of 1st proviso to Section 78(1). For the subsequent period as well, the adjudicating authority had erred in imposing penalty under the amended provisions.

12. We have heard the learned counsel for the appellant and the learned authorised representative. The primary issue for consideration before us is whether the services provided by the appellant are not exigible to service tax as they are sovereign functions. At the outset, it is important to appreciate the nature of the appellant. As per the portal of Ministry of Commerce, it is seen that the appellant is an autonomous body, and its role is toensure that products notified under the Export (Quality Control and Inspection) Act 1963 meet the requirements of the importing countries in respect of their quality and safety. Further, in order to consider the issue before us, it would be appropriate to understand the meaning of „Sovereign Function‟,in context of Service Tax. In this regard, we take note of the Board‟s Circular No. 89/7/2006- ST Dated: 18th December,2006 which is reproduced hereinafter:

"**Subject: Applicability of service tax on fee collected by Public Authorities while performing statutory functions /duties under the provisions of a law –regarding**

"A number of sovereign/public authorities (i.e. an agency constituted/set up by government) perform certain functions/ duties, which are statutory in nature. These functions are performed in terms of specific responsibility assigned to them under the lawin force. For examples, the Regional Reference Standards Laboratories (RRSL) undertake verification, approval and calibration of weighing and measuring instruments; the Regional Transport Officer (RTO) issues fitness certificate to the vehicles; the Directorate of Boilers inspects and issues certificate for boilers; or Explosive Departmentinspects and issues certificate for petroleum storage tank, LPG/CNG tank in terms of provisions of the relevant laws. Fee as prescribed is charged and the same is ultimately deposited into the Government Treasury. A doubt has arisen whether such activities provided by a sovereign/public authority required to be provided under a statute can be considered as

„provision of service‟ for the purpose of levy of service tax.

2. The issue has been examined. The Board is of the view that the **activities performed by**

the sovereign/public authorities under theprovision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature ofcompulsory levy as per the provisions of the relevant statute, and it is deposited into the Government treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/public authorityunder the provisions of law does not constitute provision of taxable service to a person and, therefore, no service tax is leviable on suchactivities.

3. However, if such authority performs a service, which is not in the nature of statutory activity andthe same is undertaken for a consideration not in thenature of statutory fee/levy, then in such cases, service tax would be leviable, if the activityundertaken falls within the ambit of a taxable service."

13. In order to understand whether the appellant is discharging sovereign function, it is important to understand thenature of the appellant. It is accepted that the appellant is a body created under Section 7 of Export (Quality Control and Inspection) Act, 1963. The Export Inspection Agency is under the administrative and technical control of the Export Inspection Council. The appellant is the certifying authority for different food products which are to be exported to other countries as perthe Free Trade Agreements executed between India and other nations. The appellant collects a fee for the purpose of examination, quality control or inspection. The structure of the fees for testing is fixed by Central Government. However, we note that as per section 10(3) of Export (Quality Control and Inspection) Act, 1963, the Council has its own fund which consist of income and receipts of the Council from other sourcesand all such money belonging to the fund of the Council is to be deposited in scheduled banks. From the above, we note that though the quantum of fee charged by the appellant is fixed by the Central Government, however the same is not deposited in the Government Treasury. Consequently, this clearly takes the functions of the appellant out of the ambit of para 2 of the aforesaid circular to para 3 of the said circular, which is „provision of service". Though the appellant"s function is essential for inspection of export goods, but the usage of the term „may" in Section 3 of the Export (Quality Control and Inspection) Act, 1963, for the establishment of the Export Inspection Council, thus making it **NOT a mandatory statutory duty activity** of the Government. Consequently, it cannot be said that the appellant is discharging mandatory/statutory obligation.We find that our conclusion is buttressed by the judgement of the Supreme Court in the case of **Krishi Upaj Mandi Samiti, Alwar, Vs Commissioner of Central Excise and Service Tax, Alwar [2022 (2) TMI- 1113- Supreme Court].** The relevant paras are reproduced hereinafter:

"9. In the present case, it is the case on behalf of the appellants that the activity of rent/lease/allotment of shop/land/platform/space is a statutory activity and the market committees are performing their statutory duties cast upon them under section 9 of the act, 1961 and therefore their exempted from payment of service tax on such activities.

The aforesaid submissions seems to be attractive but has no substance. Section 9(2) is an enabling provision in the words used is "market committee may". It is to be noted that in so far as subsection (1) of Section 9 is concerned, the word used is "shall". Therefore, wherever the legislature intended that the particular activities are mandatory statutory, the legislature has used the word "shall". Therefore, when under subsection (2) of section 9, the word used is "may", the activities mentioned in the subsection 9(2)(xvii) cannot be said to be mandatory statutory duty and/or activity. Under section 9(2), it is not mandatory statutory duty casted upon the market committees to a lot/lease/rent shop/platform/land/spaceto the traders. Hence such an activity cannot be said to be mandatory statutory activity as contended on behalf of theappellants. Even the fees which is collected is not deposited into the government treasury. It will go to the Market Committee Fund and will be used by the market committee(s). In the facts of the case on hand, such a fee collected cannot have the characteristics of the statutory levy/statutory fee. Thus, under the act, 1961, it cannot be said to be a mandatory statutory obligation of the market committees to provide shop/land/platform or rent/lease. Ifland/shop/platform/space on rent/lease then and then onlyit can be said to be mandatory statutory obligation otherwise it is only a discretionary

function under thestatute. If it is discretionary function, then, cannot be said to be a mandatory statutory obligation/statutory activity. Hence, no exemption for service tax and claimed."

We also note that the Allahabad High Court in the case of **Greater Noida Industrial Development Authority Vs. Commissioner of Customs, Central Excise - 2015 (40) STR (95) All.]** has held as follows:

"30. It is left open to the appellant to raise all such legal as well as factual issues in respect of the second show cause notice dated 17th October, 2012 during remand *denovo* proceedings.

The plea of the appellant that it is performing statutory duties and the creation of a statute and therefore cannot be subjected to service tax does not appeal to us. Sufficeis to mention that the Finance Act, 1994 makes no distinction between a statutory body i.e., a juristic personand an individual.

31. As far as the circular dated 23rd August, 2007 issued by the Government of India, which has been so heavily relied upon by the appellant is concerned, we may recordthat under clause 032.01, it has been provided that the Prasar Bharati Corporation (Doordarshan and All India Radio), which has been constituted under the PrasarBharti (Broadcasting Corporation of India) Act, 1990 is liable to pay service tax for broadcasting services.

32. Similarly under clause 999.01 with regard to sovereign/public duties/functions, it has been clarifiedthat activities assigned to performed by the sovereign/public authorities under the provisions of any law or statutory duties. The fee or amount collected as per the provisions of the relevant statute for performing such functions is a nature of a compulsory levy and a deposited into the government account. Such activities are purely in public interest and undertaken is mandatory and statutory functions. These are not to be treated as services provided for a consideration. Therefore, suchactivities to be performed by a sovereign/public authorityunder the provisions of law does not constitute taxable services. Any amount/fee collected in such cases are not to be treated as consideration for the purposes of levy of service tax.

33. However, if a sovereign/public authority provides a service, which is not in the nature of statutory activity and the same is undertaken for a consideration (not a statutory levy), then in such cases, service tax would be leviable, as long as the activity undertaken falls withinthe scope of a taxable service as defined."

14. In view of the above discussions and decisions, we are unable to accept the contention of the appellant that the functions of Technical Inspection and Certification services rendered by them is a statutory function. We have also considered the decisions quoted by the learned counsel for the appellant. As this issue was dealt in great detail by the SupremeCourt in its decision in **Krishi Upaj Mandi Samiti** (supra) there cannot be any other varying interpretation taken subsequent to this judgment. Accordingly, we hold that the appellant is providing service any undertakes Technical, Inspection and Certification service and the same cannot take the garb of sovereign/statutory function.

15. We now address the second contention of the appellant that they are collecting the fee as mandated by the Central Government. We note that the learned AR has argued before usthat Section 10(3) of Export (Quality Control and Inspection), Act lays down that the Council shall have its own fund. Rule 14 of Export (Quality Control and Inspection) Rules, 1964, lays down that it shall consist of income and receipts of the Council from other sources and all moneys belonging to the fund of the council shall be deposited in scheduled banks. The learned Authorised Representative submitted that even after the depositof money in the banks, the same does not cease to be the Council"s fund. We concur with this view. In this regard, we note that the Supreme Court in the judgement(supra)has gone on to define statutory levy and fees and held the following:

"10. Next provision relied upon by the appellants – respective Market Committees is Rule 45 of the Rajasthan Agricultural Produce Market Rules,1963(hereinafter referred to as „Rules, 1963"), whichreads as under: -

"45. The Market Committee fund. -All money received by the Market Committeeshall be credited to the fund called the Market Committee fund. Except where Government on application by the Market Committee or otherwise shall direct, all money paid into the Market Committee fund shall be credited at least once a week in full into Government treasury or sub-treasury or a bank duly approved for this purpose by the Director. All balance from the fund shall be kept in such treasury or sub treasury or bank and it shall not be withdrawn upon except inaccordance with these rules."

10.1 Now, so far as the submission on behalf of the appellants relying upon Rule 45 of the Rules, 1963 that the fees, which is collected shall be deposited with the Government treasury and therefore also the Market Committees are exempted from payment of service tax is concerned, it is to be noted that on fair reading of Rule 45, the amount of fee so collected on such activities – when/lease shall not go to the Government. Rule 45 provides how the money received by the Market Committees shall be invested and/or deposited. It provides that all moneyreceived by the market committee shall be creditedto the fund called the Market Committee fund. It further provides that all the money paid into themarket committee fund shall be credited once a week in full into Government treasury or sub treasury, or a bank duly approved for this purpose bythe Director and all balance from the fund shall be kept in such treasury or subtreasury or bank and it shall not be withdrawn except in accordance with theRules. Therefore, it does not provide that on deposit of the money received by the market committees into the Government treasury/subtreasury or a bank duly approved, it ceases to be the Market Committeefund. It will continue to be the market committee fund. Even it is the case on behalf of the appellants that the fees collected, which will be deposited in theMarket Committee fund will be utilised by the Market Committee for expanding/benefit of the Market Committee etc."

16. In the instant case, we concur with the findings in the impugned order and the arguments of the learned Authorised Representative that as the money is not deposited in the Government Treasury, and is available with the appellant. The same is the consideration received by the appellant for providing the Consultancy Service which admittedly is not transferred to the Government treasury. Hence this money cannot be equated with fee collected for discharging sovereign function.

17. The learned counsel for the appellant has submitted that the demand for the period 2008-09 to 2011-12 is barred by limitation, as the same was issued on 17.04.2014. The appellant has relied on the TRU"s clarification dated 19/03/2011wherein it was clarified that service tax was leviable on test charges. It has been contended before us that the issue of the aforesaid clarification clearly indicates that prior to this date, there was no clarity on the leviability of service tax on such testcharges. He has further been submitted before us that being an agency constituted by the Central Government, there was no intention to evade payment of tax and for the same reason penalty under Section 78 and Section 80 of the Finance Act, 1994 was also not leviable. In this context, we note that the adjudicating authority has referred to the Notification No. 17/2009-ST dated 07.07.2009, which lays down the procedure for refund of service tax paid by exporters for availing various services during export of goods. In the Table of the said notification, serial number 4 refers to „service provided by technical inspection and certification agency in relation to inspection and certification of export goods". The intent of the wordings of the notification is clear- such services are liable to tax. The appellant is an autonomous body though under the Government of India but providing the services of technical inspection and certification against consideration. Therefore, they were liable to tax, and this has been made quite clear in the said notification, which was issued in July, 2009. Consequently, the claim of the appellant that there was confusion with the regard to the applicability of service tax on test charges till the issuance of the clarification dated19/03/2011 cannot be accepted.

18. It is brought on record that the appellant was apprised about the service tax liability on the impugned services through an office memorandum dated 19.03.2011. However, despitereceiving the clarification, the appellant failed to get themselvesregistered and deposit their service tax liability to the government exchequer. To our minds, this establishes their intention to avoid payment of duty. We note that a plain reading of the provisions of Section 78 of the Finance Act, 1994,before the amendment makes it clear that the quantum ofpenalty to be imposed shall be equal 100% of the amount of such service tax. We note that the present demand covers the period from 2008–09 to 2013–14 (up to November, 2013)Therefore, the

penalty for the period prior to 08.04.2011 should have been equal to 100% of the service tax not paid for this period. In view of the legal position prior to 08.04.2011, we hold that the Commissioner had erred in extending the benefit of reduced penalty under Section 78(1) for the period 2009-09 to 07.04.2011. However,the benefit of reduced penalty under the amended provision ofsection 78(1) was available to the appellant post 08.04.2011. In view of the discussions above, we dismiss the appeal filed bythe appellant (i.e. Appeal No. 52477 of 2016). We uphold the demand and the interest confirmed in the impugned order.However, in respect of the penalty under Section 78, we hold that the penalty for the period prior to 08.04.2011, shall be equal to the service tax not paid by the appellant. For the period post 08.04.2011, the benefit of the amended penal provision is extended to the appellant. The appeal filed by the department is allowed (i.e. Appeal No. 52279 of 2016). The impugned order is amended to the extent indicated above. The appeal filed by the appellant is dismissed.

(Pronounced in open Court on 05.10.2023)

(Dr. Rachna Gupta)Member (Judicial)

(Hemambika R. Priya)Member (Technical)

RM

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

Service Tax Rectification of Mistake Application No. 50584 of 2023

(on behalf of the applicant)

in

Service Tax Appeal No.50377 Of 2021

[Arising out of Order-in-Original No. 35/TPS/PC/CGST/DSC/2020-21 dated 18.11.2020 passed by the Commissioner of Goods & Service Tax and Central Excise, New Delhi]

M/s Berkowits Hair & Skin Clinic : Appellant (s)
(Prop. M/s Seema Goel, LGF, J-1, Kailash Colony Greater Kailash-1, New Delhi-110048

Vs

Principal Commissioner, Central Excise
& Central Goods, Service Tax-Delhi South : Respondent (s)

(Plot No. 2-B, EIL, Annexe, 3rd Floor Bikaji Cama PlaceDelhi South New Delhi-110066

APPEARANCE:

Shri Amit Jain, Advocate for the Appellant

Shri Rajeev Kapoor, Authorised Representative for the Respondent

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing:06.02.2024Date of Decision:06.03.2024

MISCELLANEOUS ORDER No. 50146 /2024HEMAMBIKA R. PRIYA

The applicant has filed an application for Rectification of Mistake in the Final Order No. 51041 of 2023 dated 10.08.2023 on the ground that the applicant has noticed the following mistakes which are apparent from the record and need to be rectified in terms of provisions of Section 35C(2) of the Central Excise Act, 1944, read with Section 86(7) of the Finance Act, 1994, read with Rule 41 of the CESTAT (Procedure) Rules, 1982.

2. The Learned Counsel submitted that the following mistakesare apparent on record:

(a) No finding has been given on the issue of Quantificationof Demand.

The Learned Counsel submitted that in paragraphs 29 to 38 of the Synopsis filed at the time of hearing of the appeal, two issues were raised with regard to quantification of the demand; (i) Cum-tax benefit to be granted; and (ii) Value of products sold to be excludedfrom the value of the service of 'Radio Frequency Treatment'. In this regard, he, inter alia, submitted that the Applicant is eligible to the cum-tax benefit in terms of the provisions of Section 67(2) of the Finance Act, 1994 and that the products sold had no relevanceat all to the service of 'Radio Frequency Treatment', the same were billed separately and applicable VAT was paid on such sale. He also contended that various submissions in this regard were also made in

paragraph 4.7 of the 'Grounds of Appeal' in the appeal filed. Illustrative copies of the invoices for the products sold were also submitted along with the Synopsis, as Annexure-A & Annexure-B. Copies of the VAT Returns for the year 2016-17, showing paymentof VAT on the sales turnover, are available at page 55-62 of Appeal paper book-Vol. 2.

The Learned Counsel relied on the following judgements: -

- **Assistant Commissioner, Income Tax, Rajkot vs. Saurashtra KutchStock Exchange Ltd.[1],**
- **Commissioner of Central Excise & Customs, Valsad vs. Atul Ltd. [2]**
- **Honda Siel Power Products Ltd. vs. Commissioner of Income Tax,Delhi,[3]**

2 (b). Applicant's submissions regarding non-applicabilityof the extended period of limitation have not been considered.

The learned counsel also submitted that on the issue of extended period of limitation, the CESTAT has held against the Applicant referring only to the finding of Principal Commissioner to the effect that the service in question was not undertaken by the Applicant at the time of audit for the financial years 2009-10 to 2013-14, thus, provision of this service was not in the knowledge ofthe Department. He contended that detailed submissions on this issue were made in paragraphs 39 to 49 of the Synopsis filed by theApplicant at the time of hearing of the matter as well as in paragraph 4.3 of the 'Grounds of Appeal' in the appeal filed. It was, inter alia, submitted that in view of the Audit Report for the period
F.Y. 2009- 10 to 2013-14, accepting the services then provided by the Applicant to be eligible to the benefit of Notification No. 25/2012-ST, as amended, theApplicant was under a bona fide beliefthat these services being of similar nature are also similarly eligible to the benefit of notification.

2. (c). The finding of 'Radio Frequency Treatment' being Cosmetic Surgery is contrary to the finding in the earlier partof the same paragraph of the Final Order as well as thefinding of the Principal Commissioner in the impugned order that the process is non-surgical.

The learned Counsel submitted that in paragraph 14 of the Final Order dated 10.08.2023, it has been held that all these common skin conditions (viz., Warts, Moles, Freckles) are not usually life threatening, and any procedure to remove such warts/ moles or freckles is undertaken to enhance physical appearance or beauty. Therefore, their removal would clearly fall under the category of cosmetic surgery. He added that the findings on this issue are contradictory as in the earlier part of the same paragraph 14 of the Final Order dated 10.08.2023, it has been observed that
"the 'Radio Frequency Treatment is a non-surgical cautery ....."whereas

in the latter part of the same para it has been held to be "clearly fall underthe category of cosmetic surgery".

He further submitted that the finding holding the process to be 'non-surgical' as well as 'surgery' at the same time are apparently contradictory.While holding it to be falling under the category of Cosmetic Surgery, the Final Order also does not state whether the process of 'Radio Frequency Treatment' satisfies the definition of 'Surgery' within the meaning of TRU's letter dated06.07.2009 referred to in para 12.1 of the Final Order. Further, hesubmitted in paragraph 14 of the Synopsis, the Principal Commissioner himself, in paragraph 52 of the impugned order, heldthe 'Radio Frequency Treatment to be a non-surgical treatment. This finding of the learned Principal Commissioner in the impugned order has not been contested by the Department, and has, thus, attained finality.

2. (d). There is no discussion on the issue of imposition of Penalty.

The learned counsel submitted that by the impugned order, penalty equal to the demand confirmed was imposed upon the Applicant under Section 78 of the Finance Act, 1994, Detailed submissions in this regard were made in paragraphs 6.1 to 6.8 of the 'Grounds of Appeal' in the appeal as well as in paragraph 50 of the Synopsisfiled by the Applicant. However, the only finding given in paragraph 17 of the Final Order dated 10.08.2023 on the issue of penalty is *"the penalty amount is accordingly modified"*.

It is submitted that on the issue of penalty as well there has been no consideration of the ingredients of the statutory provisions of Section 78, satisfaction of which is a pre-requisite for imposition of penalty under this provision. There is also no consideration of thevarious submissions made by the Applicant as well as the various judgments cited on this issue. Non- consideration of the same, therefore, constitutes an error

apparent from the record, which needs to be rectified.

Concluding his arguments, the learned Counsel submitted thatthe mistakes, as indicated above, were factual in nature and apparent from the records of the case. Hence, the present Application for Rectification of Mistake has been filed praying for rectification of the same, giving appropriate finding on these issues.

3. We have considered the application and the submissions made by the learned counsel in this regard. We proceed to deal witheach of them individually.

(a) No finding has been given on the issue of Quantificationof Demand: A perusal of the grounds of appeal, and the final order reveals that this issue was raised by the learned Counsel during his submissions. It was contended before us that the Department has not grossed up the receipts for computing the demand in the SCN.It was alleged that the Service Tax had been computed on the entire receipts whereas the same should have computed considering the receipts were inclusive of service tax and the demand should have been determined using reverse calculation. Wenote that the appellant had contended that the sale of products had no relevance to the Radio Frequency Treatment, and further that these were billed separately and applicable VAT was paid on such sales. These contentions of the appellant are on facts, which cannot be verified at this stage. It would therefore be appropriate toremand this issue to the original authority to verify the contentionof the appellant.

(b). Applicant's submissions regarding non-applicability ofthe extended period of limitation have not been considered: The learned counsel has submitted that his argument in respect ofthe extended period has not been considered. In this regard, wenote that this argument of the learned counsel has been considered.The Bench has taken note of the argument, but has however heldthat extended period is invokable in the case of Radio FrequencyTreatment. The relevant paragraph of the order is reproduced:

"15. We now come to the limitation issue. We note that the Commissioner has held that these two services were not hit by limitation as these were notundertaken by the appellant at the time of the audit for the financial year 2009-10 to 2013-14. This has been corroborated by the appellant vide their email dated 16.11.2020. The observations of the Commissioner is reproduced for clearer understanding:

"56.16. I have gone through the reply of the assessee vide their email dated 16.11.2020. The assessee has submitted that Autologous Micrograph Treatment and Radio Frequency Treatment were not provided during the earlier audit period FY 2009-10 to FY 2013-14. Thus, I find that the provision of Autologous Micrograph Treatmentand Radio Frequency Treatment services were not in the knowledge ofthe Department during the audit conducted by the Department for the period FY 2009-10 to FY 2013-14 and hence, the contention of the assessee/Noticee that Beauty Parlour/Beauty Treatment Services whereby the practice of treating the hair for disease as healthcare services was duly recognised and accepted by the Department and same were found to be exempted vide Notification Number 25/2012- ST dated 20.06.2012 and an Internal Audit Report(IAR) No.260/2016-17 dated 10.08.2016 was issued to this effect is not correct in respect of provision of Autologous Micrograph Treatment and Radio Frequency Treatment services. In the era of self-assessment, where higher responsibility has been cast upon the assessee to pay his taxes correctly and voluntarily without interference by the departmentalofficers, the act of not declaring additional services such as autologousmicrograph treatment and radiofrequency treatment with effect from 2014 – 15 and 2016 – 17 respectively and not paying taxes on themis an act of suppression with the intent to evade payment of duty".

16. From the above factual matrix, it is clear that the two treatments were not in the knowledge of the Department. It is evident from the fact that the Commissioner has dropped the demand of Rs. 2,39,00438/- on other services viz., Alopecia Injection, Hairloss therapy, Mesotherapy, Platelet RichPlasma etc on the ground that these were recognised by the department in the Internal Audit Report (IAR) No. 260/2016-17 dated 10.08.2016, asthese were undertaken by the appellant during the period of the last Audit. Hence, the invocation of the extended period under Section 73 of theFinance Act, 1994 relating to Radio Frequency Treatment is justified and is upheld."

It is noted that the contention of the learned counsel has not been accepted, as per the findings of the impugned order. It is pertinentto state here that the adjudicating authority in the impugned order has dropped the demand on some of the treatments on the grounds that audit had been conducted and the audit had failed to take note that these treatments were being given by the appellant. Per contra, the details of treatment not undertaken during the audit of the records of the appellant, and thereafter, not declared to the Department would amount to suppression, and this aspect has been accepted in the Final order. We also note that thereis a categorical finding of the Commissioner that the Department was not aware of the Radio

Frequency Treatment. There is nothing contrary brought on record by the appellant. In this regard, we take support of the decisions of this Tribunal wherein it has been held that extended period is invokable if all facts are not declared inthe returns and facts come out during the course of audit only.

(i) Sunrise Industries vs Commissioner of Central Excise, Bangalore[4]

(ii) HSBC Securities & Capital Markets vs Commissioner of S.T.,Mumbai[5]

Accordingly, we reject this submission of the appellant.

(c). The finding of 'Radio Frequency Treatment' being Cosmetic Surgery is contrary to the finding in the earlier partof the same paragraph of the Final Order as well as thefinding of the Principal Commissioner in the impugned order that the process is non-surgical.

The learned counsel has submitted that in paragraph 14 of theFinal Order dated 10.08.2023, it has been held that all these common skin conditions (viz., Warts, Moles, Freckles) are not usually life threatening, and any procedure to remove such warts/ moles or freckles is undertaken to enhance physical appearance or beauty. Therefore, their removal would clearly fall under the category of cosmetic surgery. A perusal of the final order indicates that this contention is indeed correct.

(d). There is no discussion on the issue of imposition ofPenalty.

The learned counsel has submitted that by the impugned order, penalty equal to the demandconfirmed was imposed uponthe Applicant under Section 78 of the Finance Act, 1994, Detailed submissions in this regard were made in paragraphs 6.1 to 6.8 of the 'Grounds of Appeal' as well as in paragraph 50 of the Synopsis filed by the Applicant. However, the only finding given in paragraph 17 of the Final Order dated 10.08.2023 on the issue of penalty is

"the penalty amount is accordingly modified".

We find that once it has been held that extended period was invokable with regard to Radio Frequency Treatment, the penalty provisions automatically flow. In view of the same, we reject this submission as well.

4. In view of the discussions above, the following amendments are considered and ordered:

(i) The last line of paragraph 14 of the final order will read as “Therefore, their removal would clearly fall under thecategory of cosmetic procedure”, instead of ‘Therefore, their removal would clearly fall under the category ofcosmetic surgery’.

(ii) Paragraph 17 of the Final Order shall be amended to read asfollows:

“17. In view of the above, we set aside the demand relating to Autologous Micrograft Treatment and upholdthe demand confirmed in respect of Radio Frequency Treatment. However, the issue relating to quantification ofthe demand taking into consideration the contentions regarding cum-duty tax/demand of tax on sale of goods isremanded to the adjudicating authority for recalculation. The penalty amount is accordingly modified. The appeal is allowed partially and the order in original is modified to that extent.”

5. The other two contentions on the application are rejected. The application is disposed of accordingly.

(Pronounced in the open court on 06.03.2024)

(JUSTICE DILIP GUPTA)PRESIDENT

(HEMAMBIKA R PRIYA)
MEMBER (TECHNICAL)

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALWEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03

SERVICE TAX Appeal No. 12937 of 2014- SM

[Arising out of Order-in-Original/Appeal No SUR-EXCUS-001-APP-33-14-15 dated 08.05.2014 passed by Commissioner of Central Excise, Customs and Service Tax- SURAT-I]

Archna Traders **...Appellant**

Basement, Parijat Apartments,

Opp St Xavier School, Ghod Dod Road,Surat,

Gujarat

VERSUS

C.C.E. & S.T.-Surat-i **...Respondent**

New Building...Opp. Gandhi Baug,Chowk Bazar,

Surat,

Gujarat-395001

APPEARANCE:

Shri S J Vyas, Advocate for the Appellant

Shri. Himanshu P Shrimali, Superintendent (Authorized Representative) forthe Respondent

CORAM: HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO.A / 12360 /2023

DATE OF HEARING: 26.10.2023DATE OF DECISION: 26.10.2023

RA

This appeal has been filed by M/s. Archna Traders against denial of benefit of VCES Scheme to the appellant.

2. Learned Counsel for the appellant pointed out that they had applied forVCES Scheme, however the benefit of VCES Scheme was denied to him invoking Section 106 of the Finance Act, 2013. The said Section reads as follows:

“106. (1) Any person may declare his tax dues in respect of which no notice or an order of determination under section 72

or section 73 or section 73A of the Chapter has been issued ormade before the 1st day of March, 2013:

Provided that any person who has furnished return under section 70 of the Chapter and disclosed his true liability, but hasnot paid the disclosed amount of service tax or any part thereof,shall not be eligible to make declaration for the period coveredby the said return:

Provided further that where a notice or an order of determination has been issued to a person in respect of any period on any issue, no declaration shall be made of his tax dueson the same issue for any subsequent period.

(2) Where a declaration has been made by a person againstwhom,-
(a) an inquiry or investigation in respect of a service taxnot levied or not paid or short-levied or short-paid has been initiated by way of -
(i) search of premises under section 82 of the Chapter; or
(ii) issuance of summons under section 14 of the Central Excise Act, 1944 (1 of 1944), as made applicable to theChapter under section 83 thereof; or
(iii) requiring production of accounts, documents or other evidence under the Chapter or the rules made thereunder;or

(b) an audit has been initiated,

and such inquiry, investigation or audit is pending as on the 1stday of March, 2013, then, the designated authority shall, by anorder, and for reasons to be recorded in writing, reject such declaration."

2.1 He argued that in the instant case inquiry was initiated against M/s.

Adani and summon was issued to the appellant on 28.03.2012 and 07.03.2013. Learned Counsel argued that there was no inquiry against the appellant and the inquiry was only against M/s. Adani and therefore invocationof Section 106 to deny the benefit of VCES Scheme is incorrect.

3. Learned AR relied on the impugned order.

4. I have considered the rival submissions. I find that Section 106 elaborates the nature of person who is eligible to make a declaration under VCES Scheme. Sub-section 2 of 106, prescribes that people against whom anyinquiry or investigation have been initiated prior to 1 March 2013 are not eligible for making VCES declaration. In the instant case, we find that a summon was issued to the appellant on 28 March, 2012 and subsequently again on 07.03.2013. Clause 2 of Section 106 reads as follows:

"106(2) Where a declaration has been made by a person against whom,-

(a) an inquiry or investigation in respect of a service taxnot levied or not paid or short-levied or short-paid has been initiated by way of -

(i) search of premises under section 82 of the Chapter; or

(ii) issuance of summons under section 14 of the Central Excise Act, 1944 (1 of

1944), as made applicable to theChapter under section 83 thereof; or

(iii) requiring production of accounts, documents or other evidence under the Chapter or the rules made thereunder;or

(b) an audit has been initiated,

and such inquiry, investigation or audit is pending as on the 1stday of March, 2013, then, the designated authority shall, by anorder, and for reasons to be recorded in writing, reject such declaration."

4.1 It is seen that Clause (ii) & (iii) of sub-Section 106 (2) prescribes that, where summon has been issued 14 of Central Excise Act 1944, the person becomes in eligible for the scheme. In the instant case, it is noticed that a summon was issued to the appellant on 28.03.2012 much prior to the cut offdate of 01 March 2013. Moreover, it is also informed to the court by the Learned Counsel that the subsequently a demand SCN was issued to theappellant in the same proceedings which were initiated by said summons. Inview of above the appellants were rightly held ineligible for the scheme.

5. In this background, I do not find any error in the impugned order. Theappeal is therefore dismissed.

(Dictated & Pronounced in the open Court)

(RAJU)MEMBER (TECHNICAL)

PALAK

Back

Customs, Excise & Service Tax Appellate TribunalWest Zonal Bench At Ahmedabad

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 13727 of 2014
[Arising Out Of OIA-RJT-EXCUS-000-APP-164-14-15 Dated- 28/08/2014 Passed ByCommissioner of Service Tax-RAJKOT]

Natural Petrochemicals Pvt Ltd **…..Appellant**
Survey No. 443, Village : Bhimasar,Taluka : Anjar, Kutch,

Gujarat

VERSUS

C.C.E. & S.T.-Rajkot

…..Responden t
Central Excise Bhavan,

Race Course Ring Road...Income Tax Office,Rajkot, Gujarat-360001

APPEARANCE:

Shri. Dhaval K Shah, Advocate for the Appellant
Shri. A K. Mudvel, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO.A / 12059 /2023

DATE OF HEARING:11.09.2023 DATE OF DECISION:18.09.2023

RAJU

This appeal has been filed by Natural Petrochemicals Pvt. Ltd against demand of Service Tax under the head of Business Auxiliary Service.

2. Learned Counsel for the appellant pointed out that the appellants are *inter alia* engaged in providing services under the category of Goods Transport Agency and Business Auxiliary Service. During the course of audit,it was noticed that the appellants had received the commission income from M/s Gopal Enterprise and Galaxy Enterprise amounting to Rs. 78,08,192/-and Rs. 5,30,085/- respectively. During the audit, they were asked about the chargeability of Service tax on the said commission received by them under the head of Business Auxiliary Service. Later on show cause notice was issuedand demand of service tax was confirmed against the appellant. The impugned order by Commissioner (Appeals) confirmed the demand of service tax and also upheld imposition of penalty under 78. Learned Counsel pointed out that the entire details of the transaction were reported in their financial statement and there was no intention to evade service tax. He argued that, there was no *mens rea* and therefore extended period of limitation could not have been invoked. He argued that the evidence in the present case was based on the documentary evidence on records including ER-2 return and invoices of the assessee.

2.1 Learned Counsel further argued that the Business Auxiliary Service was first time made taxable w.e.f 01.07.2003, however vide Notification No. 13/2003-ST dated 20.06.2003, the same was exempted up to 09.07.2004. The said income became taxable only w.e.f 09.07.2004.

3. Learned AR relied on the impugned order. He pointed out that theappellant had not disclosed the said income under their monthly returns. He further pointed out that even if the appellant's believed that the said income was exempt, they were still required to declare the same in their monthly returns which they failed to do.

4. We have considered the rival submissions. We find that the appellants are essentially arguing the matter on the issue of limitation. It is noticed that the appellant had not declared the said income in their monthly returns. Even if the appellant believe that the said income was exempted from service tax, they should have declared the same as exempted income. It is noticed that intheir pleadings, they have also argued that they have not paid the service taxdue to financial Hardship. These facts clearly indicate that the appellant were fully aware about the taxability of the service and deliberately neither paid the tax nor declared the said income in the monthly returns. In these circumstances, we find that the appellant are fully aware of their liability and choose not be paid service tax on account of financial Hardship or otherwise.

5. In these circumstances, we do not find any merit in the appeal filed by the appellant, the same is dismissed.

(Pronounced in the open Court on 18.09.2023)

(RAMESH NAIR)MEMBER (JUDICIAL)

(RAJU)MEMBER (TECHNICAL)

PRACHI

Back

Customs, Excise & Service Tax Appellate TribunalWest Zonal Bench At Ahmedabad

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 10029 of 2022- DB

(Arising out of OIA-AHM-EXCUS-002-APP-39-2021-22 dated 01/12/2021 passed byCommissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

CADILA PHARMACEUTICALS LTD **Appellant**

Cadila Corporate Campus,Sarkhej- Dholka Road, Village: Bhat Dholka

Ahmedabad, Ahmedabad, Gujarat

VERSUS

C.S.T.-SERVICE TAX - AHMEDABAD

……Responden t

7 Th Floor, Central Excise Bhawan, Nr. PolytechnicCentral Excise Bhavan, Ambawadi,

Ahmedabad, Gujarat- 380015

APPEARANCE:

Shri S. J. Vyas, Advocate for the Appellant

Shri, Rajesh Nathan, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIRHON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No. 11758/2023

DATE OF HEARING: 03.07.2023 DATE OF DECISION: 23.08.2023

RAMESH NAIR

This appeal is directed against impugned order in appeal dated 24.11.2021. Whereby, the Learned Commissioner (Appeals) has remanded the matter to the Adjudicating Authority, to examine the issue on merit following the principles of natural Justice. The issue involved in the present case is that whether the payment of fees paid to USFDA for approval of theirmedicaments can be treated as service as per Finance Act, 1994 and consequently liable to Service Tax on reverse charge basis under Section66A or otherwise.

2. Shri S. J. Vyas, Learned Counsel appearing on behalf of the appellant submits that the Adjudicating Authority in his order clearly held that the feespaid to USFDA is not against any service on the ground that it is a statutory fees paid to the Government of U.S.A. therefore no service is involved hencedropped service tax liability. It is a submission that against the Order-in- Original the revenue filed the appeal before commissioner (Appeals). However, whether the activity is service or otherwise was not challenged. Therefore, the remand by the commissioner (Appeals) is not legal andproper. Hence the order needs to be

set aside.

3. Shri Rajesh Nathan, Learned Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the findings of the impugned order. He submits that the entire case involved the taxability of the activity for which the fees was paid to USFDA. Therefore, the issue whether the activity is service or otherwise is a part of overall dispute raised by the revenue before the Commissioner (Appeals). Accordingly, the Learned Commissioner (Appeals) has rightly remanded the matter to the Adjudicating Authority.

4. We have carefully considered the submission made by both sides and perused the records. We find that the limited issue in the present appeal is that whether the remand ordered by the commissioner (Appeals) is correct or otherwise. We find that the entire issue involved is whether the fees paid by the appellant to overseas USFDA is against the service and hence the same is liable to Service Tax or otherwise. The Learned Counsel strongly submits that the Adjudicating authority has decided that the fees paid by theappellant to USFDA is not towards any service on the ground that the USFDAis a Government of USA department, therefore, no service is involved.

4.1 We find that the activity is a service or otherwise that depends on the issue that whether the USFDA should be treated as Government in terms of 'Negative List' under Section 65B(37). Therefore, the activity is service or otherwise is a consequential to the decision, whether the Service provider to the government or other then the Government. Therefore, we do not agree with the appellant that the decision of the activity as service attained finality as per original order, which was not challenged by the department before the Commissioner (Appeals). Accordingly, we do not find any infirmity in the impugned order in appeal whereby the matter was remanded to the commissioner (Appeals). The appellant is at liberty to raise any of the issue in their defense before the Adjudicating authority. Therefore, the remand is not prejudicial to the interest of the appellant. Hence, we are of the viewthat the impugned order is clearly sustainable and the appeal has no substance.

5. Therefore, the impugned order is upheld and the appeal filed by the appellant is dismissed.

(Pronounced in the open court on 23.08.2023)

(RAMESH NAIR)MEMBER (JUDICIAL)
(C L MAHAR)MEMBER (TECHNICAL)

Raksha

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 20314 of 2014

[Arising out of Order-in-Original No. 03/2013-14 dated 07.10.2013 passed by the Commissioner of Central Excise & Service Tax (Adjudication), Bangalore]

Mann And Hummel Filter Pvt Ltd **……Appellant**
No. 27, 28 & 29, Block A, Antharasanahalli
Industrial Area, Tumkur, Karnataka - 572106

VERSUS

Commissioner of S.T., Bangalore-I **……Respondent**
1st to 5th Floor, TTMC Building, BMTC Bus Stand, Domlur,
Bangalore, Karnataka - 560071

WITH

Service Tax Appeal No. 20414 of 2016

[Arising out of Order-in-Original No. 37/2015 dated 31.12.2015 passed by the Commissioner of Service Tax -I Commissionerate, Bangalore]

Mann And Hummel Filter Pvt Ltd **……Appellant**
No. 27, 28 & 29, Block A, Antharasanahalli
Industrial Area, Tumkur, Karnataka - 572106

VERSUS

Commissioner of S.T., Bangalore-I **……Respondent**
1st to 5th Floor, TTMC Building, BMTC Bus Stand, Domlur,
Bangalore, Karnataka - 560071

APPEARANCE:

Present for the Appellant: Sh. Akbar Basha, Chartered Accountant Present for the Respondent: Sh. Jathin K. A., Authorized Representative

CORAM:
HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)
HON'BLE Mr. PULLELA NAGESWARA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 21242-21243/2023

DATE OF HEARING: 28.08.2023 DATE OF DECISION: 28.08.2023

PER D. M. MISRA

These two appeals are filed against respective Order-in- Original Nos. 03/2013-14 dated 07.10.2013 passed by the Commissioner of Central Excise & Service Tax (Adjudication), Bangalore and 37/2015 dated 31.12.2015 passed by the Commissioner of Service Tax -I Commissionerate, Bangalore. Since the issues are common in both the appeals, the same are taken up together for hearing and disposal.

2. Briefly stated facts of the case are that the during the period from September 2008 to November 2010 (Appeal No. ST/20314/2014) and from October 2011 to September 2014 (Appeal No. ST/20414/2016), the appellants even though availed the services of some of the employees from their overseas company at Germany namely M/s Mann+Hummel GmBH and deposited a portion of the salary to the bank account of their overseas company but failed to discharge service tax on reverse charge mechanism being recipient of service under the taxable category of 'Manpower Recruitment or Supply Agency Service'. Consequently, two show cause notices were issued to the appellant on 30.03.2012 and 20.02.2015 for recovery of service tax of Rs.62,55,262/- and Rs.1,83,71,836/- for the period from September 2008 to November 2010 and from October 2011 to September 2014 respectively with interest and proposal of penalty. On adjudication, demands were confirmed with interest and penalty under Section 78 of the Finance Act, 1994. Hence, the present appeals.

3. At the outset, the ld. Chartered Accountant for the appellant submits that the issue of chargeability of service tax on the services received by the appellant from their overseas company, is no more *res integra* being settled by the Hon'ble Supreme Court in the case of ***CC, CE & ST, Bangalore (Adj.) vs. Northern Operating Systems Pvt Ltd – 2022 (61) GSTL 129 (SC)***. He submits that while confirming the leviability of service tax, the Hon'ble Supreme Court in the aforesaid case held on the facts of the case that extended period of limitation cannot be invoked. He submits that in confirming the demand invoking extended period, the ld. Commissioner has observed that non- payment of service tax for the services availed, came to the knowledge of the Department only during the course of audit and accordingly, extended period is invokable. However, there is no finding of mis-declaration, suppression of facts etc on the part of the appellant with intent to evade payment of service tax has been brought on record. Further, he submits that the judgments delivered by the Tribunal during the relevant time led to the *bona fide* belief that the aforesaid services received by the appellant could not fall under the scope of 'Manpower Recruitment or Supply Agency Service'. He submits that taking note of the said circumstances, the Hon'ble Supreme Court held that extended period of limitation cannot be invoked. Consequently, imposition of penalty is also unsustainable in law.

4. The ld. AR for the Revenue reiterates the findings of the ld. Commissioner.

5. Heard both sides and perused the records.

6. We find that the ld. Advocate for the appellant has fairly accepted that the issue on merit has been decided by the Hon'ble Supreme Court in ***Northern Operating Systems Pvt Ltd*** 's case (supra) against the assessee, hence, there is no point in advancing arguments on merit. However, they seriously contest invoking of extended period of limitation and imposition of penalty.

7. Analysing the allegations made in show cause notices as well as findings by

the ld. Commissioner on the issue of invoking extended period, we do not find any substantial ground supported with evidence indicating that service tax was not paid by the appellant by resorting to mis-declaration, suppression of facts etc, warranting application of extended period of limitation in confirming the service tax. The Hon'ble Supreme Court while deciding the applicability of extended period of limitation in ***Northern Operating Systems Pvt Ltd*** 's case (supra) observed as follow:

"62. *The revenue's argument that the assessee had indulged in wilful suppression, in this Court's considered view, is insubstantial. The view of a previous three judge ruling, in Cosmic Dye Chemical*

v. Collector of Central Excise [(1995) 6 SCC 117 = 1995 (75)

E.L.T. 721 (S.C.)] - in the context of Section 11A of the Central Excise Act, 1944, which is in identical terms with Section 73 of the Finance Act, 1994 was that :

"Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Misstatement or suppression of fact must be wilful."

63. *This decision was followed in Uniworth Textiles v. Commissioner of Central Excise [(2013) 9 SCC 753 = 2013 (288)*
E.L.T. 161 (S.C.)] where it was observed that "(t)he conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts" is "untenable". This view was also followed in Escorts v. Commissioner of Central Excise [(2015) 9 SCC 109 = 2015 (319) E.L.T. 406 (S.C.)],

Commissioner of Customs v. Magus Metals [(2017) 16 SCC 491 = 2017 (355) E.L.T. 323 (S.C.)] and other judgments.

64. *The fact that the CESTAT in the present case, relied upon two of its previous orders, which were pressed into service, and also that in the present case itself, the revenue discharged the later two show cause notices, evidences that the view held by the assessee about its liability was neither untenable, nor mala fide. This is sufficient to turn down the revenue's contention about the existence of "wilful suppression" of facts, or deliberate misstatement. For these reasons, the revenue was not justified in invoking the extended period of limitation to fasten liability on the assessee."*

8. Following the aforesaid observation of the Hon'ble Supreme Court and considering the circumstances and facts of the present case, confirmation of the demand invoking extended period of limitation by the ld. Commissioner cannot be sustained. For the same reason, imposition of penalty under Section 78 of the Finance Act, 1994 also cannot be sustained. In the result, the demand be restricted to normal period of limitation. Consequently, the impugned orders are modified and appeals are partly allowed to the extent of confirming the demands with interest for the normal period and setting aside the penalty imposed as mentioned above.

(Operative part of the order pronounced in the open court)

(D. M. MISRA) MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO) MEMBER (TECHNICAL)

RA_Saifi

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL, BANGALORE

REGIONAL BENCH - COURT NO. 2

Service Tax Appeal No. 20356 of 2022

[Arising out of Order-in-Appeal No. TVM-EXCUS-000-APP- 392-2021 dated 10/03/2021 passed by the Commissioner ofCentral Tax, Central Excise & Customs, Kochi]

Ocean Polymers
Kinfra Food Processing
Industrial Park, Plot No. 26Elamannoor
P.O, Adoor Pathanamthitta – 691 524
…… Appellant(s)

VERSUS

Commissioner of Central Taxand Central Excise, Thiruvananthapuram
P.B. No. 13, I.C.E Bhawan Press Club Road
Thiruvananthapuram – 695 001Kerala

…… Respondent(s)

APPEARANCE:

Mr. P. Raghunathan, Consultant for the AppellantMr. Dyamappa Airani, AR for the Respondent

CORAM:

HON'BLE MR. PULLELA NAGESWARA RAO, MEMBER(TECHNICAL)

Final Order No. 20892/ 2023

Date of Hearing: 20/04/2023
Date of Decision: 18/08/2023

PER: PULLELA NAGESWARA RAO

M/s. Ocean Polymers, the appellant has filed a refund claim under Section 104 of the Finance Act, 1994, inserted by Finance Act 2017, which was not allowed on the grounds that it was filed beyond the stipulated period of six months, there is nonexus between challans filed with the claim, the worksheetshowing service tax payments were not authenticated by M/s. Kerala Industrial Infrastructure Corporation Ltd.(KINFRA) and that the disclaimer certificate from KINFRA is not original copy but a xerox copy. Against the rejection of refund claim by the original authority, an appeal was filed before Commissioner (Appeals), who has upheld the order of the original authority and dismissed the appeal. Aggrieved with the order of Commissioner (Appeals), this appeal is filed before this Tribunal.

(75) In the appeal filed the appellant submits that as per the declaration inserted by the Finance Act 2017, no service taxwas liable to be collected on lease deeds of more than 30 years executed during the period 1st June 2007 to 21st September 2016 and as such any amount collected during this period is notservice tax but certain amount collected without authority of lawand such amount so collected does not amount to service tax. Hence, the limitation prescribed under any of the provisions of Finance Act, 1994 for grant of refund of service tax do not applyto refund of such amount. As such neither the limitation under Section 11B of the Central Excise Act, 1994 as made applicable to service tax nor the limitation under Section 104 of the Finance Act 1994 as inserted by Finance Act, 2017 applicable to such cases. Only the general limitation applies in this case. Since the appellants have claimed the service tax within the limitation period of 3(three) years from the date of declaration as above, their claim is within limitation and the rejection of thesame as time-barred is illegal. The appellants cited the decision in *Oriental Insurance Company Ltd. Vs. Commissioner of Central Excise and Service Tax, New Delhi reported as 2020 G.S.T.R 44 (CESTAT-DEL.).* The learned Consultant also cited the following case-laws, wherein it is held that limitation prescribed under Section 104 of the Act is not applicable.

i. M/s. Dynamic Techno Medicals Pvt. Ltd. Vs.

Commissioner of CGST & Central Excise – 2021 (4)

TMI 888 – CESTAT – Chennai

ii. M/s. Suprajit Engineering Ltd. Vs. Commissioner of GST & Central Tax, Chennai Outer Commissionerate
– 2020 (5) TMI 290 – CESTAT Chennai

iii. M/s. Satyam Auto Components Pvt. Ltd. Vs.

Commissioner of GST & CE, Chennai Outer Commissionerate – 2019 (11) TMI 246 – CESTAT Chennai

iv. M/s. Teknomec Vs. Commissioner of GST & Central Excise, Chennai – 2019 (7) TMI 1416 – CESTAT Chennai

Hence the rejection of refund claim on the ground that it is not submitted within the time limit prescribed under Section 104 of the Act amounts to judicial indiscipline and is not sustainable. The learned Consultant further submits that the original authority has observed that there is no nexus between the service tax actually paid and service tax claimed as refund, which is incorrect since KINFRA has collected the service tax and had actually paid to the Government and issued disclaimer certificate, wherein the amount of service tax collected and paidby them was shown, clearly. Further they have also filed reconciliation statements showing the service tax collected fromthem by M/s. KINFRA from time to time. Hence there is no justification in alleging that there is no nexus between service tax paid and service tax claimed as refund. This point was also harped by Commissioner (Appeals) in the impugned order. The appellant further submits that they have produced sufficient documents to prove payment of service tax by KINFRA and as such the refund should have been granted on the basis of such documents.

2. Heard the Learned counsel for the appellant and the Learned Authorized Representative (AR) for the Respondent/Revenue and perused the case records.

3. The Learned Authorized Representative for the Revenue reiterated the findings of Commissioner (Appeals) in the impugned order.

4. I find in this case that the appellants have filed the refund claim beyond the time prescribed under sub section 3 of Section104, which was inserted by Finance Act, 2017. Sub section 3 of Section 104 prescribes that "**Notwithstanding anything contained in this Chapter, an application for claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2017 receives the assent of the President**".

The appellants have cited the case-laws, wherein the issue is with respect to limitation prescribed under Section 11B of the Central Excise Act, 1944. Appellants have also cited various other case-laws, wherein the Tribunal has held that since the relevant documents necessary for filing the refund claim were not made available by the concerned Industrial Development Corporation/Undertaking in time, the delay in filing of the refund claim has occurred. Hence the appellant is not fullyresponsible for the delay in filing the refund claim in time. Hence, the delay which occurred in those cases cannot be takenas the delay due to the negligence of the appellant. Since the delay occurred mostly on account of the concerned industrial Development Corporation/undertaking and partly by the Appellant, Tribunal has taken a view that the delay can be condoned. Further, in the case-law cited of this Tribunal ***M/s. Phoenix Rubbers Vs. Commissioner of Central Tax and Central Excise, Calicut – 2021 (7) TMI 633 – CESTAT- BANG.,*** the refund claim was filed within the time limit.

5. Further Section 104 reads as under:-

Special provision for exemption in certain cases relating to long term lease of industrial plots

"*Notwithstanding anything contained in section 66, as it stood prior to the 1st day of July,2012, or in section 66B, no service tax, leviable on one time upfront amount (premium, salami, cost, price, development charge or by whatever name called)in respect of taxable services provided or agreed to be provided by a State Government industrial development corporation or undertaking toindustrial units by way of grant of long term lease of thirty years or more for industrial plots, shall be levied or collected during the period commencing from the 1st day of June, 2007 and ending with 21st day of September, 2016 (both days inclusive).*

(2) Refund shall be made of all such service tax which has been collected, but which would nothave been so collected, had sub-section (1) beenin force at all material times.

(3) Notwithstanding anything contained in this Chapter, an application for claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill,2017 receives the assent of the President.

6. Hence, Section 104 of the Finance Act, 1994 inserted by Finance Act, 2017 is a special provision and all the conditions prescribed therein need to be strictly followed and there is no scope for any other interpretation. In this regard in the case of ***Commr. of C. Ex & S.T., Rajkot Vs. Essar Bulk Terminal Salaya Ltd., reported as 2018 (363) E.L.T. 262 (Tri.-Ahmd.)*** the Tribunal has held that the ld. Commissioner (Appeals) has erred in condoning the delay in filing the refund claim by the respondent. Consequently, the impugned Order was set aside and the Revenue's appeal was allowed. Onappeal before the Hon'ble High Court of Gujarat – ***2019 (25) G.S.T.L. 521 (Guj.)*** it was held that the refund application submitted by the petitioner is rightly rejected as the same is beyond the period of limitation prescribed under sub-section
(3) of Section 103 of the Finance Act, 1994.

7. In my view since there is an express provision in Section 104(3) of the Finance Act, 1994 prescribing a specific timeline for filing of the refund that time limit need to be strictly adhered respective of whatsoever reason may be the cause fordelay in filing the refund claim. I find that similar time limit is prescribed for filing refund under Section 102, Section 103(3), Section 105(3).

8. In view of the above, the appeal is not sustainable and hence the same is dismissed.

(Order pronounced in open court on 18/08/2023)

Iss

(PULLELA NAGESWARA RAO)

MEMBER (TECHNICAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 23099 of 2014

[Arising out of Order-in-Appeal No. 327/2014-ST dated 17.04.2014 passed bythe Commissioner (Appeals) Central Excise, Customs & Service Tax, Cochin]

Commissioner of Customs, CentralExcise & Service Tax, Cochin ……**Appellant**
C R Building, I S Press Road,Ernakulam, Cochin 682 018

VERSUS

Holy Faith Builders And DevelopersPvt Ltd ……**Respondent**
34/2353, Mamangalam,Cochin 682 015

APPEARANCE:

Present for the Appellant: Sh. Dyamappa Airani, D.C. (A.R.)Present for the Respondent: Sh. K. Hariharan, Advocate

CORAM:
HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)
HON'BLE Mr. PULLELA NAGESWARA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 20962/2023

DATE OF HEARING: 22.09.2023DATE OF DECISION: 22.09.2023

PER D. M. MISRA

This appeal is filed by the Revenue against Order-in-Appeal 327/2014-ST dated 17.04.2014 passed by theCommissioner (Appeals) Central Excise, Customs & Service Tax, Cochin.

2. Briefly stated facts of the case are that the Respondent are engaged in providing taxable service under the category of ‘Construction of Residential Complex Service’ and ‘Works ContractService’. Taking Note of the Circular No. 108/02/2009 dated 29.01.2009, they have filed a refund claim for Rs. 1,39,86,203/- on 17.02.2009 being the service tax paid on ‘Construction of Residential Complex Service’ and ‘Works Contract Service’ along with relevant enclosures. On scrutiny of the refund claim, show cause notice was issued to the respondent on 23.04.2009 seeking clarification on various points stated in the said notice. On adjudication, refund claim was rejected by the Deputy Commissioner after scrutiny of the few agreements for construction dated 20.11.2006 executed between the

respondent and the clients, on the ground of limitation and issue of unjust enrichment. Aggrieved by the said order, the Respondent filed an appeal before the ld. Commissioner (Appeals), who has allowed their appeal; hence, the Revenue in the present appeal.

3. At the outset, the ld. A.R. for the Revenue reiterated the grounds of appeal in assailing the impugned order. He hassubmitted that the order of ld. Commissioner (Appeals) is cryptic, devoid of reasoning and not dealt with the grounds on which the adjudicating authority rejected the refund claim. He has submitted that the ld. Commissioner (Appeals) has not recorded findings on the various agreements, limitation and issue of unjust enrichment; therefore, the order is unsustainable in law.

4. The ld. Advocate for the respondent, on the other hand, has submitted that the ld. Commissioner (Appeals) after referring the documents furnished by the respondent allowed their appeal and set aside the impugned order. He has also submitted that the same is a reasoned one and the refund is admissible to them.

5. Heard both sides and perused the records.

6 We have carefully considered the orders of the adjudicating authority as well as the ld. Commissioner (Appeals). We find that the order of the ld. Commissioner (Appeals) is not a reasoned one, inasmuch as ld. Commissioner (Appeals) has not recorded detailed reasoning on the admissibility of refund claim by analyzing the relevant agreements considered by the adjudicating authority in rejecting the refund claim. Also, the ld. Commissioner(Appeals) has not recorded any findings on the issue of limitation and detailed reasonings on the issue of unjust enrichment. In these circumstances, we are of the view that the order of ld. Commissioner (Appeals) cannot be sustained. Consequently, the impugned order is set aside and the matter is remanded to the Commissioner (Appeals) to record detailed reasonings on each and every issue raised and considered by the adjudicating authority and pass a reasoned order. Needless to mention that a reasonable opportunity of hearing be extended to the respondent.All issues are kept open. At this stage, both the sides requested tofix a time frame for disposal of the case. Consequently, as far as practicable; the ld. Commissioner (Appeals) should decide the appeal within a period of three months from the date of communication of this order. Revenue's appeal is allowed by way of remand to the ld. Commissioner (Appeals).

(Operative part of the order pronounced)

(D. M. MISRA)MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 20240 of 2020

[Arising out of Order-in-Original No. BLR-NORTH-COMM-02/2020-21 dated 30.04.2020 passed by the Commissioner of Central Tax, Bengaluru NorthCommissionerate]

Krishna Bhagya Jala Nigam Ltd **……Appellant**
PWD Offices Annexe Building,3rd Floor, K R Circle,
Bangalore, Karnataka – 560 001

VERSUS

Commissioner of Central Tax,Bangalore North **……Respondent**
No. 59, HMT Bhawan, Ground Floor, Bellary Road,
Bangalore, Karnataka – 560 032

APPEARANCE:

Present for the Appellant: Sh. B. N. Gururaj, Advocate

Present for the Respondent: Sh. P. Saravana Perumal, AuthorizedRepresentative

CORAM:
HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)
HON'BLE Mr. PULLELA NAGESWARA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 21162/2023

DATE OF HEARING: 27.06.2023DATE OF DECISION: 26.10.2023

PER D. M. MISRA

This is an appeal filed against the Order-in-Original No. BLR-NORTH-COMM-02/2020-21 dated 30.04.2020 passed by theCommissioner of Central Tax, Bengaluru North Commissionerate.

2. Briefly stated facts of the case are that the appellant is engaged in implementing the ongoing Upper Krishnamultipurpose irrigation projects and other related irrigation projects entrusted to it by the Government of Karnataka. They were registered with the Service Tax Department w.e.f.17/05/2013 for providing ‘works contract service’ and also discharging service tax under reverse charge mechanism, namely, manpower supply, legal services, rent-a-cab service and director’s sitting fee etc. Also, they have separate service tax registration for the activities carried out at Almatti Dam site and Bheemarayanagudi project

within jurisdictional Central Excise/Service Tax authorities. On the basis of intelligence, investigation was initiated and on scrutiny of documents, recording of statements and analysing of evidences, it was noticed that though the Appellant paid guarantee commission tothe Government of Karnataka for providing unconditional and irrevocable guarantee for raising funds from debt market however, they failed to discharge service tax on the said guarantee commission under reverse charge mechanism andalso had not declared the said guarantee commission in the periodical ST-3 returns filed. Consequently, show cause notice was issued to the Appellant for recovery of service tax amount ofRs. 16,31,36,263/- for the period from 01.07.2012 to 30.06.2017 with interest and penalty. Also, an amount of Rs.8,43,87,602/- paid during the period 01.04.2016 to 30.6.2017 proposed to be appropriated. On adjudication, the demand was confirmed with interest and penalty; also, the amount paid was appropriated against the said demand. Hence, the present appeal.

3.1 The learned Advocate for the appellant submits that the appellant is a wholly owned public sector undertaking of the Government of Karnataka and was formed exclusively for the development of Upper Krishna River multipurpose irrigation project for utilization of Krishna River water allocated to theState of Karnataka under Bachawat Award. The appellant ismostly supported by the State budget and earns very littlerevenue from the farmers and the water used for irrigation is almost free of cost. Karnataka Power Corporation has set up a medium size hydel power project using the water from thereservoir owned by the appellant, on which royalty is earned. Further, some water rates are collected from industrial consumers, otherwise, the appellant has only miscellaneous income such as rent from shops and various offices in their residential colony.

3.2 Upper Krishna project was financed from borrowed funds by issuing "bond", which was guaranteed by the Government of Karnataka. Towards this guarantee, the appellant pays 1% of the guarantee sum as guarantee commission. Periodically the appellant also raises money from Banks for construction operation and maintaining the reservoir and canals, for whichguarantee is given by the Government of Karnataka.

3.3 It is his submission that the financial guarantee issued by the Government of Karnataka is governed by the KarnatakaCeiling on Government Guarantees Act, 1999. Section 3 of the said Act prescribes upper limit for the guarantees which can be given by the Government of Karnataka; but the proviso thereunder makes an exception with respect to the borrowing bythe appellant and allows the Government of Karnataka to give guarantee without any limit, subject to payment of guarantee commission.

3.4 It is his argument that since the transaction is governed by a Statute, hence, it is not a business transaction and the commission paid not leviable to service tax. In support, he relieson the judgment of this Tribunal in the case of *Superintendent ofPolice, Sawai Madhopur vs. CCE 2019-TIOL-3430-CESTAT- DELHI.*

3.5 Further, he submits that the present demand of service tax falls into two different periods – one, during the period when the definition of "support service" was on the statute book in Section 65B(49) of the Finance Act, 1994, i.e. upto 01.04.2016; and the second period is after omission of the said definition. Forthe second period the Appellant had discharged service tax.

3.6 The learned Advocate submits that from the definition of 'support service', it would be clear that finance guarantee does not fall within its scope, even the same cannot come within the definition of service. He submits that giving financial guarantee cannot be outsourced by anyone else. The lenders seek guarantees from third parties (other than the borrowers), whose name and credit worthiness are unimpeachable such as a bankor a

government or an institution specializing in givingguarantees.

3.7 He further submits that the ld. Commissioner has not recorded a specific finding as to why giving financial guarantee isa "support service" but in a tangential finding held that providingguarantee by Government of Karnataka is a 'service' under Section 65B(44) of Finance Act, 1994. It is his contention that the adjudicating authority mis-classified the service provided by the Government of Karnataka. Further, he submits that for the period after the omission of Section 65B(49) w.e.f. 01.04.2016, the appellant has discharged service tax upto June, 2017.

3.8 Further, he submits that giving financial guarantee is a banking or financial service and since the Government of Karnataka is not a bank or financial institution, guarantee given by it, cannot be classified under SSBC. In support, he refers to the judgment of Hon'ble Delhi High Court in the case of *Olam Agro Industries Ltd vs. CCE – 2014 (33) STR 234 (Del.).*

3.9 Further, assailing confirmation of the demand invoking extended period, the ld. Advocate has submitted that even though the investigation was commenced in June, 2015, but the show cause notice was issued to the appellant in October, 2017 and during these two years only two letters were issued. It is hiscontention that invoking the extended period of limitation ought to have ended with the date of commencement of investigation. Any demand thereafter ought to be considered subject matter of second and subsequent statement of demand.

3.10 Further, he has submitted that the appellant has paid service tax of Rs. 8,43,87,602/- on guarantee commission after the omission of the definition of "support service" which was paidin normal course under self-assessment from 01.04.2016 is not tax short paid or short levied. Hence, inclusion of that amount inthe demand raised is bad in law as the appellant has filedperiodically ST-3 returns during the said period.

3.11 Further, he has submitted that the appellant being a PSU,has no motive for evasion of tax. In support, he refers the ratio of the judgments of this Tribunal in the cases of *IOCL vs. CCE – 2013 (291) ELT 943 (Tri.)* and *Markfed Refined Oil & AlliedIndustries vs. CCE – 2008 (229) ELT 557 (Tri. Del.).*

4. Per contra, the ld. A.R. for the Revenue reiterates the findings of the ld. Commissioner. He submits that the guarantee given by the Government of Karnataka to the appellant is nothing but the support service for raising finance to meet the day-to-day operations by the appellant by raising funds from thedebt market, hence fall within the scope of "support service", hence taxable during the relevant period up to 2016. Also, sincethe appellant is registered with Service Tax department for providing other taxable services but failed to disclose the said payment of commission to the Government of Karnataka against the guarantee received for raising funds; therefore, the ld. Commissioner has rightly invoked the extended period in demanding service tax not paid by the appellant. Also, he submits that the imposition of penalty on the Appellant in the circumstances of the case is justified.

5. Heard both sides and perused the records.

6. We find that the appellant has commenced discharging service tax on commissions paid to the Government of Karnatakafor providing guarantee in raising funds from the debt

market from 01.04.2016. The present dispute is demand of service tax on the commissions paid by the appellant for the period prior to 01.04.2016. Thus, the issues need to be determined are whether: (i) service tax is payable under the commission paid bythe appellant to the Government of Karnataka on reverse charge mechanism basis as per Rule 2(l)(d)(i)(E) of the Service Tax Rules, 1994 for the period from 01.07.2012 to 31.03.2016; (ii) Invoking of extended period and imposition of penalties is justified.

7. It is not in dispute that for the period from 01.07.2012 to 31.03.2016 and 01.04.2016 to 30.06.2017, the appellant have paid commissions for guarantee issued by the Government of Karnataka in raising funds by them from debt market. It is not in dispute that the appellant is a public sector undertaking and majority of shares are held by the Government of Karnataka. It is also not in dispute that post 01.04.2016 to 30.06.2017, the appellant accepting the said services as taxable servicedischarged service tax on the same and does not dispute the same in the present appeal. However, for the period 01.07.2012 to 31.03.2016, they resisted levy of service tax on the ground that definition of "support service" under Section 65B(49) of the Finance Act, 1994 does not cover the service of guarantee received by the Appellant from Government of Karnataka for raising funds from the debt market.

8. "Support Service" has been defined under Section 65B(49) reads as follows:

"(49) 'support service' means infrastructural, operational, administrative, logistic, marketing or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of immovable property, security, testing and analysis."

9. The ld. Commissioner in the impugned order referring to the definition of 'service' introduced w.e.f. 01.07.2012 under Section 65B(44), Taxable service under Section 65B(51),negative list of services prescribed under Section 66(D) and also analysing the definition of "support service" under Section 65B(49) of the Finance Act, 1994 concluded that the unconditional and irrevocable guarantee received by the appellant from the Government of Karnataka is nothing but a 'service' and satisfies the definition of 'support service' provided by the Government of Karnataka and consequently liable toservice tax under reverse charge mechanism. The contention of the appellant that providing the guarantee is not a 'service', hence, not a taxable service, therefore, the commissions paid to the Government of Karnataka do not fall under the scope of "support service".

10. We do not find merit in the argument of the appellant, in as much as reading the definition of " service" and "support service" in juxtaposition, it is clear that the said definition of 'support service' is exhaustive and takes in its fold all activities of infrastructural, operational, administrative, logistic, marketing orany other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract etc. Thus, raising of finance for day-to-day operations by the appellant is a 'service' in the ordinary course of business operation, squarely falls within the scope of the definition of 'support service'. Therefore, the appellant is liable to discharge service tax on the Guarantee commission paid to Government of Karnataka during the period 01.07.2012 to 31.03.2016 for providing unconditional and irrevocable guarantee in raising funds from the debt market.

11. On the issue of invoking extended period of limitation, we find that the ld. Commissioner in the impugned order has held that the returns filed by the appellant for

the period April, 2016to September, 2016 does not reflect the payment of service tax of Rs. 6,56,57,301/- and the payment of service tax for the period from April, 2016 to June, 2017 was made during the period March, 2017 to August, 2017 i.e. much after the investigation was conducted by the DGCEI between June andJuly of 2015. He has observed that though the payment ofguarantee commissions to the Government of Karnataka is reflected in the Appellant's books of accounts, however, the samehas not been reflected in the periodical ST-3 returns filed withthe department; thus, non-mentioning in the ST-3 StatutoryReturns indicate their intention to evade tax by suppressing vital and relevant facts.

12. The investigation was conducted by DGCEI somewhere around June 2015 and statements of Shri K. Somashekhar and Shri Charles Sujay Kumar were recorded. In the said statements, it has been admitted that the guarantee commission was paid to the Karnataka State government but service tax was not discharged on the same. It was clearly stated that the policy decision with regard to the discharge of service tax rests with Sri R.S. Pasupathi, Chief Executive Officer(Finance) and Shri Ajay Seth, Managing Director of the company. But, the said officials ofthe company were not examined to ascertain as to why the service tax was not paid by the appellant company, even though tax on various other services received were discharged on reverse charge mechanism basis. The extended period of limitation could be invoked only when evidence collected lead to an inference that there has been fraud, collusion, suppression, misdeclaration or contravention of any of the provisions with intent to evade payment of duty. In the present case, the Department has failed to place on record evidence indicating thatthere has been intention not to discharge service tax on the guarantee commission even though the appellant has been aware of the legal position that service tax is payable on guarantee commission paid to the State government ofKarnataka for providing irrevocable guarantee in raising funds from debt market. Moreover, the appellant is a public sector undertaking and in the absence of specific evidence to support that there has been intentional evasion of service tax, extended period cannot be invoked merely on finding the failure on their part to discharge service tax. We find support from the judgement of this Tribunal in the case of *Indian Oil Corporation Vs. CCE -2013 (291) ELT 449 (Tri-Ahmd).* For the said reason also, we do not find merit in imposing penalty on the appellant.

13. In the result, the impugned order is modified and the demand is confirmed for the normal period of limitation with interest. Penalties imposed are set aside. Appeal disposed of on above terms.

(Order pronounced in the court on 26/10/2023)

(D. M. MISRA)MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 20370 of 2023

[Arising out of Order-in-Appeal No. 06/2022-23-CT dated 05.05.2022 passedby the Commissioner of Central Tax (Appeals-II), Bangalore]

Bangalore Housing Development &Investments **……Appellant**
10/1, Lakshmi Narayan Complex,Palace Road,
Bangalore - 560062

VERSUS

Commissioner of Central Tax, Bangalore North **……Respondent**
Bangalore North GST Commissionerate,HMT
Bhavan, Bangalore – 560032

APPEARANCE:

Present for the Appellant: Ms. Suja A. Krishnan, AdvocatePresent for the Respondent: Sh. Dyamappa Airani, A.R.

CORAM:
HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)

FINAL ORDER NO. 20992/2023

DATE OF HEARING: 06.10.2023DATE OF DECISION: 12.10.2023

PER D. M. MISRA

This is an appeal filed against Order-in-Appeal No. 06/2022-23-CT dated 05.05.2022 passed by the Commissioner of Central Tax (Appeals-II), Bangalore.

2. Briefly stated facts of the case are that the appellant are engaged in providing taxable services under the category of Renting of Immovable Property Service, Real State Agent Service,Rail Travel Agent Service etc. during the relevant period. Pursuantto an audit conducted on the records of the appellant pertaining tothe period April, 2014 to June, 2016, it was noticed that the appellant had short paid interest on delayed payment of service tax amounting to Rs. 13,01,548/- for the period April, 2017 to June, 2017 and Rs. 4,36,546/- for the period July, 2016 to March,2017. Also, they had availed inadmissible CENVAT Credit of Rs. 13,77,515/-. Consequently, a show cause notice was issued to the appellant on 02.12.2019 for recovery of aforesaid amounts with interest and proposal for imposition of penalty. On adjudication, the demand was confirmed with interest on the irregular

availment of CENVAT Credit, equivalent penalty and recovery of the differential interest. Aggrieved by the said order, the appellant filed an appeal before the ld. Commissioner (Appeals) who, in turn, rejected their appeal. Hence, the present appeal.

3.1 At the outset, the ld. Advocate for the appellant submits that the CENVAT Credit of Rs. 13,77,515/- was availed by themon receiving banking and financial service, which has been used inrelation to providing of output service namely 'Renting of Immovable Property Service'. She submits that the said service squarely covered under the definition of 'input service' as prescribed under Rule 2(l) of the Cenvat Credit Rules, 2004 being specifically covered under the scope of "financing" mentioned in the inclusive part of the said definition. In support she hasreferred to the judgments of this Tribunal in the cases of ***Select Infrastructure Pvt Ltd vs. CCE, Delhi-I – 2018-TIOL-688- CESTAT-DEL*** and ***Aluminium Powder Co Ltd vs. CC CE & ST, Madurai – 2016 (42) S.T.R. 776 (Tri. – Chennai)***. She further submits that the reasoning recorded by the ld. Commissioner (Appeals) in denying the said credit to them in observing that renting of immovable property is the right to use the property and hence the service, used in relation to maintenance of such property, is not admissible to CENVAT Credit, is incorrect and not sustainable. She further submits that this issue is also covered by the judgment of this Tribunal in the case of ***Oberon Edifices & Estates Pvt Ltd vs. CC CE & ST, Cochin*** *vide* ***Final Order No. 20922-20924/2023 dated 01.09.2023***. In the said judgment this Tribunal following its earlier decision in ***Golflinks Software Park Pvt Ltd vs. CST, Bangalore – MANU/CB/0040/2018*** which has been upheld by the Hon'ble Karnataka High Court, has held that CENVAT Credit onvarious input services used in providing Renting of Immovable Property service is admissible.

3.2 Further, she has submitted that on the differential amount of interest demanded on service tax paid by the appellant, the interest was calculated by the department applying the rate of interest as 24% whereas they have discharged interestcalculating @15%. She submits that even though, the department has alleged that the appellant had collected servicetax from the customers but paid the same belatedly to the department, but no evidence has been placed on record. Therefore, the demand of interest @24% cannot be sustained.She also submits that since the appellant has rightly availedCENVAT Credit on banking and financial services used for providing the output services namely Renting of Immovable Property service, therefore, imposition of penalty equivalent to CENVAT Credit amount is unsustainable and hence be set aside.

4. On the other hand, the ld. A.R. for the Revenue reiteratesthe findings of the ld. Commissioner (Appeals). He submits that the department has preferred appeal against the judgment of Hon'ble Karnataka High Court before the Hon'ble Supreme Court, which is pending till date. He further submits that the appellant though collected the rent from the clients periodically along with service tax but has not discharged service tax so collected on due dates. Accordingly, as per Sl. No. 1 of Notification No. 13/2016- ST dated 01.03.2016, the applicable rate of interest is 24% as theappellant has applied the rate of interest as 15%. Hence, the differential interest amount is recoverable.

5. Heard both sides and perused the records.

6. Two issues are involved for determination in the present appeal are: (i) whether CENVAT Credit is admissible on banking and financial service used by the appellant in providing Renting of Immovable Property service during the relevant period;
(ii) Interest rate be 15% or 25% for belated payment of service tax.

7. The ld. Commissioner (Appeals) accepting the Revenue's stand that Renting of

Immovable Property is only right to use the said property and the immovable property is neither subjected to excise duty nor service tax, hence, the input service is not rendered in providing any output service. This reasoning has beenconsidered by this Tribunal in the light of Board's Circular No. 98/1/2008-ST dated 04.01.2008 in the case of ***Golflinks Software Park Pvt Ltd*** (supra) and rejecting the said viewobserved that cenvat credit is admissible on the service tax paid on various used in the maintenance of the immovable property; this decision of the Tribunal later on appeal by the Tribunal has been rejected by the Hon'ble High Karnataka High Court endorsing the view of the Tribunal. Following the said judgementin ***Oberon Edifices & Estates Pvt Ltd***'s case (supra), it was heldthat various input services used in providing Rental of Immovable Property service are admissible to CENVAT credit. Following the aforesaid decisions of this Tribunal, I am of the opinion thatCENVAT Credit availed on 'banking and financial services' used in providing Renting of Immovable Property service is admissible.

8. Regarding the demand of differential interest for the respective periods, I find that the department has specifically alleged in the notice that the appellant had collected rent on monthly basis along with service tax from the tenants; however, they have not deposited service tax so collected as on due date. The appellant have been disputing the said allegation of Revenue at all levels. On being inquired during the course of hearing to place the invoices under which rent was collected from the tennants, the ld. Advocate for the appellant expressed inability to produce a single copy of the invoices. Thus, the appellant couldnot establish that service tax was not collected earlier, hence could not be deposited before the due date. In these circumstances, I do not find merit in the contention of the ld. Advocate that their case falls under Sl. No. 2 of Notification No. 13/2016-ST dated 01.03.2016. On the other hand, the applicableinterest would be @24% on the service tax amount paid belatedlyeven though collected from service receivers.

9. In the result, the impugned order is modified to theextent mentioned as below:

(a) CENVAT Credit of Rs. 13,77,515/- during the period isadmissible. Hence, penalty imposed and interest levied are accordingly set aside.

(b) Interest @24% for the period in question confirmed, accordingly, the appellant are require to pay total interest of Rs. 17,38,094/- after adjusting the amount, if any,paid earlier, for relevant periods.

10. The Appeal is disposed of as above.

(Order pronounced in the court on 12.10.2023)

(D. M. MISRA)MEMBER (JUDICIAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 2237 of 2012

[Arising out of Order-in-Appeal No. 95/2012 dated 15.05.2012 passed by the Commissioner of Central Excise, Customs & ST (Appeals), Cochin]

Commissioner of Central Excise &Service Tax, Trivandrum **……Appellant**
T.C. No. 26/334(1&2),
I.C.E. Bhavan, Press Club Road,Trivandrum,
Kerala 695001

VERSUS

Kerala State Electricity Board **……Respondent**
Vaidyuthi Bhavan, Pattom P.O.
Thiruvananthapuram, Kerala

APPEARANCE:

Present for the Appellant: Sh. Dyamappa Airani, Authorized Rep.Present for the Respondent: None

CORAM:
HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)
HON'BLE Mr. PULLELA NAGESWARA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 21258/2023

DATE OF HEARING: 31.07.2023DATE OF DECISION: 17.11.2023

PER D. M. MISRA

None present for the respondent despite notices having been issued from time to time. The matter has been listed on several occasions; therefore, further adjournment would not yield any fruitful result. Therefore, the matter is taken up for disposal on the basis of records and after hearing the Ld. A.R. for theRevenue.

2. This appeal is filed by the Revenue against Order-in-Appeal No. 95/2012 passed by the Commissioner of Central Excise, Customs & ST (Appeals), Cochin.

3. The respondent have filed a refund claim ofRs.1,42,48,182/- on 08.01.2010. Brief background of the case leading to the claim are that the respondent had entered into a contract with M/s SNC Lavalin, Canada to implement a project work and received 'Consulting Engineer Service' from the said overseas firm and paid consultancy charges to them. Two show cause notices were issued to the respondent on 28.04.2003 and 19.08.2003 demanding service tax of Rs.1,38,21,517/- and Rs.5,03,247/- respectively. On adjudication, the said demand was confirmed on 08.10.2003. Consequently, the said

amount was paid by the Respondent. Aggrieved by the Order of theadjudicating authority, they filed appeal before the ld. Commissioner (Appeals), who vide order dated 12.02.2004 upheldthe order of adjudicating authority. Aggrieved by the order of the Commissioner (Appeals), they preferred appeal before this Tribunal and this Tribunal vide order dated 23.02.2005, set aside the order of the Commissioner (Appeals). Against the order of the Tribunal, the Revenue filed an appeal before the Hon'ble High Court of Kerala. The Hon'ble High Court by its order dated 25.07.2006, allowed the appeal filed by the Revenue and restoredthe order of the adjudicating authority after setting aside the order of the Tribunal. Thereafter, the respondent filed an appeal against the order of the High Court of Kerala before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide its order dated 12.12.2007, dismissed the appeal filed by the respondent. A review application thereafter filed by the respondent before the Hon'ble Supreme Court, which was also dismissed by the Hon'ble Supreme Court vide order dated 06.04.2010.

3.1 Since the issue of applicability of service tax on the partof the respondent was confirmed by the Hon'ble Apex Court by rejecting their review petition, show cause notice dated 05.03.2010 was issued to the respondent for rejection of the said refund claim filed on 08.01.2010. On adjudication, the refund claim was rejected by the adjudicating authority. However, on appeal by the respondent, the ld. Commissioner (Appeals) allowedtheir appeal by setting aside the order of rejection of refund. Hence, the Revenue is in appeal.

4. The ld. AR for the Revenue reiterating the grounds of the appeal has submitted that the present refund filed by the respondent on the ground that the service tax paid by them on receiving 'Consulting Engineer Service' from the overseas firm namely M/s SNC Lavalin, Canada during the period August 1998to September 2002 is erroneous and the same was not required to be paid. The service Tax confirmed was paid by them under protest on the insistence of the department. He submits that the leviability of service tax on the transaction between therespondent and the overseas service provider, namely, M/s SNC Lavalin, Canada reached before the Hon'ble Supreme Court and the Hon'ble Supreme Court dismissed their appeal as well as the review application filed by the respondent. Thus, the Order of the adjudicating authority confirming the demand of service Tax merged with the Order of the Hon'ble Supreme Court. He submits that thus the refund of service tax filed by the Respondent in January 2010 is not maintainable and has become infructuous. It is his contention that the ld. Commissioner (Appeals) allowed the refund claim by setting aside the Order of the adjudicating authority relying upon the judgement of the Larger Bench of the Tribunal in the case of ***Hindustan Zinc Ltd Vs. CCE,Jaipurreported as 2008 (11) STR 338 (Tri. LB)***. It is his contention that the ld. Commissioner (Appeals) has travelled beyond the authority vested on him and the Order is against the judicial discipline; as the matter has already been finally decided by the Hon'ble Supreme Court in the respondent's own case, dismissing the Appeal and Review filed against the Judgement of Hon'ble Kerala High Court, therefore, binding on both the parties. Insupport, he has cited the judgment of Hon'ble Supreme Court in the case of ***UOI Vs. Kamalakshi Finance Corporation Ltd. 1991(55) ELT 433(SC)***.

4.1 Further, he has submitted that the refund application wasfiled much after the period of one year from the decision of the Tribunal in ***Hindustan Zinc Ltd***'s case (supra). Therefore, on thisground also, refund is liable to be rejected.

5. The short issue involved in the present appeal is: whetherthe refund of service tax paid by the respondent on receiving the consulting Engineers' service from the Overseas service provider during 1998 to 2002 be admissible to them, even after the Hon'ble Supreme Court upheld the liability to discharge the tax bythe Appellant.

6. It is not in dispute that after confirmation of the demand of the service tax for the

period by the adjudicating authority, the respondent approached the ld. Commissioner (Appeals) against the order of the adjudicating authority. The ld. Commissioner (Appeals) also upheld the order of the adjudicating authority. However, on appeal by the respondent before the Tribunal, they were allowed relief by the Tribunal by setting aside the order confirming the demand of Rs.1.42 crores. Later, on appeal by theRevenue before the Hon'ble Supreme Court, the order of the Tribunal was set aside and the order of the adjudicating authority was restored. In other words, from the above narration of sequence of events, it is clear that the taxability of servicesreceived by the respondent from overseas service provider namely M/s SNC Lavalin, Canada has been ultimately settled by the order of the Hon'ble Supreme Court dated 12.12.2007 and thereafter, rejection of the review application filed by the Respondent on 06.04.2010.

7. We find that the ld. Commissioner (Appeals) in the impugned order has completely ignored the order of the Hon'ble Supreme Court and by following the judgment of the Larger Benchof the Tribunal in the case of ***Hindustan Zinc Ltd Vs. CCE, Jaipur*** (supra) *de hors* the records of the case, opined that the respondent are not liable to pay service tax during the saidperiod.

8. We are afraid that such an approach of the ld.

Commissioner (Appeals) could be sustained in view of the principle of judicial discipline laid down by the Hon'ble Supreme Court in ***Kamalakshi Finance Corporation Ltd.***'s case(supra). The order of the lower authority got merged with that of the order of the Hon'ble Supreme Court and is binding on the concerned parties to the dispute irrespective of subsequent development of law on the issues involved, unless the Final Order is varied/modified by the Apex Court. In the present case, no such order has been obtained from the Hon'ble Supreme Court modifying its earlier order rejecting the Appeal filed by the Respondent, thereby confirming the demand of service tax for thedisputed period against the Respondent. On the contrary, rejection of the review petition filed before the Hon'ble Supreme Court lends finality to the dispute.

9. In these circumstances, the impugned order passed bythe ld. Commissioner (Appeals), which is contrary to Judgment of Hon'ble Supreme Court cannot be sustained. Accordingly, thesame is set aside and the order of adjudicating authority is restored. Revenue's appeal is allowed.

(Order pronounced in the court on 17.11.2023)

(D. M. MISRA)MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 917 of 2011

(Arising out of Order-in-Original No.98/2010 dated 23.12.2010 passed by the Commissioner of Service Tax, Bangalore.)

M/s. Embassy Property Developments Limited
(Formerly M/s. Dynasty Developer(s) Ltd.)Embassy Point, No.150, Infantry Road,

Bangalore – 560 001
.....Appellant(s)

VersusThe Commissioner of Service Tax
Service Tax CommissionerateNo.16/1, S.P. Complex, Lalbagh Road,

Bangalore – 560 001..... Respondent(s)

Appearance:

Shri K. S. Ravi Shankar, Sr. AdvocateShri K. S. Naveen Kumar, Advocate
Shri Mohd. Rahim, Advocate for the Appellant Shri Dyamappa Airani, AR for the Respondent**CORAM:**
Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 20052 /2024

Date of Hearing: 25.07.2023Date of Decision: 19.01.2024
Per : Dr. D.M. Misra

This appeal is filed challenging the Order of the Commissioner of Service Tax, Bangalore. In the impugned order,the Commissioner held as follows:

i. I confirm the demand under proviso to section 73(1) of theFinance Act, 1994 of Rs.8,15,12,315/- (Rupees Eight Crores fifteen lakhs twelve thousand three hundred and fifteen only) being the service tax (inclusive of education cess) payable under the category 'Management Consultancy Service' for the period from 2004-05 upto05/2007.

ii. I appropriate the amount of Rs.5,39,67,516/- (Rupees Fivecrores thirty nine lakhs sixtyseven thousand five hundred and sixteen only paid by M/s DDPL vide challans dt.18/02/2010 & 20/04/2010 towards the demand confirmed as at (i) above.

iii. I order payment of appropriate amount of interest on the service tax above under section 75 of the Finance Act, 1994.

iv. I appropriate the amount of Rs.52,88,640/- (Rupees Fifty two lakhs eighty eight thousand six hundred and fourty only) paid by M/s. DDPL vide challan dt.18/03/2010

towards the demand of interest confirmed as at 'iii' above.

v. In respect of the demand confirmed at (i), I impose penalty of Rs. 100/- per day upto 17.04.06 and with effect from 18.04.06, Rs.200/- per day or @2% the service tax, per month, whichever is higher, till the date of actualpayment of the outstanding amount of service tax, which shall not exceed the total service tax liability confirmed as above, under section 76 of the Finance Act, 1994,

vi. I impose penalty of Rs. 1000/- (Rupees One thousand only) under section 77 of the Finance Act, 1994.

vii. I impose penalty amounting to Rs. 8,15,12,315/- (Rupees Eight crores fifteen lakhs twelve thousand three hundred and fifteen only) under section 78 of the Finance Act, 1994, which shall be reduced to 25% of the service tax confirmed at sl. No. i above, provided, the entire amountof service tax along with interest and reduced penalty are paid within THIRTY days of the receipt of this order.

2. Briefly stated facts of the case are that the Appellant during the period 2004-05 to 2007-08, provided certain services to M/s. Golf Links Software Park Pvt. Ltd. and M/s. Manyata Promoters Pvt. Ltd. On the basis of intelligence, investigation hasbeen initiated against the appellant by recording statements, scrutinizing documents, etc., which revealed that during theaforesaid period, the appellant though rendered taxable service under the category of 'Management Consultancy Service' (MCS) but failed to discharge Service Tax on the same. On conclusionof investigation, show-cause notice was issued to the appellant on 22.4.2010 for recovery of Service Tax amount of Rs.8,15,12,315/- with interest and penalty; proposal to appropriate service tax of Rs.5,39,67,516/- and interest of Rs.52,88,640/- paid by them. On adjudication, the demand was confirmed with interest and penalty mentioned as above. Hence, the present appeal.

3.1 The learned Sr. Advocate for the appellant submits thatthe appellant is a real estate development company possessing necessary expertise and skills to undertake project management work such as promotion and development of real estate projects viz., Development of STPs, commercial development, hardware tech park and entertainment centre. The appellant wasregistered with Service Tax department under the category of 'Construction Services' with effect from 24.03.2005. They have entered into two agreements dated 31.03.2005 (for project management) and 01.4.2005 (for business consultancy) withManyata Promoters Pvt. Ltd. They had also earlier entered intoan agreement with M/s. Golf Links Software Park Pvt. Ltd. for business consultancy on 06.4.2003. During the course of investigation, it was submitted to the department that the activities/services rendered by them are in the nature of Business Consultancy service, which became taxable only with effect from 01.6.2007. Hence, they were not required to discharge Service Tax for the service rendered during the said period. Further, it is argued that the services provided against the agreement dated 31.3.2005 being executory in nature and not management consultancy, therefore, no service tax is payable by them. Referring to the agreement dated 31.03.2005, the learned Sr. Advocate submitted that the services are not in the nature of advice, consultancy or technical assistance alone. The responsibility, role and function of the appellant in its entirety as per Clause 8 of the said agreement reveal a major role and responsibility of the appellant in execution of the project. It is submitted that the adjudicating authority had ignored the said submission of the appellant. In support, the learned Sr. Advocate referred to the following decisions:

a. Basti Sugar Mills Co. Ltd Vs CCE, 2007 (7) STR 431 (T). Maintained by the SC in 2012 (25) STR J.154 (SC).

b. *Rolls Royce Indus Power (1) Ltd Vs CCE, 2006 (3) STR 292 (T)*

c. *Nirulas Corner House Pvt. Ltd Vs CST, 2009 (14) STR 131 (T)*

d. *Suzlon Windfarm Services Ltd Vs CCE, 2014 (33) STR 65 (T)*

e. *CMS (1) Operations & Maintenance Co.P.Ltd Vs CCE, 2007 (7)STR 369 (T)*

f. *CCE Vs Sahney Kirkwood Pvt. Ltd, 2014 (35) STR 609 (T) Maintained by the SC in Commr. Vs CMS (1) Operations and Maintenance Co. P. Ltd, 2017 //94) GSTL J.75 (SC)*

g. *Vedanta Ltd Vs CCE, 2019 (28) GSTL 258 (T)*

3.2 Further, referring to Board's Circular No.115/9/2009-STdated 31.7.2009, he has submitted that in the said Circular, it is clarified that only advisory services are covered under the management consultancy and not the executory services. Further, he has submitted that Business Consultancy Servicewas made taxable only with effect from 01.6.2007 and since, theCommissioner chose to ignore the agreement dated 31.3.2005, the stipulations in those agreements could be materially relevantto decide the nature of services and classification. He has emphasised that the agreement dated 31.03.2005 clearly establish that the nature of service provided are executory functions and not advisory services, therefore, management consultancy service is not attracted in the facts of the present case. Further, he has submitted that since the Commissioner haslaid much emphasis on the agreement dated 31.03.2005, hence he should not have given credence to the oral testimony of the person, whose statements are recorded. Further, it is submitted that nomenclature of transactions not relevant to determine the tax liability and it is the substance of the transaction that is relevant. In support, he referred to the judgment in the case of *Delhi Stock Exchange Association vs. CIT: 1961 (41) ITR 495 (SC)* and *Sutlej Cotton Mills vs. CIT: 1979 (116) ITR 1 (SC)*. Further, referring to Section 65A of the Finance Act, 1994, hehas submitted that in deciding classification of a service, a specific service would prevail over the general service and the essential character of the transaction has to be considered. In support, he has referred to the CBEC Circular No.334/4/2006- TRU dated 28.2.2006.

3.3 Further, he has submitted that since the department had doubted the veracity of the agreement dated 06.4.2003 and 01.4.2005, the burden of proof still continues to be vested with the Revenue to establish taxability and classification of the service rendered by the appellant. The acceptance of agreement dated 31.03.2005 by the Commissioner proves the case of the appellant that the services rendered are executory and not advisory in nature.

3.4 Further, he submits that since the Commissioner has placed reliance only on the agreement dated 31.03.2005, hence the statements based on other two agreements are of no consequence to determine the taxability and classification ofservice or imposition of penalty. Further, he has submitted that the allegation of fabrication of documents are not relevant to determine the tax liability of services under Management Consultancy Service as the Commissioner chose to ignore other two agreements and simply proceeded with the agreement dated31.03.2005. Further, the learned advocate submitted that the amount paid during the course of investigation with the department should not be treated as admission of liability or guilt. Further, they have submitted that collection of taxes from M/s. Manyata Promotors Pvt Ltd. for certain period cannot lead to the inference that services rendered by the appellant are taxable. It is his contention that there is no estoppel in law and in support he referred to the judgment of the Hon'ble Supreme Court in the case of *Kalidas Dhanjibhai vs. State of Bombay: AIR 1995 SC 62* and *Sports Club of Gujarat Ltd. vs. UOI: 2010 (20)*

STR 17 (Guj.).

3.5 Further, he has submitted that extended period of limitation cannot be invoked in the present case. Also, since the tax liability itself does not arise because of the specific recitals inthe agreement dated 31.03.2005, interest and penalty would notarise. Further, it is submitted that for non-following of the procedures, benefit of CENVAT credit cannot be denied. In support, they have referred to the decision in the case of *Formica India Division vs. CCE: 1995 (77) ELT 511 (SC), mPortalIndia Wireless Solutions Pvt. Ltd. vs. CST: 2012 (27) ELT 134 (Kar.)* and *Icon Industries vs. CCE: 2018 (363) ELT 114 (Del.)*. Further, he has submitted that imposition of penalty under Section 76 and Section 78 of the Finance Act, 1994 simultaneously is contrary to the decision of the Hon'ble High Court in the case of CST vs. Motor World: 2012 (27) STR 225 (Kar.).

4. Per contra, the learned Authorised Representative for the Revenue referring to various statements recorded during the course of investigation, submitted that the nature of services rendered as disclosed in the statements, reveal that through agreement dated 31.03.2005, the appellant has been appointed as a 'project development manager' and particularly, the clause 5.2.1, Clause 8, Clause 12, Clause 14 Clause 15, Clause 16, and Clause 18, reveal that the appellant has been carrying out the activities of recommending, coordinating and supervision of the development of the project and not executing the project itself. Hence, the claim of the appellant that they were actually executing the project is incorrect and unsustainable. He has further submitted that, in fact, the consideration paid to the appellant was only 5% of the total construction cost actually paidby M/s. Manyata to building contractors, hence the claim of the appellant that they have executed the project is unacceptable.

4.1 Further, referring to the definition of 'ManagementConsultant' prior to 01.05.2006 and thereafter, the amendment brought into with effect from 01.06.2007, the learned AuthorisedRepresentative for the Revenue has submitted that the appellantwas providing services in relation to the management of the organisation i.e., M/s. Manyata with respect to different areas of management. Though, there is a significant difference in the wordings of the definition of 'Management Consultancy Service' post 01.5.2006, the essence remains the same. Explaining it further, he has submitted that before 01.5.2006, it included consultancy, advice or assistance which consisted of conceptual designing, etc., of any working system of any organisation. This definition focused on what the service provider was actuallydoing (conceptualising, designing, development, modification, rectification) in relation to any working system. After 01.5.2006, various working systems of an organisation are spelt out viz., financial, logistics, human resources, marketing, procurement, etc.. Any technical advice or consultancy in these fields or in other similar area of management was treated as Management Consultancy Service. The claim of the appellant that their company is for development of real estate projects and hence, it cannot be inferred that they were providing Management Consultancy Service, is not acceptable. It is the service provided by the appellant which is relevant and not the activity of the appellant in general, which has been specifically discussed by thelearned Commissioner in para 14 of the order.

4.2 Referring to Clause 7, 8 and 8.8 of the agreement dated 31.03.2005, the learned Authorised Representative has submitted that this service indicate advice and assistance rendered by the appellant, hence the services rendered by the appellant beyond the advisory role and purpose of other serviceslike liasoning, coordination, obtaining approvals from authorities, etc., not covered under Management Consultancy Service is unacceptable. Therefore, their services are not executory in nature and their claim that the activity involved development of software park is also not correct since they have not contributed in terms of planning, designing, architecture or construction of the project. The closet they

came to execute the project in recommending the "personnel of professional team" to be appointed by M/s. Manyata Promotors Pvt. Ltd. In support of his contention that the services rendered by the appellant are not executory in nature but management consultancy service, he referred to the following judgments of the Tribunal in the cases of:

(i) Jubliant Enpro vs. Commissioner of Central Excise, Noida:2015 (38) STR 625 (Tri.-Del.);

(ii) Anglo American Services (India) Pvt. Ltd. Vs. Commissionerof Service Tax, Delhi: 2019 (22) GSTL 415 (Tri.-Del.)

(iii) Commissioner of Central Excise and Service Tax, LTU, Mumbaivs. Reliance Industries Ltd: 2016 (45) STR 341 (Tri.-Mum.)

4.3. On the issue of applicability of extended period, the learned Authorised Representative has submitted that provision of such services rendered by the appellant to M/s. ManyataPromotors Pvt Ltd. and M/s. Golf Links Software Park Pvt. Ltd. were not disclosed to the department nor they have obtainedany service tax registration. They have not filed statutory Returns for the period 2004-05, 2005-06 and 2006-07. Further, during the course of investigation and from the statements recorded, it revealed that multiple agreements were entered andsome of them were not brought to the notice of the top executives also. One of the agreements dated 06.4.2003 was notgenuine and this has been confirmed by the letter issued by Sub Registrar, Kengeri. The appellant has also collected Service Tax from the service receiver by issuing debit notes in the year 2006 and not deposited with the Government. All the above factsmake it clear that the appellants have suppressed the facts and wilfully misstated with an intention to evade payment of service Tax. Accordingly, the Commissioner has rightly invoked the extended period of limitation and confirmation of duty demand along with interest and imposition of penalties. Further, he has also submitted that the Commissioner was right in not extendingthe benefit of CENVAT credit in the impugned order in absence ofdocuments/evidences submitted by the appellant.

5. Heard both sides and perused the records.

6. The issues involved in the present appeal for determinationare whether: (i) The service rendered by the appellant duringthe period 2004-05 to May 2007 to M/s. Manyata Promoters Pvt.Ltd. & M/s. Golf Link Software Park Pvt. Ltd. be classified under taxable category of 'Management Consultancy Service' and Service Tax is payable invoking extended period of limitation; and (ii) CENVAT credit be admissible for the said period in rendering the service, if held to be taxable.

7. The appellant during the relevant period rendered services to M/s. Manyata Promoters Pvt Ltd and M/s. Golf Link Software Park Pvt. Ltd. and received consideration for providing suchservices. Three agreements claimed to have been entered into between the appellant and the said service receivers dated 06.04.2003, 31.03.2005 and 01.04.2005. In the impugned orderthe learned Commissioner rejecting the credibility of agreements dated 06.04.2003 and 01.04.2005, laid emphasis on the stipulations under agreement dated 31.03.2005. The appellant intheir arguments did not object to the said course of action by theadjudicating authority, however, from the very beginning their contention has been that the services rendered by them do not fall under the category of 'Management Consultancy Service' but the services are executory in nature; also it is their contention referring to the agreement dated 06.04.2003 and 01.04.2005 that they have provided 'Business Consultancy Services' andsince the said business consultancy service is taxable with effect from 01.06.2007, hence, for the period prior to the said date, noliability can be fastened on them for rendering the said service.

8. The definition of 'Management Consultant Service' as was in force before and after

the relevant period reads as follows:
Prior to 01.6.2007

Section 65(105) "Management Consultant" means any person who is engaged in providing any service, eitherdirectly or indirectly, in connection with the management of any organisation in any manner and includes any person who renders any advice, consultancy or technical assistance relating to conceptualising, devising, development, modification, rectification or upgradation of any workingsystem of any organisation.

After 01.6.2007

Section 65(105) "Management or Business Consultant" means any person who is engaged inproviding any service, either directly or indirectly, in connection with the management of any organisation orbusiness in any manner and includes any person who renders any advice, consultancy or technical assistance, in relation to financial management, human resources management, marketing management, production management, logistics management, procurement andmanagement of information technology resources or other similar areas of management;

9. The Agreement dated 31.05.2005 which is the bone of contention, between the parties and the Ld. Commissioner extensively referred the same in the impugned Order needs tobe stated. The conditions relevant for the present purpose are reproduced as below:

PROJECT MANAGEMENT AGREEMENT EXECUTED THIS DAY OF31" DAY OF MARCH 2005 BETWEEN M/S.MANYATA PROMOTERS PRIVATE LIMITED, a Company incorporated under the Companies Act, 1956, having itsregistered office at Second Floor, Classic Courts, RichmondRoad, Bangalore - 560 001, represented by its Chairman andManaging Director Mr. Reddy Veeranna for the FIRST PART (hereinafter referred to as the "MANYATA" which expression shall the context means and requires shall include its successors-in-title and assigns). AND M/S.DYNASTY DEVELOPERS PRIVATE LIMITED, a Company incorporated under the CompaniesAct,1956,havingits Office at Embassy Point, No.150, Infantry Road, Bangalore - 560 001,represented by its Director Mr. Jitendra Virwani (hereinafter referred to as the "PROJECT DEVELOPMENT MANAGER", which expression shall, wherever the context means and requires shall include its successors-in-title and assigns).

NOW THIS AGREEMENT WITNESSETH AS UNDER:

1) REPRESENTATIONS AND ASSURANCES

I. WHEREAS MANYATA are the allottees under Lease Cum Sale agreements all executed by Karnataka Industrial Area Development Board (KIADB) and MANYATA and the KIADB have also vide separate possession letters handed over possession of the property allotted on the Lease cum sale basis of all that piece and parcel of industrial lands in situated in various survey Numbers all situated at Nagawara Village, Bangalore North Taluk, more fully set out and described in the First Schedule hereto and hereinafter referred to as the "PROPERTY" and the details of the Lease Cum Sale agreement and the Possession Certificate are also set out in the Schedule hereto against the lands defined therein;

II. WHEREAS MANYATA being desirous of commercially exploiting the Property by putting up commercial development / software technology park (the project hereafter),with severalother amenities and facilities to be provided in the said development;

III. MANYATA has represented that the Property is free from any kind of encumbrances, contracts, litigations, claims, liens expressed or implied, easement rights in favour of any third party, acquisition or requisition proceedings, attachments, beforeor after judgement, or against any statutory dues and MANYATA are not prohibited under any law developing Property;

IV. WHEREAS the Project Development Managers have the necessary expertise, infrastructure to take up the work of the project management and have accordingly contracted with MANYATA who after negotiations are desirous of appointing Project Development Managers with the exclusive rights to look after the promotion and development of the Entire Project envisaged on the Property in terms hereof as detailed in this agreement;

V. Project Development Managers based on the representation and assurance as aforesaid and on the specific understanding that the appointment made hereunder is exclusive to Project Development Managers and the appointment will not be revokedsave and except as expressly stipulated herein the Project Development Managers have agreed to act as the project managers undertaking the obligation as set out herein:

2) DEFINITIONS AND INTERPRETATION:

In this Agreement unless otherwise specifically expressed otherwise, the Parties hereto agree that the following terms shallbe defined and understood between them as under:

2.1) "the Site" means the land allotted to MANYATA by KIADB under the lease cum sale agreement which is more particularly described in the Schedule upon which it is proposed to carry out the Development; except the land under development under an exclusive arrangement with MFar Holdings private limited

2.2) "the Local Planning Authority" means the concerned authority for securing several permission for the Development.

2.3) "Planning Application" means the application for sanction and permission to carry out the Development made to the Local Planning Authority or to be made by the Project Development Managers at the expense MANYATA or any alternative application or variation or amendment to an application made which may subsequently be required to make;

2.4) "the Building Contractor" means a Contractor of suitable experience with adequate financial resources and good reputation to be appointed under the Building Contract by MANYATA to carry out the construction activities and the related Development;

2.5) "the Building Contract" means a contract to carry out the Development to be made between (1) MANYATA and (2) the Building Contractor:

2.6) "Development" means the carrying out of the works necessary to secure the erection and completion on the Site of the Project consisting of buildings, all the Individual Units and their infrastructure with the planning permission obtained inresponse to the planning Application and the Plans and wherethe context so admits and requires the completed IndividualUnits and their infrastructure and a brief description of theDevelopment

2.7) "the Professional Team" means:

2.7.1) Architect/s who have to be appointed for the Development by MANYATA

2.7.2) Quantity Surveyors who are to be appointed for theDevelopment by MANYATA

2.7.3) Structural Engineers who arc to be appointed for the Development by MANYATA

2.7.4) Building Services or Mechanical and Electrical Contractors or land scape contractors who are to be appointed for the Development by MANYATA

2.8) "the Plans" means the plans, sections and elevations referred to in the Planning Application and the other plans sections and elevations in respect of the buildings Individual Units and their infrastructure prepared by the Professional Team with such amendments as may from time to time in the proper opinion of the members or appropriate member of theProfessional Team deem it reasonably necessary order to secure the proper and expeditious completion of the Development;

2.8) "the Permits" means the planning permissions (other than any planning permission granted in response to the Planning Application and building regulation approvals granted from time to time in respect of the Development and all other consent and approvals whether statutory or otherwise which may be necessary for the carrying out of the Development;

2.9) “the project“mean the development of the Schedule Property by putting up commercial development , software tech park , hardware tech park , entertainment centre etc.

2.10) "the Specifications" means the specifications to be prepared by the Professional Team upon the instructions of the Project Development Managers and approved by MANYATA

2.10) "the Project Development Manager's Fee" means the amounts to be received by the Project Development Managers interms of clause 5.2.1 below;

2.11) words importing one gender shall be construed as importing any other gender;

2.12) words importing the singular include the plural and vice versa;

2.13) references to persons include bodies corporate and vice versa;

2.14) the Clause Headings are only for easy reference, andconvenience and shall not be taken into account in construction or interpretation of that Clause;

3) THE PLANNING APPLICATION

Project Development Managers shall make available to MANYATAwho shall within 06 weeks from the handing over the plan, submit to the Planning Authority for approval and MANYATA shallthen use all reasonable endeavours to obtain the sanction for theplan submitted for the Development asper the Application, subject to the conditions which are levied. The ProjectDevelopment Managers will provide the copy of all the relevant plans as per the schedule of development and also render the necessary assistance in the process of plan approval.

4) SITE OFFICE:

MANYATA will permit Project Development Managers to establisha Site Office on the Schedule Property. The expenses of running and maintenance of this site office will be the responsibility of PDM.

5) CONSIDERATION FOR THE PERFORMANCE OF THE MANAGER'S FUNCTIONS AND OBLIGATIONS:

5.1 Project Development Managers shall perform the functions and obligations on his part specified in this Agreement in consideration of the payment of:

5.2) Project Development Managers' Fee being computed asunder:

5.2.1 The MANYATA shall pay the Project Development Manager 5% (Five per cent) of the expenditure incurred on the construction and development of the PROJECT plus the service tax at the rate or rates in force from time to time as consideration for rendering all the services specified in this Agreement

5.2.2 Such consideration shall be decided annually on 31" March of a financial year on the basis of the audited accounts of the MANYATA. The amount of consideration shall become payable forthwith after it is determined subject to adjustments, if any, onaccount of advance withdrawals made by the Project Development Manager as stated hereafter.

5.2.3 The amount of consideration shall be certified by theauditors of the MANYATA.

For the purpose of this clause, the “Expenditure on Construction and development of the Site" shall mean:

(i) The direct expenditure like materials and labour and payments to contractors for the work as having been carried out certified by an engineer/architect/project management consultant.

(ii) All payments made to the professional team.

(iii) The reasonable depreciation on assets used in construction.

In case of dispute about the working of the Expenditure on Construction, the figure may be worked out with the help of the auditors of the MANYATA, and on the certification of the figureby the auditors, it shall not be called into question.

Until the final receivable in respect of the consideration is decided at the end of a financial year, the Project Development Manager shall be entitled to draw money from MANYATA against the progress of work of construction of the PROJECT from time to time. The moneys so drawn by the Project DevelopmentManager shall be adjusted against the amount of consideration determined receivable by it from MANYATA at the end of a financial year as stated hereinabove.

5.2.3. The Project Development Manager shall not be entitled to reimbursement of any other expenditure which may have been incurred in connection with the provision of services under this Agreement (except those which are preapproved by Manyata)

5.3) In the event of MANYATA, abandoning the project, the Project Development Managers shall be titled to their fee up to the stage of completion.

6) project development managers to furnish reportson progress ofdevelopment:

Project Development Managers shall:

6.1) within 04 weeks after obtaining Plan Sanction prepare and deliver to MANYATA progress charts and cash flow projections forall items of expenditure to be incurred by MANYATA in connection with the Development;

6.2 Report of all other arrangements connected with the carrying out of the Development, from time to time;

6.3 Ensure that at all times during the Development adequate, competent and suitably qualified and experienced staff of ProjectDevelopment Managers are employed properly to perform the functions and obligations of Project Development Managers under this Agreement;

6.4) Fix Meeting wherein Project Development Managers shall provide all the necessary information with regard to the progressof the development which shall be recorded and signed by Project Development Managers and MANYATA or their respective representatives;

7) MANYATA TO ENTER INTO THE BUILDING CONTRACT:

If necessary, MANYATA shall enter into a Building Contract recommended by the Project Development Manager with a Building Contractor for the Development of the PROJECT

8) SUMMARY OF THE PROJECT DEVELOPMENT MANAGER'S GENERAL FUNCTIONS ANDOBLIGATIONS:

The Project Development Managers shall in addition to the Project Development Managers specific functions and obligations under any other Clause:

8.1) supervise and co-ordinate all aspects of the Development and without prejudice to and in addition to the generality supervise and co-ordinate the activities of the Professional Team in respect of the Development;

8.2) use all reasonable endeavours to see that the Development is practically completed in accordance with the Plans and the Specifications (with such alterations as may be necessary and approved by MANYATA) and within the timeframe agreed upon

8.3) Project Development Managers shall provide from time to time cash flowcharts and estimate charts to MANYATA and such cash flow charts and estimate charts to be prepared and furnished every six months;

8.4) Liaisoning with statutory/municipal or any other appropriate authorities for obtaining approval, intermediate approvals and final completion certificate/documents including but not restricted to commencement certificate(s) and occupancy certificate(s)

8.5) Liaisoning with the Contractors for the smooth implementation of the project.

8.6) Make available to MANYATA

8.6.1) As built layout and building drawings.

8.6.2) As built electrical drawings.

8.6.3) As built sanitary and water supply drawings.

8.6.4) As built drawings for all other systems ,

8.6.5) Completion certificates from Statutory Bodies.(On completion, all these drawings will be become exclusive property of Manyata)

8.7) The Project Development Managers shall be responsible for certification at every stage of works commencing from all the drawings, from the foundation to the completion and all stages applicable thereto and as set out in this Agreement; (such certification to cover the recommendation to release payments)

8.8) The Project Development Manager shall wherever applicable support such Certification with the report of specialist whose services the Project Development Managers may have taken or have to take for such certification;

8.9) The Project Development Managers shall carry out theservices with due diligence and efficiency and shall exercise suchskill and care in the performance of the services as is consistent with recognized professional standards,

8.10) The Project Development Managers shall act at all times so as to protect the legitimate interests of MANYATA and will take all reasonable steps and exercise reasonable care and caution to keep all expenses to a minimum, consistent with sound contractual and engineering Practices.

8.11) Project Development Managers subject to the contractshall have complete control of the personnel performing theServices

9) LICENCE TO THE MANAGER:

During the period of development, as long as there is no breach of the terms of the agreement, the Project Development Managers shall have irrevocable licence and authority to enter upon the site for the purpose of carrying out its functions and obligations under this Agreement without reference to MANYATA;

10) DEVELOPMENT PLANNING.

Project Development Managers shall during the development be entitled to take decisions on planning the implementation of the contract, execution of the work, the priority of works to be done changes to be made in any works items and the day to day management of the development of the project which in the opinion of the PDM is reasonably necessary for the purpose of progress of the Development

11) ALTERATIONS RECOMMENCED BY THE PROFESSIONAL TEAM:

In the event of the Professional Team recommending any alteration to the Plans or the Specifications, the Project Development Managers shall in consultation with the professional team approve such alterations ;(provided such alterations are not in conflict with the overall development plan)

12) TERMS OF EMPLOYMENT OF NECESSARY PERSONS:

12.1) MANYATA shall appoint as recommended by the Project Development Managers,

the Building Contractor, all nominated Sub-contractors and/or specialist Sub-Traders the members of the Professional Team and all other third parties required to be appointed to carry out functions in connection with the Development all of whom are in Clause 12.2 called 'Necessary Persons'; But none of these personnel shall be deemed to be in the employment of Manyata, unless specifically stated.

12.2) The Project Development Managers shall use all reasonable endeavours to ensure that all Necessary Persons are engaged for the Development and successful completion thereof;

13) COPIES OF CONTRACTS/SITE MEETING REPORTS:

Copies of all contracts relating to the Development and/or each Approved Letting and/or any Approved be supplied to MANYATA by Project Development Managers and vice versa as soon as possible after their being entered into. Project DevelopmentManagers shall ensure that copies of all Architects Certificates, variations and orders are sent to MANY ATA on its issuance. Report of the site meetings shall be made available MANYATA;

14) MANYATA TO PROVIDE FOR FINANCE AS REQUESTED:

It shall be the responsibility of MANYATA to make payments and arrange for funds as per the cashflow charts or when requiredfor the Development and payments under several accounts as agreed from time to time and recorded in the Minutes of the Meeting held between Project Development Managers and MANYATA without prejudice to the other obligation of MANYATA to pay under any other clause of this Agreement;

15) PAYMENTS BY MANYATA

15.1) MANYATA shall endeavour, within 14 days of the issue of aProject Development Managers of the full net amount shown on such Certificates, make payments to the person entitled; However, delay in making the payments is likely to cause delayin the completion of the project.

15.2) MANYATA shall endeavour to pay all proper fees of the Professional receipt by MANYATA of a written demand by Project Development Managers;

15.3) MANYATA shall pay for all the expenses of the Development including the following but not limited to the same:

a) Travel expenses for Development; (to the concernedpersonnel)

b) All expenses for coordination with several agencies involved inthe Development;

5.4) COMPUTATION OF ACCOUNTS:

On the completion of every Building Managers shall prepare and finalise accounts for the said Building and on such finalisation of accounts for the said Building and on such finalization of accounts, pay to Project Development Managers the balanceamounts of the Management Fee after making adjustments for the advances, if any, received by the Project Development Manager:

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18) MANYATA TO PAY FEES ETC:

MANYATA shall pay all fees, charges, fines, penalties and other payments which during the progress of the Development may properly be payable to any Authority, Statutory Body or any competent person in respect of the Development;

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29.3) WHOLE AGREEMENT

The Parties acknowledge that this Agreement and these conditions contain the whole Agreement between the parties andit has not relied upon any oral or written representations made;

29.4) SUPERSEDES PRIOR AGREEMENTS

This Agreement supersedes any prior agreement between the parties whether written or oral and such prior agreements are cancelled as at the Commencement Date but without prejudiceto any rights which have already accrued to either of the parties.

10. A plain reading of the agreement particularly Clauses 5, 6, 7 and 8 of the Agreement dated 31.3.2005 which deal with the functions and obligations of the project manager in carrying out and implementing the agreement entered with M/s. Manyata Promoters Pvt. Ltd. reveals that the appellants are required to *manage* overall implementation of the project viz., the Software Technology Park for which the agreement had been enteredbetween the appellant and M/s. Manyata Promoters Pvt. Ltd.. It states and reveals their obligation and function is implementation of the project and not execution of the project. On a close reading of few stipulations/clauses of the Agreement,in the said context of the recitals, we find that the Appellantsare required to supervise and coordinate all aspects of the development, use of reasonable means to see that the development is completed in accordance with plans and specifications, cash management of the project by providing cash flow charts and estimate charts to M/s. Manyata Promoters Pvt. Ltd., approach Municipality and any other authorities inobtaining approvals; and also they are responsible for certification at every stage of work commencing from the drawings, foundation, etc.. It is clear that the actual project is executed by appointment of suitable contractors having adequate financial resources and good reputation; subcontractors, team of professionals consisting of architects, quantity surveyors, structural engineers, building services ormechanical and electrical contractors who would be appointed byM/s. Manyata Promoters Pvt. Ltd. on the basis of recommendation by the appellant for completion of the project. The term 'project' is also defined under the said Agreement at Clause 2.9 which means the development of the scheduled property by putting up commercial development, software tech park, hardware tech park, entertainment centre, etc.. The fees for rendering the service prescribed under Clause 5.2.1 to bepaid to the appellant is 5% of the expenditure incurred on the construction and development of the project; also the computation of the construction and development expenses are prescribed at Clause 5.2.3. of the agreement. Analysing the stipulations of the said Agreement dated 31.3.2005, it cannot besaid that the arrangement between the appellant and M/s. Manyata Promoters Pvt. Ltd. for execution of the project as a whole; on the contrary, it reveals that appellant has been engaged to advise/assist M/s. Manyata Promoters Pvt. Ltd. in implementation and completion of the project. Therefore, the claim of the appellant that they have been appointed to execute the project has been rightly rejected by the learned Commissioner as the activities/performance stipulated under the Agreement clearly discloses that the services rendered in the management of the project for its completion

by engaging suitable contractors, subcontractors, team of professional,obtaining approvals etc.; thus, in the nature of advice, consultancy or technical assistance. No contrary evidence has been placed by the Appellant to rebut the said finding of the Commissioner.

11. The judgment cited by the learned advocate for the appellant particularly **Basti Sugar Mills Limited** (supra), is not applicable to the facts and circumstance of the present case being on a different set of facts. In the said case by an agreement with Indo Gulf Industries Ltd., who took over the management of running of a sugar mill was alleged to be a Management Consultancy Agreement service and Service Tax was accordingly demanded from the assessee. Analyzing the various clauses of the Agreement between the appellant with Indo Gulf Industries, the Hon'ble Supreme Court concluded that the appellant was entrusted the operation of the factory and various Clauses of the Agreement were to enable the appellant to perform the operation of the factory, smoothly. TheAgreement is not for advice or consultancy. Contrary to the said facts, in the present case, the recitals in the Agreements acknowledges the expertise of the appellant in infrastructurearea to undertake the work of Project Management and the otherClauses of the Agreement which are in consonance with the object to manage the project for its smooth completion.

14. Similarly, the judgment in the case of **CMS (I) Operations & Maintenance Co. P. Ltd. vs. CCE: 2007 (7) STR 369 (Tri.)**, the issue before the Tribunal was that the appellant and M/s. ST-CMS Electric Company Pvt. Ltd., which had been formed to finance, construct, own and operate 200 MWlignite fired power plant entered into a contract called "Operationand Maintenance Agreement" with obligation to maintain the facility, generate electricity and supply the same to Tamil Nadu Electricity Board as per the Power Project Agreement betweenthe owner and Tamil Nadu Electricity Board on a continuous basis. They received a lumpsum amount every month from the owner as a consideration for operating the plant as per contract. In the said case, the entire operation of the plant was entrusted to M/s. CMC (I) Operations and Maintenance Co. Pvt. Ltd., whichis not so in the present case, therefore, the said judgment is alsonot applicable to the facts of the present case.

15. On the other hand, we find that the judgment referred by the learned Authorised Representative for the Revenue in the case of **Jubilant Enpro** (supra), the interpretation referred to the definition of 'Management Consultancy Service' can safely beadopted to the present case. In paragraph 6 of the judgment, it was observed as follows:

"6. We have considered the submissions made by both sides. A careful perusal of the appellants services to M/s. Transocean and M/s. Tide Water detailed in para 2 above makes it clear that the appellants were advising the clients about various aspects relating to Management. The services are not executionery in nature and are clearly advisory in nature. The definition of "Management Consultant" is so worded that the services performed by the appellants clearly fall within its scope and for that one only has to read the definition of "Management Consultant" quoted earlier vis-à-vis the description of impugned services (detailed in para 2) to come to such finding. The expressions like "any service", "either directly orindirectly", "in connection with the management", "in any manner" appearing in the definition of 'Management Consultancy Service' are expressionswhich are expansionary rather than restrictive. Thus, this definition is wide enough to include advisory services rendered in connection with the management of an organisation. The services rendered to M/s. Transocean and M/s. Tide Water as enumerated earlier clearly show that predominantly predominant parts of the said services were advisory (not executionary) and the 'advices' (services) were directly connected with the management of the companies the services were rendered to. The said 'advices' (services) rendered related to conceptualizing, devising,

development, modification, rectification or upgradation of the working system of the said companies. Advices on commercial aspects, current developments, import and export policy of India, potential problems and solutions, marketing strategies, alerting them about potential misuse of their IPRs, economic & political scenarios etc. were clearly applicable to and useful for the working systems of these companies (M/s. TideWater & M/s. Transocean) and thus clearly fell within the ambit of role of 'management consultant' asdefined earlier. Thus the impugned service clearly qualifies for the status of Management Consultancy Services; some of its minor fringes being subsumed thereunder by virtue of Section 65A(2)(5) of Finance Act, 1994. The appellants' attempt to elucidate the meaning of Management Consultancy by reference to meaning of the word 'Management' is not really germane because the expression "ManagementConsultant" and "Management Consultancy Service" are clearly defined in the Finance Act, 1994 itself andtherefore one doesn't have to, indeed one cannot, look beyond the statutory definition for the purpose of classification in this case. It is well settled that for the interpretation of statutes one has to go by the definition of a 'term' contained in the statute regardless of its dictionary or other meanings or its definitions in other statutes. The service which was the subject matter of *M/s. Glaxo Smithkline Consumer Healthcare* v. *CC, Mumbai-II* (supra) was essentially inregard to market development, marketing and sales and hence was not similar to the impugned service. The service involved in the case of *Bharti Televentures* (supra) was essentially liaisoning. Indeed, none of theother case laws cited by the appellants for pressing that the impugned service is not Managements Consultancy Service dealt with service of the nature described in para 2 above."

In the aforesaid judgment, the Tribunal has observed that the definition of 'Management Consultancy Service' as provided under Section 65A of Finance Act,1994 is very clear as the term contained in the statute indicates that services rendered relating to conceptualising, devising, development, etc., of the working system of the said companies; advising on commercial aspects would come under the scope of 'Management Consultancy Services'.

16. In the present case, commencing from identification of the contractors, sub-contractors, professional team, day-to-daymanagement of cash flow, completion of the project in accordance with plan, etc., with active participation and adviceof the appellant from time-to-time rendered to M/s. Manyata Promoters Pvt. Ltd., fall within the scope of advice, consultancy or technical assistance. Besides the statements of various persons recorded from time-to-time, reveal that the activities by the appellant acknowledge to be in the nature of managerial service rendered to M/s. Manyata Promoters Pvt. Ltd. Besides, we find that the appellant had collected Service Tax as per Clause 5.2.1 of the Agreement in few instances from M/s. Manyata Promoters Pvt. Ltd. but not paid the same to the department. Thus, the Project Development Management Fee collected by the Appellant squarely fall under the category of 'Management Consultancy Service' and taxable service duringthe period under dispute. The claim of the Appellant that it becomes taxable only with effect from 01.06.2007 under the 'Management or Business Consultancy Service', in our view isnot sustainable in view of the facts and circumstances of the case discussed as above.

17. The next issue to be addressed is whether extended periodof limitation could be invoked against the appellant for recovery of duty. The learned Commissioner in the impugned order while confirming the demand for extended period held that the appellant has not taken registration even though they haveprovided taxable service and also collected service tax by issuing debit notes to the service receivers; also during thefinancial

year 2005-06 and 2006-07, income on account of services rendered reflected in their balance sheet under the head Project Management fees, thus they were aware of the applicability of service tax under the category of Management Consultancy service. Also, the learned Commissioner recorded that the agreement dated 06.4.2003 found to be not genuine being reported by the Registering Authority. All these factors were cumulatively considered by the adjudicating authority and it is concluded that the Appellant has suppressed the fact of rendering taxable service during the said period and proviso to Section 73(1) of the Finance Act,1994 is attracted. We do not find any discrepancy in the said conclusion of the Ld.Commissioner. The said finding have not been rebutted through material particulars before this Tribunal. Contesting the saidfindings, it is submitted by the learned advocate on behalf of theappellant that merely collecting service tax on few occasions and not depositing it with the department would not lead to any conclusion that the appellant had suppressed or mis-declared facts to evade payment of service tax. The explanation furnished by the appellant to justify non-payment of service tax is not convincing and hence not acceptable. On the contrary, analysing the statements the learned Commissioner at para 44-45 of the impugned order held that there is mis-declaration and suppression of facts. In these circumstances, invocation of extended period of limitation is sustainable. Consequently, the penalty imposed on the appellant under Section 77 and 78 of theFinance Act, 1994 are also justified. However, penalty imposed under Section 76 along with Section 78 cannot be sustained.

18. On the issue of admissibility of CENVAT credit of the service tax paid on various input services while rendering the taxable service, the learned Commissioner in the impugned order has held that the appellant has not produced any documentary evidence in support of their claim. In other words, the learned Commissioner has not disputed admissibility of CENVAT credit, if any,cggug of the service tax paid on input services used in providing the taxable services, but not allowed the same due to lack of evidence. We are of the view that the appellants are eligible to avail CENVAT Credit of service tax paid on input services subject to production of necessary documents which would be scrutinised and CENVAT credit, if any, admissiblebe allowed. Similarly, the learned Commissioner also thoughaccepted in principle that benefit of cum-tax value can be extended to the Appellant but did not consider the same, as necessary evidence has not been placed indicating the value charged has been inclusive of tax.

19. In the result, the impugned order is modified and the issueof classification of service under Management Consultancy service and confirmation of the demand of service tax withinterest for the period in question and penalty under Section 77 and 78 of the Finance Act, 1994 is upheld; penalty imposed under Section 76 is set aside; cum-tax value and CENVAT credit be allowed subject to scrutiny of the documents. The matter is reamended accordingly to recompute the liability in accordance with the observations made as above. Appeal is disposed ofaccordingly.

(Order pronounced in Open Court on 19 .01.2024)

(D.M. Misra)Member (Judicial)

(Pullela Nageswara Rao)Member (Technical)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. I (SM)

Service Tax Appeal No. 20515 of 2021

[Arising out of Order-in-Appeal No. CAL-EXCUS-000-APP-266-2020 dated 02.09.2020 passed by the Commissioner of Central Tax (Appeals), Cochin]

IBP Auto Service ……Appellant
Perambra,Kozhikode,
Kerala

VERSUS

Commissioner of Central Tax & Central Excise, Calicut **……Respondent**

C R Building, Mananchira,Calicut, Kerala - 673001

APPEARANCE:

Present for the Appellant: None

Present for the Respondent: Sh. P. Saravana Perumal (Add. Com.), A.R.

CORAM:

HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)

FINAL ORDER NO. 20051/2024

DATE OF HEARING: 18.01.2024DATE OF DECISION: 18.01.2024

PER D. M. MISRA

None present for the appellant, however, through their email dt. 17.01.2024, the ld. Advocate for the appellant requestedto decide the case on merit on the basis of records. Heard the ld. AR for the Revenue.

2. This appeal is directed against Order-in-Appeal No. CAL- EXCUS-000-APP-266-2020 dated 02.09.2020 passed by the Commissioner of Central Tax (Appeals), Cochin.

3. The ld. Commissioner (Appeals) in the impugned order rejected their appeal observing that there was an admitted delay of 147 days in filing the appeal before him, and also the appellant has failed to comply with the provisions of Section 35F of the CEA,1944 as applicable to Service Tax matters, by making mandatory pre-deposit of 7.5% of the disputed amount involved in the case.

4. The ld. AR for the Revenue has submitted that subsequently, the appellant complied with the provisions of Section 35F of the CEA, 1944 on 11.01.2021 and also before this Tribunal, they complied with the said provisions by making the requisite pre-deposit. He has further submitted that however, there has been a delay of 147 days which is in excess of 90 days
i.e. statutory limit of 60 days, plus condonation period of 30 days in filing the appeal before the ld. Commissioner (Appeals). Hence,the delay could not be condoned in view of the judgment of Hon'ble Supreme Court in the case of ***Singh Enterprises vs. CCE, Jamshedpur – 2008 (221) ELT 163 (SC).***

5. I find that force in the contention of the ld. AR for the Revenue. In view of the principle laid down by the Hon'ble Supreme Court in the case of ***Singh Enterprises (supra)***, the ld.Commissioner (Appeals) could not have condoned the delay beyond 90 days, nor this Tribunal has jurisdiction also to condonethe delay occurred beyond the said period.

6. In the result, the impugned order is upheld and theappeal is dismissed.

(Dictated and pronounced in the open court)

(D. M. MISRA)MEMBER (JUDICIAL)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road, BANGLORE-560009

COURT-2

Customs Appeal No. 2527 of 2010

[Arising out of the Order-in-Appeal No.12/2010-Customs dated 13.9.2010 passed by the Commissioner of Central Excise, Customs and Service Tax (Appeals), Cochin – 600 018.]

The Kerala Minerals & Metals Ltd. **....Appellant**
Sankaramangalam, Chavara, Kollam, Kerala.

Vs.

The commissioner of Customs **....Respondent**
Air Cargo Complex Shangumukham,
Thiruvananthapuram.

Appearance:

Mr. Prinsun Philips, Advocate **....For Appellant**

Mr. K. A. Jathin, AR **.... For Respondent**

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 05/09/2023 Date of Decision: 09/01/2024

FINAL ORDER No. 20040 of 2024

Per R. BHAGYA DEVI:

The appellant, is a limited company fully owned by the Government of Kerala, are engaged in the business of mining and manufacturing of a Titanium Dioxide. They imported 'Huy glass 1105 M-Membrane Bags' (Filter Bags) which were classified under Customs Tariff Heading 5911 9090. On scrutiny of the documents, it was noticed that the item filter bags are not made of textile fabrics but they were made of fibreglass non-woven which are rightly classifiable under Customs Tariff Heading 8421. Accordingly, the classification is finalised under Customs Tariff Heading 8421 and differential duty was demanded, which was upheld by the Commissioner (Appeals) in the impugned order. Aggrieved by this order, appellant is before this forum.

2. The learned counsel on behalf of the appellant submits that the filter bags imported by the appellant are used as straining cloth in a strainer for separation of solid material of micron size from gaseous stream, which is similar to the cloth used in paper making machine; hence, it is rightly classifiable under Customs Tariff Heading 59. It is also submitted that the Bill of Entry was assessed and duty was paid by the appellant; and later, notice was issued on 10.1.2007 which was beyond six months and therefore, it is barred by limitation. However, the adjudicating authorities held that the notice was within the prescribed time limit of one year as is applicable to State Government Undertaking as per Section 28(1)(a).

3. The learned Authorised Representative for the Revenue submitted that the filter bags are made of 100% fibreglass material, felt needled to woven support and laminated with PTFE, which is used for filtering titanium dioxide powder and letting only hot air to atmosphere and reiterating the findings of the Commissioner (Appeals) submitted that it is rightly classifiable under Customs Tariff Heading 8421 and the demand was within the limitation period of one year.

4. Heard both sides. The issue to be decided is the classification of the product "HUY Glass 1105 Membrane Bags (Filter Bags)" imported by the appellant. The appellant admits the fact that filter bags are made of 100% Fibre Glass Material, for needled to woven support and laminated with PTFE, cut to size and sewed along the seams for use as strainer for separating fine dusty particles from gas. The Commissioner (Appeals) had rightly observed that the goods are basically used in the dryer system to prevent fine powder escaping into the atmosphere and admittedly used to filter the titanium dioxide powder from the gas. Section Note 1(r) as seen below specifically excludes glass fibre articles of glass fibres, other than embroidery with glass thread as a visible ground of fabric. The relevant portion of the Customs Tariff Headings are reproduced herein below:

Section XI

Textiles and Textile Articles

1. This Section does not cover :

(a) animal brush making bristles or hair (heading 0502); horsehair or horsehair waste (heading 0511);

(b) human hair or articles of human hair (heading 0501, 6703 or 6704), except straining cloth of a kind commonly used in oil presses or the like (heading 5911); ---

(r) glass fibres or articles of glass fibres, other than embroidery with glass thread on a visible ground of fabric (Chapter 70); The relevant entries are reproduced below:

5911 40 00 - Filtering or Straining cloth of a kind used in oil presses or the like, including that of human hair
5911 90 - Other :
5911 90 10 --- Paper maker's felt, woven
5911 90 20 --- Gaskets, washers, polishing discs and other machinery parts of textile articles
5911 90 90 --- Other

- Filtering or purifying machinery and apparatus for liquids:

8421 21 -- For filtering or purifying water : 8421 21 10 -- - Ion exchanger plant or apparatus
8421 21 20 --- Household type filters
8421 21 90 --- Other
8421 22 00 -- For filtering or purifying beverages other than water
8421 23 00 -- Oil or petrol-filters for internal combustion engines 8421 29 00 -- Other
- Filtering or purifying machinery and apparatus for gases:
8421 31 00
8421 32 00

Intake air filters for internal combustion engines

Catalytic converters or particulate filters, whether or not combined, for purifying or filtering exhaust gases from internal combustion engines

8421 39 -- Other :

8421 39 10 --- Air separators to be employed in the processing, smelting or refining of minerals, ores or metals; air strippers

8421 39 20 --- Air purifiers or cleaners

8421 39 90 --- Other

- Parts :

8421 91 00 -- Of centrifuges, including centrifugal dryers u 7.5% - 8421 99 00 – Other

From the above Chapter headings, it can be seen that articles of glass fibres are excluded from Chapter 59 and 8421 specifically includes air purifiers and therefore, the goods admittedly which are made of 100% glass fibres and which is meant for filtering the gaseous items are rightly classifiable under CTH 8421.

5. The second issue is with regard to limitation applicable under Section 28(1)(a), the Commissioner (A) has held that Section 28(1)(a) empowers them to issue notice within one year in the case of Government, any individual, educational, research or charitable institution or hospital. Hence, the appellant being a State Government Undertaking, the notice issued within one year was a valid notice. The appellant is incorporated as a company under the Companies Act, 1956 and though they are State Government Undertaking are incorporated as a company under the Companies Act, 1956. The Hon'ble Kerala High Court in the **Food Corporation of India (FCI) vs. Angamali Municipality: 1994 (1) KLT 977** rejected the claim of FCI that it is not liable to pay tax, the Hon'ble High Court observed as follows:

"10. After a conspectus of the various provisions of the Food Corporation Act, the Supreme Court held the corporation was not a Government department. A government department has to be an organisation which is not only completely controlled and financed by the Government but has also no identity of its own….. The Corporation on the other hand is an autonomous body capable of acquiring, holding and disposing of property and having npower to contract…… But the Act has given the Corporation an individuality, apart from the Government, so that it cannot be equated with the central government though it may be an agency or instrumentality thereof…."

5.1 In view of the above observations by the Hon'ble Kerala High Court and considering the fact that the appellant was registered under the Companies Act, 1956, the question of considering as Government undertaking for issuance of notice is rejected. Accordingly, the impugned order is upheld as far as the classification is concerned and rejected on the ground of limitation.

6. The appeal is allowed partly.

(Order pronounced in open court on 09.01.2024.)

(P. A. AUGUSTIAN) MEMBER (JUDICIAL)

(R. BHAGYA DEVI MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 20400 of 2017

Service Tax Cross Objection Application No.20232 of 2017

(Arising out of Order-in-Original No. BGM-EXCUS-000-COM- BKK-028-16-17(CX) dt. 28/10/2016 passed by Commissioner Of Central Excise, Customs & Service Tax, Belgaum)

Commissioner of Central Excise, Customs and Service Tax,
No.71, Club Road, Belgaum – 590 001. Appellant(s)

VERSUS

Vicat Sagar Cement Pvt. Ltd.,
Now Kalburgi Cement Pvt. Ltd. Chatrasala Village, Karachakhed Post, Chincholi Taluka, Gulbarga, Karnataka – 585 320. Respondent(s)

APPEARANCE:

Mr. Rajiv Kumar Agrawal, Commissioner(AR) for the appellant. Mr. Ravi Raghavan, Advocate and Mr. Mohd. Ibrahim, Advocate

CORAM:
HON'BLE Dr. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE Mrs. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20050 / 2024

Date of Hearing: 02/01/2024
Date of Decision: 02/01/2024

Per : DR. D.M.MISRA

This is an appeal filed against Order-in-Original No. BGM-EXCUS-000-COM-BKK-028-16-17(CX) dt. 28/10/2016 passed by Commissioner Of Central Excise, Customs & Service Tax, Belgaum.

2. The facts in brief are that the respondents are engaged in the manufacture of excisable goods viz. cement and clinker. The short question involved in the present appeal is whether the respondents are entitled to avail cenvat credit on GTA service for outward transportation of finished goods from the factory on FOR basis up to the customers' premises. Demand notice was issued denying cenvat credit of Rs.1,25.29,631/- for the period August 2014 to January 2015 alleging that credit on the said GTA service is inadmissible as the place of delivery is the factory premises even the sale is on FOR basis.

3. Learned advocate for the respondent submitted that subsequent to the delivery of the judgment of the Hon'ble Supreme Court in the case of Ultra Tech Cement Ltd. [2018(9) GSTL 337 (SC)] on the appreciation of the said judgment, the matter was referred to Larger Bench on account of conflicting opinions of different Division Benches of this Tribunal. The Larger Bench recently in the case of The Ramco Cements Limited Vs. CCE, Puducherry [Central Excise Appeal No.40575/2018 – Interim Order No.40020/2023 dt. 21/12/2023 answered the reference observing as under:

35. In the result, in a case where clearances of goods are against FOR contract basis, the authority needs to ascertain the 'place of removal' by applying the judgments of the Supreme Court in Emco and Roofit Industries, the decision of the Karnataka High Court in Bharat Fritz Werner, and the Circular dated 08.06.2018 of the Board to determine the admissibility of CENVAT credit on the GTA Service upto the place of removal.

4. Learned AR for the Revenue has reiterated the findings in the impugned order.

5. Heard both sides and perused the records.

6. Following the aforesaid principle laid down by the Larger Bench of this Tribunal, the matter is remanded to the adjudicating authority to ascertain the place of removal in accordance with the observations of the Larger Bench of this Tribunal. Appeal is allowed by way of remand. All issues are kept open. Cross-objection also gets disposed of. Needless to say that a reasonable opportunity be given to the respondent.

(Operative part of this order was pronounced in open court on conclusion of the hearing)

(D.M. MISRA) MEMBER (JUDICIAL)

(R. BHAGYA DEVI) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.709 Of 2011

[Arising out of Order-in-Appeal No.20/CE/LDH/2011 dated 31.01.2011 passed by the Commissioner (Appeals), Central Excise & Customs, Chandigarh-II]

M/s Lovely Autos : Appellant (s)

Lovely Mall, Ambedkar Chowk, Jalandhar, Punjab-144001

Vs

The Commissioner of Central

Excise, Ludhiana : Respondent (s)

Central Excise House, F-Block Rishi Nagar, Ludhiana-141001 (Punjab)

APPEARANCE:

Shri Ravi Chopra, Advocate for the Appellant

Shri Narinder Singh, Authorised Representative for the Respondent

CORAM :

HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL) FINAL ORDER No.60233/2023

Date of Hearing:04.07.2023 Date of Decision: 01.08.2023

Per:P. ANJANI KUMAR

M/s Lovely Autos, the appellants, are authorized service station of M/s Bajaj Auto; the appellants are registered for provision of service in the category of "Authorized Service Station" and "Business Auxiliary Service". Audit conducted, by the Department, on the accounts of the appellants, revealed that the appellants are collecting Rs.474/-, from all the customers who purchased Bajaj products, under a Scheme known as "Lovely Service Club" subscription; on enquiry, the appellants informed that they are collecting the amount for providing guaranteed service and also for providing replacement of engine oil, a few parts and a gift. A show-cause notice, dated 07.01.2009, was issued to the appellants seeking demand of service tax of Rs.4,46,078/- along with interest and penalties. The appellants submitted that out of this Rs.474/-, Rs.200/- is charged for service and therefore, this amount alone is chargeable to service tax; the appellants accordingly paid service tax of Rs.1,88,220/- on the same and contested the Department's claim on the remaining amount of Rs.274/-; they have also submitted that the show-cause notice is time barred; since they have paid the amount before issuance of show- cause notice, penalties also are required to be waived. The Original Authority vide Order dated 17.03.2010 confirmed the demand along with interest and penalties; the order was upheld by the Appellate Authority vide impugned Order dated 31.01.2011.

2. Shri Ravi Chopra, learned Counsel for the appellant reiterates the Grounds of Appeal and submits that the appellants have deposited service tax, which they admit to be payable, along with interest and penalty equal to 25%, within thirty days of receipt of OIO in terms of provisions of Section 78 of Finance Act, 1994; penalties under Sections 76
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and 77 have not been paid. He submitted a date chart of the case and submits that they contest the entire duty demanded, except Rs.1,88,220/-, and interest and penalties. He submits that the show-cause notice is time barred as there was no suppression of facts involved. Learned Counsel also submits that penalties can also not be imposed. He further submits that learned Adjudicating Authority or the Appellate Authority, for that matter, has not given the benefit of cum- duty while calculating the service tax payable. Learned Counsel, in support of his arguments, relies upon the following cases:

- *Chemphar Drugs & Liniments- 1989 (40) ELT 276 (SC).*
- *Aditya College of Competitive Exams- 2009 (16) STR 154 (Tri.)*
- *Omega Financial Service- 2011 (24) STR 590 (Tri.)*
- *First Flight Courier Ltd.- 2011 (2) STR 622 (P&H).*

3. Shri Narinder Singh, learned Authorized Representative for the Department, submits that the benefit of Notification No.12/2003 dated 28.06.2003, is available with the condition that there is documentary proof indicating the value of the said goods and materials. He relies on *Ador Fontech Ltd.- 2014 (36) STR 146 (Tri. Mumbai)* and submits that as the appellants have not submitted any documentary proof, exemption cannot be given. He submits that to claim the benefit, the value of the material should have been indicated in the invoices and applicable VAT/ Sales Tax should have been paid on the same in order to be eligible for the exemption as held in *Mahendra Engineering Limited- 2015 (38) STR 233 (All.)* and *Tanya Automobiles (P) Ltd.- 2016 (43) STR 155 (Tri. All)*. Adverting to the appellant's claim that in some cases, as service itself was not provided, inclusion for payment of service tax is not acceptable, he submits that gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of said service in terms of Section 67 of the Finance Act, 1994; the consideration includes any amount that is payable for the taxable services provided or are to be provided. Learned Authorized Representative further submits that though the appellant have paid Rs.1,88,220/- for the entire period, it was only after the lapse was pointed out by the Department and therefore, it is incorrect to mention that the said amount has been paid in normal course and reflected in the Returns; waiver of the penalty under the Act is on the condition that service tax along with interest is paid before the issuance of show-cause notice; in the instant case, the appellant has not paid interest involved even for the amount accepted by the appellant. He submits that the appellants have failed to make correct and full declaration of the facts in the ST-3 Returns; the appellants did not pay service tax even in case which is not contested by them; the appellants have intentionally choose not to disclose the amount collected by them with intent to evade payment of service tax; as held in *Deccan Plaza Vs CST (Appeals)- 2016 (45) STR 202 (Madras)*, demand can be raised for the extended period for failure to make correct and full declaration in ST-3 Returns.

4. Heard both sides and perused the records of the case. We find that the appellants are not disputing either the levy or the classification of service tax. It is the case of the appellants that though they are collecting Rs.474/- from the customers for service of the vehicles under a Scheme, they are not liable to pay service tax on an amount of Rs.274/- because of the fact that out of this Rs.474/-, Rs.274/- does not pertain any service rendered; in fact, out of this Rs.274/-, Rs.124/- pertains to free oil change during the servicing, Rs.50/- for free replacement of parts and Rs.100/- for the gift. On the contrary, it is the argument of the Department, in order to avail exemption from service tax on the above items, the appellants are required to satisfy the conditions laid down in the Notification No.12/2003; the appellants did not satisfy the conditions inasmuch as the said amounts are not reflected either in the invoices or in the books of accounts under relevant Heads and the appellants did not provide any proof like invoice etc. to show that those payments were for the purposes cited above and that applicable VAT/ Sales Tax has been paid on the same.

5. We find that Notification No.12/2003-ST dated 20.06.2003 is as follows:

"In exercise of the powers conferred by Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government being satisfied that it is necessary in the public interest so to do,

hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under Section (66) of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials."

6. We find that a simple perusal of the Notification would indicate that the exemption contained therein is applicable subject to condition that there is documentary proof specifically indicating the value of the said goods and materials. The documentary proof could be in any form such as invoices, debit/ credit notes, books of accounts etc. We find that the appellants did not produce any evidence to that effect, either before the original adjudicating authority or before appellate authority or before us.

7. When the appellants avail the benefit of any notification, it shall be incumbent upon them to satisfy the conditions therein. As per the records of the case, we find that the appellants have not satisfied the conditions. Hence, we find that there is considerable force in the arguments put forth by the Authorized Representative. We find that Tribunal, in the case of *AdorFontech Ltd.* (supra), held that:

"9. We find that as per the provisions of the above Notification, there is a condition that there should be documentary proof specifically indicating the value of goods and material sold. In the present case, the appellants were clearing the goods under a consolidated invoice and uniformly taking 80% of the value of material and consumables and 20% towards the service. There is no separate invoice regarding the sale of goods and material."

8. Coming to the arguments of the appellants that they have paid the service tax payable within one month of the issuance of OIO, we find that the appellants claim to have paid only Rs.1,88,220/- out of total demand of Rs.4,46,078/- along with interest and 25% of the penalty. We find that in terms of Section 73 (3) of the Finance Act, 1994, the appellants are required to pay the service tax confirmed along with interest and 25% of the penalty; it is not open to the appellant to pay a portion of the demand that they think is payable and claim the benefit of the provision of law. Therefore, we are of the considered opinion that the appellants cannot take shelter under the provisions of Section 73 (3) of the Finance Act, 1994.

9. Coming to the issue of limitation, the appellants submit that they have not suppressed any material fact so as to attract the provisions of Section 73 for invocation of extended period. Revenue argues that the appellants have not paid service tax, even to the extent they agreed upon, on their own and have not filed any Returns in this regard. We find that the contention of the appellant is not acceptable. The word "Suppression" means "to hide something"; by not filing the Returns and by not disclosing the material fact, the appellants have clearly suppressed the fact that they have collected the consideration from their customers for the services to be provided by them. Now the question arises as to whether such suppression was with an intent to evade payment of service tax. Suppression by itself may not indicate any intent. However, suppression coupled with the appellant's failure to disclose the amounts collected in the ST-3 returns; failure to deposit the applicable service tax, which they are not disputing, leads to the inevitable conclusion that the intent, to evade payment of service tax, is presentin this case considering the facts and circumstances. For this reason and as per our discussions above, we find that the ratio of the cases relied upon by the appellant will not be of any avail to them.

10. Therefore, we are of the considered opinion that the extended period is rightly invoked for the reasons cited above. Therefore, the demand of duty as confirmed by the lower authorities along with interest and penalty under Section 78 requires to be upheld. We find that the decision of the Tribunal in the case of *Tech Mahindra- 2015 (38) STR 1200 (Tri. Mumbai)* supports our view. It was held that:

6.3 *As regards the argument that the demand is hit by time-bar, the argument advanced on behalf of the appellant in this regard is not convincing at all. The reliance placed in the case of MuthiahChettiarv. Commissioner of Income Tax (supra), has no relevance since the said decision pertains to the provisions of Income Tax Act, which is different from the provisions of the Finance Act, 1994, which governs the levy and assessment of the service tax. Further, in the case of Finance Act, 1994, Section 66A provides for a deeming fiction for treating the service-recipient in India as the service-provider in respect of the services received from abroad and for application of the provisions of the Finance Act, 1994 in respect of such a deemed service-provider. Therefore, in view of the clear unambiguous language used in Section 66A, it cannot be said that the appellant was not liable to declare the activities undertaken by the appellant in this regard. It is a fact on record that the appellant did not disclose this information in the ST-3 returns filed. The contention of the appellant that there was no specific column for declaration of the amounts paid lacks merits for the reason that the appellant has to declare the amounts received as the amounts billed or charged as the appellant is deemed as a service provider. Even otherwise, the appellant could have disclosed this information in the return with suitable remarks in this regard. Therefore, the non-disclosure of the details of the transaction in the ST-3 returns in spite of specific statutory mandate in this regard clearly amounts to suppression of facts. An identical issue was considered by this Tribunal in the case of Star India Pvt. Ltd. [2014-TIOL-1886-CESTAT-MUM = 2015 (38) S.T.R. 884 (Tri.-Mum.)] and the contention rejected as detailed in para 5.15 of the said decision.*

However, looking into the facts and circumstances of the case, we find that interest of justice will be more than met if penalty under Section 78 is imposed. Accordingly, penalty imposed under Sections 76 and 77 are being set aside.

11. In the result, the appeal is partly allowed by upholding the confirmation of duty, interest and penalty under Section 78; penalties under Sections 76 & 77 are, however, set aside.

(Pronounced in the open Court on 01/08/2023)

(S. S. GARG)

MEMBER (JUDICIAL)

(P. ANJANI KUMAR)

MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 60625 Of 2016

[Arising out of OIA No. JAL-EXCUS-000-APP-16-16-17 dated 12.07.2016 passed by the Commissioner (Appeals) of Central Excise, Chandigarh]

General Manager, Punjab Roadways : Appellant (s)
Main Bus Stand, Jalandhar-I

Vs

CCE & ST-Ludhiana : Respondent (s)
F Block, Rishi Nagar, Ludhiana

APPEARANCE:

Shri Piyush Kant Jain, Advocate for the Appellant

Ms. Shivani, Authorised Representative for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL) HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No. 60253/2023

Date of Hearing:14.08.2023Date of Decision:14.08.2023

Per : S. S. GARG

The present appeal is directed against the impugned order dated12.07.2016 passed by the Commissioner (Appeals) whereby the Ld. Commissioner (Appeals) has dismissed the appeal on the ground of delay in filing the appeal in terms of provisions of Section 85 of the Finance Act, 1994.

2. Briefly the facts of the case are that the appellant had leased/rented out its immovable property (shops) to various parties for use in the course of furtherance of business or commerce and received rent from these parties. In addition they had also collected Bus Adda/Stand fees from the transporters for providing infrastructural support in relation to furtherance of business and commerce such as embarking/disembarking of passengers, to issue tickets and to use public conveniences etc. at the Bus Stand.

These services appeared to fall in the category of "Renting of Immovable Property Services" and "Business Support Services" and were providedby the appellant without getting registered with the department, without paying service tax thereon and without filing the ST-3 returns.On being investigated by the department, the appellant supplied the data of taxable services provided for each service for the period
01.06.06 to 24.10.2007, a perusal of which revealed that, on the gross receipts of Rs. 1,18,59,022/-, they had evaded service tax ofRs. 12,96,787/-(including cesses). The benefit of cum-tax value was extended to the appellant while calculating their service tax liability. Italso appeared that the appellant had suppressed the material facts of providing the taxable services from the department with intend to evade payment of service tax.

3. Accordingly, a show cause notice was issued to the appellant for recovery of Service tax of Rs. 12,96,787/-(including cesses) under proviso(1) to Section 73 of the Finance Act, 1994 (for brevity the Act')by invoking the extended period of limitation along with interest underSection 75 of the Act, respectively. Penal action under Sections 76, 77 and 78 of the Act was also proposed against them.

4. After following due process, the original authority has confirmed the demand alongwith interest under Section 75 of the Finance Act, 1994 and equivalent penalties imposed under Section 78 and Rs. 5,000/- penalty imposed under Section 77 of the Act.

5. Aggrieved by the said order, the appellant filed appeal beforethe Ld. Commissioner (Appeals) alongwith an application for condonation of delay in filing the appeal before the Ld. Commissioner. The appellant stated in the condonation of delay application that they had received the impugned order dated 29.02.12 on 06.03.12. They have further stated that the adjudicating authority had passed Order- in- Original no. 85/ST/ADC/LDH/2011 dated 25.01.12 on the same issue in the case of General Manager, Punjab Roadways, Ludhiana against which an appeal had been filed by the latter and they had bonafide belief that the decision of the said appeal would be applicableto the appellant also. They further stated that the delay in filing the appeal was neither wilful nor intentional as the appellant is a State Government Undertaking and providing state utility services of transportation to the public. The Ld. Commissioner after considering the submissions of the appellant dismissed the same on the ground that he did not have power to condone the delay beyond the period of three months as provided under Section 85 (3) of the Finance Act, 1994 whereas the present appeal has been filed before him on 19.05.2014 which is more than one and half year later.

6. Heard both the parties and perused the case records.

7. Ld. Counsel for the appellant submitted that the appellant were under a bonafide belief that the decision in the case of appeal filed by General Manager, Punjab Roadways, Ludhiana will be applicable to them as the issue involved therein is identical. He further submitted that the appellant is a State Government Undertaking engaged in providing state utility services of transportation to the public and had never intended to evade any tax. He also submitted that in the interest of justice, the delay in filing the appeal should be condoned.

8. On the other hand, the Ld. DR submitted that the Ld.

Commissioner (Appeals) does not have power under Section 85 (3) of the Finance Act, 1994 to condone the delay beyond the period of threemonths. He further submitted that in the present case, the delay is more than one and half year which is beyond the condonable power ofthe Ld. Commissioner (Appeals).

9. After considering the submissions of both the parties and perusal of the material on record, we find that admittedly the impugned order dated 29.02.2012 received on 06.03.2012 and appealwas required to be filed on or before 05.06.2012 and if sufficient reasons preventing the appellant from filing the appeal are given and the Ld. Commissioner (Appeals) is satisfied with those reasons then the Ld. Commissioner (Appeals) has power to condone the delay upto maximum period of three months whereas in the present case, the appeal was filed on 29.05.2014 after the delay of more than one and half years. This issue has been considered by the Hon’ble Supreme Court in the case

of Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur – 2008 (221) ELT 163 (S.C.) wherein the Hon'ble Supreme Court after discussing the power of the Commissioner (Appeals) to condone the delay has held in Para 10 as under:-

"10. Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps. In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was only opened for some short period. From the application for condonation of delay, it appears that the appellant has categorically accepted that on receipt of order the same was immediately handed over to the consultant for filing an appeal. If that is so,the plea that because of lack of experience in business there was delaydoes not stand to be reason. *I.T.C.'s* case (supra) was rendered taking note of the peculiar background facts of the case. In that case there was no law declared by this Court that even though the Statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any event, the causes shown for condonation have no acceptable value. In that view ofthe matter, the appeal deserves to be dismissed which we direct. There willbe no order as to costs."

10. By following the ratio of the aforesaid decision cited (supra), we are of the considered opinion that there is no infirmity in the impugned order passed by the Ld. Commissioner (Appeals) which we uphold by dismissing the appeal of the appellant.

(Operative part of the order pronounced in the open Court)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHANDIGARH
REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.339 Of 2010

[Arising out of OIA No.406/MA/RTK/2009 dated 09.12.2009 passed by the Commissioner of Central Excise (Appeals), Delhi-III]

M/s Laxmi Pipes Limited **: Appellant (s)**

Bhiwani Road, Hansi, District Hisar, Haryana

Vs

The Commissioner of C.E &

S.T, Rohtak **: Respondent (s)**

2nd Floor, Pacific City Centre, Opposite Shangrila Hotel,

Near Jat Bhawan, Delhi By-Pass, Rohtak, Haryana-124001

APPEARANCE:

Shri Shubham Garg, Chartered Accountant for the Appellant Shri ShivamSyal, Authorised Representative for the Respondent

CORAM :

HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL) FINAL ORDER No.60270/2023

Date of Hearing:04.08.2023 Date of Decision:21.08.2023

Per :P. ANJANI KUMAR

The appellants, M/s Laxmi Pipes Ltd., assails the order in Appeal No. 406/MA/RTK/2009 dated 9.12.2009 passed by commissioner of Central Excise (Appeals), Delhi III.

2. The appellants have entered into contracts with M/s Tiger Logistics (I) Pvt. Ltd. and M/s Color Barcode Pvt. Ltd. and provided certain services as per the contracts. The consideration received from the said companies was accounted as commission in the books of accounts.Revenue opined that the commission received by the appellants to be the consideration towards the commission and brokerage service rendered by the appellants to their clients and the same is chargeable under "Business Auxiliary Service" chargeable to Service tax. A show cause notice dated 24.04.2008 was issued to the appellants demanding Service tax of Rs. 07,96,622/-. The demand was confirmed, by the joint commissioner, vide Order-in-Original dated 30.04.2009, along with interest and penalty. On the appeal preferred by the company, Commissioner (appeals) who upheld the order-in-original vide order dated 09/12/2009. Hence, this appeal.

3. Shri Shubham Garg, learned Consultant for the appellants submits that that activities performed by the appellants were in fact related to Administrative services like maintenance of payroll of the employees, maintenance of attendance data, managing office supply needs, planning meeting, scheduling appointments etc.He submits affidavits dated

08.06.2023 and 03.08.2023 to that effect.Learned Consultant further submits that it is incorrect to decide the type of service on the nomenclature used for accounting; He relies on the decision of the tribunal in the case of *Laminar industries 2007 (220) ELT 946 (Tri. Mumbai).* The services rendered by the appellants would at best fall under "Business Support Service" which came to be charged from 01.05.2006 which is after the impugned period i.e, 01.04.2005 to 31.03.2006. Before 01.05.2006, "Business Support Service" cannot be taxed under any other Heading.'Learned Consultant further submits that in the instant case, there are two separate transactions involved, one transaction is between the company and their own clients where in the companies render "Business Auxiliary Service" of management of distribution and logistics services, the second transaction is between the appellant and the above mentioned companies where in the appellants render administrative assistance; the appellant raises the invoice and receives the consideration which is a specific percentage of the total consideration charged by the companies to their own clients . He further submits that even if it is assumed that the services rendered by them are taxable under "Business Auxiliary Service", the appellant is eligible for the benefit available to sub service providers as per department circular F/No. 341/43/96-TRU dated 31.10.1996 and trade notice No. 1/2000 dated 24/07/2000.

4. Shri Shivam Syal, Authorized Representative for the Revenue submits that the appellants themselves submitted, vide letter dated 16.06.2008, that the commission income received from two companies was for the services rendered, on their behalf to their customers, in management of distribution and logistics; it is important to note that the service was rendered by the appellants on behalf of their clients and therefore as held in *Phoenix IT solutions ltd. 2011 (22) STR 400(Tri-Bang),* the service falls under "Business Auxiliary Service". He further submits that the appellants were receiving commission based on the revenue earned by the two companies from their customers and therefore they are acting as a commission agent as held by the circular F/No. 334/4/2006-TRU dated 28.02.2006.

5. Learned Authorized Representatives further submits that the agreement mentions the service without detailing the roles and responsibilities of the appellant. He relied on the Hon'ble Himachal High Court order in the case of *Ramlal versus Om Prakash and another (Appeal No. 87/2009)* and submits that "All material aspects which needed to be reflected with certainty have been left in the realms of speculation. Neither the agreement gives out a clear identity of the land nor it spells out the boundaries. Even the area of the house-subject matter of the agreement is not correctly recorded therein. No ascertainable or determinative intention can be deciphered from this agreement. Such an agreement to sell is not capable of enforcement. Its specific performance cannot be granted".

6. Learned Authorized Representative submits, moreover, that as per circular 15.8.2003 dated 20.06.2003 services need to be classified under "Business Auxiliary Service" even before 01.05.2006 in view of Tribunal's Judgment in *Kopran Ltd. 2009 (16) STR 279 (T)* and in *Kajaria Ceramics ltd. 2005 (191) ELT 20 (SC),* it was held that the circular can be read as a contemporaneous understanding and exposition of the intention and purpose of the notification. He further submits that the appellants claim that the show cause notice did not specify the sub-heading under which "Business Auxiliary Service" falls and thus the show cause notice requires to be set aside, is wrong . He relies on M/s Golden Handling Works Final Order dated 16.10.2017 by CESTAT New Delhi. He further submits that in the present case, it was specifically mentioned that the appellants were rendering the work as a commission agent. He relies on *ITC ltd. 2014(36)STR481(DEL)* and submits that the object and purpose of the issue of show cause notice is to inform the assessee so that reply or submissions can be made and relevant facts which are in the knowledge of the assessee can be brought on record. After examining and considering the show cause notices, we feel that the assessee was informed and made aware of the contention of the revenue and their stand and stance.

7. Heard both sides and perused the records of the case. It is the case of the appellants that though the consideration received from their clients as "Commission" in their books of accounts; the appellants received only the remuneration for the services rendered by them to M/s Tiger Logistics (India) Limited and M/s Color Bar Cosmetics Private Limited; the remuneration received was towards the service and the actual service rendered was that of maintenance of pay-roll of the employees, maintenance of attendance data, managing office supply needs, planning meeting, scheduling appointments etc. which are basically administrative services and are essentially classifiable under "Business Support Service" and not taxable during the impugned period; they cannot be classified as "Business Auxiliary Service". We find that the appellant submits that the nomenclature in the books of accounts cannot be a deciding factor in arriving at the type of services rendered; the actual services rendered need to be looked into.

1) To have a proper appreciation of the facts of the case, we consider that it is expedient to have a look at the relevant clauses of the agreement which are as follows:

(i) In respect of Tiger Logistics, the offer letter dated 10.04.2005 informs that M/s Tiger Logistics are pleased to appoint the appellants for managing distribution and logistics of their above-mentioned clients as per the discussions held in their office between the appellant and Mrs. Rakhi Marwah of M/s Tiger Logistics Limited and that M/s Tiger Logistics would give 6.5% of the total billing to the parties mentioned therein in respect of management of their distribution and logistics.

(ii) The agreement with Color Bar which is titled "Business Support Agreement" mentions as under

"Support Service Clause"

CCPL hereby appoints LPL as its facilitator for business support for promotion of its products and LPL accepts the said appointment. LPL shall render services including evaluation of prospective customers, processing of purchase orders and fulfillment services, information and tracking of delivery schedules in regard to the sale of the products which CCPL in representing their foreign principal supplies, including the competitor's information.

"Price Clause"

CCPL shall pay to LPL a 60% of revenue earned by CCPL from its immediate principal subject to Tax Deduction at Source at applicable rates.

8. Ongoing through both the agreement and offer letter, we find that none of them specify the nature of services to be in relation to administrative services like maintenance of payroll of the employees, maintenance of attendance data, managing office supply needs, planning meeting, scheduling appointments etc. This being so, we are not in a position to appreciate the arguments of the appellant that the services was in the nature of "Business Support Service". Moreover, there is no mention of charges paid for the said "Business Support Services" claimed to have been rendered by the appellants. The consideration is only in the form of a fixed percentage of the total transaction that the principals had with their clients. Therefore, notwithstanding, the averments of the appellants and the affidavits filed by the Counsel on behalf of the appellants, we are unable to be convinced that the appellants have rendered "Business Support Services". We are of the considered opinion that an agreement, oral or written, is the source to understand the type of service rendered. In the instant case, it is understood from the contracts or the offer letter that the appellants rendered services with reference to the main work of their principals i.e. provision of support for logistics. This being the case, we are not inclined to accept the argument of the appellant that the services rendered were "Business Support Service". Therefore, we find nothing in the records or in the arguments proposed by the appellants to set aside the impugned order. We find that the impugned order does not necessitate any interference.

9. In the result, the appeal is dismissed.

(Pronounced on 21/08/2023)

(S. S. GARG)

MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 60340 of 2021

[Arising out of Order-in-Appeal No. CHD-EXCUS-001-APP-04-2021-22 dated26.04.2021 passed by the Commissioner (Appeals), Chandigarh]

M/s Competent Constructions **……Appellant**
1258 Sector 37B Chandigarh 160036

VERSUS

C.C.E & S.T. Chandigarh **……Respondent**
Plot No. 19 Sector 17-C, Chandigarh 160017

APPEARANCE:

Present for the Appellant: Shri S.P. Singh, Advocate

Present for the Respondent: Shri Amandeep Kumar & Ms. Shivani,Authorized Representatives

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)

FINAL ORDER NO. 60441/2023

DATE OF HEARING: 26.05.2023DATE OF DECISION: 21.09.2023

PER S. S. GARG

The present appeal is directed against the impugned orderdated 24.04.2021 passed by the Commissioner (Appeal) whereby theCommissioner (Appeals) has confirmed the demand in respect of services provided to Thapar University, Patiala for the period 01.07.2012 to 31.03.2013 (post negative list regime) and ordered to be deposited by the appellant along with interest and also imposed penalty under Section 76 of the Act equal to 10% of the service tax.

2. Briefly the facts of the present case are that the appellants are engaged in providing services under the category (i) Management, Maintenance or Repair services (ii) Erection, Commissioning or installation and (iii) Construction of Residential Complex and (iv) Commercial or industrial construction services.

3. That on the basis of information, that the appellant had provided taxable services under the category of taxable servicesprovided i.e. "Construction of Residential complex Services" & Commercial Construction services. An enquiry was conducted by C.Ex. Commissionerate Chandigarh I, against the appellants and as a result, a show cause notice for Rs. 35,35,436/- for the period from November 2005 to 31.03.2010 issued on 31.03.2011 and show cause notice for the period April-2010 to 31.03.2011 for Rs. 43,81,840/- issued on 22.10.2011. The demands were partially confirmed byadjudicating authority vide Order-In-Original No. 14/ST/JC(P)/CHD- 1/2012 dated 14.09.2012. Two separate appeals were preferred against the said OIO, one by the Department against the dropped demand and the other by the Appellants against the confirmed demand. That both the appeals were decided vide a common OIA No.CHD-Excus-000-APP474475-14-15 dated 13.03.2015. That on thebasis of above, it was observed that the appellants rendered services which fell under category of taxable services i.e.

"Construction of Residential Complex Services" "Management, Maintenance or repair Services and Electrical Installations under the category of "Erection, commissioning or installation on which, the appellants were liable to pay service tax. Accordingly, Show Cause Notice for the period 2011-12 issued on 23.04.2013 for demand of Service tax of Rs. 10.58,539/- and a statement issued under Section 73(IA) for the subsequent period for the period 2012-13, for demand of Service tax of Rs. 30,11,158/-. Both demands of Rs. 40,69,697/- (1058539+30,11,158) confirmed by the adjudication authority vide OIO No. 31/AC/ST/GST/CHD-III/2018-19 dated 23.01.2019
alongwith penalty of Rs. 10,000/- under Section 77 and penalty of Rs.40,69,697/- under Section 78.

4. The Appellant filed an appeal before Commissioner(Appeals) CGST Commtt. Chd, against OIO dated 23.01.2019, who vide OIA No.CHD-EXCUS-001-APP04/2021-22 dated 26.04.2021, thereunder, ordered to deposit the demand in respect of services provided to Thapar University, Patiala for the period 01.07.2012 to 31.03.2013(Post-negative list regime) alongwith interest and imposedpenalty under Section 76 of the Act equal to 10% of the service tax.

The Appellants are in appeal against the said OIA.

5. Heard both the parties and perused the record.

6. Ld. Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted thatthe service tax liability on the service of Commercial and industrial constructions provided during the period 01.07.2012 to 31.03.2013 is to the tune of Rs. 20,29,280/- and the said liability was discharged bythe appellant in the year 2013-2014.

7. He further submitted that the Commissioner (Appeals) has wrongly held that the appellant has failed to establish co-relation to the tax paid during the period 2013-2014 that was payable for the period 01.07.2012 to 31.03.2013. He further submitted that the appellant had filed an application under SVLDRS, 2019 for settlement of dispute covered by the said appeal, since the disputed amount has already been paid on account of commercial and industrialconstruction provided to Thapar University but the contention was notaccepted by the department. He further submitted that the designated committee again issued form SVLDRS-3 without considering the grounds and the appellant brought to the notice of Principal Commissioner but nothing was heard from the Principal Commissioner or designated committee. He further submitted that since the appellant has already paid the service tax for the disputed period 2012-13 and nothing remains payable at the end of the appellant. He further submitted that service tax for the period 01.07.2012 to 31.03.2013 on the services provided to the Thapar University stands discharged before issuance of show cause notice on23.04.2013 and 23.04.2014, as such provisions of Section 73(3) of Finance Act, 1994 no penal action warranted and further the penalty under Section 76 liable to be set aside.

8. On the other hand, Ld. DR reiterated the findings of the impugned order and submitted that the allegation of the appellant

that he has paid the service tax for the period 01.07.2012 to 31.03.2013 to the tune of Rs. 20,29,280/- was discharged in the year 2013-2014 has been considered by the Commissioner and he has given detailed findings in the impugned order in para no. 8B.3 to 8B.3.1.

9. She further submitted that if the appellant has excess paid in their service tax returns for the period 2013-14, then there is a separate mechanism to handle the same as provided in Rule 6(4A) of the service Tax Act, 1994.

10. She further submitted that the right procedure is to file refund and the appellant cannot ask for adjustment of excess payment inone period towards the service tax liability of the other period asthere is no provision for adjustment of excess payment but the party has to file refund for the excess payment. She further submitted that if the appellant files refund for excess payment during 2013-14 thenin that case the unjust enrichment has also to be examined.

11. After considering the submissions of both the parties and perusal of the material on record, I find that by the impugned order the Commissioner (Appeals) has confirmed the demand in respect of Thapar University but the appellant has never challenged the Order- in-Appeal on merits.

12. Further, I find that the period of 2013-14 is not in dispute and hence never been examined by the department. Further, I find that the contention of the appellant that he has paid excess payment in 2013-14 has been examined by the department and the Ld. Commissioner has dealt with the same in para 8B.3 and 8B3.1 which is reproduced hereinbelow:

" 8B.3 Further, the appellants have canvassed that they had already deposited service tax of Rs. 26,92,635/- against service tax amount of Rs.1,53,530/-as per details in Annexure B attached with the appeal, on their own ascertainment before the issue of impunged statement under Section 73, hence no show cause notice/Statement was required to be issued as per the provisions of Section 73(3) ofthe Act.

8B.3.1 However, on examining the details annexed with the appeal and the challans submitted by the appellants, I find that there is nothing to co-relate the amounts paid with the liability of the appellants for the post negative list regime period, therefore, nothing could be deduced regarding payment of service tax liability w.e.f. 01.07.2012 in want of any corroborative documents."

13. Further, I find that the ground taken by the appellant that the service tax liability for 01.07.2012 to 31.03.2013 was discharged in the year 2013-14 is not tenable as the service tax return for the financial year 2013-14 filed by the appellant has never been challenged nor the revise return was filed by the assessee. Further, I find that if the appellant has discharged their service tax liability for the period 2012-13 in ST-3 returns of financial year 2013-14 but theyhave not given any intimation to the department regarding the payments of service tax liability in financial year 2013-14 for the period 2012-13.

14. Further, if the contention of the appellant is accepted that they have paid excess service tax in the returns filed for the period 2013-
14 then the only course left to him is to seek refund of the same.

There is no provision of adjustment of excess payment of service tax of one period towards the liability of the other period.

15. In view of the above discussion, I am of the considered view that there is no infirmity in the impugned order passed by theCommissioner (Appeals) which I uphold by dismissing the appeal of the appellant.

(Order pronounced in the open court on 21.09.2023)

(S. S. GARG)MEMBER (JUDICIAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 60503 Of 2013

[Arising out of OIA No.65/ST/Appeal/DLH-IV/2013 dated 19.07.2013 passed by the Commissioner (Appeals), Central Excise, Delhi-IV, Faridabad]

M/s H.B. Securities Ltd. : Appellant (s)
H-72, Connaught Circus,New Delhi-110001

Vs

The Commissioner of Central
Excise, Delhi-IV **: Respondent (s)**

Plot No.36&37, Sector-32, NearMedanta Hospital, Gurgaon, Haryana-122001

With

Service Tax Appeal No.60505 Of 2013

[Arising out of OIA No.65/ST/Appeal/DLH-IV/2013 dated 18.07.2013 passed by the Commissioner (Appeals), Central Excise, Delhi-IV, Faridabad]

M/s H.B. Securities Ltd. **: Appellant (s)**
H-72, Connaught Circus,New Delhi-110001

Vs

The Commissioner of Central Excise, Delhi-IV **: Respondent (s)**
Plot No.36&37, Sector-32, Near Medanta Hospital, Gurgaon, Haryana-122001

APPEARANCE:

Shri Nitesh Garg and Shri Kamal Gupta, CA for the Appellant

Shri Rajiv Gupta and Shri Narinder Singh, Authorised Representativesfor the Respondent

CORAM :
HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL) HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60493-60494/2023

Date of Hearing:21.08.2023Date of Decision:13.10.2023

Per:P. ANJANI KUMAR
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The appellants, M/s H.B. Securities Limited, are engagedin trading of securities as Stock Brokers; alleging that the appellants have not paid service tax on the transaction charges recovered, from their clients along with brokerage, from their customers, show-cause notices dated 31.12.2008 and 02.02.2009 were issued to the appellants seeking to recover service tax of Rs. 2,92,740/- and Rs.6,977/-, for the periods, October 2003 to March 2008 and 01.04.2008 to 15.05.2008along with interest and penalty; the show- cause notices were adjudicated by the OIOs dated 05.01.2011 confirming the service tax demanded, imposing penalty of Rs. 2,92,740/- and Rs.6,977/- under Section 76 and penalty ofRs.5,85,480/- and Rs.13,954/- under Section 78 of the Finance Act respectively; on appeals filed by the appellants, the Commissioner (Appeals), vide the impugned orders dated 19.07.2013 and 18.07.2013, upheld the duty demanded and penalty imposed under Section 76 while setting aside the penalty imposed under Section 78. Hence, these appeal Nos. ST/60503/2013 and ST/60505/ 2013.

2. Shri Nitesh Garg assisted by Shri Kamal Gupta, learned Consultant appearing on behalf of the appellant, reiterates the grounds of appeal and submits that the impugned order is perverse and passed dis-regarding the consistent Final Orders passed by the Tribunal, in the case of LSE Securities Ltd.- 2013 (29) STR 591 (Tri. Delhi) in favour of the assessee. He submits that Hon'ble High Court of Delhi in the case of Intercontinental Consultants and Technocrats Pvt. Ltd.- 2013 (29) STR 9 (Delhi) held that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies a tax only on the taxable service and nothing else. He submits that learned Commissioner (Appeals) has grossly erred in holding that the service tax is levied on transaction charges. He relies on the following cases:

- H.B. Securities Ltd. (Stay Order No.1-2/2015 dated01.12.2015).
- Edelweiss Financial Advisors Ltd.- 2019-TIOL-2409-CESTAT-AHM.
- HEM FinleasePvt. Ltd.- 2018-TIOL-1998-CESTAT-DEL.
- Monarch Research and Brokerage Pvt. Ltd.-2021-TIOL-655-CESTAT-AHM.

3. Shri Rajiv Gupta, assisted by Shri Narinder Singh, appeared on behalf of the Department,submits that transaction charges are collected as per Regulation 8 of Securities and Exchange Board ofIndia (Stock Brokers [***]) Regulations, 1992; transaction charge is afee payable by the Stock Broker to the Stock Exchange for using the stock platform; Stock Broker has to pay these charges in order to provide their service as Stock Broker to their clients. He furthersubmits that while clarifying in respect of Securities and Exchange Board of India (Mutual Funds) Regulations, 1996, SEBI vide Letter dated 20.07.2016 clarified that there is no dispute regarding theinclusion of service tax on brokerage and exchange transaction cost. He relies on Sriram Insight Share Brokers Ltd.- 2009 (14) STR 86 (Tri.Kolkata) and Sriram Insight Share Brokers Ltd.- 2019 (26) GSTL 231 (Tri. Kolkata) and submits that the issue stands settled by theTribunal in favour of the Revenue vide above cases.

4. Heard both sides and perused the records of the case. The main allegation of the Department is that the appellants are recovering the transaction fees/ charge from their customers and are not discharging the applicable duty on it. The argument of the appellant is that the transaction charges, payable to SEBI, are in the nature of statutory levies and therefore, are not includable in the assessable value; he relies on Intercontinental Consultants and Technocrats Pvt. Ltd. (supra) and submits that service tax is to be levied on the amountthat is charged for the service rendered in terms of Section 66 of Finance Act, 1994. We find that these transaction charges are payable by the Stock Brokers in terms of the Regulations issued by SEBI and these are not any fee or statutory levy that is payable by the customers of the Stock Brokers. In effect, the Stock Broker/ Appellants are recovering the fee or charges payable by them to SEBI for the conduct of business and are paying the same to SEBI. It is not the case of the appellants that the said transaction charges are payable by the ultimate customers

and that as the Stock BrokerAgent, they are paying the same on behalf of the customers. Therefore, we are of the considered opinion that these charges recovered from the customers are in the nature of considerationtowards the taxable service rendered by the appellant as far as the customers are concerned. We find that the Tribunal has already gone into the issue of the includability of transaction charges in the service tax in the case of Sriram Insight Share Brokers Ltd.- 2019 (26) GSTL 231 (Tri. Kolkata). We find that the Tribunal has found as under:

5. Before answering the question (i) above; it is necessary to have a look at Section 67 of the Finance Act, 1994 which [is] reproduced: -

67. Valuation of taxable services for charging service tax. *- For the purposes of this Chapter, the value of taxable services, -*

(a) in relation to service provided by a stock-broker, shall be the aggregate of the commission or brokerage charged by him on the sale or purchase of securities from the investors and includes the commission or brokerage paid by the stock-broker to any sub-broker;

(b) in relation to telephone connections providedto the subscribers, shall be the gross total amount (including adjustments made by the telegraph authority from any deposits made by the subscribers at the time of applications for telephone connections) received by the telegraph authority from the subscribers.

Explanation. - For the removal of doubts, it is hereby declared that the value of taxable servicein this clause shall not include the initial deposits made by the subscribers at the time of applications for telephone connections;

(c) in relation to services of general insurance business provided to the policy holders, shall be the total amount of the premium received by the insurer from the policy holders.

6. *It can be seen from the provision of Section 67that the gross amount charged by the serviceprovider need to be taken as the taxable value for determination of service tax liability. In this particular case, it has been the contention of the appellant that so far as transaction charges are concerned, they have worked as a pure agents between their client and the concerned stock exchanges/statutory bodies and accordingly the transaction charges collected by them from their clients have been deposited as it is with the statutory bodies and therefore, same cannot be* included in the taxable value of the service tax. In this regard we have perused the guidelines which have been provided by National Stock Exchange intheir Circular dated 7th November, 1998 :-

"It is hereby notified to all the Trading Members inthe Capital Market Segment of National Stock Exchange of India Ltd. that with effect from 1st December, 1998, transaction charges in respect oftrades done shall be payable by the Trading Members at the following rates until further notice
:-
…….
It is clarified that the reduced rates as given abovewill apply to only the incremental trade value falling under the respective slabs stated above.For example, a Trading Member who has tradedfor Rs. 250 crores in a calendar month will pay transaction charges of Rs. 1.85 lacs (i.e. @ 0.009% for the first Rs. 50 crores trade values, @ 0.008% for the next Rs. 50 crores trade value, @ 0.007% for the next Rs. 100 crores trade value, @0.006% for the balance Rs. 50 crores trade value)."

7. A perusal of above guidelines makes itapparently clear that the transaction charges recovered by the appellant from their respective clients is primarily statutory levy on the trading members and not on the clients of the trading members. We are of the view that if any of such charges which are primarily legal responsibility for payment with the appellant and same have been passed on to their clients, in case, same that will certainly form the part of gross value charged by them for providing taxable service. In this regard, we hold that the legal responsibility of the payment of transaction charges was of the trading members (in this case apparently the appellant) and as levy of transaction charges from the concerned stock exchange is on the appellant and since this liability have been passed on by him on their clients, we are of the view that same need to be included in the taxable value as per the provision of Section 67 of the Finance Act, 1994. Accordingly, we find that there is no merit in the appeal on this count and same is dismissed.

8. On the second question wherein Cenvat creditsof Rs. 8,95,377/- + Education Cess of Rs. 16,643/- have been availed by the appellant onthe documents which are not approved documentsas per the provisions of Rule 9(1) of the Cenvat Credit Rule. In this regard, we find that since the details contained in such documents has not been discussed either in the show cause notice or in theOrder-in-Original it is very difficult to ascertainwhether the documents on the strength of which appellants have availed the Cenvat credit fulfilled the requirement of details to be available as prescribed under proviso to Rule 9(2) of the Cenvat Credit Rules or not. We are of the viewthat a substantive benefit cannot be denied to the appellant only for some procedural lapses and if allthe requisite details are available on the documents on the strength of which Cenvat credit has been availed by them and as provided under proviso to Rule 9(2) of the Cenvat Credit Rules, same cannot be denied to them legally. Thus, we hold that the department should verify thedocuments again on the strength of which theCenvat credit has been availed by them and ifsuch documents contained all the requisite details has been prescribed under proviso to Rule 9(2) of the Cenvat Credit Rules, the substantive benefit ofCenvat credit cannot be denied to them.

5. In view of the above, we find that the appellant has not made out any case in their favour. Therefore, we are of the considered opinion that the impugned orders do not require intervention. Accordingly, both the appeals are rejected.

(Pronounced on 13/10/2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 61410 Of 2018

[Arising out of Order-in-Original No. GST/GGM/COM/SM/26/18-19 dated 29th June 2018 passed by the Commissioner Goods and Service Tax, Gurgaon, Haryana]

M/s Canon India Pvt Ltd : Appellant (s)
(DLF Epitome, Building No.5, 7th Floor,DLF Phase-III, Gurugram-122002)

Vs

Commissioner, Goods & Service Tax,
Gurgaon-I **: Respondent (s)**

(Central Excise Building, Plot No. 36-37,Sector 32, Near Medanta Hospital, Gurugram, Haryana-122003)

with

Service Tax Appeal No. 60852 Of 2019

[Arising out of Order-in-Original No. GST/GGM/COM/Adj/Canon/128/18-19 dated 30th April 2019 passed by the Commissioner Goods and Service Tax, Gurgaon, Haryana]

M/s Canon India Pvt Ltd : Appellant (s)
(DLF Epitome, Building No.5, 7th Floor,DLF Phase-III, Gurugram-122002)

Vs

Commissioner, Goods & Service Tax,
Gurgaon-I **: Respondent (s)**

(Central Excise Building, Plot No. 36-37,Sector 32, Near Medanta Hospital, Gurugram, Haryana-122003)

APPEARANCE:

Shri V. Lakshmikumaran, Ms. Krati Singh, Shri Aman Garg, Advocates forthe Appellant

Shri Rajeev Gupta, Shri Siddharth Jaiswal, Shri Nikhil Kumar Singh, ShriNarinder Singh, DRs for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

INTERIM ORDER No. 13-14/2023

Date of Hearing:11.08.2023Date

of Decision:17.11.2023

Per : S. S. GARG

The following questions have been referred to me on account of difference of opinion having arisen between the two Members constituting the Division Bench.

"i. Whether in view of the para 4.17 of the order proposed by Member(Technical), Member (Judicial) is correct in making the observation to effect that the decision of Delhi Bench which as per him are contrary to the viewbeing taken in this case have not been considered in the order proposed by Member (technical)

ii. Whether in view of the observations made by Member (Judicial) matter needs to be referred to larger bench or in view of para 4.17 of the order proposed by the Member (Technical) appeal needs to be dismissed.

2. Heard both the parties and perused the respective opinionsrecoded by both the Learned Members.

3. Shri Lakshmikumaran, Ld. Senior Counsel appearing for theappellant submitted that the view taken by the Member (Judicial) to refer the matter to the Larger Bench is correct and legal because the Member (Technical) has not distinguished the facts in the case in handfrom the facts of India Yamaha Motor Private Limited and M/s Mikuni India Pvt. Ltd. cited by the Member (Judicial) in his opinion. He further submitted that the decisions in the case of India Yamaha MotorPrivate Limited and M/s Mikuni India Pvt. Ltd. are appropriately applicable in the facts of the present case. He also submits that the factual and the legal background in which the Tribunal decided the matters in the above two cases are identical to the facts of the

present case. He further submits that the Member (Technical) has notconsidered the said decisions and has given his independent findings which is not sustainable in law in view of the various decisions relied upon by the appellant.

3.1 Ld. Counsel in his written submissions has also given a detailed chart comparing the present case with India Yamaha Motor Private Limited and M/s Mikuni India Pvt. Ltd. on various parameters, viz. period involved, category of service, agreement between the parties, and contract of employment, supervision and control over the expats during their deputation with the appellant, compensation paid to the expats during their secondment period with the appellant, deduction of TDS and deposit of Provident Fund for the seconded employees. Healso submits that the observation of the Member (Technical) that inthe case of India Yamaha Motor Private Limited, the appellant therein established that there existed employer-employee relationship between Indian company and expats, is incorrect. He also submits that the Member (Judicial) is correct in observing that Member (Technical) has not considered the said judgements while deciding thepresent case. He also submits that in the interest of justice delivery system, the present case must be referred to the Larger Bench for resolution of conflict. In support of his submission, he relied upon the following decisions:-

- Commissioner Of Central Excise, Mumbai vs. Mahindra & Mahindra Ltd. 2015(315) E.L.T. 161 (S.C.)
- Gammon India Ltd. vs. Commissioner of Customs, Mumbai 2011 (269) E.L.T. 289 (S.C.)
- Jayaswals Neco Ltd. vs. Commissioner of Central Excise, Nagpur 2006 (195) E.L.T.142 (S.C.)
- Commissioner of Central Excise & Customs vs. Kraps Chem Pvt. Ltd 2015 (319) E.L.T. 622 (S.C.)
- D.J. Malpani vs. Commissioner of Central Excise, Nashik 2016 (337) E.L.T. 484(S.C.)
- Engineers India Ltd. vs. Commissioner of Income Tax 2018 (12) SCC 593 (S.C.)
- Amritlakshmi Machine Works vs. Commr. of Cus. (Import), Mumbai 2016 (335) E.L.T. 225 (Bom.) [@pg no. 162-193 of the compilation]
- Union of India vs Colonel G.S. Grewal 2014 (7) SC 303 (S.C.)

3.2 He further submits that in the difference of opinion cases, the third Member cannot go beyond the scope of reference vis-à-vis the questions framed for reference and for this he relied upon the following decisions:-

- Kelkar Trading Corporation v. Commissioner of C. Ex., Mumbai-V 2008 (223) E.L.T. 382 (Bom.)
- Collector of Customs, Bombay v. Indian Scientific Glass & Others 1991 (52)

E.L.T. 405 (Tribunal)

- Collector of Customs v. Hindustan Photo Film Ltd 1991 (52) E.L.T. 301(Tribunal).
- Reliance Industries Ltd. vs. Commissioner of C. Ex. & Cus., Rajkot 2009 (244) E.L.T. 254 (Tri. - Ahmd.)
- Tata Iron & Steel Company Limited vs. Commr. of Cus., Calcutta 2000 (126) E.L.T. 1204 (Tribunal) (CEGAT-Del.)
- Colourtex vs. Union of India 2006 (198) E.L.T. 169 (Guj.)
- Indian Metals & Ferro Alloys Ltd. vs. Collector of Customs 1991 (55) E.L.T. 59 (Tribunal) (CEGAT-Del.)
- Jan Mohammed, Nainital vs. The Commr. of Income-Tax 1952 SCC Online All206: AIR 1953 All 119

4. On the other hand, the Ld. DR Shri Rajeev Gupta assisted byShri Nikhil Kumar Singh and Shri Narinder Singh vehemently supported the view expressed by Member (Technical) and submitted that it is wrong to say that Member (Technical) has not considered thedecision in the case of India Yamaha Motor Pvt. Ltd; rather Member (Technical) has considered the said decision and distinguished the same after considering the definition of Manpower Supplies Service prior to 01.07.2012 as prescribed in Section 65(105)(k) and after 01.07.2012 as prescribed in Section 65(B) (44) inserted in the FinanceAct, 1994 and effective from 01.07.2012. He then referred to the definition of the service to mean any activity done by one person for another for a consideration. The definition has widened the scope of service much beyond the term „service" as was interpreted by the Hon"ble Apex Court in the case of Lucknow Development Authority vs.M K Gupta (1994 SCC (1) 243).

4.1 Ld. DR further submits that Member (Technical) in Para 4.17 of his opinion has held that in the facts of that case, the bench had concluded that their existed and employer-employee relationship between the expats and the Indian company and hence had given the benefit of exclusion clause to Section 65 B (44) which is not the casein appeals before us.

4.2 Thereafter, Ld. DR took me through the decisions in the case of M/s India Yamaha Motor Private Limited and M/s Mikuni India Pvt. Ltd.and mainly referred to Para 3, 7, 8 and 9 in the case of M/s India Yamaha Motor Private Limited and submitted that in the said decisions, the Tribunal has relied upon the following decisions:-

- Computer Sciences Corporation India Pvt. Ltd. 2015 (37) STR 62 (All.)
- Commissioner of Service Tax vs. Arvind Mills Ltd. 2014 (35) STR 496
- Volkswagon India Pvt. Ltd. vs. CCE, Pune-I 2014 (34) STR 135 (Tri. Mumbai)

and further in the case of M/s Mikuni India Pvt. Ltd., the Tribunal has relied upon the decision of M/s India Yamaha Motor Private Limitedbut the period involved in those cases was post 01.07.2012.

4.3 Ld. DR further submits that the Hon‟ble Apex Court in the case of CCE & ST, Bangalore (Adjudication) vs. Northern Operating Systems Pvt. Ltd. 2022 (61) GSTL 129 (SC.) dealing with the same issue under similar facts and circumstances pertaining to the period prior and post 01.07.2012 has *interalia* held in Para 60 as under:-

"60. *This Court is also of the view, for similar reasons, that the orders of the CESTAT, affirmed by this Court, in Volkswagen and Computer Sciences Corporation, are unreasoned and of no precedential value."*

4.4 Ld. DR further submits that in view of the findings of the Hon‟bleApex Court, the decision in the cases of M/s India Yamaha Motor Private Limited and M/s Mikuni India Pvt. Ltd. (which has relied upon the decisions in the case of Volkswagon India Pvt. Ltd. and Computer Sciences Corporation India Pvt. Ltd. cited (supra) loses its precedential value and hence no relevance exists for difference of opinion.

4.5 Ld. DR also submits that on merit this issue has now been settled by the Hon‟ble Apex Court in the decision cited (supra) whereinit has been held that the assessee was a service recipient for the taxable service by the overseas entity, with regard to the employees itseconded to the assessee, for the duration of their deputation or secondment and the assessee is liable to pay service tax on reverse charge mechanism as provided under Section 66(A) of the Finance Act, 1994. Ld. DR then referred to the relevant paras from the judgement of the Hon‟ble Apex Court where the Hon‟ble Apex Court after considering the facts of the case including the various agreements between the parties and the definition of Manpower Recruitment Service prior to and after amendment w.e.f. 01.07.2012 has categorically held that the assessee is liable to pay service tax on Manpower Supplies Service on reverse charge mechanism.

4.6 Ld. DR also submits that the Member (Technical) has consideredthe relevant clauses of three agreements, namely, cost reimbursement agreements, international assignment Letter issued bythe Cannon Japan to expats and employment contract of expats with Canon India Private Limited (the appellant) and thereafter has held that the expat is the employee of Cannon Japan. Ld. DR also submits that clauses of agreement on record, for arrangement to depute the expats by Canon Japan to the appellant in this case, are similar to the agreement discussed in the judgement of the Hon‟ble Apex Court in the

case of M/s Northern Operating System Pvt. Ltd. cited (supra). Ld. DR further submits that the payments in foreign currency are regulated by Foreign Exchange Management Regulations, 2000. The expats were receiving their salary in Japan from the foreign company in their foreign accounts and as per Sub-regulation 8 of Regulation 7of the said Regulations, it is evident that the expats were foreign citizens, residents in India, employee of foreign company, receiving remuneration as payable to them by the foreign company. As per the provisions of said regulations, they cannot be termed as the employees of the appellants. The deduction of TDS of Income Tax on such amounts is in accordance with the said FEMA notification which provides that "Income Tax is chargeable on the entire salary asaccrued in India" and hence, cannot be considered as evidence to prove that the said expats were the employees of the appellants. He further submits that all aspect of the instant cases has been coveredby the Hon'ble Supreme Court in the above case of M/s. Northern Operating System Pvt. Ltd cited (supra) and the law laid down in the said judgement is squarely applicable to the facts and circumstances of the present case.

4.7 Ld. DR further submits that the demand in the present cases is for the normal period and the Hon‟ble Apex Court has also rejectedthe plea of the revenue neutrality. Further, the said judgement of the Hon‟ble Apex court has been followed by the coordinate bench in the case of Dell International Services India Pvt. Ltd.- 2023 (73) G.S.T.L. 369 (Tri. - Bang.).

5. I have considered the submissions of both the parties and perused the opinion expressed by both the Learned Members. Here it is relevant to refer to the definition of the „manpower recruitment andsupply agency‟ as it existed before 01.07.2012 and post amendmentin 2012 w.e.f. 01.07.2012 which is reproduced herein below:-

Provisions Prior to 1.7.2012In this Chapter, unless
“65. the context otherwise requires,-
(105) "taxable service" means any service provided (or to be provided],
[(k) [to any person], by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner.]"
PROVISIONS POST 1.7.2012:
“65B. In this Chapter, unless the context otherwise requires, -
(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include -
(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

6. Further, I find that Member (Technical) has considered the definition of Manpower Supply Agency before and after the amendment in details as recorded in his opinion and I also find that Member (Technical) in Para 4.17 has also considered the decision in the case of M/s India Yamaha Motor Private Limited and held that the same is not applicable to the present case. It is pertinent to reproduce the said findings of the Member (Technical) where he held after considering the facts of both the cases that in the case of M/s India Yamaha Motor Private Limited , the bench had concluded that their existed employer and employee relationship between the expats and the Indian company, hence had given the benefit of exclusion clause to Section 65 (B) (44) which is not the case in appeals before us. Here, it is pertinent to refer Para 4.18 where Member (Technical) has observed as under:-

"4.18 In view of our discussions as above we are not in positionto agree with the submissions made by the appellants on the merits of the issue. Before concluding discussion on the issue of liability to service tax we would put on record, that Commissionerhas in both the impugned order considered the definition ofService as it existed at the relevant time as per Section 65 B (44)ibid, and has decided the issue accordingly and not on the basis of Section 65 (105) (k) defining Manpower Supply Services. Allthe arguments made by Appellants relying on various decisions inrespect of Manpower Supply Services have been rejected by us earlier."

7. Further, I find that Member (Technical) has considered various clauses of all three agreements, viz. International Assignment Letter and employment contract of expats with the appellant and also the amendment in the Finance Act, 1994 in Section 65(B)(44) w.e.f.1.7.2012 and then came to the conclusion on merits that the expats are the employees of the foreign entity i.e. Canon Japan and the assessee is liable to pay service tax under reverse charge mechanism on the salary paid to expats in foreign currency. I also find that the decision in M/s India Yamaha Motor Private Limited was given after relying upon the decisions of the Tribunal in the case of Computer Science Corporation Ltd., Arvind Mills, Volkswagen India Private Limited and M/s Mikuni India Pvt. Ltd. was decided by relying on M/s India Yamaha Motor Private Limited but the Hon"ble Apex Court in the case of M/s Northern Operating System Pvt. Ltd. cited (supra) has held that those cases having no precedential value. In this regard, Para 60 in the Judgement of the Hon"ble Apex Court is reproduced herein below:-

"60. *This Court is also of the view, for similar reasons, that the orders of the CESTAT, affirmed by this Court, in Volkswagen and Computer Sciences Corporation, are unreasoned and of no precedential value."*

8. Further, I find that the facts of the present cases are identical tothe case of M/s

Northern Operating System Pvt. Ltd. cited (supra) decided by the Hon‟ble Apex Court wherein the Hon‟ble Apex Court has held that those cases on which M/s India Yamaha Motor Private Limited and M/s Mikuni India Pvt. Ltd. were decided have not precedential value.

9. I also find that Member (Judicial) has not recorded his opinionon merits and simply observed that Member (Technical) has notdistinguished the facts of this case from the case of M/s India Yamaha Motor Private Limited and M/s Mikuni India Pvt. Ltd. and therefore, thematter should be referred to Larger Bench to resolve the issue:-

"*Whether in the facts and circumstances of the case, the levy of service tax in respect of payment of salary of expats is liable to be taxed post 1.7.2012 under reverse charge mechanism or not?"*

10. Here, I also note that the opinion expressed by Member (Technical) has subsequently been upheld by the Larger Bench of the Hon‟ble Apex Court in the case of M/s Northern Operating System Pvt. Ltd. cited (supra) under similar facts and circumstances as it exist in the present cases.

11. In view of my discussion above, I am of the considered opinion that the opinion expressed by Member (Technical) is correct in law and the appeals of the appellant are liable to be dismissed as held by the Member (Technical) and there is no necessity to refer the matterto the Larger Bench.

12. The matters shall now be placed before the regular bench for recording the majority order.

(Pronounced on 17.11.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

G.Y.

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALCHANDIGARH
REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.382 Of 2012

[Arising out of OIA No.10/ST/APPL/DLH-IV/2011 dated 30.08.2011 passed by theCommissioner (Appeals), Central Excise, Delhi-IV, Faridabad]

M/s Goodyear India Limited : Appellant (s)
Mathura Road, Ballabgarh,Faridabad, Haryana

Vs

The Commissioner of Central
Excise and Service Tax, Delhi : Respondent (s)

17-B.I.A.E.A. House, M.G. Road,

I.P. Estate, New Delhi-110002

With

Service Tax Appeal No.545 Of 2012

[Arising out of OIA No.18/CE/APPL/DLH-IV/2011 dated 26.12.2011 passed by theCommissioner (Appeals), Central Excise, Delhi-IV, Faridabad]

M/s Goodyear India Limited : Appellant (s)
Mathura Road, Ballabgarh,Faridabad, Haryana

Vs

The Commissioner of Central
Excise and Service Tax, Delhi : Respondent (s)

17-B.I.A.E.A. House, M.G. Road,

I.P. Estate, New Delhi-110002

APPEARANCE:

Shri Ajay Aggarwal and Shri Naveen Bindal, Advocates for the AppellantShri Siddharth Jaiswal and Ms. Shivani, Authorised Representatives for the Respondent

CORAM:
HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL) HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER Nos.60725-60726/2023

Date of Hearing: 13.12.2023Date of Decision: 22.12.2023

Per: P. ANJANI KUMAR

The appellants, M/s Goodyear India Limited, are engaged in manufacture of tyres and tubes which are sold in the domestic market as well as overseas; the appellants have engaged commission agents abroad to provide certain services with respect to their exports and have paid the commission thereof; Revenue was of the opinion that the commission paid by the appellants is chargeable to servicetax under the Reverse Charge Mechanism whereas the appellants entertained a view that as the services are rendered and received in a territory beyond India, the same are not taxable. Two show-cause notices, dated 25.04.2008 and 30.06.2009, covering the period January 2004 to November 2007 and December 2007 to March 2009, demanding service tax of Rs.29,05,153/- and Rs.12,00,588/- respectively, were issued to the appellants; the show-cause notices were confirmed by the OIOs dated 22.02.2011 and 30.08.2010 respectively; on an appeal filed by the appellants, Commissioner (Appeals) vide impugned orders dated 26.12.2011 and 30.08.2011 respectively, upheld the Orders-in-Original.

2. Shri Ajay Aggarwal, assisted by Shri Naveen Bindal, learned Counsels for the appellants, submits that there is no dispute on the fact that the service has been rendered and received at the same timeand entirely outside India; learned Commissioner has categoricallyheld more than once in the impugned orders that the services were rendered abroad. He relies on the decision of the Tribunal in the case of Orient Crafts – 2006 (4) STR 81 (Del.) and CBEC Circular dated 19.04.2006 and submits that only services received in India are taxable under these provisions. He submits that as per Section 64 (1) of the Finance Act, 1994, provisions of service tax do not extend beyond India; Rule 3 (iii) of Taxation of Services (Provided fromOutside India and Received in India) Rules, 2006 are not applicable asthere is no service received in India; he relies upon Hon'ble Supreme Court's decision in the case of Carborundum Vs CIT, Madras – (1997)
2 SCC 862 and submits that operations/ activities are carried out of India, question of rendition of services in India does not arise.

3. Learned Counsel submits that it is incorrect on the part of the Department to rely upon the ratio of Indian National Ship Owners Association – 2009 (13) STR 235 (Bom.) and Hindustan Zinc Limited –2008 (11) STR 338 (Tri.); he submits that the said decisions relate to the period before 18.04.2006. He also submits that the issue is revenue neutral as the amount of service tax, if any, paid by the appellant would be available to them as credit; the same was clarified by Trade Notice dated 11.09.2008 issued by Madurai Commissionerate.

4. Learned Counsel submits that the show-cause notice dated 25.04.2008 is time-barred; prior to 25.04.2008, Department attempted to tax the very same transaction under ―Clearing and Forwarding Agent Service‖; continuous correspondence was on between the appellants and the Department; the Department knewthe facts as early as 08.03.2007; in a subsequent proceedings, in respect of a subsequent show-cause notice issued to the appellants, Department vide Order dated 03.11.2007 held that extended period cannot be invoked. He submits that as the case is revenue neutral, extended period cannot be invoked as held by the Hon'ble Supreme Court in the case of Nirlon Limited – 2015 (320) ELT 22 (SC); as therewas no suppression of material facts, extended period cannot beinvoked as held by the Hon'ble Supreme Court in the case of Pahwa Chemicals – 2005 (189) ELT 257 (SC); as held by the Hon'ble Supreme Court in the case of Nizam Sugar – 2008 (9) STR 314 (SC), extended period cannot be invoked in the subsequent show-cause notice dated 30.06.2009.

5. Shri Siddharth Jaiswal, assisted by Ms. Shivani, learned Authorized Representatives for the Department, reiterates the findingsof the impugned order. He

submits that the validity of Section 66A of Finance Act, 1994 is not in dispute; the services received by the appellants are in the category of ―Business Auxiliary Service‖, which were used by the appellants in the manufacture and export of tyres and therefore, the services of the overseas agents, though performed outside India have been received by none other than the appellants situated in India; the Adjudicating Authority was correct in holdingthat the services rendered are taxable in view of Rule 2(1)(d)(iv) of Service Tax (Fifth Amendment) Rules, 2005 and sub-Section- (iii) of Section 66A of Finance Act, 1994. He relies on Melange Developers Pvt. Ltd. – 2020 (33) GSTL 116 (Tri. LB) and Northern Operating Systems Pvt. Ltd. – 2022 (61) GSTL 129 (SC).

6. Heard both sides and perused the records of the case. The appellant has appointed commission agents abroad who would book orders for the sale of tyres for the appellants; the appellant export thetyres manufactured in India and accordingly realise the sale proceeds, for the services rendered by the overseas agents, the appellants pay them a commission. Revenue seeks to levy service tax on the commission paid by the appellants to the commission agents; it is alleged that the agents are performing ―Business Auxiliary Service‖ tothe appellants; the services rendered by the overseas agents are received and utilized in India. On the other hand, the contention of the appellant is that the services are rendered and received abroad.

7. We find that it is beneficial to have a look at the statutory provisions in this regard.

7.1. Section 66A as amended from 18.04.2006 read as under:

6A. (1) Where any service specified in clause (*105*) of section 65is,—

provided or to be provided by a person who has established a business or has a fixed establishment from which the

service is provided or to beprovided or has his permanent address or usualplace of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, andaccordingly all the provisions of this Chapter shall apply:

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions ofthis sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall betreated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

7.2. Rule 2 (1)(d)(iv), as amended by the Service Tax (Fifth Amendment) Rules, 2005, by Notification No.23/2005-ST dated 07.06.2005, w.e.f. 16.06.2005, reads as under:

2(1) In these rules, unless the context otherwise requires,

(d) person liable for paying the service tax means:

(iv) —in relation to any taxable service provided or to beprovided by a person, who has established a business or has a fixed establishment from which the service is provided or to be provided, or has his permanent address or usual place ofresidence, in a country other than India, and such serviceprovider does not have any office in India, the person who receives such service and has his place of business, fixed establishment, permanent address or, as the case may be, usual place of residence, in India.

7.3. Rule 2 (1)(d)(iv) as further amended by the Service Tax (Second Amendment) Rules, 2006 vide Notification No.10/2006 dated 19.04.2006, reads as under:

2(1) in these rules unless the context otherwise requires-

(d) person liable for paying the service tax means:

(iv) —in relation to any taxable service provided or to beprovided by any person from a country other than India and received by any person in India under Section 66A of theFinance Act, 1994, recipient of such service;

7.4. Section 68 (2) of the Finance Act, 1994 provides:

68(2) Notwithstanding anything contained in section 68

(1) in respect of any taxable service notified by the Central Government in the Official Gazette the service tax thereon shallbe paid by such person and in such manner as may be prescribed at the rate specified in Section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

7.5. In terms of sub-rule (iii) of Rule 3 of the Taxation of Service (Provided from Outside India and Received in India) Rules, 2006, as notified vide Notification No.11/2006-ST dated 19.04.2006 that all other services other than the above specified in clause (105) of section 65 of the Act, but excluding the services mentioned in sub-clauses (zzzo) and (zzzv) and those specified in clauses (d) (zzzc) and (zzzr) in so far as theydo not relate to immovable property, shall be taxable of thesaid services as are received by a recipient located in India for use in relation to business or commerce.

8. The appellant submits that the reliance of the Department onthe case of Indian National Ship Owners Association (supra) is incorrect. On going through the

provisions of the statute, it is seen that applicability of service tax on Reverse Charge Mechanism is not indispute w.e.f. 18.04.2006 at least; the impugned period is after the said date; therefore, there is no dispute as regards the applicability of Reverse Charge Mechanism. The appellants basically dispute the fact that the services are received in India and heavily rely on the averments, in a couple of places, in the Order-in-Original that the service has been rendered and received abroad. The appellants are manufacturers of tyres; they are clearing the tyres in the domestic market and are also exporting to other countries; they have appointedagents, overseas, to procure orders for such tyres; as per the orders confirmed by the agents, the appellants export the tyres and pay the agents a certain commission. The services rendered by agents abroad results in the export of the goods manufactured by the appellant. Thus, the services rendered by the agents are in the direction of promoting the business of the appellants. Undoubtedly, the business of the appellant is in India. We find that the effect of the services rendered by the overseas agents, results in export of tyres by the appellant, which is their business; to this extent, we find that the categorization of the services under ―Business Auxiliary Service‖ is correct. Moreover, it cannot be said that the services are received abroad though, they are certainly performed outside India; as long as the recipient and his business are in India, it cannot be said that the said service is not received in India. Receipt of the service takes the colour of recipient of the service that is to say receipt of service is decided by the recipient. The services rendered by the agents are nota personalized service availed by the appellants on their visit toabroad; moreover, by no stretch of imagination, the appellant being a body corporate, services cannot be held to have been received and enjoyed overseas, as they have no place of business abroad. Understandably, the benefit of the service accrued to the business of the appellant in India and therefore, to that extent, receipt of the services is certainly in India and not abroad. To this extent, we find that the contention of the Revenue is correct. We find no infirmity in the findings of the OIO and OIA to the extent that the appellants have received services from foreign agents who have procured order outside India against which they had supplied the goods and thushave rendered themselves liable to pay service tax on Reverse ChargeMechanism in terms of Section 66A of Finance Act, 1944 and the Taxation of Service (Provided from Outside India and Received in India) Rules, 2006.

9. Coming to the other issue of neutrality of revenue, we find that the Scheme of Service Tax and Excise Duty work on the principle of a chain of paying the duty and availing the credit. It is not correct to argue that the service tax paid could have been availed as credit and therefore, non-payment of service tax has not made any material difference to the Revenue. The principle of netting of duty is not in operation. For a smooth flow of goods and seamless procedures, a system of payment of duty and availing credit has been put in place. Breaking of this chain for whatever logic would entail in chaos which isneither a principle envisaged nor an intended result under the Schemeof taxation.

10. The appellants have further submitted that the Department was aware of the issue long before the impugned period; in fact, a show- cause notice was issued to the appellants to tax the same item under the Head ―Clearing and Forwarding Agents Service‖; the issue at thebest can be said to be a result of difference in appreciation of law. Moreover, we find that vide OIO dated 08.11.2017, pursuant to the findings by CESTAT vide Final Order No. ST/A/51060/2016-CU (DB) dated 21.03.2016, that the issue is barred by limitation; the Original Authority has dropped the proceedings against the noticee. It is apparent from the records that the appellant and the Department were in constant correspondence and litigation in this regard. Therefore, in view of the facts discussed above, we are of the

considered opinion that Revenue has not made out any case forinvocation ofthe extended period. Therefore, we are of the considered opinion that extended period cannot be invoked to this extent. We borrow strength from the ratio of the cases cited above by the appellants in this regard. As the Department has not made out any case for invocation of extended period and considering the facts of thecase, we hold that the penalties imposed are liable to be set aside.

11. In view of the above, both the appeals are partially allowed to the extent of limitation; we hold that the demands be restricted to thenormal period; however, penalties imposed on the appellants are set aside.

(Pronounced on 22/12/2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.60083 of 2023 [SM]

[Arising out of Order-in-Appeal No.CHD-EXCUS-001-LDH-APP-04-2022-23 dated 10.02.2023 passed by the Commissioner (Appeals), CGST Commissionerate, Chandigarh]

M/s G.S. Promoters and Developers : Appellant (s)
SCO-409, 1st Floor, Sector-20,Panchkula-134117

Vs

The Commissioner of CGST
Commissionerate, Ludhiana **: Respondent (s)**

Central Excise House, F-BlockLudhiana, Punjab-141001

APPEARANCE:

Shri Vikrant Kackaria, Advocate for the Appellant

Shri Rajeev Gupta and Shri Shivam Syal, Authorised Representativesfor the Respondent

CORAM: HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)
FINAL ORDER No.60703/2023

Date of Hearing: 10.11.2023Date of Decision: 11.12.2023

Per: P.ANJANI KUMAR

The brief facts involved in the case are that the appellants, M/s G.S. Promoters and Developers, are engaged in providing the services of Construction of Residential Complexes and Construction of Commercial Complexes; on the basis of a search conducted by the officers of DGCEI, it was noticed that the appellants have not paid service tax to the tune of Rs.75,95,723/-; a show-cause notice was issued and was confirmed by the Commissioner of Central Excise, Chandigarh-II vide Order dated 20.01.2016; on an appeal filed by the appellants, this Bench vide Final Order No.61106-61107/2019 dated 29.11.2019, allowed the appeal of the appellants; accordingly, the appellants have applied for refund of Rs.25 Lakhs which was deposited by them during the investigation; Assistant Commissioner of Central Excise vide Order dated 08.01.2020 has sanctioned the refund; aggrieved by the Order of the Assistant Commissioner in non-granting the interest on the refund, the appellants preferred an appeal before the Commissioner (Appeals), who vide impugned order dated 10.02.2023 rejected the request of the appellants to grant interest.

2. Shri Vikrant Kackria, learned Counsel for the appellants, submits that the issue is no longer *res integra*; in a number of cases, it was held that interest is payable from the date of deposit of amount at the rate of12%. He relies on the following cases:

- M/s Impressive Management Solutions Pvt. Ltd. – FinalOrder No.60090 of 2023 dated 06.04.2023.
- M/s Riba Textiles Ltd. – Final Order No.60015/2020dated 07.01.2020.
- M/s Parle AgroPvt. Ltd. – 2022 (380) ELT 219 (Tri. All.).
- M/s Kesar Enterprises – 2022 (380) ELT 319 (Tri. All.).
- M/s Marshal Foundry Works Pvt. Ltd. – Final OrderNo.60055-60059/2022 dated 15.03.2022.
- M/s Shahi Exports Ltd. – 2022 (58) GSTL 367 (Tri.Chen.).
- MGF Construction Pvt. Ltd. – 2021 (51) GSTL 311 (Tri.Del.)

3. Shri Rajeev Gupta, assisted by Shri Shivam Syal, Authorized Representatives for the Department, reiterates the findings of the impugned order and submits as follows:

(a) In terms of Section 11B/11BB of Central Excise Act, 1944, if any duty is ordered to be refunded under sub-section (2) of Section 11B of the Act to the applicant and the same is not refunded within **three months** from the date of receipt of such application under sub-section
(1) of Section 11B of the Act, then the applicant would be entitled to interest.

(b) Notification No.67/2003-CE (NT) dated 12.09.2003 prescribes the interest rate at 6% Per Annum.

(c) It has been held by the Hon'ble Apex Court in the case of Willowood Chemicals Private Limited – 2022 (60) GSTL 3 (SC); in Gujarat Fluoro Chemicals – 2017 (51) STR 236 (SC) and in VKCFoosteps (India) Private Limited – Civil Appeal No.290 of 2023, that once there are statutory provisions, no authority can grant interest beyond the statutory provisions.

(d) CESTAT, being a creature of statute, cannot traverse beyond the provisions in the Statute as held in Veer Overseas – 2015 (18) GSTL
59 (Tr. LB); Bochasanwasi Shri Aksharpurushottam Swaminarayan Sanstha – 2022 (380) ELT 82 (Tri. Ahmd.); Kali Aerated Water Works – 2023 (383) ELT 413 (Mad.); Ajay Exports – 2016 (335) ELT 150 (Tri. Mumbai) and Maa Mahamaya Industries Ltd. – 2014 (310) ELT 244 (A.P.).

(e) Refund of any amount deposited during investigation should be processed in accordance with Section 11B only as held by Hon'ble Gujarat High Court in the case of Ajni Interiors – MANU/GJ/1628/2019following the decision of the Constitutional Benchof the Hon'ble Apex Court in the case of Mafatlal Industries – 1997 (89) ELT 247 (SC) which was followed by the Tribunal in the case of Nino Chak of Delhi HC – 2020 (371) ELT 701 -Delhi and Ratnami Metals – 2019 (366) ELT 139 (Tri. Ahmd.).

4. In view of the above judgments, reliance made by the appellants, in the cases of Riba Textiles Ltd; M/s Parle Agro Pvt. Ltd; M/s Impressive Management Solutions Pvt. Ltd; M/s Kesar Enterprises; M/s Marshal Foundry Works Pvt. Ltd; M/s Shahi Exports Ltd and MGF Construction Pvt. Ltd. (all supra), is of no avail.

5. I have gone through the rival submissions and the records of the case. The appellants rely heavily on the decision of the Tribunal in some cases wherein interest was not only allowed but was allowed beyond thestatutory provisions. Revenue relies on the recent judgments of Hon'ble Apex Court in the cases of Willowood Chemicals Private Limited (supra) and Cosmo Films Ltd. (supra) and submits that when a statute prescribes a certain rate of interest, it is not free for the Courts and Tribunals to increase the same. I find that Hon'ble Apex Court's decision in the case of Sandvik Asia Ltd. – 2006 (196) ELT 257, relied upon by the various judgments cited by the appellants, is distinguishable on the facts that in the case of Sandvik Asia, the refund was granted inordinately in a delayed manner i.e. after 20 years.

6. I find that Hon'ble Apex Court in the case of Cosmo Films Limited (supra) has made it clear as follows:

"**72.** This Court recollects its recent decision, on the question of entitlement to refund, under the old tax regime, which was subsumed and resulted in somebusinesses being affected. Negativing the challenge to constitutionality of the provisions of GST, it was held, in*Union of India (UOI) &Ors.* v. *VKC Footsteps India Pvt. Ltd.* [2021 (15) SCR 169 = 2021 (52) G.S.T.L. 513 (S.C.)] that :

"A claim to refund is governed by statute. Thereis no constitutional entitlement to seek a refund. Parliament has in Clause (i) of the first proviso alloweda refund of the unutilized ITC in the case of zero-rated supplies made without payment of tax. Under Clause

(ii) of the first proviso, Parliament has envisaged a refund of unutilized ITC, where the credit has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies. When there is neither a constitutional guarantee nor a statutory entitlement to refund, the submission thatgoods and services must necessarily be treated at par on a matter of a refund of unutilized ITC cannot be accepted. Such an interpretation, if carried to its logical conclusion would involve unforeseen consequences, circumscribing the legislative discretion of Parliament tofashion the rate of tax, concessions and exemptions. If the judiciary were to do so, it would run the risk of encroaching upon legislative choices, and on policy decisions which are the prerogative of the executive."

7. In view of the above, I am of the considered opinion that the provisions regarding interest as provided in the Central Excise Act prevail and this Tribunal cannot intervene as regards the date from which the interest is payable or as regards the rate of interest, so far as refunds under Central Excise Act, 1944 are concerned. Accordingly, I reject the appeal.

(Pronounced on 11/12/2023)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHANDIGARH
REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 60591 Of 2018

[Arising out of OIA No. 199/CE/DLH/2014 dated 30.09.2014 passed by the Commissioner (Appeals) of Central Excise, Delhi-III]

Sigma Moulds Nad Stampings Pvt. Ltd. **: Appellant (s)**
Plot No. 149-151, Sector 5, IMT Manesar, Gurugram

Vs
Commissioner of Central Excise
Goods and Service Tax, Gurgaon-II **: Respondent (s)**

Plot No. 36-37, Sector 32, Gurugram

APPEARANCE:

Shri Joy Kumar, Advocate for the Appellant

Shri Narinder Singh, Shri Aneesh Dewan, Authorised Representative for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

ORDER No. A/60026/2024

Date of Hearing:29.01.2024 Date of Decision:30.01.2024

Per : S. S. GARG

The present appeal is directed against the impugned order dated 30.09.2014 whereby the Learned Commissioner (Appeals) has rejected the refund of the appellant being time barred and upheld the order-in-original.

2. Briefly the facts of the present case are that the appellant are engaged in the manufacture of Auto Parts falling under Chapter Sub- heading No. 8708 and are registered under the Service Tax Act, 1994. The appellant filed a refund claim of Rs. 2,59,052/- on 19.02.2013 of service tax paid on specified services used for export of goods during the year 2008, 2009 and 2010 under Notification No. 52/2011-ST dated 30.12.2011.

2.1. After following due process, the Original Authority rejected the refund claim vide its order dated 10.06.2013 on the ground that the same has been filed after stipulated period of one year as prescribed under the law.

2.2 Aggrieved by the said order, the appellant filed appeal before the Commissioner (Appeals) who has also rejected the appeal of the appellant.

2.3 Hence, the present appeal.

3. Heard both the parties and perused the material on records.

4. Learned Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without appreciating the facts and the law. He further submitted that the impugned order qua rejecting the appeal on the ground of wrong mentioning of the notification number in the application for refund cannot be valid ground for rejection of the claim if otherwise admissible.

4.1 Learned Counsel further concedes that as per the terms of paragraph 3(g) of the Notification No. 41/2012-ST dated 29.06.2012 namely "the claim for refund of service tax paid on the specified services used for export of goods shall be filed within one year from the date of export of the said goods."

4.2 Learned Counsel further submits that though the refund claim filed by the appellant was not in compliance with the condition of the notification with regard to time, he prays that if refund is not granted to the appellant then at least he should be allowed to take cenvat credit of input services as defined under Rule 2(l) of CCR, 2004. In support of his submissions, the Learned Counsel relied upon the following decisions:-

- M/s Sigma Vibracoustic (India) Pvt. Ltd, Mohali vs.

Commissioner, Central Excise, Chandigarh-I vide Final Order No. 60669-60670/2017 dated 25.04.2017.

- Kennametal India Ltd. vs. Commissioner of C.Ex. Ltu, Bangalore 2016 (46) STR 57 (Tri.-Bang.)
- Mahindra Reva Electric Vehicles (P) Ltd. vs. CCE, Service Tax, Bangalore-I 2017 (3) GSTL 75 (Tri.-Bang.)
- Commissioner vs. Dynamic Industries Ltd. – 2014 (35) STR 674 (Guj.)
- Commissioner of Central Excise, Raipur vs. Bhilai Engineering Corporation Ltd. 2016 (41) STR 774 (Tri.-Del.)

5. On the other hand, the Learned Authorized Representative defended the impugned order and submits that under the Notification it is strictly provided that the claim of refund shall be filed within one year from the date of export of the said goods whereas in the present case, admittedly, the refund was filed beyond the period of limitation and consequently, both the authorities below have rejected the same. He further submits that the judgements relied upon by the appellants relates to admissibility of cenvat credit of CHA Services which is not the issue in dispute in the present case.

5.1 Learned Authorized Representative also relied upon the decisions of Revisionary Authority in the case of B. B. Chemicals reported in 2012 (280) ELT 581 (G.O.I).

6. After considering the submissions of both the parties and perusal of the material on record, I find that admittedly, the appellant has filed the refund claim beyond the stipulated period of one year as prescribed under the law and consequently, the Original Authority as well as the Appellate Authority have rejected the refund claim only on the ground of limitation. Further, I find that both the Notification No. 52/2011-ST dated 30.12.2013 and the subsequent Notification No. 41/2012-ST dated 29.06.2012 clearly provides that the refund claim shall be filed within one year from the date of export of goods and in the present case, admittedly, the refund has been filed after the limitation period is over. The prayer of the Learned Counsel for the appellant that he may be allowed to take the cenvat credit at this stage, cannot be entertained because it would amount to allowing rebate which is not provided in the notification.

6.1. Further, I find that the decisions relied upon by the appellant are not directly relates to the refund of cenvat credit of CHA Service which is not the issue in the present case.

6.2 Further, those decisions relied upon by the appellant are not applicable in the present case, therefore, in view of my discussion above, I do not find any infirmity in the impugned order which is upheld by rejecting the appeal of the appellant.

(Pronounced on 30.01.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

G.Y.

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATETRIBUNAL, SOUTH ZONAL BENCH, CHENNAICOURT HALL No.III

SERVICE TAX APPEAL No. 41567 OF 2013

(Arising out of Order-in-Original No.04/2013 (RST) dated 27.03.2013 passed by Commissioner of Central Excise, Chennai III Commissionerate, 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai 600 034)

M/s. Coxswain Technologies Ltd. **…. Appellant**
No.29A, ARK Colony,Eldams Road, Alwarpet,

Chennai 600 018.

Versus

The Commissioner of GST & Central Excise **… Respondent**
Chennai North CommissionerateNo.26/1, Mahatma Gandhi Road,Nungambakkam,

Chennai 600 034.

APPEARANCE :

Mr. N. Viswanathan, AdvocateFor the Appellant

Ms. Anandalakshmi Ganeshram, Superintendent (A.R)For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING : 26.06.2023DATE OF DECISION :04.08.2023

Service Tax Appeal No. 41567 of 2013

FINAL ORDER No.40651/2023

ORDER : Per Ms. SULEKHA BEEVI, C.S.

Brief facts are that the appellant is engaged in operating television channel and also uplinking facility for third party and has obtained registration under the category of 'Business Support Service'(BSS). During the course of audit of accounts it was noticed by the Internal Audit Group of Service Tax Commissionrate that the appellant had accounted the income under the head 'Fees for allotment of air time and uplink income'. It appeared to the department that the allotment of air time was relating to broadcasting service and that the appellant is primarily engaged in the business of television broadcasting. The appellant had not paid service tax under the category of Broadcasting Service which has come into effect on 16.07.2001. On seeking explanation, the appellant vide letter dt. 23.04.2010 informed the department that the appellant was not a broadcasting organization or agency and thatthey were engaged only in the uplinking of TV programme produced by SS Music and Sur Sangeeth Channel which were owned by M/s.Fortune Media Pvt. Ltd. and M/s.Mindscape Creations Pvt. Ltd. respectively. They also cited Board's circular dt. 09.07.2001 andcontended that mere uplinking cannot be classified under Broadcasting Service.

2. On scrutiny of records, it was found that the appellant was providing broadcasting service also and that two channels referred asabove were initially owned by

the appellant company and subsequently transferred under the name of other companies. The appellant had obtained permission from the Ministry of Information and Broadcasting vide letter dt. 03.06.2003 in which it was statedthat appellant owned a television channel under the name & style "Coxwaine Channel". On 08.10.2004, appellant obtained permission from the Ministry of Information & Broadcasting for changing the name of the channel into "SS Music". It was also seen that the permission letter dt. 11.09.2003 given by the Ministry to appellant was for operating "Sur Sangeeth" channel in Hindi language. The license agreement dated 11.08.2005 entered into appellant with M/s.Videsh Sanchar Nigam Limited confirmed the fact that the appellant continued to own and operate 'Sur Sangeeth Channel'. The accounting of income under the head "Fee for allotment of air time and uplinking income" thus appeared to indicate that the appellant was indeed providing broadcasting service as well as uplinking facilities to other channels. The appellant had been paying service tax under the category of 'Business Support Service' (BSS) on the income earned by them only from 2006-07. In spite of repeated request by the Audit Group, the appellant did not provide break up income for broadcasting and uplinking for the year 2005-06. It was also noticed that as the uplinking charges are taxable under BSS w.e.f. 01.05.2006, the appellant should have paid service tax on the entire income from such date under the category of 'Business Support Service'. The appellant was not discharging service tax on entire income received under BSS. From the facts and circumstances,it appeared that the appellant had suppressed and misrepresentedthe facts of providing broadcasting service by deliberately declaring that they were undertaking only uplinking facility and also resorting to misclassification of the service as 'BSS' with an intention to evade payment of service tax. Therefore, the show cause notice dt. 22.10.2010 was issued for the period from 2005-06 to 2009-10demanding service tax under the category of 'Broadcasting Service' along with interest and for imposing penalties. After due process of law, the original authority vide order impugned herein upheld the demand of Rs.78,38,768/- along with interest and imposed equal penalty under Section 78 besides imposed penalty under Section 77of the Finance Act, 1944. Aggrieved by such order, the appellant is now before the Tribunal.

3. Ld. Counsel Sri N. Viswanathan appeared and argued for the appellant. It is submitted that the appellant is engaged in thebusiness of uplinking programme for other channels only. Due to a misconception and misunderstanding, the department has issued the show cause notice alleging that the appellant is providing Broadcasting Service also. The appellant had initially taken registration under Broadcasting Agency Service also. Later realizing that they are not liable to pay service tax under 'Broadcasting Service' as their activity was only uplinking of programmes, theappellants surrendered the service tax registration for broadcasting services with the department on 29.10.2004. After much exchange ofcommunications between the appellant and the department and on the request of the Range superintendent, the appellant obtained legalopinion as to whether their services would fall under Broadcasting Agency Service. They obtained legal opinion that on the basis of the clarification issued by the Board vide its circular dt. 09.07.2001, their activity would not attract levy of service tax under BroadcastingService and the uplinking services would attract levy of service tax under Business Support Service w.e.f. 01.05.2006. Accordingly, the appellant registered for paying service tax under BSS and has been paying service tax w.e.f. 01.05.2006 under BSS on the uplinking charges received by them. It is contended by the counsel that in the SCN, the department itself is not sure as to whether the activity would fall under Broadcasting Service and it is treated that theappellant ought to have paid at least under BSS. Ld. Counsel explained that appellant-company is engaged in the uplinking business for television channels owned by others. During the material time M/s.Videsh Sanchar Nigam Ltd. (VSNL) was only a licensed company to uplink TV channel programs either bythemselves or through persons who have been granted permission bythe Ministry of Information and Broadcasting (MIB), New Delhi. Later, this position was modified and private operators were also given licenses to operate their ports. One of the various private companies who had obtained license to operate television programs isM/s.Fortune Media Pvt. Ltd. As the appellant proposed to undertake uplinking activities appellant filed application for permission to uplink TV programs and thereafter obtained the permission. For obtaining

the permission it was required to indicate the name of TV channel proposed to be uplinked and the appellant thus indicated the TV channel name as "Coxwain", even though no such channel was owned or operated by appellant. The name was indicated in the letter requesting for permission only because it was necessary to indicate a TV channel name. Accordingly, the appellant obtained the license for uplinking from the Ministry of Information and Broadcasting, New Delhi vide letter dt. 3.6.2003 and was directed to approach the WPC, a wing of the Department of Communications for obtaining licnese in this regard. There was another company by name M/s.Fortune MediaPvt. Ltd. which owned a TV channel by name 'SS Music' and owned brand / trade name 'SS' for uplinking TV programs and accordingly the arrangement was made for uplinking the programs by engaging the services of overseas uplinker by name Thailand. Due to some technical reasons for some time upto January 2005 appellant could not operate even though they had obtained necessary licnese from MIB. The channel name was changed from 'Coxwain' to 'SS Music' vide letter dt. 08.10.2004. Later, during the year 2003 another company by name M/s.Mindscape Creations Pvt. Ltd. which owned TVchannel by name "Sur Sangeeth" approached the appellant for uplinking their programs and accordingly obtained necessary permission from MIB vide letter dt. 11.09.2003 and started operating their programs. Later on, removing the different obstacles the appellant started uplinking the program of SS Music also w.e.f January 2005.

4. The appellant entered into back-to-back agreements with the above broadcasting companies for undertaking uplinking services and these broadcasting companies were also registered with the service tax authorities under the category of Broadcasting Service. These broadcasting companies (M/s.Fortune Media Pvt. Ltd. and M/s.Mindscape Creations Pvt. Ltd.) were accordingly discharging service tax on the entire receipts. The appellant company had provided the program uplinked by third party and telecasting for public view by these companies only and they did not deal with the clients for booking various commercial or allotment of time slot.Therefore, only these companies can be considered as broadcasters. The appellant had only provided uplinking services as per the permission granted to them by MIB. This is evident from the license granted to them as it is only for uplinking services and not for broadcasting services. It is submitted that the department has issued SCN under Broadcasting Service due to the misconception that the appellant is rendering broadcasting services also.

5. Ld. Counsel submitted that there are factually incorrect allegations in the SCN. It is alleged in the SCN that the appellant originally owned two channels namely 'SS Music' and 'Sur Sangeeth' which is incorrect. The appellant had never owned these channels and these channels belong to the respective companies mentioned above. To substantiate this, the appellant had produced trade mark registration request made by Fortune Media Pvt Ltd. The said request letter would show that the above broadcasting company had requested for registration of trade mark as 'SS'. Original authority did not consider the said document observing that the request made for trade mark has been withdrawn. It is submitted by the ld. Counsel that even though the request for the trade mark has been withdrawn, the document would evidence that the name of the company who has requested for registration of trade mark ('SS') is M/s.Fortune Media Pvt. Ltd. and not the appellant. This document would be sufficient proof that the appellant does not ownbroadcasting company and that M/s.Fortune Media Pvt. Ltd. is engaged in activity classifiable under 'Broadcasting Service' within themeaning of the Finance Act, 1994. The appellant has discharged service tax under BSS from 01.05.2006. The demand made now alleging that the appellant is liable to pay service tax under 'Broadcasting Service' for the period 2006-07 to 2009-10 cannot be sustained.

6. Ld. Counsel adverted to the Board's circular dt. 09.07.2001 to argue that the said circular clearly stated that no tax is payable on unlinking services.

7. The decision in the case of *ESPN Software India Pvt. Ltd.* was relied by the Counsel to argue the ingredients for attracting the levy of tax under the definition of "Broadcasting Service".

8. Ld. Counsel argued on the ground of limitation also. It issubmitted by the counsel that they had earlier obtained registration for Broadcasting Service and thereafter on obtaining legal advice thattheir activity being only uplinking services would not attract levy under the said category had surrendered the registration on 29.10.2004. The legal opinion was given to them on the basis of clarification issued by the Board vide circular dt. 09.07.2001. The consideration received for uplinking services has been subjected to service tax under BSS and the present demand under BSS cannot be sustained. Further, the demand has been raised on the basis of the figures accounted by the appellant in their books of accounts and there is no positive act of suppression established by the department to invoke the extended period. It is submitted that there were repeated communications between the appellant and the department as to whether their activity would fall under 'broadcasting service' and after which they had surrendered their registration for'broadcasting service' and later had obtained registration under Business Support Service. For this reason, there was no willfulsuppression of facts with intent to evade payment of service tax on the part of the appellant and the show cause notice issued invoking the extended period therefore cannot sustain. The Ld. Counsel prayed that the appeal may be allowed.

9. Ld. A.R Ms. Anandalakshmi Ganeshram appeared and argued for the Department. It is submitted that the original authority had carefully considered the documents and the submissions made by theappellant before confirming the demand. Ld. A.R adverted to para11 of the findings in the impugned order and submitted that the showcause notice was issued proposing to demand the service tax of Rs.1,03,34,893/- for the period from 2005-06 to 2009-10. However, the appellant had put forward the contention that the said amount received by them includes tax and the demand has to be quantified taking the value as cum tax which would work out to be Rs.78,38,768/- only. The adjudicating authority accepted the said contention of the appellant and confirmed the demand only to the extent of Rs.78,38,768/-.

10. The main ground put forwarded by the appellant is that theyare rendering only up-linking services and is not engaged in broadcasting services. It is submitted by the Ld. AR that in their accounts, the appellant has mentioned amounts received under the head 'Air time allotment charges / uplinking charges'. The mention of'air time allotment charges' would definitely indicate that the appellant is rendering broadcasting services also. There cannot beany amount in the nature of airtime allotment for uplinking services. Further, the adjudicating authority has examined the permission letter dt. 03.06.2003 issued by MIB and also the permission letter dt.08.10.2004. In the previous letter the permission is granted to the appellant viz. M/s.Coxwain Technologies Ltd. who owns channel 'Coxwain' for providing uplinking services. In the second letter, the change of channel name from 'Coxswain' to 'SS Music' has been noted. In the letter dt. 11.09.2003, the channel name 'Sur Sangeeth' 'owned by the appellant' has been noted. Again, in the license agreement entered with VSNL, the channel name 'Sur Sangeeth' has been mentioned to be owned by the appellant. Though the appellant contends that they do not own any channel and have been doing only up-linking services, the documents speak otherwise. The adjudicating authority has rightly considered all these documents andheld that the appellant owns these channels and therefore appellantis not only engaged in up-linking services but also is engaged in the business of broadcasting service. Further in the agreement entered with M/s.VSNL, it is stated that the channel of the appellant isallowed to bring into the said play-out station its furniture and articlesand materials as necessary and required for maintaining a fully equipped play out set up. The permission letter from MIB along with agreement entered with M/s.VSNL will establish that the appellant is owning and operating these channels. In the Profit & Loss Account for the year ended 31.03.2008 and 31.03.2009 it is shown as 'Feesfor allotment of airtime and uplink income'. It is clear from the aboveaccount head that appellant has been collecting fees for allotment of airtime. Further "Notes on Accounts" for the year ending 31st March 2006 under "Segment Reporting" it is mentioned that "*The Company is engaged in the business of Broadcasting"*. This document is considered as the only reportable business segment as peraccounting Standard-17. The appellant has not been able to establishthat they were providing only uplinking services. The demand quantified has not included the value that has been subjected to service tax under BSS.

11. Ld. A.R submitted that one of the arguments put forward by appellant is that other broadcasting companies use uplinking services of the appellant and that appellant has incurred expenses for uplinking services only. On perusal of the Notes on Accounts for the year ending 31.03.2006 under the head Expenses in Foreign Currency it is seen mentioned as expense of Rs.62,10,000/- towards renting of satellite. Such expenses towards renting of satellite can only be incurred for the purpose of broadcasting.

12. The circular dt.09.07.2001 adverted to by the Ld. Counsel was countered by the Ld.AR, by submitting that the said circular was issued prior to the amendment brought forth in the definition of "Broadcasting Service". After the amendment to the definition of "Broadcasting Service" another circular dt. 27.07.2005 was issued by the department. After the amendment, the services rendered by MultiSystem Operators (MSO) who were permitted to receive signals from the broadcasting agencies on prescribed amount were also subjected to service tax. The decision in the case of *CC VS Worldspace India P. Ltd.* 2008-TIOL-42262-CESTAT BANG was relied by the Ld. A.R to argue that after the amendment brought forth with regard to definition of 'broadcasting agency' the earlier circular dt.09.07.2001 has lost its relevancy. Ld. A.R prayed that the appeal may be dismissed.

13. Heard both sides.

14. The issue to be decided is whether the demand, interest and penalties imposed alleging that the appellant is rendering 'Broadcasting Services" is sustainable or not.

15. The Ld. Counsel for appellant has vehemently argued that they are providing only uplinking services and that they do not own and operate any channel and therefore are not doing any broadcasting service. To support the contention that uplinking services are different from broadcasting services, appellant has relied on the Board's circular dt.09.07.2001. Relevant para of the said circular reads as under :

"3. Broadcasting is done either terrestrially or through satellite links. Most of the private TV channels are using satellite links for broadcasting their programmes. The uplinking of the programme to the satellite is done through VSNL or other earth stations located in India or through other agencies located abroad. The up-linking agencies are not broadcasting agencies and are not liable to service tax in respect of such service….."

16. It is the plea of the appellant that they had obtained legal opinion and on the basis of circular, they were advised that they are not rendering any broadcasting service. Ld. A.R has adverted to the change brought forth in the definition of 'Broadcasting Agency' and 'Broadcasting Service' in the year 2005. To appreciate these rival submissions, it would be beneficial to look into the relevant definitions of "Broadcasting Service" and "Broadcasting Agency" as defined under Section 65 (14) and 65 (15) prior to 2005 as well as after 16.06.2005.

17. In the decision of *ESPN Software India (P) Ltd.* – 2014 (35)STR 927 (Tri.-Del) the Tribunal had occasion to analyse the ingredients of definition of 'Broadcasting Service' prior to 16.06.2005 and after. The relevant para reads as under :

"26. We have heard both sides. Major issue to be decided in these appeals is whether Appellant No. 1 and No. 2 are liable to pay Service Tax as recipients of broadcasting Service under reverse charge mechanism. Broadcasting and Broadcasting agency or organisation has been defined under Section 65(14) and Section 65(15) as under (prior to 2005).

"65(14) Broadcasting has the meaning assigned to it in clause (c) of Section 2 of the Prasar Bharati (Broadcasting Corporation of India) Act, 1990 (25 of 1990) and also includes programme selection, scheduling or presentation of sound or visual matter on a radio or a television channel that is intended for public listening or viewing, as the case may be; and in the case of a broadcasting agency or organisation, having its head office situated in any place outside India, includes the activity of selling of time slots or

obtaining sponsorships for broadcasting of any programme or collecting the broadcasting charges on behalf of the said agency or organisation, by its branch officeor subsidiary or representative in India or any agent appointed in India or by any person who acts on its behalf in any manner,"

65(15) "broadcasting agency or organisation" means any agency or organisation engaged in providing service in relation to broadcasting in any manner and, in the case of a broadcasting agency or organisation, having its head office situated in any place outside India, includes its branch office or subsidiary or representative in India or any agent appointed in India or any person who acts on its behalf in any manner, engaged inthe activity of selling of time slots for broadcasting of any programme or obtaining sponsorships for programme or collecting broadcasting charges on behalf of the said agency or organisation.

Broadcasting and broadcasting agency or organisation have been defined as under with effect from 16-6-2005.

"65(15) Broadcasting has the meaning assigned to it in clause (c) of Section 2 of the Prasar Bharti (Broadcasting Corporation of India) Act, 1990 (25 of 1990) and also includes programme selection, scheduling or presentation of sound or visual matter on a radio or a television channel that is intended for public listening or viewing, as the case may be; and in the case of a broadcasting agency or organisation, having its head office situated in any place outside India, includes the activity of selling of time slots or obtaining sponsorships for broadcasting of any programme or collecting the broadcasting charges or permitting the rights to receive any form of communication likesign, signal, writing, picture, image and sounds of all kinds by transmission of electro- magnetic waves through space or through cables, direct to home signals or by any other means to cable operator including multisystem operator or any other person on behalf ofthe said agency or organisation, by its branch office or subsidiary or representative in India or any agent appointed in India or by any person who acts on its behalf in any manner."

"65(16) "broadcasting agency or organisation" means any agency or organisationengaged in providing service in relation to broadcasting in any manner and, in the case of a broadcasting agency or organisation, having its head office situated in any place outside India, includes its branch office or subsidiary or representative in India or any agent appointed in India or any person who acts on its behalf in any manner, engaged inthe activity of selling of time slots for broadcasting of any programme or obtaining sponsorships for programme or collecting the broadcasting charges or permitting the rights to receive any form of communication like sign, signal, writing, picture, image and sounds of all kinds by transmission of electro-magnetic waves through space or through cables, direct to home signals or by any other means to cable operator including multisystem operator or any other person on behalf of the said agency or organisation."

Taxable service is defined under [Section] 65(105)(zk) of the Finance Act as under :-

"Any service provided or to be provided to a client, by a **"broadcasting agency or organization"** means any agency or organization in relation to broadcasting in any manner and, in the case of a broadcasting agency or organization, having its head office situated in any place outside India, includes service provided by its branch office or subsidiary or representative in India or any agent appointed in India or any person who acts on its behalf in any manner, engaged in the activity of selling of time slots for broadcasting of any programme or obtaining sponsorships for programme or collecting the broadcasting charges or permitting the rights to receive any form of communication like sign, signal, writing, picture, image and sounds of all kinds by transmission of electro-magnetic waves through space or through cables, direct to home signals or by any other means to cable operator including multisystem operator or any other person on behalf of the said agency or organisation".

Explanation

"For the removal of doubts, it is hereby declared that so long as the radio or television programme broadcast is received in India and intended for listening or viewing as the case may be, by the public, such service shall be a taxable service in relation to broadcasting, even if the encryption of the signals or beaming thereof through "the satellite might have taken place outside India."

Section 2(c) of Prasar Bharati (Broadcasting Corporation of India) Act, 1990 reads as under :-

'2(c) "broadcasting" means the dissemination of any form of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electro-magnetic waves through space or through cables intended to be received by the general public either directly or indirectly through the medium of relay stations and all its grammatical variations and cognate expression shall be construed accordingly."

18. From the above, it can be seen that after 16.06.2005, the taxable service under Section 65 (105) (zk) has become wide so as toinclude transmission of electro-magnetic waves through space orthrough cables, direct to home signals or by any other means tocable operator including multisystem operators (MSO) or any other person on behalf of the said agency or organisation. Thus the clarification issued by the Board vide its circular dt.09.07.2001 that MSO is not a broadcasting agency as they merely transmit signals looses its relevancy after the amendment brought forth in the definition. The argument of the appellant taking shelter of the circulardt. 09.07.2001 therefore fails.

19. The Ld. Counsel has vehemently argued that they do not own any TV channel and are only engaged in up-linking services for which they have permission from MIB.

20. The letter dt. 11.09.2003 reads as under :

"Subject : Permission to uplink TV Channel from India through VSNL – M/s.Coxswain Technologies Limited.Sir,

The undersigned is directed to refer to your letters dated 10.07.2003 and 31.07.2003, seeking permission for uplinking "**SUR SANGEETH**" channel (in digital mode) from India through VSNL, Chennai.

2. The undersigned is directed to convey permission to **M/s.Coxswain Technologies Ltd.** to uplink their "**SUR SANGEETH**" channel in Hindi language (in digital mode) from India through VSNL, Chennai using INSAT satellite 2E, for a period of ten years, subject to the following:"

21. The permission letter dt. 08.10.2004 reads as under :

"Subject : Permission to change the name of the channel from **"COXSWAIN"** to **"SS Music"** – **M/s.Coxswain Technologies Ltd.**

Sir,

This is with reference to your letters dated 9.8.2004, 13.9.2004 and 16.9.2004 requesting for the change of your channel name from "**COXSWAIN**" to "**SS MUSIC**"

2. In continuation of this Ministry's letter of even number dated 3rd June, 2003 whereby permission was conveyed to M/s.Coxswain Technologies Ltd. to uplink your TV channel namely "COXSWAIN" from Indiathrough VSNL, Mumbai, the undersigned is directed to convey no objectionof this Ministry to change he name of your channel from "COXSWAIN" to "SS MUSIC". All other terms & conditions, as contained in the permission letter dated 3.6.2003 would continue to apply."

22. In these letters, it is stated that 'Coxswain' channel belongs to the appellant. It

is also noted that the name of the channel has been changed from 'Coxswain' to 'SS Music'. It is stated that permission isgranted to the appellant to uplink their 'Sur Sangeeth' channel in Hindi language. Though the appellant contends that they do not own or operate any channel and therefore is not rendering any broadcasting service, they have not been able to give plausible explanation as to why in these permission letters it is stated that these channels are owned and operated by them. Further, in the licence agreement dt.11.08.2005 entered by the appellant with M/s.VSNL it is stated as under :

"M/s.COXSWAIN TECHNOLOGIES LIMITED, operating a Private Satellite Channel under the name and style, "**SUR SANGEETH TV**" incorporated under the Companies Act, 1956, having its Corporate Office at No.90, Jawaharlal Nehru Street (100 feet Road), Vadapalini, Chennai-600 026, duly represented by its Director, Shri Shriram (hereinafter referred to as the 'CHANNEL" which expression shall unless repugnant to the context or meaning thereof be deemed to mean and include its successors and permitted assigns of the **OTHER PART.**

WHEREAS VSNL provides inter-alia, the uplinking facilities to the private satellite channels from its sources for the purpose of telecasting and broadcasting various programs in India.

AND WHEREAS THE Channel is one such private satellite channel, which is presently availing such uplinking facilities from ***VSNL, situated at 226,Redhills Road, Ambattur, Chennai-600 053,*** by virtue of the MCPC Agreement dated 22nd September 2003.

AND WHEREAS, the Channel has approached VSNL with a request for grant of license to use the room space for play-out set up admeasuring 200 Sq.Ft to organize play-out setup inside the compound of VSNL at the above stated situation."

23. In all the above documents, it is stated that the channels'SS Music' as well as 'Sur Sangeeth' are owned and operated by the appellant. Again, the accounts maintained by appellant show collection of charges towards airtime allotment. This fact of collecting charges for airtime allotments would lead to a strong inference that the appellant has indeed been rendering 'Broadcasting Service'. The appellant has relied upon an application made for trade mark. On the basis of this document, it is argued that the said application for trademark ('SS') has been filed by M/s.Fortune Media (P) Limited andwould indicate that the channel 'SS' is owned by M/s.Fortune Media (P) Ltd. and not the appellant. The application was given on 29.11.2001. The present status of the application shows 'abandoned'.Merely because an application was given by M/s.Fortune Media (P) Ltd. it cannot be said that the said channel belonged to them and is discussed in this order. The permission letters submitted before the competent authority for issuing licence shows that these channels 'SSMusic' and 'Sur Sangeeth' are owned by appellant. On merits, we do not find any grounds to accept the contention of appellant that they are not rendering any broadcasting services.

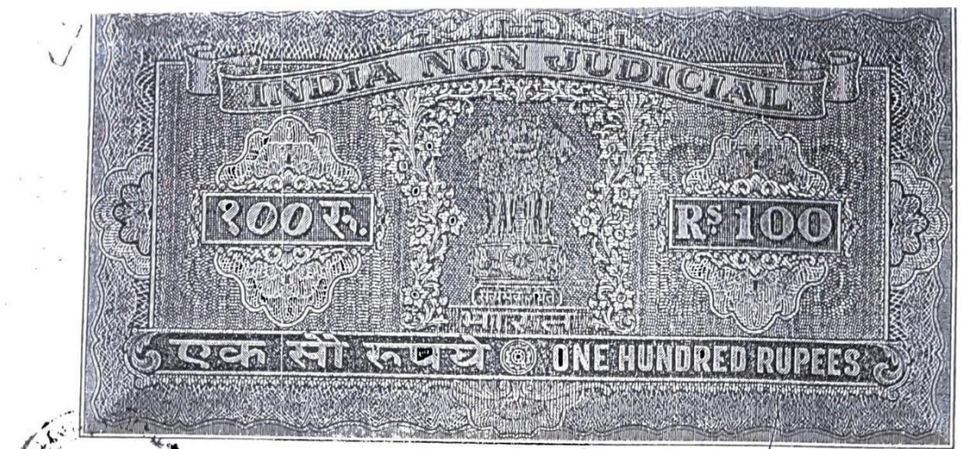
24. Ld. Counsel has argued on the ground of limitation also. It is the case of the appellant that they have been registered with the service tax and have been filing returns from 2002 onwards. It is argued by the Ld. Counsel for appellant that after obtaining legal opinion they had surrendered the registration for Broadcasting agency and got registration under BSS for payment of service tax on the uplinking charges received by them. However, it has to be seen that there were charges received by the appellant for airtime allotment also. Expenses incurred is the nature of satellite rent etc. Appellant has taken the shelter of Board circular dt. 09.07.2001 for non-payment of service tax under 'Broadcasting Service'. Even after amendment w.e.f 16.06.2005, appellant has not paid service tax for broadcasting services. We therefore do not find any ground to hold that invocation of extended period is not sustainable. The appellant has in fact disguised rendering of Broadcasting services behind uplinking services and misguided the department repeatedly by furnishing letters that they were providing only uplinking services.

25. The original authority in para 11.3 has discussed in detail how the appellant has disguised the rendering of Broadcasting service under the cover of uplinking services. The discussions of the original authority is noteworthy and reproduced as under :

"….From the discussions above, it is clear that the notice has disguised their services of 'Broadcasting Services' behind uplinking services and misguided the department by submitting letters that they were providing only uplinking services. Surrendering the registration certificate citing the same grounds was also incorrect. The notice had submitted the documents showing they were providing uplinking services only and it is on the basis of uplinking that the departmental officers have accepted the classification under "Business Support Services". The notice has taken advantage of the Board Circular thatuplinking services are not covered under "Broadcasting Services" and deliberately misled the department about their activities and misclassified the same under "Business Support Services" with intention to evade paymentof Service Tax. "Business Support Services" became taxable with effect from 1.5.2006 only whereas the "Broadcasting Services" have been brought under the tax net much earlier. The notice has tried to use this gap between the two services being made taxable and mislead the department by misclassifying the "broadcasting services" as uplinking services under the category "Business Support Services". The discussions in the paras referred above clearly show as to how the assessee in the guise of uplinking tried to avoid payment of service tax. Only after detailed investigation and on unearthing various permissions and letters the department could finalise the extent of service tax liability. Therefore it is proved beyond doubt that the notice has deliberately misled the department with the intention of evading the payment of the tax under "Broadcasting Services".

26. The above view of the original authority that the appellant hasplayed clever hide and seek game with the department is brought out on perusal of the various documents like the permission letters,agreement etc. The appellant has taken up the contention that they were providing only uplinking services and that the channels in the name of 'SS Music' and 'Sur Sangeeth' belong to M/s.Fortune Media Pvt. Ltd. and M/s.Mindscape Creations Pvt. Ltd. respectively.As already discussed, in the letters submitted before the MIB for obtaining license they have stated that they own 'Coxswain' channel; the name changed to 'SS Music'. It is also stated that they own 'Sur Sangeeth'. The appellant has been denying the ownership of these channels all along. The documents/records placed before us show that M/s.Fortune Media Pvt. Ltd. is owned and operated by the appellant itself and the agreement entered by the appellant contending that they provide uplinking services for 'SS Music' channelis only a sham document. The agreement which is said to have been entered into by the appellant (**M/s.Coxswain TechnologiesLimited**) with M/s. **Fortune Media Pvt. Ltd**. dt. 17.06.2004 is seen signed by Sri K. Shriram as the Director of Coxswain TechnologiesLtd. and Sri B.D. Ramesh Babu as the President of M/s.Fortune Media Pvt. Ltd. The copy of the

relevant part of the agreement is asunder :



Coxswain Technologies Ltd.

1750
17/6/2004

AGREEMENT

This Agreement is entered between **Coxswain Technologies Limited** incorporated under Companies Act 1956 and having its registered office at New No.90, Jawaharlal Nehru Road (100 Feet Road), Vadapalani, Chennai 600 026, represented by its Director Mr.K.Shriram, (hereinafter called **"CTL"** which term includes its successors and permitted assigns) of the one part; and

M/s Fortune Media Private Ltd., having its registered office at 126 & 127, Triplicane High Road, Triplicane, Chennai 600 005, represented by its President Mr.B.D.Ramesh Babu (hereinafter called **"CUSTOMER"** which term includes its successors and permitted assigns) of the other part .

contd..2

for COXSWAIN TECHNOLOGIES LIMITED

Director

For FORTUNE MEDIA PRIVATE LTD.

B.D. RAMESH BABU
President

27. From the above, it is made to understand that Sri K. Shriram is the person representing M/s.Coxswain Technologies Ltd. (appellant herein). The very same impression is seen in the application dt. 10.07.2006 submitted for registration of Business Support Service filed by the appellant before the Department. The said application is signed by the Director, Sri K. Sriram for the appellant. The relevant part of the application is reproduced as under:

Coxswain

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10 July 2006

The Assistant Commissioner
Office of the Commissioner of Central Excise
Service Tax Cell, Chennai II
MHU Complex
No 692, Anna Salai
Chennai – 600 035

Dear Sir,

Sub : Application for Registration under Sec.69 of the Finance Act, 1994

Please find enclosed the following documents duly signed, with regard to our Application for Registration under Section 69 of the Finance Act, 1994 :

1. Form ST 1 (2 Copies)
2. PAN No.
3. Memorandum and Articles of Association of the Company.
4. Covering Letter

We request you to kindly do the needful,

Yours faithfully,
For Coxswain Technologies Limited

K.Shriram
Director.

Encl : As above.

COXSWAIN TECHNOLOGIES LIMITED
No. 127, Triplicane High Road, Chennai - 600 005. Tel : +91 44 4215 5557

28. The appellant contends that the channel 'Sur Sangeeth' is owned by M/s.Mindscape Creations Pvt. Ltd. The Agreement dt. 27.09.2003 is entered by the appellant with M/s.Mindscape Creations Pvt. Ltd. It is executed by Shri K. Shriram Director of appellant Company and by Shri Usman Fayaz, Director of M/s.Mindscape Creations Pvt. Ltd. It can be seen from the document that the address of M/s.Mindscape Creation Pvt. Ltd. is the same as that of M/s.Fortune Media Pvt. Ltd. The address is "126, Triplicane High Road, Triplicane, Chennai 600 005". This appeal (filed by M/s.Coxswain Technologies Ltd.) is filed by the President, Sri B.D. Ramesh Babu (who is the President of M/s.Fortune Media Pvt. Ltd.). The verification for filing the appeal in the appeal paper records is as under :

36. The learned lower adjudicating authority further failed to note that when the entire demand is not sustainable on merits as well as on limitation and as such when no taxes are payable by them, was in error in sustaining the demand for interest and the imposition of the penalties on them

37. The learned lower adjudicating authority ought not to have imposed the harsh and unsustainable penalties when no criminal intent or defiance of law or negligence has been alleged or established against them

Verification

I B.D. Ramesh Babu President M/s Coxswain Technologies Ltd., Chennai, the appellant herein, do hereby declare that what is stated above is true to the best of my information and belief.

Verified at Chennai this the 1st day of July 2013

for COXSWAIN TECHNOLOGIES LIMITE

B.D. RAMESH BABU

Signature of the appellant

Signature of authorized Representative, if any

29. Thus, it can be seen that Sri B.D. Ramesh Babu is the Presidentof M/s.Fortune Media Pvt. Ltd as well as M/s.Coxswain Technologies Ltd. The appellant has not explained the relationship between these two related entities. It is also not understood why Sri B.D. Ramesh ofM/s.Fortune Media has filed this appeal. Even if separate legal entities, the appellant should have disclosed the relationship. In fact, appellant has totally suppressed these facts and has tried to create confusion so as to escape the liability to pay tax. The agreement entered by M/s.Coxswain Technologies Ltd. with M/s.Fortune Media Pvt. Ltd. and M/s.Mindscape Creations Pvt. Ltd. has to be considered as a sham document to cover up the 'broadcasting service' rendered by the appellant. Proceedings before *quasi-judicial* authority is not tied up in the heavy shackles of Procedures and Evidence Act. The same should not be taken advantage by parties to misrepresent facts and furnish fabricated and sham documents.

30. Taking note of these aspects into consideration, we are of the view that the demand invoking extended period and imposition of penalties are legal and proper.

31. In the result, the impugned order is upheld. Appeal is dismissed.

(pronounced in court on 04.08.2023)

sd/- sd/-

(M. AJIT KUMAR) **(SULEKHA BEEVI C.S.)**
Member (Technical) Member (Judicial)

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 40074 of 2014

(Arising out of Order-in-Appeal No. 156/2013 (M-III) ST dated 02.12.2013 passed by the Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai – 600 034)

M/s. Surin Automotive Private Limited **: Appellant**
No. 5, GST Road,
Guduvanchery, Chennai – 602 303

VERSUS

Commissioner of Central Excise and Service Tax **: Respondent**
Mahatma Gandhi Marg, Nungambakkam, Chennai – 600 034

APPEARANCE:

Shri M.N. Bharathi, Advocate for the Appellant

Smt. Anandalakshmi Ganeshram, Superintendent for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 40652 / 2023

DATE OF HEARING:
19.07.2023

DATE OF DECISION:
04.08.2023

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

Brief facts, as could be gathered from the orders of lower authorities and other relevant documents placed on record, are that the appellant is a registered service provider for Goods Transport Operator Service. The balance sheet of the appellant appears to have revealed the receipt of Rs.9,91,954/- and Rs.4,42,174/- for the periods 2007-08 and 2008-09 respectively.

2. Upon enquiry, the Department appears to have found that the appellant was making payments to their suppliers only after sixty days and if the supplier wanted earlier payment, 5% of the value of the bill was deducted by the appellant, which was shown in the appellant's balance sheet as income under "Bill discount".

3. From the above, the Revenue entertained a doubt that the appellant did render service within the meaning of Section 65(12)(a)(ix) read with Section 65(105)(zm) of the Finance Act, 1994 and thus, a Show Cause Notice dated 19.06.2009 was issued proposing to demand Service Tax under 'banking and other financial services'.

4. The appellant appears to have filed a reply dated 04.08.2009 whereby they appear to have denied rendering any service under 'banking and other financial services'.

5. However, in adjudication, the Deputy Commissioner of Central Excise, Tambaram-adjudicating authority proceeded to confirm the demand as proposed in the Show Cause Notice vide Order-in-Original No. 02/2011 dated 27.01.2011.

6. Feeling aggrieved by the above demand, it appears that the appellant filed an appeal before the first appellate authority, but however, the first appellate authority also having dismissed their appeal vide impugned Order-in- Appeal No. 156/2013 (M-III) ST dated 02.12.2013, the present appeal has been filed before this forum.

7. Heard Shri M.N. Bharathi, Ld. Advocate for the appellant and Smt. Anandalakshmi Ganeshram, Ld. Superintendent for the Revenue. Ld. Advocate has also filed written submission during the course of arguments.

8.1 The contentions of the Ld. Advocate are summarized as under: -

- Granting of discount was in the course of trade which was relating to the sale of goods and not a service activity as such.

- The bill discounting was essentially for the buyer to avail the facility of discount granted by the seller, who is the service provider; but however, in the case on hand, the transaction between the seller and the buyer being a commercial transaction, which is an activity of trading / sale, is not a 'service' and hence, there was no taxability.

- The lower authority does not specifically spell out as to how the service is involved in a bill discounting scheme.

- In a bill discounting scheme, there is no service by the seller to the buyer nor is there any service by the buyer to the seller and therefore, neither the seller nor the buyer could be the service provider or service receiver.

- The appellant is not initiating the bill discounting scheme as a service provider as contemplated under Section 65(12)(a)(ix) *ibid.* since no consideration was received by them.

- The appellant had only availed the facility of discount against prompt payment, which is a direct facility given to the appellants as buyers in terms of the purchase orders.

8.2 Thus, the Ld. Advocate prays for setting aside of the impugned order and the consequential demand raised against the appellant.

9.1 *Per contra,* Ld. Superintendent supported the findings of the lower authorities. She would also invite our attention to the definition of 'banking and other financial services' to contend that the scope of the said service covers even bill discounting facility.

9.2 She would also rely on an order of the co-ordinate Delhi Bench of the CESTAT in the case of *M/s. Hind Filters Ltd. v. Commissioner of Central Excise, Indore [2017 (51)*
S.T.R. 70 (Tri. – Del.)]

10. We have heard the rival contentions, we have gone through the documents placed before us and we have also gone through the order relied upon during the course of arguments.

11. Upon hearing, we find that the only issue that is to be decided by us is: whether the nature of activity rendered by the appellant was amenable to Service Tax under the category of 'banking and other financial services' within the meaning of Section 65(12)(a)(ix) *ibid.*?

12. Section 65(12)(a)(ix) of the Finance Act, 1994, which defines the service, reads

as under: -

"Section 65. Definitions. — In this Chapter, unless the context otherwise requires, -

....

(12) "banking and other financial services" means —

(a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate [or commercial concern], namely :—

(i) ...

.

.

(ix) other financial services, namely, lending, issue of pay order, demand draft, cheque, letter of credit and bill of exchange, transfer of money including telegraphic transfer, mail transfer and electronic transfer, providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults; operation of bank accounts;"

13.1 The transaction/activity, as explained by the appellant in its reply to the Show Cause Notice is that: -

"... discounts granted to the buyer as per the bill discounting scheme are in the nature of cash discounts or prompt payment discounts.

These discounts granted by the sellers enable buyers to honour the Bills early to avail of reduction in price. They are not any consideration for rendering any service towards 'sales promotion' or any 'business' of the seller.

...

The transaction between buyer and sellers are on principal to principal basis. In fact these discounts are considered as abatable elements in value for excise duty purposes at the hands of the manufacturer/seller ...

Buyers pay for the goods purchased and based upon so many factors, discounts are offered by manufacturers to promote their own sales and granting of discounts is part of marketing strategy adopted by manufacturer himself for his own self ..."

13.2 The case of the appellant, therefore, appears to be that Service Tax is payable on 'bill discounting' under banking and other financial services ('BFS' for short) only when the service is rendered by a banking company or financial institution including a non-banking financial company. They would thus contend that they are only a body corporate and not liable to pay Service Tax as they cannot be classified under the category of banking company or financial institutions.

14. From the reply to the Show Cause Notice and the contentions before us, we find that the appellant has not denied the fact of giving bill discounting facility to some of its customers, but had denied liability only on the ground that they are not a banking company or a financial institution.

15.1 From the definition of BFS reproduced *supra*, we find that sub-clause (ix) covers even 'bill discounting facility' and as such, the appellant being a limited company, is also covered under the said definition.

15.2 The definition makes it clear that such bill discounting facility could be offered not only by a banking company or a financial institution, but also a body corporate.

16. We find that our above view is supported by the decision in the case of *M/s. Hind Filters Ltd. (supra)* relied upon by the Ld. Superintendent.

17. In view of the above we do not find any justifiable reasons to interfere with the impugned order and hence, the appeal is dismissed.

(Order pronounced in the open court on **04.08.2023**)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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IN THE CUSTOMS, EXCISE & SERVICE TAXAPPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.40601 of 2014

(Arising out of Order-in-Appeal No. 3/2014 (M-III) dated 1.1.2014 passed by the Commissioner of Central Excise (Appeals), Chennai)

M/s. Upshot Utility Services **Appellant**
No. 6, Raju Street, AppurSingaperumal Kol Kanchipuram 603 204.

Vs.

Commissioner of CGST & Central Excise **Respondent**
Chennai Outer CommissionerateNewry Towers, 12th Main Road Anna Nagar, Chennai – 600 040.

APPEARANCE:

Shri T. Ramesh, Advocate for the Appellant

Shri Harinder Singh Pal, AC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial) Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40665/2023
Date of Hearing : 21.07.2023Date of Decision: 10.08.2023

Per M. Ajit Kumar,

This appeal is filed by the appellant against Order in Appeal No.3/2014 dated 1.1.2014 passed by the Commissioner of Central Excise(Appeals), Chennai.

2. Brief facts of the case are that the appellants who are registeredwith the Service Tax Department for providing Manpower RecruitmentAgency Services had filed half-yearly ST-3 return for the periodOctober 2008 to March 2009 on 24.4.2009 for the aforesaid services. During the scrutiny of the said ST-3 returns, it was found that the appellant had availed the benefit of exemption Notification No. 4/2004- ST dated 31.3.2004 for the services rendered to units located inside the Special Economic Zone (SEZ) for the month of March 2009. However, the aforesaid exemption Notification was superseded by Notification No. 9/2009-ST dated 3.3.2009. Accordingly, all providers providing services to units located inside SEZ were liable to pay appropriate service tax from 3.3.2009. The appellants have availed exemption to an extent of Rs.43,12,932/- from the gross amount received towards the services rendered by them to the units located inside the SEZ and have short-paid service tax demand of Rs.4,44,232/- for the month of March 2009. Hence Show Cause Noticewas issued to the appellant proposing to demand the short-paid servicetax amount of Rs.4,44,232/- for the month of March 2009 along with appropriate interest and also to impose penalties. After due process oflaw, the adjudicating authority confirmed the proposals in the Show Cause Notice and demanded an amount of Rs.4,44,232/- towards short-paid service tax demand for the month of March 2009 along withappropriate interest. The adjudicating authority appropriated an amount of Rs.1,65,458/- already paid by the appellant towards servicetax demand and Rs.4,772/- towards interest. The adjudicating authority also imposed penalty under section 77 of the Finance Act, 1994. Assailing the aforesaid findings and the order of the adjudicatingauthority, the appellants preferred appeal before Commissioner (Appeals) who vide the impugned order has upheld the order passed by the adjudicating authority. Hence the appellants are before the Tribunal.

3. No cross-objections have been filed by the respondentdepartment.

4. The learned counsel Shri T. Ramesh appeared for the appellant and learned AR Shri Harinder Singh Pal, Assistant Commissioner for the department.

5. The learned counsel for the appellant submitted that even after the amendment to the Notification 4 of 2004-ST, the Service renderedto SEZ is exempted from any levy of Service Tax as per the amendedNotification 9 of 2009-ST. The main portion of the Notification exempts the levy itself and proviso only contemplates that if tax or duty is paid,the exemption is available in the form of refund. The above said submission is supported by the Clause 3 of the Notification, 9 of 2009-ST, dated, 03.03.2009. He further stated that the demand is barred by Limitation. Though the show cause notice was dated, 11.09.2009. thesame was received by the appellant on 04.05.2010. It is well settled that the date of service of the show cause notice is the determining factor to compute the period of limitation to issue show cause notice under Service Tax Provisions (Finance Act, 1994). The Commissioner(Appeals), has rendered an erroneous finding in this regard. Though the Appellant's plea regarding the date of receipt of the show cause notice on 04.05.2010 only, was recorded at paragraph 3(b) of the impugned order, at Paragraph 7 of the impugned order, the Commissioner (Appeals) recorded the finding regarding receipt of the Order In original. The department has not produced any evidence to show that the appellant had received the show cause notice immediately after, 11.09.2009 or within 1 year from the disputed period. The appellant also placed reliance on the decision of Hon'ble Tribunal in the case of **Krisons Electronic Systems Ltd., Vs. CC, reported in 1996 (87) ELT, 514 (Tri)** to submit that the impositionof the penalty in this case is not sustainable. The issue involved in thepresent case is regarding the interpretation of the exemption notification. Further, even assuming without admitting that the exemption can be availed only by way of refund, the appellant is otherwise eligible for the exemption. Therefore, the appellant was under the bona fide belief that the Appellant was entitled for the exemption during the disputed period as well and appellant need not pay any Service Tax as per notification 4 of 2004 read with Notification9 of 2009-ST. There is no intention to evade payment of tax warrantingexorbitant penalty. Without prejudice to the above, the appellant is entitled for the Cum-Tax benefit. He prayed that the impugned order be set aside.

6. The learned AR Shri Harinder Singh Pal supported the findings inthe impugned order.

7. Heard both sides. We find that Notification No. 9/2009-ST dated3 March 2009 supersedes the older notification No.4/2004 by providingfor exemption from the levy of service tax in respect of the taxable services rendered to SEZ Developers and SEZ Units by way of a refund. Notification 9/2009 has in a change of policy modified the earlier procedure of automatic exemption from payment of service tax provided in relation to the authorised operations in a SEZ under the SEZ Act. Exemption of service tax under the new notification is by wayof a refund and is subject to the various conditions enumerated therein.

The appellant is of the view that the main portion of the Notification exempts the levy itself and that the 'proviso' contemplates that even iftax or duty is paid, the exemption is available in the form of Refund. This is not a proper reading of the notification. The exemption provided by the notification is circumscribed by the proviso. There is no scope for intendment. Plain words of the notification must be given meaningto. It cannot be read disjointedly in different parts. In ***Commissionerof Central Excise, Chandigarh vs. Bhalla Enterprises [2004 (173) ELT 225 (SC)]***, it was held;

"The basic rule in interpretation of any statutory provision is that theplain words of the statute must be given effect to"

The same basic rule of interpretation applies to a notification too. It iswithin the remit of Government to change a policy keeping in view theeconomic conditions, financial constraints and many other administrative and other attending circumstances. Hence when an exemption of service tax is made under a new notification which replaces an old notification, the grant of exemption/ refund is subject to the various conditions enumerated therein. The contention of the appellant is hence devoid of merit.

8. The second plea of the appellant is that though the show cause notice was dated, 11.09.2009. the same was received only on 04.05.2010. They have not taken up the issue of time bar of the SCN before the Original Authority. In fact, they did not attend the personal

hearing given by him. We find that the impugned order also only examines the date of receipt of OIO, which is not relevant to determinethe question of time bar. Hence this matter which was not brought for consideration to the Original Authority by the appellant needs to be examined by him along with the available evidence.

9. As regards the imposition of penalty, we find that the appellant was earlier availing exemption under Notification No. 4/2004-ST dated 31.3.2004 which got superseded by Notification No. 9/2009-ST dated3.3.2009. The exemption availed was reflected in the ST-3 returns andthe demand is also only for the period of March 2009. The short- payment was noticed during the scrutiny of the ST-3 returns and wasa genuine mistake. Hence no penalty is imposable in this case.

10. Having regard to the facts as discussed, we find that the demandof duty and interest made in the impugned order is as per law. We have also set aside the penalty for reasons stated. However, with regard to the issue of time bar as per the normal time limit i.e. the matter regarding the receipt of Show Cause Notice by the appellant within normal time or whether time-barred alone is remanded to the Original Authority to be decided after giving sufficient opportunity to the appellant to state his case both in writing and orally as per law. The impugned order is modified accordingly. The appeal is disposed ofon the above terms.

(Pronounced in open court on 10.08.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 40092 of 2014

(Arising out of Order-in-Appeal No. 47/2013 dated 23.10.2013 passed by the Commissioner (Appeals), Central Excise and Service Tax, Large Taxpayer Unit, 1775, Jawaharlal Nehru Inner Ring Road, Anna Nagar [W] Extension, Chennai – 600 101)

M/s. Alstom T&D India Limited **: Appellant**
19/1, GST Road,
Pallavaram, Chennai – 600 043

VERSUS

Commissioner of Central Excise and Service Tax Large Taxpayer Unit, **: Respondent**
1775, Jawaharlal Nehru Inner Ring Road, Anna Nagar [W] Extension, Chennai – 600 101

APPEARANCE:

Shri Joseph Prabakar, Advocate for the Appellant

Shri Harendra Singh Pal, Assistant Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 40688 / 2023

DATE OF HEARING:
21.07.2023

DATE OF DECISION:
17.08.2023

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

This appeal is filed against the impugned Order-in- Appeal No. 47/2013 dated 23.10.2013 passed by the Commissioner (Appeals), Central Excise and Service Tax, Large Taxpayer Unit, Chennai.

2.1 Brief relevant facts leading to the present dispute are that the appellant *inter alia* had paid certain amounts to M/s. Areva T&D Holding SA, France towards Royalty and Technical Knowhow and had made provision for the same in their books of account.

2.2 The Department, entertaining a doubt, in terms of Explanation to Section 67 of the Finance Act, 1994 and Explanation to Rule 6(1) of the Service Tax Rules, 1994, that where the transaction of taxable service was with an 'Associated Enterprise', any payment received towards the value of taxable service would include any amount credited or debited, as the case may be, whether called "suspense account" or by any other name in the books of account and that there was Service Tax liability, issued a Show Cause Notice dated 27.01.2011 proposing *inter alia* to demand Service Tax accordingly, along with applicable interest and penalty.

3. The Show Cause Notice was adjudicated vide Order- in-Original No. LTUC/358/2011-ADC dated 28.10.2011 whereby the demands proposed in the Show Cause Notice were confirmed.

4. It appears that the appellant preferred an appeal before the first appellate authority, who, after hearing the appellant, also having upheld the demands as in the Order- in-Original, the present appeal has been filed before this forum.

5. Heard Shri Joseph Prabakar, Ld. Advocate for the appellant and Shri Harendra Singh Pal, Ld. Assistant Commissioner.

6. Ld. Advocate would submit at the outset that since the appellant has paid the Service Tax part, it is only the interest which is the point of dispute. He would submit that the issue is no more *res integra* as the same has been decided and settled in favour of this very assessee/appellant in their own case for a different period. He would take us through the order of this Bench in Final Order Nos. 40072 to 40075 of 2023 dated 15.02.2023 [Service Tax Appeal Nos. 269 to 272 of 2012] and also through the relevant observations made by the Bench therein.

7. *Per contra*, Ld. Assistant Commissioner supported the findings of the lower authorities.

8. The only issue to be decided by us is: whether the lower authorities were correct in demanding Service Tax on the provisions made in the books of account of the appellant towards the payment of Royalty and Technical Knowhow fees?

9.1 We have considered the rival contentions and we have also gone through the order of this Bench relied upon by the Ld. Advocate.

9.2 We find, in the facts of this case as well as the grounds urged by the appellant, that the appellant has not disputed but has paid the tax as demanded; but however, the only grievance of the appellant is as to the chargeability of interest.

10. We find that after hearing both sides and following the ratio in the cases of *M/s. Tata Consultancy Services Ltd. v. Commissioner of S.T., Mumbai [2016 (41) S.T.R. 121 (Tri. – Mumbai)], M/s. Alstom T and D India Ltd. and Schneider Electric Infrastructure Ltd. v. Commissioner of Central Excise & Service Tax, LTU, Chennai & ors. [2018- VIL-88-CESTAT-CHE-ST]* and *M/s. Areva T&D India Ltd. v. Commissioner of Service Tax, Chennai [Final Order Nos. 41132-41142/2018 dated 13.04.2018 – CESTAT Chennai]*,
this Bench had observed as under: -

"8. In the case on hand, the appellant has categorically canvassed, which is also clear from the grounds-of-appeal urged before us, that wherever Royalty and Technical Knowhow fees were paid to the overseas entities, applicable Service Taxes have been discharged by the appellant and that it is only the interest which is the point of dispute and not the Service Tax.

9. After considering the rival contentions, we find that the scope of the appeals is limited, as contended by the appellant, to the demand of interest alone and when the orders of the CESTAT Benches (supra) are considered, we find that since the liability itself was questionable, the Revenue is not justified in demanding the interest also."

11. Based on the above order of this Bench, the Ld. Advocate is requesting for waiver of the interest charged.

12.1 The facts, as appearing from the Statement-of-Facts and the orders of the lower authorities, indicate that the appellant had short-paid the tax even though the same was apparently on the provision made. Whether the provision made by the appellant on the payments of Royalty and Technical Knowhow is amenable to Service Tax has not been questioned nor do we find any arguments advanced in this regard. When the assessee, without questioning the taxability, has paid part of the tax, it is incumbent for the assessee to remit the balance tax portion upon being pointed out, with interest in terms of Section 75. Thus, when there is a delay of the payment, then the same has to be remedied with the payment of interest on such belated payments in terms of Section 75 of the Finance Act, 1994.

12.2 The appellant, admittedly, has not challenged the levy of tax, but only questioned the interest which, according to us, does not merit consideration. We find that interest under Section 75 is necessarily linked to the duty payable, such liability arises automatically by operation of law, as held by the Hon'ble Apex Court in the case of *Commissioner of Central Excise, Pune v. M/s. SKF India Ltd. [2009-TIOL-82-SC-CX]*, which is also applicable to belated payment of interest even under the Service Tax Act.

13. In view of the above, we do not find any merit in the appellant's case and therefore, the same is dismissed.

(Order pronounced in the open court on **17.08.2023**)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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IN THE CUSTOMS, EXCISE & SERVICE TAXAPPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.41820 of 2013

(Arising out of Order in Original No. 02/2013 dated 29.1.2013 passedby the Commissioner of Service Tax, Chennai)

Tamil Nadu Medical Services Corporation Ltd. **Appellant**
No. 147, 2nd FloorPantheon Road
Egmore, Chennai – 600 008.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai North Commissionerate 26/1, Mahatma Gandhi Road Nungambakkam, Chennai – 600 034.

APPEARANCE:

Shri P.C. Anand, Chartered Accountant for the AppellantShri R. Rajaraman, AC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial) Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No.40784/2023

Date of Hearing : 02.08.2023Date of Decision: 12.09.2023

Per M. Ajit Kumar,

This is an appeal filed by the appellant M/s. Tamil Nadu MedicalServices Corporation Ltd. (TNMSCL) against Order in Original No. 2/2013 dated 29.1.2013 passed by the Commissioner of Service Tax,Chennai.

2. Brief facts of the case are that the appellant who is a State Government Public Limited Company are engaged in procurement anddistribution of drugs and medicines for Tamil Nadu State Government Hospitals. They are providing taxable services viz. Transport of Goods by Road and Management Consultancy Service and are registered for service tax purposes with the Service Tax Department under the categories of "Transport of Goods by Road" and "Management Consultancy Services". On the basis of intelligence that the appellantsare not paying service tax on storage and warehousing and cargo handling service, the officers of DGCEI, Chennai Zonal Unit undertookinvestigation. During the course of investigation, it was noticed that the appellants are engaged in providing storage and warehousing services to the Government of Tamil Nadu; that for the storage and warehousing services the appellants are receiving 'administrative charges' from Tamil Nadu State Government; further that the appellantdeducted 'Handling and Testing' Charges @ 1.5% of the value of drugsas per the terms agreed in the tender towards handling activities like loading, unloading and transportation to the various Governmenthospitals. It appeared from the investigation that the appellant is liableto pay service tax on the above activities. However, the appellant neither obtained service tax registration nor paid service tax for the said services. Hence a Show Cause Notice dated 28.12.2011 was issued to the appellant proposing demand of service tax of Rs.7,12,45,295/- for the period from 1.10.2006 to 31.3.2011 along with interest besides proposing penalties under various sections of theFinance Act, 1994. After due process of

law, the adjudicating authorityafter dropping certain service tax demands and granting relief under cum-tax benefit on the services rendered viz. storage and warehousingservice and cargo handling service, ordered the appellants to pay balance service tax demand of Rs.1,71,28,672/- along with interest and imposed equal penalty under sec. 78 of the Finance Act, 1994 besides imposing penalty of Rs.5,000/- under sec. 77(2) of the Finance Act, 1994. Hence the present appeal before the Tribunal. In their Appeal memorandum at Sl. No. 11 hey have described the service as 'sovereign service'.

3. No cross-objections have been filed by the respondent- department.

4. We have heard Shri P.C. Anand, Chartered Accountant for the appellant and Shri R. Rajaraman, Assistant Commissioner (AR) for Revenue.

4.1. The learned consultant Shri P.C. Anand submitted that theformation of the appellant-company was by the Government of Tamil Nadu as per G.O. Ms. No.446 dt.12.4.1993. The sole objective was procurement and distribution of drugs, surgical and medical supplies. The drugs and medicines are to be clearly marked 'governmentsupplies not for sale'. Over a period of time, in addition to drugs and medicines, the role of the TNMSCL has expanded to include procurement and supply of equipment for the use of the HealthDepartment. In addition, TNMSCL is also involved in the provision of diagnostic and other medical services through the maintenance of CT/MRI Scan Centers at various Government Hospitals and payment wards. It is now an ISO 9001: 2008 Certified Organization. As TNMSCLhas been nominated as the sole agency of the Government, forprocurement and supply of drugs and equipment's to Government Hospitals / Institutions, the Government have decided to levy nomination charges at 7.5% on the total revenue earned (except interest receipt). The company has been directed to open its own warehouses where the medicines are stored prior to distribution. As per G.O.No.431 dt.18.12.1996 exemption has been granted in respectof sales tax payable by TNMSCL for the drugs and medicines procuredand distributed to the various medical institutions. As per G.O.No.243dt.28.9.2005 the appellant has been permitted to draw service charges up to a maximum of 5% of the total turnover. As per G.O.No.93 dt.2.6.2006 the nomenclature of the 5% Services Charges was changed to Administrative Charges. Vide G.O.No.461 dt.31.12.2007 Administrative Charges, amounting to a maximum of 5% of the total turnover or at the rate as approved by the Board of Directors of the company may be utilized towards payment of any liquidated damagestransport fines, penalties, forfeiture of EMD, as also writing off expireddrugs, etc. He prayed that considering the services done by anextended limb of the Government of Tamil Nadu, viz. the company, and the service is with reference to the public health; such service findsa place in the Central Government Publication on Service Tax as beinga service done to the Sovereign State, the Hon'ble Bench may disposeoff the matter accordingly.

4.2. Shri R. Rajaraman, Assistant Commissioner (AR) stated onbehalf of Revenue that TNMSCL was created by a G.O. and not by an Act of Parliament or State Legislature. He stated that as per mega Notification 25/2012-ST dated 20/06/2012 to be eligible for exemptionas a governmental authority TNMSCL should have primarily been set up by an Act of Parliament or the State Legislature. The appellant company was providing services of warehousing, unloading, stacking and indenting of goods belonging to the government of Tamil Nadu tothe various hospitals and was deducting certain amounts received fromthe suppliers of drugs and medicines towards loading, unloading, packing, unpacking and transporting of drugs. This shows that the appellant was only providing a commercial function which could also be done by any other private entity and hence they were not discharging any sovereign function. He reiterated the points given in the impugned order and prayed that the impugned order be upheld.

5. We have heard the rival parties. The main plea taken by the appellant is that they are not liable to pay tax as they are discharging'sovereign functions'. The issue will have to be examined and decidedin the context of indirect taxation.

5.1 **In re. The Bill to Amend the Sea Customs Act** (1878), [1963AIR 1760/ 1964 SCR (3) 787] pertaining to indirect taxation, a SpecialBench of eight judges of the Hon'ble Apex Court exercising its advisoryjurisdiction decided on whether the provisions of Art. 289 of the Constitution precluded the Union from imposing, or authorising the imposition of (a) Customs duties on the import or export or (b) exciseduties on the production or

manufacture in India of the property of a State used for purposes other than those specified in cl. (2). of that Article. In a majority decision the Hon'ble Chief Justice speaking for himself and four other Judges held that the immunity granted to the States in respect of Union taxation, under Art. 289(1) does not extendto duties of customs including export duties or duties of excise. Relevant portions of the judgment are extracted below:

"11. It will thus appear that both s. 154 and Art. 285 set out above speak only of "property" and lay down that property vested in the Unions shall be exempt from all taxes imposed by a State or by any authority within a State, subject to one exception of saving the pre-existing taxes on such property until Parliament may by law otherwise provide. Similarly whereas s. 155 of the Government ofIndia Act exempts from federal taxes the Government of a Province in respect of lands or buildings situate in British India or income accruing, arising or received in British India, Art. 289(1). says "the property and income of a State shall be exempt from Union taxation". Section 156 aforesaid has two provisos (a) & (b); (a) relating to trade or business of any kind carried on by or on behalf of the Government of a Province, and (b) which is not relevant, relating to a Ruler. It will be seen that "income" is repeated in both the provisions, but what was "lands" or "buildings" has become simply "property" in Art. 289(1). .

12. The question naturally arises why "income" was at all mentioned when it is common ground that "income" would be included in the generic term "property". It was suggested on behalf of the Union that the juxta-position of the terms "property" and "income" of a State which have been declared to be exempt from Union taxation would indicate that the tax from which they were to be immune was tax on "property" and on "Income", i.e., in both cases a direct tax, and not a indirect tax, which may be levied in relation to the property of a State,namely, excise duty, which is a tax on the manufacture or production of goods and customs duty which is a tax on the event of importation or exportation of goods.

. . .

33. Similarly in the case of duties of customs including export duties though they are levied with reference to goods, the taxable event is either the import of goods within the customs barriers or their export outside the customs barriers. They are also indirect taxes like excise and cannot in our opinion be equated with direct taxes on goods themselves. Now, what is the true nature of an import or export duty?Truly speaking, the imposition of an import duty, by and large, resultsin a condition which must be fulfilled before the goods can be brought inside the customs barriers, i.e., before they form part of the mass of goods within the country. Such a condition is imposed by way of the exercise of the power of the Union to regulate the manner and terms on which goods may be brought into the country from a foreign land. Similarly an export duty is a condition precedent to sending goodsout of the country to other lands. It is not a duty on property in the sense of Art. 289(1). Though the expression "taxation", as defined in Art. 366(28), "includes the imposition of any tax or impost, whether general or local or special", the amplitude of that definition has to be cut down if the context otherwise so requires. The position is that whereas the Union Parliament has been vested with exclusive powerto regulate trade and commerce, both foreign and inter-State (Entries41 and 42) and with the sole responsibility of imposing export andimport duties and duties of excise, with a view to regulating trade andcommerce and raising revenue, an exception has been engrafted in Art. 289(1) in favour of the States, granting them immunity from certain kinds of Union taxation. It, therefore, becomes necessary so to construe the provisions of the Constitution as to give full effect to both, as far as may be. If it is held that the States are exempt from alltaxation in respect of their export or imports, it is not difficult to imagine a situation where a State might import or export all varieties of things and thus nullify to a large extent the exclusive power of Parliament to legislate in respect of those matters. The provisionsof Art. 289(1) being in the nature of an exception to the exclusive field of legislation reserved to Parliament, the exception has to be strictly construed, and therefore, limited to taxes on property and on income of a State. In other words, the immunity granted in favour of States has to be restricted to taxes levied directly on property and income. Therefore, even though import and export duty or duties of excisehave reference to goods and

commodities, they are not taxes on property directly and are not within the exemption in Art. 289(1).

The ratio of this judgment would also be applicable to an indirect tax like service tax which is a much later levy. The salient points of the judgment are:

(1) Though the expression "taxation", as defined in Art. 366 (28), "includes the imposition of any tax or impost, whether general or localor special", the amplitude of that definition has to be cut down if the context otherwise so requires.

(2) Whereas the Union Parliament has been vested with the exclusive power to regulate trade and commerce and with the sole responsibility of imposing export and import duties and duties of excise, with a view to regulating trade and commerce and raising revenue, an exception has been engrafted in Art. 289 (1) in favour ofStates granting them immunity from certain kinds of Union taxation and it is necessary that the general words of the exemption in that Article should be limited in their scope so as not to come in conflict with the power of the Union to regulate trade and commerce.

(3) Though the Constitution of India does not make a clear distinction between direct and indirect taxes, the exemption provided in Art., 289 (1) from Union taxation to property must refer to direct taxes on property and not to indirect taxes like duties of customs andexcise which are in their essence trading taxes and not tax on property.

5.2 The main contention of the appellant is in terms of Entry 25 of the Mega Exemption Notification 25/2012-ST dated 20.06.2012, as amended which reads as under:

"25. Services provide to Government, a local authority or a governmental authority by way of –

(a) Water supply, public health, sanitation conservancy, solid waste management or slum improvement and up-gradation; or]

(b) Repair or maintenance of a vessel];"

We find that Notification 25/2012-ST dated 20.06.2012 came into forceon the 1st day of July, 2012 i.e. after the period in dispute which is from 1.10.2006 to 31.3.2011. The notification was issued post the introduction of the negative list of services when Parliament by the Finance Act, 2012 introduced an altogether new system of taxation of services w.e.f. 1-7-2012 thus making a paradigm shift in the law and is hence not relevant in deciding the facts in issue. The appellant has drawn attention to the educational guide published by the governmentof India, wherein the activity/ function of a government or a municipality which is also eligible for the benefit has been clarified under question 7.3.2. They have stated that public health is specificallyear marked as one such activity. We find that the said guide is also issued with reference to Notification 25/2012-ST and is not relevant tothe present issue. The relevant para from the Education Guide as extracted from their synopsis is reproduced hereunder:

"7.3 Services provided to or by a governmental

Authority

7.3.1 Are various corporations formed under Central Acts or State Acts or various government companies registered under the Companies Act, 1956 or autonomous institutions set up by special acts covered under the definition of 'governmental authority'?

No. In terms of its definition in mega notification 25/2012-ST, following conditions should be satisfied fora board, body or an authority to be eligible for exemptions as a governmental authority:

- set up by an act of the Parliament or a State Legislature;
- established with 90% or more participation by way of equity or control by Government; and
- carries out any of the functions entrusted to a municipality under article 243W of the Constitution.

7.3.2 What are the functions entrusted to a municipality under article 243W of the Constitution?

Article 243W of the Constitution is as under:

'Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow—

(a) the Municipalities with such powers and authority asmay be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to—

(i) the preparation of plans for economic development and social justice;

(ii) the performance of functions and the implementationof schemes as may be entrusted to them including thosein relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule.' Matters listed in twelfth schedule are:

……

6. Public health, sanitation conservancy and solid wastemanagement.

……"

The appellant has also relied on Boards clarification dated 18.12.2006.It is seen that the same was withdrawn vide Master Circular No. 96/7/2007-ST dated 23.8.2007, however the Master Circular covers the clarification issued in the Circular dated 18.12.2006 also. The Circular covers the period under dispute. Relevant portion of the sameis reproduced below for ease of reference:

Reference code	Issue	Clarification
(1)	(2)	(3)

999.01 / 23.08.07	Sovereign/public authorities perform functions assigned to them under the law in force, known as "statutory functions". For example, · Regional Reference Standards Laboratories (RRSL) undertake verification, approval and calibration of weighing and measuring instruments; · Regional Transport Officers (RTO) issue fitness certificate to motor vehicles; · Directorate of Boilers inspects and issues certificates for boilers; or · Explosive Department inspects and issues certificate for petroleum storage tank, LPG/CNG tank in terms of provisions of the relevant laws. Authorities providing such functions, required to be performed as per law, may collect specific amount or fee and the amount so collected is deposited into government account. Whether such activities of a sovereign / public authority, performed under a statute, can be onsidered as'provision of service' for the purpose of levy of service tax and the amount or fee collected, if any, for such purposescan be treated as consideration forthe services provided?	Activities assigned to and performed by the sovereign / public authorities under the provisions of any law are statutory duties. The fee or amount collected as per the provisions of the relevant statute for performing such functions is in the nature of a compulsory levy and are deposited into the Government account. Such activities are purely in public interest and are undertaken as mandatory and statutory functions. These are not to be treated as services provided for a consideration. Therefore, such activities assigned to and performed by a sovereign / public authority under the provisions of any law, do not constitute taxable services. Any amount / fee collected in such cases are not to be treated as consideration for the purpose of levy of service tax. However, if a sovereign / public authority provides a service, which is not in the nature of statutory activity and the same is undertaken for a consideration (not a statutory fee), then in such cases, service tax would be leviableas long as the activity undertaken falls within the scope of a taxable service as defined.

The clarification does not come to the help of the appellant as the clarification relates to provisions of service where a fee is prescribed and it clearly states that , if a sovereign / public authority provides a service, which is not in the nature of statutory activity and the same is undertaken for a consideration (not a statutory fee), then in such cases, service tax would be leviable as long as the activity undertakenfalls within the scope of a taxable service as defined.

6. Having laid out the legal context, we now examine the issues involved:

(A) Whether Tamil Nadu Medical Services Corporation Ltd. is an instrumentality of the Sovereign State and is exempted for its activitiesfrom Service tax.

(B) Whether the services rendered by TNMSCL to the Government ofTamil Nadu in warehousing and related activities for drugs and medicines is classifiable under the category of 'Storage and WarehouseServices' in terms of Section 65(102) read with section 65(105)(zza) of the Finance Act 1994.

(C) Whether the services rendered by TNMSCL in relation to loading,unloading, packing,

unpacking and transporting of drugs to Government Hospitals should not be classified under the category of 'Cargo Handling Services' in terms of section 65(23) read with section 65(105)(zr) of the Finance Act 1994.

(D) Whether the extended time limit for issue of SCN is valid as thereis no evidence that TNMSCL had attempted to evade Service Tax liability, neither is there evidence of fraud or suppression. Hence the question of paying interest and penalty does not arise.

6.1 From the submissions made by the appellant it is seen that appellant-company was created by a G.O. of the Government of TamilNadu and not by an Act of the State Legislature. It is admittedly an autonomous corporation registered and incorporated under the Companies Act, 1956. The company is registered for service tax purposes with the Service Tax Department under the categories of "Transport of Goods by Road" and "Management Consultancy Services" which is not under dispute. Further from clause III (A) of the 'Memorandum of Association of TNMSCL' a sample of the various objects of the company are listed below to give a flavour of its activities.

Clause III (A) states:

(A) Main object to be pursued by the company on itsincorporation are:-

…….

4. To establish modern Warehouse and Engineering workshops to manufacture, assemble, repair or otherwise maintain various medical equipments, surgical instruments, diagnostic equipment, fire-fighting equipment, furniture and fittings including hospital furniture and also to undertake civil and other general maintenance of hospitals.

……

5. To buy, sell, supply, distribute, store, stock, maintainand otherwise handle, deal in and carry on business in all kinds and varieties of patent and non-patent vetyerinary science, medicines, drugs, mixtures, formulation, capsules, tablets, pills, powder, pharmaceutical, chemical, medical and medicinal products, preparation and materials, sterilized injections, vaccines, immunogens, chemical and surgical dressings relating to all kinds of animal husbandry

i.e. live-stock, veterinary, aquatic living poultry, equine, canine etc. whether domestic or otherwise.

Clause III (B) states:

(B) The objects incidental or ancillary to the attainment ofthe above main objects are:-

…..

3. To establish warehouses, storage rooms, godowns and cold storage facilities in various districts in Tamil Nadu for providing safe and convenient places for storage of medicines, surgical products and other medical and para- medical products of all kinds and description.

…….

9. To accept advance payment, deposits and / or to lend money to any department, institution, person, firmassociation, society, corporation or company on such termsand on such security as may be seen expedient and to giveguarantees and indemnities.

10. To invest and deal with the money of the corporationwhich is not immediate required in such manner and upon such security as the company may from time to time think fit.

……

13. To enter into partnership or any arrangements for sharing of or pooling of profits, including amalgamation, joint ventures, reciprocal concessions or otherwise with anyperson, firm, association or body corporate, carrying on or engaged in or about to carry on or engage in any business or transaction which may seem capable of being carried onor conducted.

15. To enter into any arrangement with any Government,local authority or Corporation or Boards etc. which may seem conducive to the Corporation 's objects and / or to obtain from Government or any authority any rights, privileges and / or concessions, which the company may think fit or desirable to obtain and to carry out, exercise andto comply with any such arrangement, rights, privileges andconcessions.

Clause III (C) states:

(C) Other objects for which the company is established are:-

……..

5. To manufacture or deal in various inorganic and organic compounds.

6. To manufacture or deal in acids, alkalies or such otherkinds of chemicals either in solid, liquid or gaseous form.

7. To carry on the business of manufacture and dealing in toilet preparations, colours, dyes, glue paper of all kindsplastics rexines, woven and non-woven fabrics, cellophane,paper, adhesive-tapes and other articles.

8. To undertake, transact and execute all kinds of agencybusiness and also trusts of all kinds.

9. To carry on the business of transportation of goods and commodities either directly or through others.

10. To act as advertising agents either directly or throughothers.

11. To carry on the business of packing and forwarding agents.

Again, from the 'Articles of Association of TNMSCL' it is seen that the Company is a Public Limited Company. Clause 7 of the 'Article' allows the Board of Directors to allot or otherwise dispose of the Company's shares to such persons on such terms and conditions as they think fit.Clause 99 states that profits made on the sale, or a part of the undertaking shall be made available for dividend. These make it clearthat the Corporation is a separate legal entity which is not 'Governmental' in nature and is like any other private company. The objective of the company is multifarious and relates to activities whichare not in the exclusive domain of government and can also be provided by private persons. The company is hence not discharging mandatory and statutory functions and are receiving a consideration for their services. The adequacy or otherwise of the consideration received is not a relevant issue. The income derived by the appellant from its trading activities is not income of the State, but its own to bespent by the Company. As per G.O. dt.2.6.2006, after the introductionof the Finance Act, 1994, the Government of Tamil Nadu changed thenomenclature of the 5% element - monies collected from the government from 'Services Charges' to 'Administrative Charges'. However, this may not come to their help as it is an accepted legal principle that the nomenclature of a service, is not decisive of the nature of the service provided. Even as per the educational Guide cited by the appellant, they are not covered under the definition of 'governmental authority'. The relevant portion is cited below.

"7.3.1 Are various corporations formed under Central Acts or State Acts or various government companies registered under the Companies Act, 1956 or autonomous institutions set up by special acts covered under the definition of 'governmental authority'?

Answer: No.

As stated earlier the appellant company is also not set up by an Act ofthe State Legislature. They further claim that they are established with90% or more participation by way of equity or control by Governmentand they carry out functions entrusted to a municipality under article 243W of the Constitution with respect to Public health. From the Memorandum and Articles of Association of TNMSCL listed above, it isclear that the Corporation is a separate legal entity which is not 'Governmental' in nature and is like any other private company. State activities are multifarious. Considering the wide ramifications,sovereign functions should be restricted to those functions, which areprimarily inalienable, and which can be performed by the State alone.In its judgment in **Agricultural Produce Market Committee Vs Ashok Harikuni** [AIR 2000 SC 3116] the Apex Court held in para 22;

"Even if a statute confers on any statutory body, anyfunction which could be construed to be "sovereign" in nature would not mean every other functions under the same statute to be also sovereign. The Court should examine the statute to severe one from the other by comprehensively examining various provisions of that statute."

Para 33 of the judgment further amplifies this point;

"33. So, sovereign function in the new sense may have verywide ramification but essentially sovereign functions are primary inalienable functions which only State could exercise. Thus, various functions of the State, may be ramifications of 'sovereignty' but they all cannot be construed as primary inalienable functions. Broadly it is taxation, eminent domain and police power which covers its field. It may cover its legislative functions, administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon. So, the dichotomy between sovereign and non-sovereign function could be found by finding which of the functions of the Statecould be undertaken by any private person or body. The one which could be undertaken cannot be sovereign function. Ina given case even in subject on which the State has the monopoly may also be non-sovereign in nature. Mere dealing in subject of monopoly of the State would not makeany such enterprise sovereign in nature. Absence of profit making or mere quid pro would also not make such enterprise to be outside the ambit of "industry" ……"
(emphasis added)

The impugned activities of the appellant are not primary inalienable functions and are liable to be done by a private body. It is also relevantto note the State Government has issued a conditional notification exempting sales tax payable by TNMSCL for the drugs and medicines procured and distributed to the various medical institutions. (G.O.Ms No 431 dated 18/12/96). The exemption is not on account of its sovereign functions. Had the exemption not been granted or if the conditions of the notification are violated TNMSCL would be liable to pay sales tax. The said notification is reproduced below:

NOTIFICATION

"In exercise of the powers conferred by sub-section (1) of section 17 of the Tamil Nadu General Sales Tax Act, 1950 (Tamil Nadu Act 1 of1950), the Government of Tamil Nadu hereby makes an exemption in respect of the tax payable by Thiruvalar Tamil Nadu Medical Services Corporation Limited, Chennai – 14 under the said Act on the drugs and medicines procured and distributed to the Medical institutions of the Government of Tamil Nadu, subject to the following conditions, namely:-

i) Such drugs and medicines shall be clearly marked as "Government supply – Not for Sale"

ii) The Corporation shall not sell the said drugs and medicines in the open market

2. This notification shall be deemed to have come into force on the 12th April 1993.

The notification states exemption in respect of "tax payable", this shows that had the notification not been issued TNMSCL would have topay sales tax and the benefit of 'sovereign function' has not been recognized by the State Government itself in the appellant's case. Further as held in '**In re. The Bill to Amend the Sea Customs Act'**(supra) the immunity granted to the States in respect of Uniontaxation, under Art. 289(1) does not extend to indirect taxes. For the reasons discussed above we are of the opinion that in the absence of a specific notification by the Central Government exempting their activities from service tax, like that issued by the State Government inthe case of sales tax reproduced above, the appellant will not be eligible to claim exemption from service tax citing the 'sovereign function' principle.

6.2 The next issue is whether the services rendered by TNMSCL to the Government of Tamil Nadu is classifiable under the category of 'Storage and Warehouse Services' in terms of Section 65(102) read with section 65(105)(zza) of the Finance Act 1994. The relevant provisions of Finance Act, 1994, relating to storage & warehousing service which came into effect from 16.08.2002 are reproduced belowfor ease of reference:
Section 65(102):

"'storage and warehousing' includes storage andwarehousing services for goods including

liquids and gasesbut does not include any service provided for storage of agricultural produce or any service provided by a coldstorage"

Section 65(105)

'"taxable service' means any service provided or to be provided to any person, by a storage or warehouse keeper in relation to storage and warehousing of goods"

Further, the Board explained the scope of storage and warehousing service in **F.No.B11/1/2002-TRU dated 01.08.2002** as follows:

"

3. Storage and warehousing service for all kinds of goods are provided by public warehouses, private warehouses, byagencies such as the Central Ware Housing Corporation, AirPort Authorities, Rallways, Inland Container Depots,Container Freight Stations, storage godown and tankers operated by private individuals etc. The storage and warehousing service provider normally make arrangement for space to keep the goods, loading, unloading and stackingof goods in the storage area, keeps inventory of goods, makes security arrangements and provide insurance cover etc. Service provided in ports has already been covered under the category of port service.

……

5. It has been stated that in some case a storage owner onlyrents the storage premises. He does not provide any servicesuch as loading/unloading, stocking security etc. A point hasbeen raised as to whether service tax would be leviable in such cases. It is clarified that mere renting of space cannotbe said to be in the nature of service provided for storage or warehousing of goods. Essential test is whether the storage keeper provides for security of goods, stacking, loading/unloading of goods in the storage area."

The appellant has not contested that they are operating their own warehouses where medicines procured by them are stored prior to distribution to various Government Hospitals in the state of Tamil Nadu. Their main averments are based on the Boards Circular and Education Guide extracted at para 5.2 above. We have found that theBoards Education Guide and Master Circular do not come to their helpfor reasons discussed above. The appellant has stated that theydischarge a statutory function and collect only a basic cost of the drugsand deposit the same in the account of government. There is no consideration received. Therefore, it would not be correct to charge Service Tax in relation to storage and warehousing services. This legal issue has been examined at para 6.1 above and for the reasons discussed we have found no merits in their claim for exemption from tax citing the 'sovereign function' principle. We hence do not find any merits in their appeal in this regard.

6.3 TNMSCL have stated that the activity in relation to loading, unloading, packing, unpacking and transporting of drugs to Government Hospitals should not be classified under the category of 'Cargo Handling Services' in terms of section 65(23) effective from 16.08.2002 read with section 65(105)(zr) of the Finance Act 1994, reproduced below for ease of reference:

"cargo handling service" means loading, unloading, packing or unpacking of cargo and includes,-

(a) cargo handling services provided for freight in special containers or for non containerised freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport, and cargo handling service incidental to freight; and

(b) service of packing together with transportation of cargo or goods, with or without one or more of other services like loading, unloading, unpacking, but does not include, handling of export cargo or passenger baggage or mere transportation of goods"

As per provisions of Section 65(105)(z) of the Act.

"taxable service means any service provided or to be provided to any person, by a cargo handling agency in relation to cargo handling services"

It is seen from the facts of the case that the impugned goods are received and stored in the warehouses. Subsequently samples are sentfor testing and on completion of the testing process, the goods are dispatched to respective destinations as per the requirements. This being the factual position, the essential activities undertaken by the assessee like packing, repacking, loading, unloading etc. are a part ofcargo handling service. In fact sub clause 11 of clause III (C) of the 'Memorandum of Association of TNMSCL' dealing with other objects forwhich the company is established, states 'To carry on the business of packing and forwarding agents.' The appellant has not mainly contested the classification they are aggrieved that the amount received by them cannot be considered as 'consideration', hence the taxability and valuation adopted is not correct. They are receiving 1.5% deduction towards 'handling and testing' charges from the suppliers. Itis the appellants case that TNMSCL had a policy whereby each individual supplier was responsible for providing a certificate as to thequality of the drugs supplied. But the method of execution waschanged, and it has become standard policy for TNMSC to withhold theamount from the suppliers and to get the testing done at the suppliers' cost, as per the tender document. However, the fact remains that thesecharges are not statutory fees and hence are a consideration for theirservice. The amounts are also accounted for under 'income from operations' in their profit and loss account. If any part of this paymentis also paid as statutory fees for testing to Government Authorities onbehalf of their suppliers, it is for the appellant to bifurcate the said amount received from the total receipts separately towards cargo 'handling' and for 'testing'. They should have disclosed the factual information within their exclusive knowledge. We feel that the matterneeds to be considered afresh by the Original Authority after giving theappellant sufficient opportunity to put forward his submissions both onlaw and fact before deciding the matter.

7. The appellant has averred that the extended time limit for issueof SCN is not valid as there is no evidence that TNMSCL had attemptedto evade Service Tax liability, nor is there evidence of fraud orsuppression. Hence the question of paying interest and penalty does not arise. We have gone through the facts of the case and the impugned order and find that the main issue involved is relating to their claim of 'sovereign function' pertaining to activities, like that of the appellant which they claim takes the colour of governmental activities and is subject to exemption from taxation. We find that the company is registered for service tax purposes with the Service Tax Department under the categories of "Transport of Goods by Road" and"Management Consultancy Services" and they have not disputed the same on grounds of 'sovereign function'. Further the appellant has stated that per G.O.No.431 dt.18.12.1996 exemption has been grantedin respect of sales tax payable by TNMSCL for the drugs and medicinesprocured and distributed to the various medical institutions. This in itself shows that TNMSCL is not a 'sovereign/ governmental authority'' even by the State Governments own understanding as discussed above. This being so, there should not have been any confusion in theinterpretation of law especially in the light of the Apex Courts advisory'**In re. The Bill to Amend the Sea Customs Act'** in the early 1960's.The declaratory responsibility of an assessee in the self-assessment regime is much bigger and the non-disclosure of taxable activity in the ST-3 Return and non-payment of duty has to be viewed strictly and can only be held to be an act of suppression of facts with an intentionto evade payment of duty. Hence the extended period of limitation hasbeen rightly invoked and the appeal in this regard is without merit.

8. We have examined the case laws cited by the appellant. The judgment of the Apex Court in the case of **Indian Oil Corporation Ltd Vs Chief Inspector of Factories** [1999 (113) ELT 761 (SC)] is in context of Section 2(n) of the Factories Act. The question sought to be answered therein was, who is to be deemed 'occupier' of a factory of a government company incorporated under the Indian Companies Act? The issue is distinguished from the facts of this case which pertains to taxation. The more relevant judgement pertaining to indirect taxation is '**In re. The Bill to Amend the Sea Customs Act'** (supra) where the immunity granted to the States in respect of Union taxation, under Art. 289(1) was found to be not applicable. Similarly, the decision of a coordinate Bench of this Tribunal in UTI Technologies Services Ltd Vs CST, Mumbai [2012 (26) STR 147 (TRI-MUM)] relates to the issue of PAN cards on behalf of the Income Tax Department.

Collection of taxes has been recognized as a core activity of government. A taxation department of the Union cannot be equated with a corporation and hence the facts are not similar. We have above,discussed the reasons why TNMSCL cannot be considered as having discharged sovereign functions based on facts that are peculiar to the appellant's case. We have also discussed relevant case laws pertaining to taxation matters, in this regard. Hence, we find that the decisions cited by the appellant are distinguished and do not come to their help.

9. Having regard to the discussions above, we modify the impugnedorder to the extent that we remand the matter back to the Original Authority to decide the issue of 'Cargo Handling Services' only, afresh.The lower authority shall follow the principles of natural justice and afford a reasonable and time bound opportunity to the appellant to state their case both orally and in writing if they so wish, before issuinga speaking order in the matter. The appellant should also co-operate with the adjudicating authority in completing the process expeditiouslyand in any case within ninety days of receipt of this order. The impugned order is otherwise upheld except for the matter remanded as indicated above. The appeal is disposed of accordingly.

(Pronounced in open court on 12.09.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

Rex

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IN THE CUSTOMS, EXCISE & SERVICE TAXAPPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.40811 of 2014

(Arising out of Order-in-Appeal No. 36/2014 dated 28.1.2014 passed by theCommissioner of Central Excise (Appeals), Salem)

M/s. KRSS Manpower Service **Appellant**
4/165, Sengaradu, P.O. Thathiangarpatty, Omalur TalukSalem – 636 102.

Vs.

Commissioner of GST & Central Excise **Respondent**
No. 1, Foulks CompoundAnai Road

Salem – 636 001.

APPEARANCE:

Ms. Nivedita Mehta and Ms. R. Rekha, Advocates for the AppellantShri N. Satyanarayanan, AC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial) Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40782/2023

Date of Hearing : 23.08.2023Date of Decision: 12.09.2023

Per M. Ajit Kumar,

This appeal is filed by the appellant M/s. KRSS Manpower Serviceagainst Order in Appeal No. 36/2014 dated 28.1.2014 passed by Commissioner of Central Excise (Appeals), Salem.

2. Brief facts of the case are that the appellant who is registered with the Service Tax Department carried out the work of collection, cleaning, segregation and stacking of blasted raw magnesite within themining area for M/s. Burn Standard Co. Ltd. by entering into an agreement / contract. During the period from 6.10.2006 to 11.6.2007,it was noticed by the Central Excise officers that they had received a sum of Rs.15,22,166/- as consideration but had not paid any service tax, not filed ST-3 returns and not followed the relevant provisions of the FA. A Show Cause Notice dated 24.11.2010 was issued seeking toclassify the activity under 'Business Auxiliary Service' and demanding service tax of Rs.1,86,514/- with interest and also proposed to imposepenalties. After due process of law, the original authority vide Order inOriginal dated 29.9.2011 confirmed the demand of service tax with interest and also imposed penalty of Rs.3,73,028/- under section 78 and Rs.5,000/- under Sec. 77. Aggrieved against the Order in Original,the appellant preferred appeal before Commissioner of Central Excise (Appeals) who vide the impugned order rejected the appeal filed by the appellant and upheld the adjudication order. Hence the appellant is before the Tribunal.

3. No cross-objections have been filed by the respondent- department.

4. We have heard learned counsel Ms. Nivedita Mehta and Ms. R. Rekha for the appellant and learned AR Shri N.Satyanarayanan, Assistant Commissioner for the Revenue.

5. The learned counsel for the appellant submitted that the appellant is engaged in the business of collection, cleaning, segregationand stacking of blasted raw magnesite within the mining area on behalfof M/s. Burn Standard Ltd. Show Cause Notice dated 24.11.2010 was issued proposing to demand service tax of Rs.1,86,514/- as service taxpayable on Business

Auxiliary Service alleged to have been rendered during the period 6.10.2006 to 11.6.2007. The original authorityconfirmed the demand. The appellate Commissioner without affording a reasonable opportunity of hearing to the appellant upheld the adjudication order. It is submitted that the issue involved in the present case is squarely covered in favour of the appellant. The Tribunal vide Final Order No. 42314 and 42315/2017 dated 26.9.2017held that the services rendered by the appellants who were also engaged in the business of segregating, lifting and stacking rawmaterials would fall under the category of 'Mining Services' and not under 'Business Auxiliary Service'. Reliance was also placed on the following judgments:-

a. M/s. Aryan Energy Pvt. Ltd. Vs. CCE, Hyderabad – 2009 (13) STR42 (Tri. Bang.)

b. Union of India Vs. Spectrum Coal Power Ltd. – 2016 (41) STR 592 (Chhattisgarh)

c. CCE, Salem Vs. Thriveni Earth Movers Ltd. – 2015 (39) STR 749The learned counsel submitted that the issue stands covered in favourof the appellant and the appeal is therefore liable to be allowed with consequential relief.

6. The learned AR Shri N. Satyanarayanan reiterated the findings inthe impugned order.

7. We have heard both sides and perused the records and the caselaws cited. The issue to be decided is whether the service of "segregation of magnesite" is classifiable under 'business auxiliary service' under section 65(105)(zzb) of the Finance Act, 1994 or under 'mining service' classifiable under section 65(105)(zzzy) of the FinanceAct, 1994. We find that the impugned order had found that the activityis equally classifiable under both the services and as per section 65A of the Finance act 1994, the activity under the sub-clauses which occurs first among the sub-clauses is preferable. The learned Commissioner (Appeals) has hence chosen to accept the classificationof the service as 'Business Auxiliary Service' as in the Order in Originaland rejected the appeal.

7.1 We find that the activity of collection, cleaning, segregation andstacking of blasted raw magnesite is provided in relation to mining. Theactivities undertaken by the appellant are a part of the mining operations and are more appropriately classified as a 'Mining Service'. Mining activity has been made taxable by legislation with effect from 1.6.2007 only. Prior to this date, such activities, being part of mining operations, were not subjected to service tax. The period of demand inthis case is from 6.10.2006 to 11.6.2007, therefore, no service tax is leviable on such activities for a major part of the impugned period. Wefind that a similar issue was examined by a Coordinate Bench of this Tribunal vide Final Order No. 42314 and 42315/2017 dated 26.9.2017in the case of **Commissioner of Central Excise Salem Vs R SureshKumar**. Relevant portion of the said order s reproduced below:

"3. The learned counsel Ms. Nivedita Mehta appeared on behalfof the respondent and submitted that the respondents were primarily engaged in cleaning, segregation and stacking of blasted raw magnesite and, therefore, Commissioner (Appeals) has rightly held that the said services would fall within the meaning of mining activities. In this regard, she submitted that Commissioner (Appeals) rightly relied upon the decision in the case of M/s. Aryan Energy Pvt. Ltd. Vs Commissioner of Customs & Central Excise, Hyderabad-I repo in 2009 (13) S.T.R.42 (Tri.-Bang.) Learned counsel also relies on the decision in the case of Union of India Vs M/s. Spectrum Coal Power Ltd., reported in 2016 (41) S.T.R.592 (Chattisgarh).

4. Heard both sides and we have gone through the records.

5. The issue whether the activities of cleaning, segregation and stacking of blasted raw magnesite would fall within the meaning ofservice or "Business Auxiliary Services" during the disputed periodhas been analysed in the decisions relied upon by the learned counsel for the respondents. The Commissioner (Appeals) has applied the decision in the case of M/s. Aryan Energy Pvt. Ltd. (supra), which we feel squarely covers the issue. The Hon'ble High Court in the case of CCE, Salem Vs. Thriveni Earth Movers Ltd.

reported in 2015 (39) STR 749 had an occasion to discuss similar issue and the same has been decided in favour of the assessee."

We find concurrence with the above order.

7.2 Having regard to the facts as discussed above we hold that the activity of collection, cleaning, segregation and stacking of blasted rawmagnesite is classifiable under the category

'Mining Services' classifiable under section 65(105)(zzzy) of the Finance Act, 1994 and the demand is restricted to the period from 01/06/2007 onwards. We order that duty and interest may be worked out accordingly. Since dutywas payable only from 01/06/2007 late fee and penalties are set aside.

8. Based on the discussions above the appeal is disposed of accordingly. The appellant is eligible for consequential relief, if any, asper law.

(Pronounced in open court on 12.09.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

Rex

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 40590 of 2013

(Arising out of Order-in-Appeal No. 208/2012 (MST) dated 10.12.2012 passed by the Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Chennai – 600 034)

M/s. International School for Management Studies **: Appellant**
32, Casa Major Road, Egmore, Chennai – 600 008

VERSUS

Commissioner of Service Tax **: Respondent**
MHU Complex, 692, Anna Salai, Nandanam,Chennai – 600 035

AND

Service Tax Appeal No. 41046 of 2013

(Arising out of Order-in-Appeal No. 31/2013 (MST) dated 11.02.2013 passed by the Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Chennai – 600 034)

M/s. International School for Management Studies **: Appellant**
32, Casa Major Road, Egmore, Chennai – 600 008

VERSUS

Commissioner of Central Excise and Service Tax **: Respondent**
26/1, Mahatma Gandhi Road, Nungambakkam,Chennai – 600 034

APPEARANCE:

Ms. Manne Veera Niveditha, Advocate for the Appellant

Shri N. Satyanarayanan, Assistant Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOs. 40810-40811 / 2023

DATE OF HEARING: 30.08.2023

DATE OF DECISION: 15.09.2023

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

These appeals have been filed by the assesseeagainst the impugned Order-in-Appeal No. 208/2012 (MST) dated 10.12.2012 and Order-in-Appeal No. 31/2013(MST) dated 11.02.2013 passed by the Commissioner of Central Excise (Appeals), Chennai and the only issue is the liability or otherwise of the appellant to Service tax under the category of "commercial training or coaching centre" within the meaning of Section 65(105)(zzc) of the FinanceAct, 1994. The period of dispute is from 01.04.2007 to 31.03.2008 and 01.04.2008 and 31.03.2009.

2.1 The facts are not in dispute: the appellant is engaged in conducting foundation courses in Chennai for first-year students of Masters degree in Business Administration under twinning arrangement with accredited Missouri State University, Springfield, USA andit is the Missouri State University which issues the certificate.

2.2 The Revenue entertained a doubt that on the said activities of the appellant, the appellant had not been paying tax under the said category and consequently, twoShow Cause Notices came to be issued covering the abovetwo periods proposing demand, *inter alia*, of Service Tax.

3. After due process, the demands proposed in the above Show Cause Notices were confirmed vide respectiveOrders-in-Original.

4. It appears that the appellant preferred appeals against the said demands in those Orders-in-Original, but however, even the first appellate authority having rejectedtheir appeals vide impugned Order-in-Appeal No. 208/2012 (MST) dated 10.12.2012 and Order-in-Appeal No. 31/2013 (MST) dated 11.02.2013, the same have beenassailed in these appeals.

5. We find, after hearing both the sides, that a commonissue is involved in both these appeals and hence, for convenience, the same are considered for common disposal.

6. Ms. Manne Veera Niveditha, Ld. Advocate, relied on the grounds-of-appeal, but however, fairly admitted that the very same issue has been considered by the Ld. LargerBench of the CESTAT in the case of *Sri Chaitanya Educational Committee v. Commissioner of Customs, Central Excise and Service Tax, Guntur [2019 (29) G.S.T.L.712 (Tri. – LB)]* and decided against the taxpayer.

7. *Per contra*, Shri N. Satyanarayanan, Ld. Assistant Commissioner, having relied on the findings of the lower authorities, also relied on the order of the Ld. Larger Benchin the case of *Sri Chaitanya Educational Committee (supra).*

8. We have perused the orders of lower authorities.

9. We find, from the grounds-of-appeal, that the challenge is with regard to the liability of the appellant under "commercial training or coaching centre" within the meaning of Section 65(105)(zzc) *ibid.* The Ld. LargerBench in the case of *Sri Chaitanya Educational Committee(supra)* has elaborately dealt with the issue and has concluded as under: -

"53. In our opinion, for an institute to claim that it is nota 'commercial training or coaching centre', it must also beissuing certificates recognized by law for the time being in force. The appellant does not issue the certificates. In such circumstances, it is clearly a 'commercial training orcoaching centre' providing 'commercial training orcoaching'. It is providing a taxable service. All decisions of the Tribunal taking a contrary view stand overruled."

10. In view of the specific finding of the Ld. Larger Bench, as also admitted by the Ld. Advocate, we do not find any merit in the appeals filed by the assessee and hence, we dismiss the same.

(Order pronounced in the open court on **15.09.2023**)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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IN THE CUSTOMS, EXCISE & SERVICE TAXAPPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.40966 of 2014

(Arising out of Order-in-Original No. CHN.SVTAX-000-COM-041-13-14 dated22.1.2014 passed by the Commissioner of Service Tax, Chennai)

M/s. Kaveri Warehousing Pvt. Ltd. Appellant
New No. 9, Old No. 5, Errabalu StreetChennai – 600 001.

Vs.

Commissioner of GST & Central Excise Respondent
Chennai North Commissionerate 26/1, Mahatma Gandhi Road Nungambakkam, Chennai – 600 034.

APPEARANCE:

Smt. Radhika Chandrasekar, Advocate for the AppellantShri M. Ambe, DC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial) Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40797/2023

Date of Hearing : 31.08.2023Date of Decision: 15.09.2023

Per M. Ajit Kumar,

This appeal is filed by M/s. Kaveri Warehousing Pvt. Ltd. againstOrder-in-Original No. CHN.SVTAX-000-COM-041-13-14 dated22.1.2014 (impugned order) passed by the Commissioner of Service Tax, Chennai.

2. Brief facts of the case are that the appellants are engaged in Storage and Warehousing Services and Goods Transport Operator Services. Based on investigations by officers of DGCEI, Chennai, it wasnoticed that the appellant had a centralized registration at Chennai fortheir various branches situated all over India. The appellants were collecting service tax for rendering Storage and Warehousing Servicesbut did not pay service tax for the period from February 2009 to December 2009. The verification culminated into issue of Show CauseNotice dated 1.3.2012 by the ADG, DGCEI, Chennai demanding servicetax of Rs.4,15,36,896/- on Storage and Warehousing Service and GTAservice for the period from February 2009 to December 2009 besides demanding interest and imposition of penalty. After due process of law,the Commissioner of Service Tax vide the impugned order confirmed the duty demanded along with interest and imposed penalties. Aggrieved by the said order, the appellant is before this Tribunal assailing the findings and order.

3. No cross-objection has been filed by respondent-department.

4. We have heard Smt. Radhika Chandrasekar, learned counsel forthe appellant and Shri M. Ambe, learned Deputy Commissioner (AR) for the respondent-department.

4.1 The learned counsel for the appellant submitted that the appellant is engaged in providing service under the category of storageand warehousing services. The Appellant had not discharged service tax for the period February 2009 to December 2009 due to financial constraints. On being pointed out by the department about non- payment of service tax, they had discharged the entire service tax to the extent of Rs.4,15,36,896/- (through cash and cenvat) along with proportionate interest to the extent o.Rs.11,77,532/-. She stated sincethe entire amount of duty had been paid prior to the issuance of Showcause notice, therefore in terms of Section 73(3) show cause notice ought not to have issued. She contended that:

A. The demand of Service Tax on the ground that the appellant is ineligible for credit of

Rs.4,05,781/-, out of the total CENVAT creditpaid towards duty was incorrect. She stated that since the Department did not question the eligibility of cenvat credit used to set off the liability in the SCN the same cannot be denied by theadjudicating authority vide the impugned order. The OIO travels beyond the scope of the SCN. Therefore, the same is liable to be set aside.

B. The Jurisdictional Tribunal in the case of ***Servocraft HR Solutions Pvt.3 Ltd. Vs. Commissioner of Central Excise andService Tax Service Tax*** in ***Appeal No. 40625 of 2013 dated 07.03.2023***, held that, no Show Cause Notice is to be issued when the assessee has paid Service Tax along with interest and no penalties are warranted under Section 77 and 78 of the FinanceAct, 1994. She referred to Board's **Letter F.NO. 137/167/2006-CX.4 dated 3-10-2007** which prescribes conclusion of proceedings against such person who satisfies the provision of section 73(3) of the Finance Act, 1994. Further this isnot merely a conclusion under sub-section (1), but conclusion of all proceeding against such person including those under sections76, 77 and 78 of the Finance Act. The Hon'ble Supreme Court in the case of ***Paper Products Ltd Vs. Commissioner of CentralExcise (1999)7 SCC 84*** has held that Circulars issued by the Board are binding on the Department.

C. Without prejudice she submitted that in terms of Section 80, penalty cannot be imposed under Section 76, 77 and 78 if the Assessee proves that there was a reasonable cause for the said failure. The Appellant had not discharged service tax for the periodFebruary 2009 to December 2009 due to financial constraints. However, the moment the investigating authority pointed out thenon-payment of service tax, the appellant had discharged the same along with interest. That the Madras High Court in the caseof ***CST Vs. Lawson Travels (2014) TIOL 2295*** has held that acareful perusal of the order of the Tribunal would reveal that 'reasonable cause' as provided under Section 80 of the Act has been recorded by the Tribunal, therefore, it rightly went on to invoke the provisions of Section 80 of the Act on the ground of reasonable cause. She referred to various judgments of courts / Tribunal in support of their stand and prayed that the penalties imposed may be set aside.

4.2 The learned AR for the department has stated that although theappellant had claimed to have paid an amount of Rs 2,18,47,630/- in cash and Rs 1,96,89,265/-by way of CENVAT credit towards duty dueafter the visit of DGCEI officers and before issue of SCN, on scrutiny ofthe payments it was noticed by the Original Authority at para 6.1 of the impugned order that the actual Cenvat credit debited was only Rs1,85,44,015/-. Further an amount of Rs 4,05,781/- of credit availed bythe appellant was not found eligible as the service had not been received by the appellant. Hence the actual amount of credit eligible for appropriation was only Rs 1,81,38,234/- as against Rs.1,96,89,265/- claimed to have been paid by the appellant. He further reiterated the points given in the impugned order and prayed that the order may be upheld.

5. We have gone through the appeal and have heard the rival parties. Both parties do not dispute the taxability of the service, calculation of duty, interest etc. or to its confirmation. The challenge is mainly on the penalty imposed on the appellant and to the cenvat credit of Rs. 4,05,781/- used to pay duty which was found ineligible, as set out in the impugned order. We examine the issues raised by the appellant below.

6. The appellant states that since the Department did not questionthe eligibility of cenvat credit used to set off the liability in the SCN thesame cannot be denied by the adjudicating authority. We find that theSCN has framed allegations against the appellant for not havingdischarged duty for the period from February 2009 to December 2009.The demand had not crystallized at that stage and the question of theadjudicating authority scrutinizing the CENVAT credit entries would have been premature. As seen from para 3.0 of the impugned order itwas in their reply to the SCN vide their letter dated 04/07/2012 that the appellant had claimed and brought to the notice of the learned adjudicating authority that they had discharged the entire demand even before issue of the SCN. It is only when the issue was finally examined by the adjudicating authority after following the process of natural justice that he recorded his findings, and the demand was confirmed. Scrutiny of the payments made against the demand allegedin the SCN is part of the quasi-judicial process prior to the issue of theorder. The question of eligibility of money deposits / CENVAT credits in the book of the appellant or claimed to having been paid, being appropriated or not is a part of the adjudicating authority's discretionary jurisdiction at this stage. Hence if he has come across credit payments made by the appellant that were found not legally subject to appropriation, or for any other reason, it was well within hisdiscretion not to do the same. In this case the appellant was not foundeligible to have availed the credit of Rs. 4,05,781/- as the service hadnot been received by the appellant. The non receipt of service has notbeen disputed before us. Further it is also seen that the impugned order has pointed out discrepancies in the amounts claimed to have been debited towards duty from the credit account and

that which wasactually debited as discussed at para 6.1 of the impugned order. This has also not been disputed by the appellant. This only goes to show that the scrutiny of payments claimed by the appellant is a part of thequasi-judicial process involved in the passing of the order in original and any discrepancies noticed and pointed out cannot be faulted. We do not find any reason to interfere with the impugned order in this regard.

7. The next issue raised by the appellant is that as per Section 73(3)of the Finance Act 1994, if tax is paid along with interest before the issuance of show-cause notice, then in that case show-cause notice shall not be issued. Before taking up the issue it is necessary to reproduce the relevant portions of section 73 ibid, as it then stood.

Section 73

73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded

....

Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub- section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid:

Provided that the Central Excise Officer may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of one year referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determinedby the Central Excise Officer, but for this sub-section.

(3) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-

(a) fraud; or
(b) collusion; or
(c) wilful mis-statement; or (d) suppression of facts; or
(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

From a plain reading of the section 73 it is seen that nothing containedin sub-section (3) shall apply to a case where section 73 (4) applies. This is a case where the Original Authority has invoked the extended time limit under proviso to section 73(1) of the Finance Act 1994 for demand of service tax citing suppression of facts with an intention to evade payment of duty. The appellant has agreed that duty is payablefor the entire period which was subsequently covered by the SCN and has paid a substantial part of the dues. Hence the payment of duty forthe extended period, which is triggered by fraud, suppression etc, is not under challenge. This being so section 73 (4) applies in their caseand they cannot seek protection under section 73 (3). The appellant has further referred to Boards letter **F. No. 137/167/2006-CX4, Dated 3-10-2007**, which is reproduced below.

Section 73(1A) of the Finance Act, 1994 provides for conclusion of adjudication proceeding in the cases of wilful suppression/ fraud / collusion if the taxpayer pays service tax liability along with interest and a penalty equal to 25% of service tax amount, within a period of one month from the date of issue of SCNs. Similarly, section 73(3) provides conclusion of adjudication proceedings in other cases on payment of service tax and interest.

2. A question has been raised as to whether the conclusion of proceedings in such cases is limited to the action taken under section73 of the Act or all proceedings under the Finance Act, 1994, including those under sections 76, 77 and78, get concluded.

3. The issue has been examined. The intention of section 73(1A) has already been explained vide para 8(g) of the post budget instructions issued by TRU vide D.O.F. No. 334/4/2006-TRU, dated 28-2-2006, wherein it has been clarified that this sub-section provides for conclusion of adjudication proceedings in respect of person who has voluntarily deposited the service tax.

3.1 The relevant portion of section 73 is reproduced below.-

"Provided further that where such person has paid service tax in full together with interest and penalty under sub-section (1A), the proceeding in respect of such person and other person to whom notices are served under sub-section (1) shall be deemed to be concluded."

Thus, law prescribes conclusion of proceedings against such person to whom SCN is issued under sub-section (1) of section 73. Therefore, it is not merely a conclusion under sub-section (1). but conclusion of all proceeding against such person. Similar is the position in respect of sub- section (3) of section 73.

4. Accordingly, conclusion of proceeding in terms of sub-sections (1A)and (3) of section 73 implies conclusion of entire proceedings under the Finance Act, 1994.
It is seen that the letter clarifies the position regarding a case where section 73 (3) applies. However as discussed above the appellants case is covered by section 73 (4) due to which section 73 (3) will not apply.This being so the appeal on this ground fails.

7.1 The appellant has relied on the following judgments in support of their averments:

A) ***Servocraft HR Solutions Pvt.3 Ltd. Vs. Commissioner of Central Excise and Service Tax Service Tax in Appeal No. 40625 of 2013 dated 07.03.2023,*** wherein it was held that, no Show Cause Notice is to be issued when the assessee has paidthe Service Tax along with interest and no penalties are warranted under Section 77 and 78 of the Finance Act, 1994.

B) ***C.C.E. Vs. Adecco Flexione Workforce Solutions Ltd. (2012) 26 STR 3 (Kar.)*** wherein it was held that payment of dues by the appellant shows his intention that they want to buypeace. Even before the interest could be paid the Department ought not to have issued a Show Cause Notice in the present case.

C) ***YCH Logistics Vs. CCE Service Tax Appeal No. 886 of 2012dated 13.03.2020*** has held that Section 73(3) is very clear asit says that if a tax is paid along with interest before the issuanceof show-cause notice, then in that case show-cause notice shallnot be issued

D) ***Sen Brothers Vs. CCE (2014) 33 STR 704*** has held that it is thus evident from the aforesaid provisions that in the cases of non-payment of Service Tax on due dates, once payment along with interest is made before issuance of show cause notice, in such cases no show cause notice could be issued for imposition of penalty.

We find that none of the cases above are covered by the provisions ofsection 73(4) and are hence distinguished and are not applicable to thefacts of this case.

8. The final submission made by the appellant is that in terms of section 80, penalty cannot be imposed under section 76, 77 and 78 if the Assessee proves that there was a reasonable cause for the said failure. The Appellant had not discharged service tax for the period February 2009 to December 2009 due to financial constraints. Section80 is extracted below:
Section 80. Penalty not to be imposed in certain cases

(1) Notwithstanding anything contained in the provisions of section 76, or section 77, no penalty shall be imposable on the assessee forany failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.

(2) Notwithstanding anything contained in the provisions of section 76 or section 77 or section 78, no penalty shall be imposable for failure to pay service tax payable, as on the 6th day of March, 2012, on the taxable service referred to in sub-clause (zzzz) yes of clause (105) of section 65, subject to the condition that the amount of service tax along with interest is paid in full within a period

of six months from the date on which the Finance Bill, 2012 receives the assent of the President.

The Appellant has stated that they had not discharged service tax for the period February 2009 to December 2009 due to financial constraints. The Appellant had borrowed heavily from the banks and all receipts were going directly to the bank as per the escrow arrangement. After adjustment of the loan liability the banks directly dispersed the salaries to the employees listed with the bank. Therefore, the appellant was not in a position to pay service tax within the time limit prescribed under the statute. However, the moment the investigating authority discovered the non-payment of service tax, theappellant had discharged duty along with part interest. We find that asper the general rule of legal proceedings, he who asserts must prove.It was for the appellant to prove financial constraint before the originalauthority and thereby plead 'reasonable cause' for delayed payment. A bald statement of financial constraint will not be enough. Even as persection 106 of the Indian Evidence Act, the fact within the knowledge of a person must be proved as the burden of proof is cast upon him. Not only have they not done so the circumstantial evidence also do nothelp establish their cause, for the following reasons:

a) There was no confusion on legal issues or any dispute regardingthe taxability of the service being provided by them.

b) The duty that they were required to pay was tax collected from their clients / customers and was not to be paid from their own resources. Collecting tax from their customers (public money) and not depositing it to the government exchequer is breach of law and may be viewed as an embezzlement of public funds.

c) After the introduction of the self-assessment regime in Service Tax, it is incumbent upon the assessee to make a truthful declaration of facts in their declarations, ST-3 returns etc. madeto the department. Trust brings with it responsibility.

d) The appellant filed their ST-3 Return for the period October 2008to March 2009 and April 2009 to September 2009 on 08/07/2010and October 2009 to March 2020 on 02/11/2010 i.e. only after the investigation initiated by officers of DGCEI, Chennai. In fact, if they genuinely faced a financial constraint and could not pay their dues, they should have declared the tax dues not paid in column 4C of the ST-3 Return and filed it on time. The ST-3 Return has the columns to show the cash/CENVAT credit balancelying with them and the tax due but not paid. Suppressing thesefacts by not filing their Returns, even after having collected the tax from their customers, is a clear case of suppression of vital information with intention to evade payment of duty.

e) They had a cenvat credit balance of Rs 1,81,38,234/- but did notuse it to pay long outstanding tax dues, although they could nothave used it to settle other outstanding payments to thirdparties, if any. Clubbing this with their non-filing of ST-3 Returnsclearly shows their intention to evade payment of duty.

f) Once the officers visited their unit and discovered the evasion ofduty, they have immediately cleared all the tax dues. They did not face any financial constraint in doing so.

For these reasons we find that the appellant has not shown 'reasonablecause' within the meaning of Section 80 ibid for their failure to pay duty.

8.1 We now examine the judgments cited by the appellant to supporttheir stand on this issue. It must be said at the outset that the issue involved as to what constitutes 'reasonable cause' is one of fact and involves the subjective satisfaction of the Authority deciding thematter. Decisions of Courts / Tribunals essentially involving questionsof fact, are not always a precedent for decisions in other cases. Each judgment based on the peculiar facts of a case has to be understood in the terms set out therein. It is an accepted principle that it is neitherdesirable nor permissible to pick out a word or a sentence from a judgment divorced from the context of the question under consideration and treat it to be complete law. No general principle canbe evolved from the said judgments. The judgments cited are:

A) ***CST Vs. Lawson Travels (2014) TIOL 2295*** wherein the Hon'ble Madras High Court held that a careful perusal of the order of the Tribunal would reveal that 'reasonable cause' as provided under Section 80 of the Act has been recorded by the Tribunal stating that the respondent assessee had fallen into financial crisis on account of the criminal breach of trust committed by their sub-agent and criminalproceedings were initiated against such persons and the same are pending. In addition to the above, the Tribunal also came to hold thatit is a case of payment of duty voluntarily at the time of investigation even prior to issuance of show cause notice. Therefore, the Tribunal went on to invoke

the provisions of Section 80 of the Act on the groundof reasonable cause. The Court finds no cause to interfere with the order of the Tribunal. We find that the subjective satisfaction of the Tribunal was based on the facts of the case involving criminal breach of trust committed by their sub-agent where criminal proceedings wereinitiated and was upheld by the Hon'ble Court. In this case the facts are different. Further it was for the appellant to prove financialconstraint before the original authority and thereby plead 'reasonablecause' for delayed payment while explaining the unused CENVAT credit lying in their books. The appellant has not done so.

B) ***Daurala Organics Vs. CCE (2014) 35 STR 214*** wherein it hasbeen held that the benefit of Section 80 is not deniable even when extended period of limitation is invoked for demand of duty. This judgement pertains to a case where the Adjudicating Authority was ofthe view that the issue involved interpretation of legal provisions whichhas resulted in the non-payment of service tax in time. The facts are distinguished. In **Gazi Saduddin v. State of Maharashtra andAnother** [(2003) 7 SCC 330] the Hon'ble Supreme Court held as under:

"Primarily, the satisfaction has to be of the authority passing the order. If the satisfaction recorded by the authority is objective and is based on the material on record then the courts would not interfere with the order passed by the authority only because another view possibly can be taken. Such satisfaction of the authority can be interfered with only if the satisfaction recorded is either demonstratively perverse based on no evidence, misreading of evidence or which a reasonable person could not form or that the person concerned was not given due opportunity resulting in prejudicing his rights under the Act."

C) **CCE, Guntur vs. Narasaraopet Municipality** (2015) 39 STR 800 (A.P.) and **Commissioner of Central Excise vs. Dineshchandra R. Agrawal** [(2013) 31 STR 5] wherein penalties setaside in the order under appeal by invoking the provisions of Section 80 were upheld. The case laws state that power to set aside penalty isgiven to the Tribunal if a reasonable cause exists. We have discussed above that the appellant has failed to make out a case of 'reasonable cause'. The judgments are distinguished on facts.

8.2 For the reasons stated, we are of the view that the subjective satisfaction of the adjudicating authority cannot be interfered with as the impugned order is not shown to be demonstratively perverse basedon no evidence or misreading of evidence or which a reasonable person could not form. The penalty imposed is mandatory in nature and as held by the Hon'ble Supreme Court in **UOI Vs. Dharmendra TextileProcessors (2008) 13 SCC 369**, the section prescribing mandatorypenalty should be read as penalty for a statutory offence and the authority imposing penalty has no discretion in the matter in such cases and was duty bound to impose penalty equal to the duties so determined.

9. Having regard to the discussions above the impugned order merits to be upheld and is so ordered. The appeal fails and is disposedof accordingly.

(Pronounced in open court on 15.09.2023)

(M. AJIT KUMAR)
Member (Technical)

(P. DINESHA)
Member (Judicial)

Rex

Back

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

CHENNAI

REGIONAL BENCH – COURT NO. III

Service Tax Appeal Nos. 40452 and 40453 of 2013

(Arising out of Order-in-Original Nos. 40 & 41/2012 dated 30.11.2012 passed by Commissioner ofCentral Excise, MHU Complex, No. 692, Anna Salai, Nandanam, Chennai – 600 035.)

M/s. International Seaport Dredging Limited ...Appellant
5th Floor, Challam Towers No. 62/113,Dr. Radhakrishnan Salai, Mylapore, Chennai – 600 004.

Versus

Commissioner of GST and Central Excise ...Respondent
Chennai Outer Commissionerate,Newry Towers, No. 2054, I Block,

II Avenue, 12th Main Road, Anna Nagar,Chennai – 600 040.

And

Service Tax Appeal Nos. 42060 and 42061 of 2013

(Arising out of Order-in-Original Nos. 14 & 15/2013 dated 28.02.2013 passed by Commissioner ofService Tax, Newry Towers, No. 2054, II Avenue, 12th Main Road, Anna Nagar, Chennai – 600 040)

M/s. International Seaport Dredging Limited ...Appellant
5th Floor, Challam Towers No. 62/113,Dr. Radhakrishnan Salai, Mylapore, Chennai – 600 004.

Versus

Commissioner of GST and Central Excise ...Respondent
Chennai Outer Commissionerate,Newry Towers, No. 2054, I Block,

II Avenue, 12th Main Road, Anna Nagar,Chennai – 600 040.

APPEARANCE:

For the Appellant : Shri Raghavan Ramabadran, Advocate

For the Respondent : Smt. Anandalakshmi Ganeshram, Superintendent / A.R.

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL) HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 24.07.2023DATE OF DECISION : 15.09.2023

FINAL ORDER Nos. 40803-40806/2023

Order : Per Ms. SULEKHA BEEVI C.S.

The issue in all these appeals being similar and connected they were heard together and are disposed of by this common order.

2. Brief facts are that the appellant, M/s. International Seaport Dredging Private Ltd., are engaged in providing Dredging Service. They are registered with the service tax Commissionerate and subsequently obtained centralized registration on 12.02.2009. During the course of audit, it was noted by the Department that appellant had not paid Service Tax on Dredging Services provided to Dredging Corporation of India (DCI) for Sethu Samudram Project and Dhamra Port Company Ltd., and also on certain services imported by them. Show Cause Notices for the different periods were issued to demand Service Tax on amounts received for Soil Stabilisation and Land Reclamation Servicesas Dredging Services, Charter-hire charges as Dredging Services, Maintenance and Repair Services, Man Power Recruitment and Supply Agency Services and other services.After due process of law, the authorities below confirmed thedemand on the above and dropped all other issues. Aggrieved by the confirmation of demand of Service Tax, interest and penalties imposed the appellants are now beforethe Tribunal.

3.1 The Ld. counsel Shri Raghavan Ramabadran appeared and argued for the appellant. The details of the Show Cause Notice period involved and the issues are furnished below:-

ppeal No.	-in-O	Period	ature of services for which emand confirmed/dropped
ST/40452/201	0&41/2012 t. 0.11.2012	01.01.2009 to 31.03.2009	) Soil stabilisation and land eclamation services alleged to be redging services provided to Dhamra ort confirmed.) Supply of Dredgers as Dredging ervicesconfirmed) Maintenance and Repair Service eceived from foreign service provider onfirmed.) Manpower recruitment and upply gency services received from foreign ervice provider confirmed.
ST/40453/201		01.04.2009 to 31.07.2009	
ST/42060/201	4&15/2013 t. 8.02.2013	01.08.2010 to 31.03.2011	) Soil stabilisation and land eclamationservices incidental to redging dropped.) Manpower Recruitment and SupplyAgency services onfirmed.) Maintenance and Repair Service eceived om foreign service provider confirmed.
ST/42061/201		01.04.2011 to 30.09.2011	

3.2 The Ld. counsel submitted that the issues withregard to demand of Service Tax on (a) Soil Stabilisation andReclamation Services treated as Dredging Services (b) Supply of Dredgers treated as Dredging Service (c)Maintenance and Repair Service received for repair of vessel from foreign service provider have already been considered by the Tribunal in the appellants

own case and decided in favour of appellant as reported in *International Seaport Dredging Ltd. vs. Commissioner of Service Tax, Chennai2018 (6) TMI 933 (CESTAT, Chennai).*

3.3 The Ld. counsel adverted to page 10 of the impugned Order-in-Original No. 40&41/2012 dated 30.11.2012 to assert that the issues considered in these appeals are the same as that have been decided in their earlier appeal for different period. At paragraph 12 of page 10 of the said Order-in-Original, the issues framed by the adjudicating authority read as under:-

"12.0 The issues to be decided in the subject notices are :

i. Whether the services offered to Dredging Corporation of India was „Dredging Services" or „Supply of Tangiblegoods" service?
ii. Whether the services offered to Dhamra Port Company were „Dredging Services" or otherwise?
iii. Whether ISDL were liable to service tax for maintenance, repair services rendered by Foreign Service provider? And
iv. Whether service tax was payable on manpower supplyservices received from M/s. Bellsea?"

3.4 The facts of each issue was explained by the Ld. counsel as under:-

Services at Dhamra Port:

3.4.1 The present dispute revolves around dredging services rendered to Dhamra Port Company Limited ("Dhamra Port"). The appellant had undertaken the activities of dredging, soil stabilisation, land reclamation under separate agreements, as described herein below:

i. Dredging Services:

- The appellant provides dredging services by removing material including silt, sediments, rocks, sands, debris, etc., form the port / navigational route, so that the vessel can approach and berth at the port.
- The appellant has remitted applicable servicetax on dredging services. This is an undisputed fact as is reflected in paragraph 4 of the Show Cause Notice No. 240/2010 dated 19.04.2010 and paragraph 4 of the Show Cause Notice No. 608/2010 dated 11.10.2010.

ii. Land Reclamation:

- The land reclamation process involved reclamation of land from the sea. The appellantwas required to undertake activities such asconstruction of containment of dikes, extraction of filling material from the respective locations, filling up of the proposed reclamation site with the fill material as specified by the customer for finally reclaiming the land.
- The appellant did not remit service tax on the land reclamation activities since the activity is classifiable as „site formation services" under Section 65(105)(zzza) of the Act, and site formation services provided in the course ofconstruction of ports were exempted from the levy Service Tax under Notification No. 17/2005 dated 07.06.2005.

iii. Soil Stabilisation:

- The soil stabilisation process in undertaken to stabilise the soil in the reclaimed area. The soil contains lots of water and hence, any structure placed on the land is likely to sink, unless the soil naturally stabilises, and such stabilisation process generally takes years. Accordingly, the soil stabilisation process is undertaken whereby vertical drains are installed to drain out the excessive water to expedite the soil stabilisationprocess and allow the development of cargo handling facilities at the port.
- The appellant did not remit service tax on the soil stabilisation activities since the activity is classifiable as „site formation services" under Section 65(105)(zzza) of the Act, and site formation services provided in the course ofconstruction of ports were exempted from the levy

of service tax under Notification No. 17/2005.

Charter Hire Services – Dredging Corporation of India:

3.4.2 The appellant provided dredgers/equipment on charter-hire/lease to the Dredging Corporation of India ("DCI") for the Sethu Samudram Canal Project. The appellant‟s responsibility is limited to providing the dredger or equipment on lease to DCI. The appellant has been remitting service tax on the charter hire charges under the category „Supply of Tangible Goods for Use‟ under Section 65(105)(zzzzj) of the Act form 16.05.2008, when the taxable category of supply of tangible goods for use was introduced in the Finance Act, 1944.

3.4.3 The consideration though was received during the impugned period, the services were provided prior to 16.05.2008 (before the service became taxable), and thus, no service tax was paid by appellant on the consideration received.

Import of Services – Maintenance and Repair:

3.4.4 The appellant‟s dredger-vessel required repair-work to be undertaken. In such situations, the appellant would engage Foreign Service providers to carry out maintenance and repair work on the dredger. The Foreign Service providers had physically taken the dredger(s) to their premises at Durban in South Africa for carrying out therepairs. As the repair work was performed outside India, the appellant did not remit service tax under reverse charge since the activity as per the Taxation of Services (Provided from outside India and received in India) Rules, 2006 (Import Rules), the appellant is not liable to pay tax for the services received / performed outside India.

5.1 The Ld. counsel submitted that the Tribunalin the appellants own case had occasion to consider all thesethree issues as reported in *[2018 (6) TMI 933]* and advertedto the same.

5.2 In regard to the demand of Service Tax as dredgingservices at Dhamra Port, for soil stabilisation and reclamation services, the Ld. counsel explained that appellant had entered into three separate contracts for dredging, soil stabilisation and land reclamation. The appellant had discharged the service tax for dredging services provided by them. They are not liable to payservice tax for amounts received for land reclamation andsoil stabilisation for the reason that these services in the nature of site formation services are exempted from payment of service tax when provided at port as per Notification No. 17/2005-ST.

5.3 In the earlier appeal, the Tribunal had remanded this issue to the adjudicating authority to verify whether the contracts are separate for the three activities and to considerthe issue afresh. In such remand proceedings, the adjudicating authority *vide* Order-in-Original No. 15/2020dated 31.10.2020 dropped the demand on amount received for Soil Stabilisation and Land Reclamation activities.

5.4 The appellant submitted that for the period from August 2010 to September 2011, the identical issue washeld in favour of the appellant in Order-in-Original No. 14&15/2013 dated 28.02.2013 (paragraphs 6.5-6.5.1, 6.9) wherein the adjudicating authority held that the services are classifiable under site formation under Section 65(97a) and not taxable for the impugned period and dropped the demand. As on date, no appeal has been filed by theRevenue against the said order. Hence the findings therein have attained finality.

5.5 It is well settled law that if particular services are covered under one category of services, they cannot betaxable under any other category of services. Reliance is placed on *Indian National Shipowners' Association v. Union of India [2009 (14) S.T.R 289 (Bom.)]* as affirmed in *Unionof India vs. Indian National Shipowners' Association [2011 (21) S.T.R.3 (S.C.)]*.

5.6 The second issue is with regard to demand of service tax under the category of dredging services on the charter/hire/lease of dredgers provided to DCI for the Sethu

Samudram Canal Project. It is submitted that the appellant has been paying service tax on charter hire charges under the category of supply of tangible goods falling under Section 65(105)(zzzj) with effect from 16.05.2008. The saidactivity of charter of dredger cannot fall under dredgingservices. The very same issue was considered by the Tribunal in the earlier period of litigation and it was held tobe not taxable under dredging services. The relevant paragraph reads as under:-

"4.1 We propose to address the matter issues wise:

(i) Services provided to Dredging Corporation of India (DCI):

The adjudicating authority has concluded mainly on the ground that the dredging vessel supplied by the appellants is required to be delivered with full complement of officers and crew who operate, control and supervise the dredging work. We are not able to appreciate such an interpretation. Even a plain reading of the agreement between the appellant and Dredging Corporation of India will indicate that it is "Charter Hire Agreement". The said Charter Hire Agreement lays down charter hire per week of operation, period of hire (4 months), place, date and time of delivery as also place, date and time of re-delivery. We also find that although the vessel is hired along with a complement of officers and crew, the decision where to do the dredging work, the hours of operation etc. are totally those of the Dredging Corporation of India and appellants have no role or say in that whatsoever. The positioning of one Appeal Nos.ST/502- 504/2010 representative of the appellant on board the vessel may well be for co-ordination purpose, but it is nobody"s case that the said representative calls the shots in respect of dredging operations. From the sample of the invoice produced by the Ld. Advocate (page 351 of compilation), it is in fact seen that the billing has been done based on operational hours at 100% and at 85% and even at 0%.The DCI has also been billed towards wear and tear of the dredging equipment at Rs.3.60 per cubic metre. If the services provided by theappellant indeed was only "dredging service", the appellant would nothave been able to bill DCI for such wear and tear charges. In our considered opinion, the activity of the appellants may possibly fall under supply of „Tangible Goods Service", but surely not under

„Dredging Service". It is interesting to note that appellants have paid service tax amount of Rs.57,03,661/- towards the services providedto DCI under the category of Supply of Tangible Goods Services. In these circumstances, that part of the impugned order confirming demand of service tax in respect of the services provided by the appellants to Dredging Corporation of India under the category of "Dredging Service" cannot sustain and will therefore have to be set aside, which we hereby do."

5.7 The Department has confirmed the demand under maintenance and repair service for the repair service doneby Foreign Service provider. The impugned order refers the vessel name as „Pacific". In fact the issue of repair charges paid for the vessel „Pacific" was the subject matter of the earlier appeal before the Tribunal and the Tribunal had remanded this issue. In remand proceedings, the adjudicating authority after noting that the vessel (Pacific) was repaired at Dry Dock of Colombo (Outside India) held that the demand cannot sustain and dropped the demand (paragraph 7.4 of O-I-O No. 15/2020). In the presentappeal the issue is with regard to repair works of Vessel Orwell and not Pacific as wrongly noted in the order.

5.8.1 It is submitted that the dredger-vessel Orwell was taken to the premises of the Foreign Service providers for carrying out repairs to the vessel, i.e., the repairs were made outside India at overseas locations (Durban, South Africa) and therefore, it is non-taxable.

5.8.2 The Appellant submits that Rule 2(1)(d)(iv) of the Service Tax Rules, 1994, read with Section 68 (2) and Section 66A of the Act and Rule 3 of the Import Rules, provides that in cases where services are provided from outside India and such services are received in India then the recipient of services would be liable to pay service tax provided the respective conditions are fulfilled.

5.8.3 Rule 3 of the Import Rules categorise taxable services in the following three categories:

- location of immoveable property.

- situs of services/location where the services areprovided;
- location of service provider

5.8.4 Rule 3(ii) of the Import Rules positions Section 65(105)(zzg) for „management maintenances and repairs services' under the second category i.e. they will be deemed as having been rendered in India if the situs of performance of services is in India. In other words, the Import Rules provide that such services would be taxable in the hands of the recipient of services located in India, provided that such services are partly or fully performed in India. The services having been provided outside India, the demand is prayed tobe set aside.

5.9 The fourth issue is with regard to the Manpower Recruitment and Supply Agency (MRSA) Services. This issuewas also considered by the Tribunal for the earlierperiod (appeal). The demand was then set aside. The relevant discussion of the Tribunal reads as under:-

"(b) Manpower Supply Services:

(i) The dispute relates to salary payments paid to the "expatriate" employees employed under them. According to appellant, the salary payments had been routed through foreign companies who made Appeal Nos.ST/502-504/2010 payment to the said employees on behalf of the appellant in foreign currency and on reimbursement basis without any mark up.

(ii) The appellants have contended that with each of the expatriates, drafts for employment had been drawn up, which, inter alia, indicatedthe monthly salary payable. The appellant, therefore, contends that liability to pay salaries rested with the appellants and not with the foreign companies. They also pointed out that income tax had been deducted and TDS certificates issued to these employees in form 60.

(iii) We find merit in these averments. It is a usual practice to facilitate payment of the salaries of expatriate employees in foreign currency, to be payable in their home country. It is not the case that appellants had engaged services of a manpower service provider fromabroad to have the services of these persons. It is also pertinent to note that drafts were drawn up by the appellants directly with their employees and not with any manpower supply provider abroad.

(iv) Further, even the foreign agents who had facilitated routing ofthe salaries to the secondees, were functioning as pure agents and, hence, on this core also, service tax liability under reverse charge basis will not arise. Hence, that part of the impugned order which has confirmed service tax liability in respect of the employment of expatriate persons, cannot sustain and requires to be set aside, whichwe hereby do."

5.10 The Ld. counsel was however, fair enough to submit that after the above order of the Tribunal, the Hon"ble Supreme Court, in the case of *Commissioner ofCustoms, Central Excise and Service Tax, Bangalore vs. M/s.Northern Operating Systems Pvt. Ltd. [2022 (61) GSTL 129 (SC)]* had occasion to consider similar issue of „seconded employees" by foreign company and held that the activity would be covered under MRSA. It is argued by the Ld. counsel that the true nature of the agreement between theappellant and foreign entities does not involve MRSA.

5.11 With regard to the issue of demand of Service Tax under MRSA, the Ld. counsel put forward detailed arguments. It is submitted that the appellant was under *bona fide* belief that there was no MRSA in the arrangement entered between foreign entities for providing employees. In the appellant"s own case, the Tribunal had decided the issue in their favour. Being an interpretational issue, the penalties may be set aside. It is pleaded that the

benefit of waiver of penalty under Section 80 may extended as the appellant has put forward reasonable cause for non-paymentof tax. The Ld. counsel prayed that the appeals may be allowed.

6.1 The Ld. Authorised Representative Smt. Anandalakshmi Ganeshram appeared and argued for theDepartment. The main crux of argument was in respect of the demand of Service Tax under MRSA. It is submitted by the Ld. AR that the appellant"s contention that manpower supplied by the non-resident service providers were absorbed as their own employees and only the payment to the employees was routed through the overseas serviceproviders (M/s. N.V. Baggerwerken Decloedt and M/s. Bellsca Investments Ltd., Cyprus (Bellsee)) and that no service was involved as per the secondment agreement dated 01.11.2004 cannot be accepted. On a perusal of this agreement it can be seen that the appellant has requested Bellsea to depute the secondees for agreed tenure and the secondees shall resume their services with Bellsea upon completion of the secondment. The salient features of this agreement are as below:

Clause B: Bellsea to depute „Secondees" to the assessee initially for a period of 3 years andrenewable further as per agreed terms Clause ID: Bellsea agreed upon the terms and conditions relating to the secondment of the Secondees
Clause_1.1.b)- Definition of „Secondees": Secondees means the employees of Bellsea to be deputed to the assessee
Clause 2.2.2:: During the period of secondment, Bellsea shall pay salaries net of income tax outside India and the assessee shsall provide perquisites and other benefits to the secondees

6.2 The appellant has also furnished copy of contract ofemployment dated 01.11.2004 entered with Mr. Bezshiyakh Vasyl of Russia, deputed by Bellsea Investments Ltd. and Form-16 in support of their defence. On perusal of this contract it can be seen that the same pertains toemployment of the aforesaid individual as 1st Mate of one of the vessels of the appellant company. Apart from specifying the details of designation, scope of work, compensation,etc., it has been specifically provided in the said contractthat M/s. Bellsea Investments Ltd. will directly remit the remuneration to the bank account of the secondee and the same will be reimbursed by the appellant. The relevant clause-B of the subject contract reads is reproduced below:

B. Remittance of Remuneration Outside India

Subject to applicable law, Bellsea Investments Limited who has seconded the Employee to the Company will directly remit on your behalf, a sum equal to you net remuneration (after deduction oftaxes and other deductions) account, specified by you,outside India, representing remittance for personalpurposes. The company will reimburse Bellsea Investments Limited accordingly.

6.3 The Ld. AR argued that it is evident from the abovefactual position that Bellsea deputed its personnel to the appellants and it only Bell sea who has paid the salaries to such persons deputed by Bellson by them to the appellant.

It is pertinent to note that outflow of foreign exchange for various purposes, including payment of remuneration to non-Indian employees is permitted and monitored by the Reserve Bank of India as per regulations stipulated. Whereas, it is observed that the appellant requested Bellsea to depute personnel to them and accordingly the charges forthe service were paid to them. Further, it is also an admitted fact that Bellsea paid the remuneration to such personnel as per the terms and conditions of the agreement.It is also categorically mentioned in the agreement that any extension of deputation of such personnel can take placeonly upon terms and conditions mutually agreed upon by theappellant with Bellsea and not the employees.

6.4 It is very much apparent that the appellant has directly appointed these persons working in Bellsea as their employees, it can be reasonably understood that such persons have resigned their jobs with Bellsea and joined the appellant company in their individual capacity. It is substantiated with documentary evidence with regard to deputation of personnel to the appellant and extension of deputation to responsibility for payment of salaries is remains within

the control of Bellsea itself. The above facts establish that the personnel deputed to the appellant continued to be employees of Bellsee. Under the facts and circumstance, personnel claimed to be the employees of the appellant are actually employees of the Foreign Service provider and the amount paid by the appellant to them as salary is nothing but a consideration for providing manpowerservices.

6.5 The argument of the Ld. counsel for the appellant that the amounts are nothing but reimbursements and therefore not subject to levy of Service Tax prior to 2015 was countered by the Ld. AR by stating that the said issue was brought to the notice of the Hon‟ble Apex Court in the case of *Northern Operating Systems P Ltd. [2022-TIOL-48- SC-ST-LB]*. However, the Apex Court held that secondment agreement comes under the category of Manpower Supply Service and is subject to levy of Service Tax. The said decision of the Hon‟ble Apex Court was followed by the Tribunal in the case of *M/s. Renault Nissan Automotive India Pvt. Ltd. [2023 (7) TMI 635-CESTAT CHENNAI]*.

6.6 In regard to the penalties imposed, the Ld. ARsubmitted that the appellant had not paid Service Tax and the same would not have come to light, but, for the scrutiny done by the Department officers. The appellant has not put forward any reasonable cause for the non-payment of the failure to pay the Service Tax and therefore the penalty imposed is legal and proper. The Ld. AR prayed that the appeals may be dismissed.

7. Heard both sides.

8.1 Out of the four issues narrated above, which arise for consideration in these appeals, the demand of Service Tax confirmed under the category of Dredging services at Dhamra Port, on the consideration received for activities of Soil Stabilisation and Land Reclamation has been decided by the Tribunal in the appellant‟s own case as reported in *[2018 (6) TMI 933-Cestat Chennai]*. It was explained by the appellant that three separate contracts for dredging, soil stabilisation and land reclamation were entered by them. In the present case also the demand is made under dredging services on amounts received for soil stabilisation and land reclamation services at Dhamra Port. In paragraph 14.2.0, the adjudicating authority has held that the activities undertaken were not stand-alone and therefore, the contract has to be considered as composite one. It is alleged that theamounts received for site formation and land reclamation though separately fixed or recovered from the Board authorities, as they are interconnected with dredging services, the appellant has to discharge Service Tax under the category of dredging services. This view does not find favour with us. On the very same set of facts, the Tribunal had remanded the matter for the earlier period to examine the agreements. In such *denovo* adjudication, the original authority *vide* Order-in-Original No. 15/2020 dated 31.10.2020 has dropped the demand. Further in the appellant‟s own case for the different period on the very same agreements, the original authority *vide* Order-in- Original No. 14&15/2013 dated 28.02.2013 dropped the demands. In such order, the original authority has dropped the demand in respect of all the above three issues and has upheld the demand of Service Tax on manpower supplyservices only. The discussion by the adjudicating authority for setting aside the demand of Service Tax in regard to soil stabilisation and land reclamation activities is as under:-

“7. Dredging service

7.2 This taxable service covers dredging which is generally undertaken for removal of material such as silt, sediments, rocks etc. of rivers, ports, harbour, backwater or estuary for providing adequate draught for ships and other vessels and to maintainshipping channels. Service tax is leviable only on dredging ofriver, port, harbour, backwater or estuary and dredging in any other cases does not attract service tax. The definition of dredging is an inclusive definition and the activities specified are only indicative and not exhaustive.

As clarified by the Ministry, the dredging service isgenerally undertaken for removal of material such as silt, sediments, rocks, etc for providing adequate draught for ships and other vessels

and to maintain shipping channels. It is therefore seen from the definitions and the clarifications reproduced above that soil stabilisation and land reclamation work are specifically included under site formation service [Section 65(97a)] whereas Dredging service is separately notified under Section 65(36a), eventhough both the services were brought under tax net on the same day ie, 16.06.2005. Therefore, soil stabilisation and land reclamation work undertaken by the assessee during the course of construction of port cannot be grouped as a composite service under dredging service.

6.9 In the present case, as already discussed it isestablished beyond doubt by the assessee that

i)No dredging work is involved in the soilstabilisation contract

ii) Land reclamation service is not incidental serviceto Dredging contract

iii) The dredging activity carried out under landreclamation contract is only for the purpose of reclamation of land to develop cargo handing facilities and this dredging activity does notcontribute to the deepening of the navigational path of the ships.

Therefore, I have no hesitation to hold that in terms of Section 65A(2)(a) of the Act the soil stabilisation and land reclamation services provided by the assessee during the course of construction of Dhamra Port are classifiable under Section 65(97a) - site formation service only and not under Dredging service. At this juncture it is pertinent to mention here that the facts ofthe case as discussed above have not been clearlybrought out to the notice of my predecessors resulting in confirmation of the demand as mentioned in para 2 above. Consequently, I hold that the assessee is eligible for the exemption from payment of service tax on the aforesaid activities in terms of Notification No.17/2005-ST dated 07.06.2005. The service tax demanded in the show cause notice in respect of these activities is liable to be dropped.

8.2 The Notification No. 17/2005-ST dated 07.06.2005 exempts site formation services (soil stabilisation, land reclamation) provided in the course of construction of road, airports, railways, transport terminals, bridges, tunnels, dams, major and minor ports. After considering the agreement, the original authority in the above extractedorder has come to the conclusion that the considerationreceived for site formation services is exempted under the above Notification and cannot be subject to levy of Service Tax under dredging services. The facts entirely being the same, we are of the view that the demand of Service Tax under the category of dredging services for the amountreceived by the appellant for soil stabilisation and land reclamation services cannot sustained and requires to be setaside which we hereby do.

9.1 The second issue is whether the service offered by the appellant to Dredging Corporation of India by way of charter-hire of vessel for dredging work of the Sethu Samudram Canal Project. The demand of Service Tax is under Dredging services. In paragraph 13.1.1, the facts have been discussed by the adjudicating authority as under:-

"13.1.1 A perusal of the Agreement dated 10.01.2008 between ISDL (Owner) and DCI (Charterer) at plain sight appears to be an agreement for charter-hire of vessel for dredging work of the Sethu Samudram Canal Project. However, on detailed scrutiny of the same, it is observed that not only has the vessel been leased out but also, the manpower. DCI have deputed only 3 persons for the said project. Hence, the contention thatdredging was carried out by DCI appears far-fetched. Also, if the dredging activity was indeed carried out by DCI, there was no reason for ISDL, as the owner of the vessel to maintain the record of daily/weekly and monthly production and log sheets. That ISDL have rendered dredging services is further reinforced by the fact that at Sl. No. 8B of the General conditions of the Contract, it has been mentioned as follows:

"The Vessel should be dredging for a minimum period of 22 days in any calendar month. In case of continuous shortfall during several continuous months, Charterer will have the right to terminate the Charter after giving 14 days notice to the owner." "

9.2 The very same issue was considered by the Tribunal in the appellant‟s own case for the earlier period wherein it was held that the charter/hire of vessel would at the best fall under Supply of Tangible Good Services and notunder dredging services. Following the same, we are of the view that the demand of Service Tax on amount received by the appellant upon the charter-hire agreement under the category of dredging services cannot sustain and requires to be set aside which we hereby do.

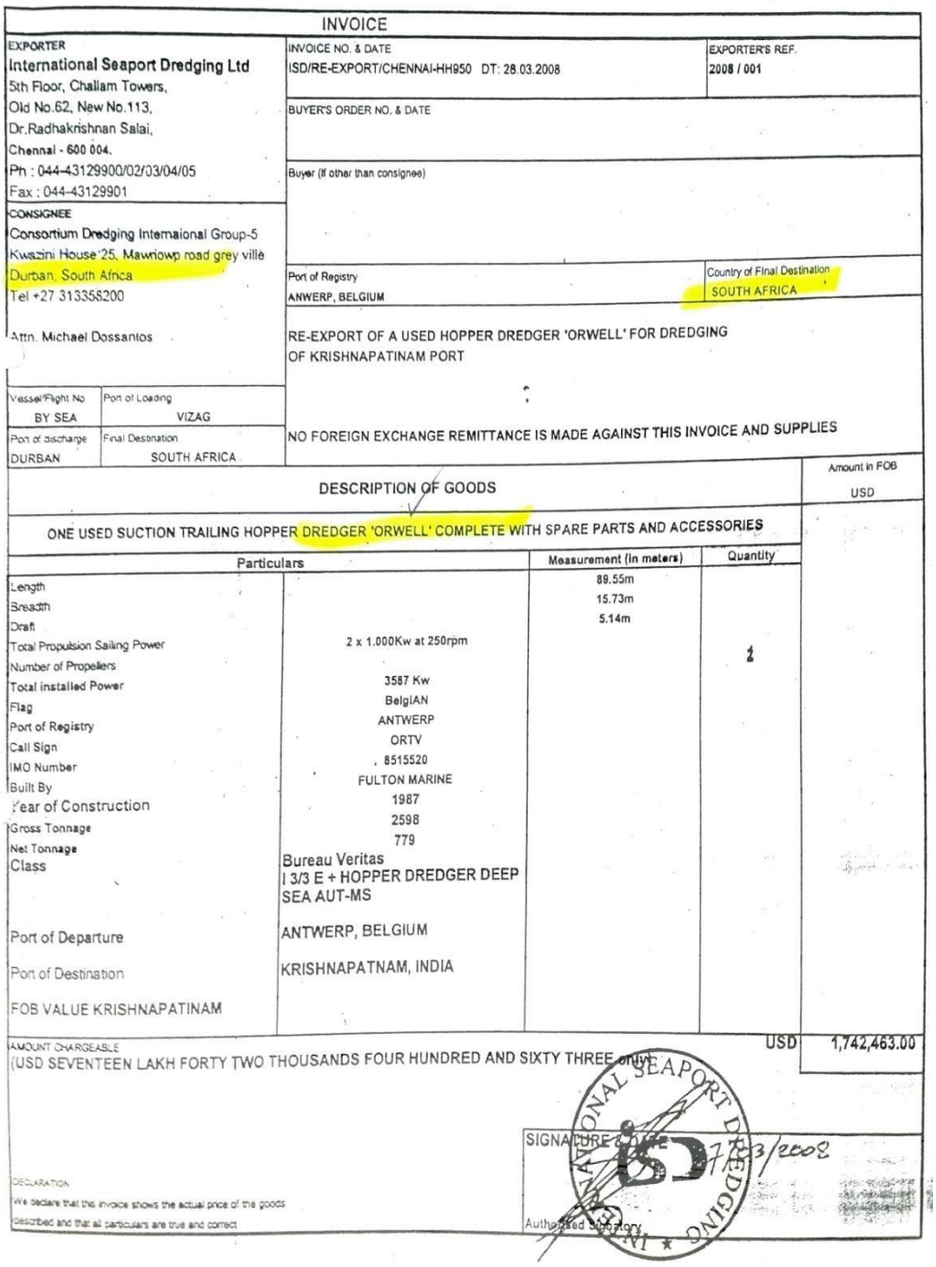
9.3 The third issue is with regard to demand of Service Tax under Maintenance and Repair Services received from the Foreign Service provider. The very same issue had come up for consideration in regard to the maintenance and repair services of the vessel „Pacifique‟. The matter was remanded to the adjudicating authority and in such *denovo* adjudication, the original authority held that the demand cannot sustain and dropped the same. The contention raised by the appellant is that the maintenance and repair services were performed on the vessel outside India and amount paid for such repair services to the Foreign Service provider cannot be subject to levy of Service Tax under reverse charge mechanism alleging import of services. That repair and maintenance services are performance based services; as the services have been performed outside India,the provisions regarding import of services cannot be appliedto demand Service Tax from the appellant. After perusal of the documents, the original authority analysed this issue in the remand proceedings as under to drop the demand. The relevant paragraphs read as under:-

"In this regard, the assessee had submitted that:-

a. The 010 has referred a particular invoice and confirmed the demand on them;
b. They have received repair and maintenance services from the various foreign service providers for thevessel located outside India.
c. They have received services for vessels located at Colombo Ship yard & at Singapore. They have submitted documents to substantiate that the repair activities were carried out at Colombo, Sri Lanka & Singapore respectively.
d. With regard to maintenance and repair services, the decide the applicability of service tax under import of services, the location of service' is to be determined and as all their services were carried out outsideIndia, service tax will not be applicable on the same.

Based on the above reply given by the assessee, I have examined the documents submitted by them to confirm their averments on the place of provision of service. I find that for the work carried out at Colombo Dockyard, they have submitted various documents such as work-done certificate/Invoice wherein date wise details of work done vis-à-vis the charges for the same has been given. In the said Invoice, charges for occupation of dock, wharfage, etc.,were given, which indicate that the repair work have really been carried out at Colombo Dry Dock, Sri Lanka, only. Similarly, invoices issued by the ST Marine dry- dockingyard for repair work carried out for the vessel 'Pacifique' at Singapore were also found available in the reply given by the assessee earlier and hence all the above confirm that the repair and maintenance work have been carried out outside India. As per Taxation of Service (Provided from outside India and Received in India) Rules, 2006, maintenance services are grouped under category (ii), i.e. the service receiver will be liable to pay tax if only these services are performed in India. Thus, based on the findingsrecorded above and as a similar view has been taken by theAdjudicating Authority No.14 &15/2013 dated by dropping the demand of service tax on repair and maintenance services, I hold that the demand of service tax made in the three subject SCN"s (under de-novo adjudication) on repair and maintenance services is liable to be dropped."

9.4.1 The Ld. counsel submitted that the original authority has referred the name of the vessel as 'Pacifique". In fact, in these appeals, the repairs were with regard to Vessel Orwell and repairs were done at South Africa. Order- in-Original has erroneously mentioned the vessel name as „Pacifique". The invoice furnished at page 1196 of the type set is scanned below:-



INVOICE

EXPORTER
International Seaport Dredging Ltd
5th Floor, Challam Towers,
Old No.62, New No.113,
Dr.Radhakrishnan Salai,
Chennai - 600 004.
Ph : 044-43129900/02/03/04/05
Fax : 044-43129901

INVOICE NO. & DATE: ISD/RE-EXPORT/CHENNAI-HH950 DT: 28.03.2008

EXPORTER'S REF.: 2008 / 001

BUYER'S ORDER NO. & DATE:

Buyer (if other than consignee):

CONSIGNEE
Consortium Dredging International Group-5
Kwazini House 25, Mawlowp road grey ville
Durban, South Africa
Tel +27 313358200

Attn. Michael Dossantos

Port of Registry: ANWERP, BELGIUM

Country of Final Destination: SOUTH AFRICA

RE-EXPORT OF A USED HOPPER DREDGER 'ORWELL' FOR DREDGING OF KRISHNAPATINAM PORT

Vessel/Flight No	Port of Loading
BY SEA	VIZAG
Port of discharge	Final Destination
DURBAN	SOUTH AFRICA

NO FOREIGN EXCHANGE REMITTANCE IS MADE AGAINST THIS INVOICE AND SUPPLIES

DESCRIPTION OF GOODS			Amount in FOB USD
ONE USED SUCTION TRAILING HOPPER DREDGER 'ORWELL' COMPLETE WITH SPARE PARTS AND ACCESSORIES			
Particulars		Measurement (in meters)	Quantity
Length		89.55m	
Breadth		15.73m	
Draft		5.14m	
Total Propulsion Sailing Power	2 x 1.000Kw at 250rpm		1
Number of Propellers			
Total installed Power	3587 Kw		
Flag	BelgIAN		
Port of Registry	ANTWERP		
Call Sign	ORTV		
IMO Number	. 8515520		
Built By	FULTON MARINE		
Year of Construction	1987		
Gross Tonnage	2598		
Net Tonnage	779		
Class	Bureau Veritas I 3/3 E + HOPPER DREDGER DEEP SEA AUT-MS		
Port of Departure	ANTWERP, BELGIUM		
Port of Destination	KRISHNAPATNAM, INDIA		
FOB VALUE KRISHNAPATINAM			

AMOUNT CHARGEABLE: USD 1,742,463.00
(USD SEVENTEEN LAKH FORTY TWO THOUSANDS FOUR HUNDRED AND SIXTY THREE only)

SIGNATURE & DATE: ISD 7/3/2008

DECLARATION
We declare that this invoice shows the actual price of the goods described and that all particulars are true and correct

Authorised Signatory

INTERNATIONAL SEAPORT DREDGING

9.4.2 From the above document, it is very much clear that the repair services were done outside India. The levy ofService Tax on Maintenance and Repair Services is on the basis of the place of performance and therefore the demand cannot be sustained as the services have been performed outside India and not received in India. For this reason, we hold that the demand under this category cannot sustain andrequires to be set aside which we hereby do.

9.5 The fourth issue is with regard to the demand of Service Tax on reverse charge basis under the category of Manpower Recruitment and Supply Agency (MRSA) services received from Foreign Service providers. In both the Orders-in-Original, the adjudicating authority has confirmed the demand. The issue as to whether secondment agreement entered by the appellant with the foreign companies for deputation of employees would come within the ambit of the definition of Manpower Recruitment And Supply Agency services was analysed by the Hon'ble Apex Court in the case of *Commissioner of Customs, Central Excise and Service Tax, Bangalore vs. M/s. Northern Operating Systems Pvt. Ltd. [2022 (61) GSTL 129 (SC)]*.The Ld. counsel for the appellant has submitted

that the Hon'ble Apex Court in the said case did not refer to the application of the decision of the Apex Court in the case of *Union of India Vs. Intercontinental Consultants and Technocrats Pvt. Ltd. [2018 (10) GSTL 401 (SC)]* . Though in para 26, the said decision was brought to notice and referred to by the Hon'ble Apex Court, the Hon'ble Apex Court has only considered taxability under the category of manpower requirement and supply agency services and has not considered the valuation aspect. The discussion in paragraph 34 of the said judgment is as under:-

"34. *The contemporary global economy has witnessed rapid cross-border arrangements for which dynamic mobile workforces are optimal. To leverage talent within a transnational group, employees are frequently seconded to affiliated or group companies based on business considerations. In a typical secondmentarrangement, employees of overseas entities aredeputed to the host entity (Indian associate) on the latter"s request to meet its specific needs and requirements of the Indian associate. During the arrangement, the secondees work under the control and supervision of the Indian company and in relation to the work responsibilities of the Indian affiliate. Socialsecurity laws of the home country (of the secondees) and business considerations result in payroll retention and salary payment by the foreign entity, which isclaimed as reimbursement from the host entity. The crux of the issue is the taxability of the cross charge, which is primarily based on who should be reckoned as an employer of the secondee. If the Indian company is treated as an employer, the payment would in effect be reimbursement and not chargeable to tax in the hands of the overseas entity. However, in the event the overseas entity is treated as the employer, the arrangement would be treated as service by the overseas entity and taxed."*

9.6 The Ld. counsel for the appellant has adverted to the reply to the Show Cause Notice and the agreements entered with foreign company to argue that the amounts paid by the appellant to their employees were only actual reimbursements. Though activity may be taxable underMRSA as per the decision of the Hon'ble Apex Court in the case of M/s. Northern Operating Systems Pvt. Ltd. *(supra)*, the amount being in the nature of reimbursements cannotbe included in the taxable value under Section 67 as it stood during the relevant period (prior to 2015). It is submitted that the decision of the Hon'ble Apex Court in the case of Intercontinental Consultants and Technocrats Pvt. Ltd. *(supra)* would apply on such reimbursed amounts.

9.7 By judicial discipline, we follow the decision of the Hon'ble Apex Court in the case of M/s. Northern Operating Systems Pvt. Ltd. *(supra)* and hold that the demand under this category is sustainable, and uphold the same.

9.8 The Ld. counsel has argued to set aside the penalties. We have already held that only the demand under MRSA survives. The said issue was interpretational in nature and has travelled upto to the Hon'ble Apex Court. Further, in the appellant's own case for the previous period, the Tribunal had set aside the demand under this category. We therefore find that the appellant has made out sufficient cause for non-payment of Service Tax and is a fit situation to invoke Section 80 of the Finance Act, 1944 to set aside thepenalties.

10. In the result, the impugned order is modified asunder:-

i. The demand of Service Tax under the category of Dredging services for Dhamra Port on amounts received for soil stabilisation and land reclamationactivity is set aside.

ii. The demand of Service Tax on the amount receivedfor charter / hire of vessels to DCI is set aside.

iii. The demand of Service Tax on the amounts paid for repair and maintenance of the Vessel Orwell is set aside.

iv. The demand of Service Tax on Manpower Recruitmentand Supply Agency services is upheld along with interest.

v. The penalties imposed are entirely set aside.

11. The appeals are partly allowed in above terms.

(Order pronounced in open court on 15.09.2023)

(VASA SESHAGIRI RAO) **(SULEKHA BEEVI C.S.)**

MEMBER (TECHNICAL) MEMBER (JUDICIAL)

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 41399 of 2014

(Arising out of Order-in-Appeal No. 131/2014 (MST) dated 14.03.2014 passed by the Commissioner of Customs, Central Excise and Service Tax (Appeals), Chennai-I Commissionerate, 26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai – 600 034)

M/s. Orient Flights P. Limited **: Appellant**
1/40, Mount – Poonamallee Road,St. Thomas Mount,
Alandur, Chennai – 600 016

VERSUS

Commissioner of Service Tax **: Respondent**
Newry Towers, No. 2054-I, II Avenue,
Anna Nagar, 12th Main Road, Chennai – 600 040

APPEARANCE:

Shri N. Viswanathan, Advocate for the Appellant

Shri Harendra Singh Pal, Assistant Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 40864 / 2023

DATE OF HEARING: 20.09.2023

DATE OF DECISION: 04.10.2023

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

Brief facts are that the assessee do not own an aircraft, had leased an aircraft to M/s. SG Air Leasing Ltd.for their exclusive use and it is a fact borne on record thatthe said flight belonged to the sister concern of the assessee. The narration in the Order-in-Original also reveals that from the perusal of the copy of invoice raisedon the said firm by the assessee, the assessee had not charged any tax either VAT or Service Tax. Not charging oftax under VAT, according to the Revenue, implied that there was no transfer of legal right of possession and effective control, but however, the description in the invoice was "towards charter flight charges". This was understood by the Revenue as aircraft having been leasedout by the assessee to M/s. SG Air Leasing Ltd. for their exclusive use and not just for transportation of passengers.This activity prompted the Revenue to assume that there was 'supply of tangible goods for use' service, they appear to have sought clarifications from the assessee, and after many of such exchanges of letters, Show Cause Notice came to be issued in 2010 proposing to demand Service Tax under the said category.

2. During adjudication, the original authority, having considered the explanations of the assessee and the relevant provisions of statute, however, vide Order-in-Original No. 24/2010 dated 24.11.2010 proceeded to confirm the demands proposed in the Show Cause Notice,has ordered the appropriation of payments made by the assessee, along with the interest as well.

3. Aggrieved by the Order-in-Original wherein the demand came to be confirmed against the assessee, the assessee appears to have approached first appellate authority, wherein it appears to have contested the leviability of Service Tax under 'supply of tangible goods for use' service. Even the first appellate authority vide impugned Order-in-Appeal No. 131/2014 (MST) dated 14.03.2014 having dismissed their appeal, thereby upholding the demand raised against them, the present appeal has been filed by the assessee before this forum.

4. Shri N Viswanathan, Ld. Advocate appearing for theassessee, would argue at the outset that the assessee is not contesting the demand but however the assessee is seriously aggrieved by the invocation of extended period oflimitation since right from the year 2009, there wereexchange of letters and hence the Department was very much aware of the factual background; the Show Cause Notice having been issued only in the year 2010 is, therefore, clearly after the period of limitation and hence the same is not sustainable.

5. On the other hand, Shri Harendra Singh Pal, Ld. Assistant Commissioner, defended the orders of the lowerauthorities.

6.1 After hearing both sides and after noting down the request of the Ld. Advocate that the scope of the appeal isnot against the demand, but is restricted to the invoking of the larger period of limitation, we find that the only issue to be decided by us is: "whether the Revenue is justified ininvoking the larger period of limitation under proviso to section 73(1) of the Act?"

6.2 Hence, we do not propose get into the interpretationand scope of applicability of section 65(105)(zzzzj) –'supply of tangible goods for use' service.

7.1 Admittedly, from the documents placed on record, we find that there have been quite a few exchanges of communication between the Department and the assesseeright from the year 2009, there was also a survey by the SIR wing of the Service Tax Commissionerate and finally the Show Cause Notice dated 24.05.2010 was issued proposing to demand the tax.

7.2 From the perusal of the letters/communication, we find that the appellant seriously contested the chargeabilityto tax under supply of tangible goods service, but however,only after much persuasion did the assessee pay the tax along with interest. Hence, such payment of tax andinterest is certainly not a voluntary act; it is a different matter altogether that the assessee did not collect the Service Tax from its customer. Also, the fact remains thatthe assessee was aware of the change in law with the introduction of supply of tangible goods service with effectfrom 2008, when admittedly, a tangible goods is being leased/rented, or given to use, without thereby transferring the right of possession or effective control overthe same. If there was any genuine doubt, the only optionperhaps was to pay the tax instantly and upon being pointed out, and then seek clarification from a tax expert or the Department.

7.3 This is also clear to us from the very fact that the appellant is contesting the issue of invoking larger period of limitation, that the rendering of service under the 'supplyof tangible goods' is accepted; but for survey, persuasion,etc., by the officials, the tax would have remained unpaid amounting to evasion of duty. The other fact that the rendering of service and the receipt is not shown in the ST-3 return thus clearly amounts to suppression of facts; and hence, it is a clear case of suppression of facts with intent to evade tax payment.

8. Now let us analyse the corollary; suppose we acceptthe case of the appellant to hold that there was no suppression nor with intent to evade tax, then the Revenuewould

be deprived of what is lawfully due to it. There will be refund claim with interest, which would derail the wholeprocess of collection of lawful tax, at least.

9. In view of the above, we do not see any justifiable reasons to interfere with the invocation of extended periodof limitation and hence, the same is held to be in order, for which reason we dismiss the appeal.

(Order pronounced in the open court on **04.10.2023**)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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

Service Tax Appeal No.40955 of 2014

(Arising out of Order in Original No. CHN-SVTAX-000-COM-047-13-14 dated 22.1.2014 passed by the Commissioner of Service Tax, Chennai)

M/s. Green House Promoters Pvt. Ltd. Appellant

No. 4, Ramarao Street, 1st Floor (Opp. To Bazullah Road), T. Nagar Chennai – 600 017.

Vs.

Commissioner of GST & Central Excise Respondent

Chennai South Commissionerate MHU Complex, No. 692, Anna Salai Nandanam, Chennai – 600 035.

APPEARANCE:

Smt. Radhika Chandrasekar, Advocate for the Appellant Shri N. Satyanarayanan, AC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)

Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40658/2023

Date of Hearing : 20.07.2023 Date of Decision: 08.08.2023

Per M. Ajit Kumar,

This appeal is filed by the appellant against Order in Original No. CHN-SVTAX-000-COM-047-13-14 dated 22.1.2014 passed by the Commissioner of Service Tax, Chennai who vide the impugned order has confirmed the service tax demand of Rs.5,30,04,265/- along with appropriate interest and also imposed penalties.

2. Brief facts of the case are that the appellants who are registered with the Service Tax Department for providing construction services in respect of commercial or Industrial buildings and civil structures. On intelligence that the appellant is not paying service tax on land development charges, the Survey, Intelligence and Research (SIR) Unit, Chennai took up investigation of the case. On verification and scrutiny of records of the appellant, it was noticed that the appellant was engaged in promotion of layouts/ projects which are then marketed as plot/ land for residential construction for individual customers/ commercial customers. They collected development charges from the buyers. However, the appellant neither paid service tax nor filed periodical ST-3 returns. Hence a Show Cause Notice dated 17.10.2012 was issued to the appellant proposing to demand service tax to the tune of Rs.5,30,04,265/- for the period from 2007–08 to 2011–12 under the taxable service 'Site Formation and Clearance' service as per section 65(105)(zzza) of the Finance Act, 1994, under proviso to section 73(1) of the Finance Act, 1994. Further demand of interest and imposition of penalties were also proposed. After due process of law, the adjudicating authority confirmed the service tax demand as proposed in the Show Cause Notice. He held that the appellants have rendered 'Site Formation and Clearance'

service to the buyers of the lands for which consideration towards the said activity has also been received from the buyers. He stated that it proves beyond doubt that there is a service provider and service receiver and there is a consideration for the service which is liable for service tax. The adjudicating authority has also imposed a penalty under sec. 78 of the Finance Act, 1994. Aggrieved by the impugned order, the appellants are now before the Tribunal.

3. No cross-objection has been filed by the respondent-department.

4. We have heard learned counsel Smt. Radhika Chandrasekar for the appellant and learned AR Shri N. Satyanarayanan, Assistant Commissioner for the Revenue.

5. The learned counsel Smt. Radhika Chandrasekar submitted that the appellant is engaged in construction services and real estate business. The appellant is not engaged in providing site formation and clearance services. They purchase lands from various individuals by executing valid sale deeds or by way of Irrevocable General Power of Attorney (GPA). The transaction is recognized as a valid transfer of property under Section 53A of the Transfer of Property Act. Appellant has the absolute possession and right of enjoyment over the land so purchased. Hence anything done on this land is only a self-service. The appellant developed these lands by putting layout, clearing unwanted vegetation etc. before selling the land in order to enhance the sale value of land. These activities are activities which are incidental to sale and cannot be considered as a different activity. The nature of transaction is nothing but sale of immovable property which is outside the ambit of Service Tax and development is only incidental to the sale of land. A similar pattern was followed in the sale of land to MRF Ltd (MRF). MRF entered into an agreement with the appellant for purchasing land for their new projects in Tamil Nadu. The total price was inclusive of cost of land plus development charges and this price was fixed by the parties and any amount beyond this would be borne by the Appellant. The Appellant has paid the consideration to the land owner which is indicated in the power of attorney agreement and has also discharged stamp duty. This indicates that the Appellant is not an agent but an independent party purchasing the land and selling the land to MRF and the appellant has offered the amount to Income tax. The invocation of extended period is not justified as the Appellant has not suppressed any facts. The Appellant has been filling ST-3 returns regularly and the law mandates only to inform the taxable revenue in the ST-3 returns and the appellant was under a was a bonafide belief that development charges are not liable to be taxed as the agreement is for sale of land and the development is being carried out prior to registration. She hence prayed that the impugned order be set aside.

6. The learned AR Shri N. Satyanarayanan reiterated the findings in the impugned order.

7. Heard both sides.

8. We find that on merits, this is a case in which the appellant has stated to be carrying out two types of transactions. One is an outright purchase of land that is further sold reportedly after developing it, before selling the land in order to enhance the sale value of land. Secondly, they sell the land to buyers on the strength of the GPA executed in their favour by landowners. After the execution of GPA and prior to the sale of the land to buyers they develop the land to enhance the land value. These activities according to them are activities which are incidental to sale and cannot be considered as a different activity. In both the cases they are of the opinion that since the land is in their possession anything done on this land is only self-service. The appellant is not an agent but an independent party purchasing the land and selling the land. The nature of the transaction is nothing but sale of immovable property which is outside the ambit of Service Tax. Hence two issues arise for consideration.

A) Whether on the land purchased outright by the appellant from the landowners and where site formation etc. is done after purchasing the land but before selling it, service tax is payable under the classification heading ‘Site formation and clearance’ service.

B) Whether on the land sold by the appellant as per the GPA obtained from the landowners and where site formation etc. is done after obtaining GPA but before selling

the land, service tax is payable under the classification heading 'Site formation and clearance' service.

8.1 The issue of time bar will be examined separately, if need be, after examining the issue on merits.

8.2 Before examining the above issues it would be beneficial to extract the relevant provisions of the Finance Act 1994 and also the activities of 'site formation' performed by the appellant, which is under dispute.

8.2.1 Section 65(97a) defines 'site formation and clearance, excavation and earthmoving and demolition' as under –

"site formation and clearance, excavation and earthmoving and demolition" includes —

(i) drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or

(ii) soil stabilization; or

(iii) horizontal drilling for the passage of cables or drain pipes; or

(iv) land reclamation work; or

(v) contaminated top soil stripping work; or

(vi) demolition and wrecking of building, structure or road, but does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies".

The definition is an 'inclusive' one with specific 'exclusions'. The Taxable service as per Section 65(105)(zzza) of the Finance Act, 1994 is defined as under; "to any person, by any other person, in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities"

It is relevant to note that the taxable activity is service in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities rendered 'to any person, by any other person'. Ownership of the land where the service is rendered is not mentioned and is hence not a relevant condition for determining the taxable service.

8.2.2 The relevant portions of Agreement dated 27/06/2007 between M/s MRF Ltd and Green House Promoters (Pvt) Ltd. is reproduced below:-

AND WHEREAS the Second party has further represented to the First Party that they have entered into negotiations and have obtained the authority to negotiate on behalf of the owners / occupiers of the land in the "SCHEDULE PROPERTY" hereunder and is in a position to arrange for the purchase / registration of the entire 'SCHEDULE PROPERTY' in favour of the First Party at a sale price of Rs.4,35,000/- (Rupees four lakhs thirty five thousand only) per acre inclusive of land cost and development charges etc. if any. The Second Party shall also do the development of the land post sale or simultaneously for which there shall be a fixed priced of Rs.2,90,000/- (Rupees two lakhs and ninety thousand only), thus making the total consideration per acre under this agreement at Rs.7,25,000/- (Rupees seven lakhs twenty five thousand only). The land will be conveyed to the First Party within a period of 180 days from the date of execution of this agreement. The development charges include, charges towards land approvals if any, brokerage, legal expenses, ground leveling, earth filling and fixing of boundary stones etc.

Shri R.P. Paramesh Kumar, Director of the appellants company who was jointly looking after the entire affairs of the company, has in his statement dated 21/09/2012 stated that, "they use machines if

required to level the ground, laying of roads" etc. We now examine the two issues listed above.

9. Whether on the land purchased outright by the appellant from the landowners and where site formation etc. is done after purchasing the land but before selling it, service tax is payable under the classification heading 'Site formation and clearance' service.

9.1 The appellant has stated that they are not engaged in providing site formation and clearance services, they have, in certain cases, purchased lands directly from landowners and developed the same to enhance its value before re-sale to customers. They have also produced some agreements/ sale deeds before us for perusal. It is their view that since the activity of site development in this case is self- service, no tax is payable. How site formation and clearance services is different from developing the land is not explained. They further state that the issue is squarely covered by the decision in the case of ***Hallmark Infrastructure Pvt Ltd Vs Commr. of GST & CE Final Order No. 43116 of 2018*** wherein it was held that the activity of land development which took place prior to the sale of land cannot be liable for Service Tax demand as the service was a self-service and there is no service provider and service receiver relationship. We have perused the sample agreements/ sale deeds produced by the appellant and mentioned above, in furtherance of their claim, relating to the purchase of land by them from individual landowners and its subsequent sale to different buyers as part of the layout 'Bharath Nagar'. No land development agreement clause/ charges have been shown in either of the agreements/ sale deeds. Neither was any document showing receipt of development charges paid by the buyer pertaining to the said agreements shown to us. This is not unusual as self-service would not result in income generation to be reflected in account books. It may only add to the cost of developing land which would generally be reflected/ subsumed in the sale price of land. If any land developer collects development charges separately from customers without any receipt it is perhaps illegal, with implications on taxability under various laws. Hence it appears that these lands purchased by the appellant and sold as plots to any person were not among those which have generated income from development charges as recorded in their book of accounts and mentioned in the calculations at para 4 of the SCN 319/2012 dated 17/10/2012. They are hence not the subject of the impugned order.

9.2 However, on principle it is agreed that if a landowner does site preparation/ development work on self-owned land, which work is not done on behalf of or for any person involving a consideration, then it would be self-service. The landowner would not be liable to pay service tax for such self-development of land as there is no service provider and service receiver relationship. It is also relevant to state that if the taxable service is performed for any person, by any other person, in relation to site formation and clearance etc, even on self-owned land of the service provider, then there is a service provider and service receiver relationship along with consideration involved and service tax will be payable. The ownership of land is not an issue as discussed at para 8.2.1 above. In other words, self-owned land developed as per the requirements of any person who may be a prospective buyer, whether as per an agreement written or oral, expressed or implied, <u>for which consideration is received</u> from any person will be a taxable activity as it is a service performed 'to any person, by any other person' and not a self-service. It is also seen that land developers and promoters are a dominant party and dictates their own terms, leaving it upon the buyers, either to take it or leave it. These contracts / sale deeds signed at the time of sale to buyers may apart from the sale value of land, include a consideration for land development or the charge may be paid separately under a receipt. Such contracts/ agreements involving the said separate consideration, although obviously one sided and perhaps grossly in favour of the land developer/ promoter due to the weak bargaining power of the land buyer, continue to be a document with a service provider – service receiver relationship. The development charges in the present case is paid by the buyer of land for site formation done by the seller by way of levelling, plotting, boundary marking, road layout, clearance of the area etc done by the seller so that the buyer can enjoy a vacant land which is ready for use. The land development charge paid for such site

formation carried out when such land was owned by the developer/ promoter will be liable to service tax. This aspect was not a part of the discussion in the Hallmark Infrastructure Pvt Ltd judgment (supra). The said judgment referred to a case where the site formation and clearance activity was done by the landowners themselves for themselves in such a situation payment of development charges do not arise secondly no buyer would pay development charges done by a landowner for himself. Yes they would pay a higher price for the developed land . In the instant case the site formation activity was done by the appellant but for any other person from whom they have collected a separate consideration for this activity at the time of sale of land and is hence distinguished.

9.3 Hence, when land is purchased outright by the appellant from the landowners and where it is self-developed by site formation etc. after purchasing the land but before selling it, and the development work is not done for or on behalf of any person involving a consideration being collected, service tax is not payable by the landowner. The judgements cited by the appellant are in accordance with the views stated above.

10. Whether on the land sold by the appellant as per the GPA obtained from the landowners and where site formation etc. is done after obtaining GPA but before selling the land, service tax is payable under the classification heading 'Site formation and clearance' service.

10.1 This issue is examined in the context of the 'development charges' pertaining to various projects recorded in the appellants books of account and the MRF agreement which is a matter of dispute in the present appeal. The main contention of the appellant is that they are not liable to pay any service tax as being Power of Attorney holders of the said land, they are its owners and the activity is only self-service and secondly, in the case of MRF, they have not done any development activity at all. Based on the averments made by the appellant and during the hearing a few sub-issues have come up for consideration. Whether,

- the Appellant is not an agent but an independent party purchasing the land and selling the land to MRF.

- once the possession of the land is granted to the Appellant by landowners who execute a 'General Power of Attorney' (GPA) in the appellants favour, then for all legal purposes the transaction is recognized as purchase of immovable property.
- the transaction without the execution of the sale deed is recognized as a valid transfer of property under Section 53A of the Transfer of Property Act.
- these activities are activities which are incidental to sale and cannot be considered as a different activity.
- even though there is a clause in the agreement for development, with MRF the Appellant has sold the land as it is and they have not done any development work.

- the activity done by the appellant does not amount to 'Site Formation and Clearance' service.

10.2 A plain reading of the Agreement entered into by the appellant with MRF will show that the appellant is engaged in the procurement and development of land. There is no reference to the appellant selling land as a principle to MRF. Relevant portions are extracted below;

AND WHEREAS the Second Party has represented that it is a Private Limited Company formed in 2004 which is engaged in procurement and development of land, construction of commercial, residential and industrial land / property in the State of Tamil Nadu, Karnataka and Andhra Pradesh and has the necessary expertise and infrastructure for the performance of its obligations under this Agreement.

***** ******* *******

AND WHEREAS the Second party has further represented to the First Party that they have entered into negotiations and have obtained the authority to negotiate on behalf of the owners / occupiers of the land in the "SCHEDULE PROPERTY" hereunder and is in a position to arrange for the purchase / registration of the entire 'SCHEDULE

PROPERTY' in favour of the First Party at a sale price of Rs.4,35,000/- (Rupees four lakhs thirty five thousand only) per acre inclusive of land cost and development charges etc. if any. The Second Party shall also do the development of the land post sale or simultaneously for which there shall be a fixed priced of Rs.2,90,000/- (Rupees two lakhs and ninety thousand only), thus making the total consideration per acre under this agreement at Rs.7,25,000/- (Rupees seven lakhs twenty five thousand only). The land will be conveyed to the First Party within a period of 180 days from the date of execution of this agreement. The development charges include, charges towards land approvals if any, brokerage, legal expenses, ground leveling, earth filling and fixing of boundary stones etc.

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That after being satisfied about the marketability / legality of the title / ownership of the "SCHEDULE PROPERTY" and the Registered Power of Attorney, the First Party shall call upon the Second Party to arrange for the transfer and registration of the "SCHEDULE PROPERTY" hereunder in favour of the First Party and the Second Party shall on receipt of such intimation in writing, arrange for the same for and on behalf of the owner(s) forthwith, as provided in this agreement within 180 days from the date of execution of this agreement.

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The fixed consideration / amount of Rs.7,25,000/- (Rupees seven lakhs twenty five thousand only) per acre represents the total consideration under this agreement which includes the sale price of Rs.4,35,000/- (Rupees four lakhs thirty five thousand only) of the land and the development charges of Rs.2,90,000/- (Rupees two lakhs ninety thousand only) and the difference in the actual purchase price to the Second Party shall be an adequate consideration for negotiating, fixing of price, dealing with owners and ensuring the registration of the sale deed(s) in favour of the First Party etc.

All actions in the Agreement are done by the appellant on 'behalf of the owners' only. Hence the appellant is only an agent of the landowners and not an independent party who has purchased land from the landowners and sold it to MRF.

10.3 The appellant has referred to Section 53A of the Transfer of Property Act, to assert that once the possession of the land is granted to the Appellant by landowners who execute a GPA in the appellants favour, then for all legal purposes the transaction is recognized as purchase of immovable property. The transaction without the execution of the sale deed is recognized as a valid transfer of property under the Transfer of Property Act. To examine this view it is necessary to extract Section 53A of the Transfer of Property Act, which is done below;
Section 53A of the Transfer of Property Act

Part performance.-- Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.
It is noted that the section does not deal with the transfer of title from the seller (transferor) to the prospective buyer (transferee). It only protects the transferee from certain actions by the transferor

once he has taken possession of the property. Taking possession of property does not amount to ownership of property. Hence by virtue of this section the appellant cannot claim to possess transferable tile to the land and become its actual owner. It is for this reason that the Agreement also only recognizes the appellant for performing certain actions on behalf of the landowners for which it provides for a 'brokerage'. The appellant has also signed the sale agreement with MRF only as the "power agent of the landowner" and not as the landowner. Hence, in the instant case the appellant is not even the owner of the land when they carry out site formation / development activities on the land as GPA holders. Hence, self-service is ruled out and they have to pay service tax on the site formation / development activities done by them.

10.4 The appellant has further claimed that land development activities are incidental to sale and cannot be considered as a different activity. The Appellant relies upon the decision of the Tribunal in the case of ***Ess Gee Real Estate Developers Pvt Ltd Vs CCE 2020 (34) GSTL 486*** wherein the Hon'ble Tribunal has set aside the demand under Site Formation Services on the ground that the contract is for construction and development by the Appellant therein. The said decision has relied upon the decision in the case of ***Radius Corporation Ltd Vs CCE 2014 (33) STR 416***. The Appellant also relied upon the following decisions wherein it has been held that the Site Formation and Clearance, Excavation and Earth Moving services done before mining of ores is incidental to the mining activity. The essential character of work under taken is mining and the same is classifiable under mining services and not under Site Formation.

a) ***CCE Vs Vijay Leasing Company 2011 (22) STR 553***

b) Associated Soap Stone Distributing Company Pvt Ltd Vs CST 2014 (34) STR 865

c) Ramakrishna Reddy Vs CCE 2009 (13) STR 661

All these decisions are based on a bundle of similar services of the service provider and not between an activity of service and sale. Further the appellants are only service providers and not the owners of land. Sale and service are two distinct activities. In the instant case too sale of land is by the landowners and the service of land development is an independent action performed by the appellant. To cite a similar example, it cannot be said that manufacture of goods is an activity incidental to the sale of goods and hence there cannot be a separate tax on manufacture and on sale of goods. The Hon'ble Supreme Court **In Re, Sea Customs Act, [AIR 1963 SC 1760]** has contrasted sales tax with excise duty and observed that in case of sales tax, the taxable event is an act of sale. Therefore, though both excise duty and sales-tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In the present case the imposition of service tax is on service rendered for site formation etc of land, while sale tax is on the act of sale of the land. The Appellant has relied upon the following two decisions wherein the demand of service tax was under renting of immovable property services with respect to an agreement entered into for granting license to a hotel company to run a hotel. This Hon'ble Tribunal has held that the main object of the agreement is to exploit the commercial potential of the hotel business and the use of the immovable property is only incidental and the same cannot be considered as letting of immovable property. It is submitted by the appellant that the agreement entered into with MRF is for procurement of land but not for development of land. Development is only incidental to make the land more suitable for sale.

(a) Spencer International Hotels Ltd. – F.O.No.40461-40462/2023 dt.22.06.2023

(b) Hotel Shreelekha Regency Ltd. – F.O. No. 40554 / 2023 dt.14.07.2023

We have examined the said judgements on the accepted principle that it is neither desirable nor permissible to pick out a word or a sentence from a judgment divorced from the context of the question under consideration and treat it to be complete law. Each contract has to be understood in the terms set out therein. No general principle can be evolved on the facts of the said judgments other than to say that that the main object of the agreement has to be examined for each contract or agreement and to see its objectives and to examine whether these are severable or not. When a contract is an amalgam of two or more distinct activities they are not to be understood by clubbing the same. In this case if the appellant did not carry out any development activity on the land within the time schedule provided in the Agreement, they will not have been entitled to the development charges fixed there under and may also be liable to a claim of damages by MRF, but the Agreement for sale would remain valid on its own terms. Hence the land development activities are independent and not incidental to sale. The appellant is liable to pay service tax on the development activity undertaken on the land belonging to other landowners and for which activity he has received a consideration.

10.5 The appellant states that even though there is a clause in the agreement for development, the Appellant has sold the land as it is and they have not done any development work and this is evident from the statement of their Director which is referred to in the SCN. We find that this assertion is contrary to the agreement entered into with MRF for which a sizeable amount has been fixed as development charge per acre. Further MRF vide their letter date 12/10.2011, reproduced in the impugned order, have accepted to having paid development charges in furtherance of the Agreement and also submitted the details of the debit note raised by the appellant on MRF towards development charges. On the face of it huge payments made by a company to another for no work done fails the test of something which a prudent and reasonable man would do. In the light of the wordings of the contract and it being acted upon by the appellant by claiming the amount from MRF the statement made by the Director of the appellants co can only be taken as being false and meant to wriggle out of tax liability.

10.6 To examine whether the activity carried out by the appellant amounts to 'Site Formation and Clearance' service it would be beneficial to examine the relevant provisions of the Finance Act 1994 as extracted at para 8.2.1 above. The activities of development of land carried out by the appellant as per the Agreement is also extracted at para 8.2.2 above. It is seen from the agreement and the statement of the Director that the development charges include, charges towards ground leveling, earth filling, fixing of boundary stones and laying of roads on the land etc. The appellant has received a development charge of Rs.2,90,000/- per acre. The sale price of the land has been fixed separately at Rs 4,35,000/- per acre. Ground leveling, earth filling, laying roads on the land, fixing of boundary stones etc. are part of site formation and clearance which are clearly covered by the inclusive definition of Section 65(97a) that defines 'site formation and clearance, excavation and earthmoving and demolition'. The appellants activities do not fall under any of the exclusions of the said definition. The amount received by the appellant is shown as 'development charges' in the Agreement. If any part of this charge was towards any other expenses they should have bifurcated it with the help of documents and informed the department. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Hence the service has been correctly classified and the value correctly determined in the impugned order.

10.7 We find that the validity and legality relating to the sale of land by use of GPA transactions was examined by a three judge bench of the Apex Court in **Suraj Lamp & Industries Pvt. Ltd. vs. State of Haryana & Anr.,** [Special Leave Petition (C) NO.13917 of 2009/ (2012) 1 SCC 656], and is very relevant to the legal issues involved in this case. The relevant portions are reproduced below.

" 6. In this background, we will examine the validity and legality of SA/GPA/WILL transactions. . . .

Relevant Legal Provisions

7. Section 5 of the Transfer of Property Act, 1882 (`TP Act' for short) defines `transfer of property' as under:

"5. Transfer of Property defined : In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons,

or to himself [or to himself] and one or more other living persons; and "to transfer property" is to perform such act." xxx xxx Section 54 of the TP Act defines `sales' thus:

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made. Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.-A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

Section 53A of the TP Act defines `part performance' thus :

"Part Performance. - Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract : Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

8. We may next refer to the relevant provisions of the Indian Stamp Act, 1999 (Note : Stamp Laws may vary from state to state, though generally the provisions may be similar). Section 27 of the Indian Stamp Act, 1899 casts upon the party, liable to pay stamp duty, an obligation to set forth in the instrument all facts and circumstances which affect the chargeability of duty on that instrument. Article 23 prescribes stamp duty on `Conveyance'. In many States appropriate amendments have been made whereby agreements of sale acknowledging delivery of possession or power of Attorney authorizes the attorney to `sell any immovable property are charged with the same duty as leviable on conveyance.

9. Section 17 of the Registration Act, 1908 which makes a deed of conveyance compulsorily registrable. We extract below the relevant portions of section 17.

"Section 17 - Documents of which registration is compulsory- (1) The following documents shall be registered, namely:--

xxxxx

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

xxxxx

(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.

Advantages of Registration

10. In the earlier order dated 15.5.2009, the objects and benefits of registration were explained and we extract them for ready reference
:

"The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.

Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether vested or contingent of the value of Rs. 100 and upwards to or in immovable property.

Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed. Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified."

Registration of documents makes the process of verification and certification of title easier and simpler. It reduces disputes and litigations to a large extent.

Scope of an Agreement of sale

11. Section 54 of TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in Narandas Karsondas v. S.A. Kamtam and Anr. (1977) 3 SCC 247, observed:

A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. See Rambaran Prosad v. Ram Mohit Hazra [1967]1 SCR

293. The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein." In India, the word `transfer' is defined with reference to the word `convey'. The word `conveys' in section 5 of Transfer of Property Act is used in the wider sense of conveying ownership... ...that only on execution of conveyance ownership passes from one party to another. "

In Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra [2004 (8) SCC 614] this Court held:

"Protection provided under Section 53A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed

transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party."

It is thus clear that a transfer of immoveable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immoveable property can be transferred.

12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of sections 54 and 55 of TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under section 53A of TP Act). According to TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of TP Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

Scope of Power of Attorney

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see section 1A and section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In State of Rajasthan vs. Basant Nehata - 2005 (12) SCC 77, this Court held :

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

Scope of Will 14. . . . .
Conclusion

15. Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in Asha M. Jain v. Canara Bank - 94 (2001) DLT 841, that the "concept of power of attorney sales have been recognized as a mode of transaction" when dealing with transactions by way of SA/GPA/WILL are unwarranted and not justified, unintendedly misleading the general public into thinking that SA/GPA/WILL transactions are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognize or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law."

The appellant, being engaged in procurement and development of land under a GPA, could not have missed out on the above significant Supreme Court judgement to continue to take a stand on GPA sale, quite contrary to it. In this context in **D.P. Chadha vs Triyugi Narain**

Mishra, [Appeal (civil) 1124 1998/ (2001) 2 SCC 221], the Hon'ble Supreme Court, held as follows;

"26. A lawyer must not hesitate in telling the court the correct position of law when it is undisputed and admits of no exception. A view of the law settled by the ruling of a superior court or a binding precedent even if it does not serve the cause of his client, must be brought to the notice of court unhesitatingly. This obligation of a counsel flows from the confidence reposed by the court in the counsel appearing for any of the two sides. A counsel, being an officer of court, shall apprise the Judge with the correct position of law whether for or against either party."

The judgement in 'Suraj Lamp & Industries Pvt. Ltd.' (supra) makes it very clear that a power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is only a creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him. Even an irrevocable attorney does not have the effect of transferring title to the grantee. Hence the averment of the appellant that Section 53A of Transfer of Property Act envisages situations where under the contract of transfer of immovable property the transferee has paid the consideration and taken possession of the property even without the execution of the sale deed the transfer takes place and the transaction is recognized as a valid transfer of property, is incorrect and not sustainable in law. Their entire argument of self-service hence falls through. The activity of land development as rendered by them for a consideration is hence liable to Service Tax as per the taxable service 'Site Formation and Clearance Service' under section 65(105)(zzza) of the Finance Act, 1994.

10.8 Based on the discussions above it is held that, even on the land sold by the appellant as per the GPA obtained from the landowners and where site formation etc. is done after obtaining GPA but before selling the land, service tax is payable under the classification heading 'Site formation and clearance' service.

11. The appellant states that the invocation of extended period is not justified as the appellant has not suppressed any facts. The Appellant has been filling ST-3 returns regularly and the law mandates only to inform the taxable revenue in the ST-3 returns and the appellant was under a was a bonafide belief that development charges are not liable to be taxed as the agreement is for sale of land and the development is being carried out prior to registration. The activity conducted by the Appellant and their non-payment of Service Tax on it were known to the Department from 2009. This itself shows that the Appellant had not suppressed any facts with an intention to evade payment of Service Tax. The transfer of land is also recognized under Income Tax Act. The averment of the appellant cannot be accepted. Firstly, under Income Tax laws, illegal gains can be taxed at the hands of those who financially gained from these illegal actions. Hence this fact does not come to their rescue. The development of land by site formation was done by the appellant as per a registered agreement. The Agreement states that taxes like service tax and income tax etc. are to be paid by the appellant. This should have made them verify their obligations under the Finance Act 1994. What prompted them to believe that service tax on the development charges were not tenable is not forth coming from their pleadings. Hence their bonafide's cannot be accepted since as per the Agreement they have collected service tax from MRF. The Agreement clearly mentions the land development activity to be performed and the renumeration per acre that they are to receive as a consideration for this activity. They have also on completion of the activity raised debit notes and received the consideration. The income received towards development charges has been entered in their ledger account pertaining to Income Tax. But with regard to MRF they have even suppressed the fact of receiving development charges clearly mentioned in the Agreement and paid for by MRF. The development charges received are inclusive of service tax as stated at para 11 of the Agreement and in the letter of MRF dated 12/10/2011 mentioned in the impugned order. They have shown the amounts thus collected as 'sale value', although they have not paid any stamp duty, registration charges for this value of 'sale'. Further in spite of such documentary evidence they are brazen enough to claim that no development was done on the land, just to escape from the levy of Service Tax. There is no complication in the definition of the service or the taxability of the activity as per the Finance Act 1994. It was clearly a suppression of fact from the department with the intention to fraudulently evade payment of duty. These facts would not have come to light without the investigation done by the Survey, Intelligence and Research Unit of the Service Tax Commissionerate, Chennai. In **Commissioner of Customs, Kandla Vs M/s Essar Oil Limited & Ors.** [2004 (172) E.L.T. 433 (S.C.)] it was held;

"Fraud" in relation to statute must be a colourable transaction to evade the provisions of a statute. If a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope."

It is now well settled that fraud vitiates all solemn acts. Any advantage obtained by practicing fraud is a nullity. Hence the extended period of time has been rightly invoked in this case. Moreso the very process of using GPA to claim principle-to-principle sale is a fraudulent act as highlighted in the Apex Court's judgment above. The ill effects of these transactions as held by the Apex court in Suraj Lamp & Industries Pvt. Ltd. (supra) is extracted below;

"3. The earlier order dated 15.5.2009, noted the ill-effects of such SA/GPA/WILL transactions (that is generation of black money, growth of land mafia and criminalization of civil disputes) as under: "Recourse to `SA/GPA/WILL' transactions is taken in regard to freehold properties, even when there is no bar or prohibition regarding transfer or conveyance of such property, by the following categories of persons:

(a) Vendors with imperfect title who cannot or do not want to execute registered deeds of conveyance.

(b) Purchasers who want to invest undisclosed wealth/income in immovable properties without any public record of the transactions. The process enables them to hold any number of properties without disclosing them as assets held.

(c) Purchasers who want to avoid the payment of stamp duty and registration charges either deliberately or on wrong advice. Persons who deal in real estate resort to these methods to avoid multiple stamp duties/registration fees so as to increase their profit margin.

Whatever be the intention, the consequences are disturbing and far reaching, adversely affecting the economy, civil society and law and order. Firstly, it enables large scale evasion of income tax, wealth tax, stamp duty and registration fees thereby denying the benefit of such revenue to the government and the public. Secondly, such transactions enable persons with undisclosed wealth/income to invest their black money and also earn profit/income, thereby encouraging circulation of black money and corruption.

This kind of transactions has disastrous collateral effects also. For example, when the market value increases, many vendors (who effected power of attorney sales without registration) are tempted to resell the property taking advantage of the fact that there is no registered instrument or record in any public office thereby cheating the purchaser. When the purchaser under such `power of attorney sales' comes to know about the vendors action, he invariably tries to take the help of musclemen to `sort out' the issue and protect his rights. On the other hand, real estate mafia many a time purchase property which are already subject to power of attorney sale and then threaten the previous `Power of Attorney Sale' purchasers from asserting their rights. Either way, such power of attorney sales indirectly lead to growth of real estate mafia and criminalization of real estate transactions.

It also makes title verification and certification of title, which is an integral part of orderly conduct of transactions relating to immovable property, difficult, if not impossible, giving nightmares to bonafide purchasers wanting to own a property with an assurance of good and marketable title."

Hence not only has the extended period been correctly invoked so also has penalty been correctly imposed. In an apt quotation which also applies to this case, the Patna High Court in **Syed Askari Hadi Ali Augustine vs Union Of India And Ors. [1994 (42) BLJR 1389]** at para 20 mentioned the following quote with approval;

"20. In Howard De Walden (Lord) v. IRC [1942] 1 All ER 287 (CA) at page 289, Lord Greene observed : "For years a battle of manoeuvre has been waged between the Legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow-subjects. In that battle, the Legislature has often been worsted by the skill, determination and resourcefulness of its opponents, of whom the present appellant has not been the least successful. It would not shock us in the least to

find that the Legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers."

In the circumstances the imposition of penalty is justified as per law.

12. With regard to the discussions above, we hereby reject the appeal filed by the appellant and uphold the impugned order. The appeal is disposed of accordingly.

(Pronounced in open court on 08.08.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

Rex

Back

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 40791 of 2014

(Arising out of Order-in-Appeal No. 23/2014 (M-III) ST dated 10.02.2014 passed bythe Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai – 600 034)

M/s. N.M. Zackriah & Co. **: Appellant**
Gudiyattam Road, Thuthipet – 635 811

VERSUS

Commissioner of Service Tax **: Respondent**
Chennai-III Commissionerate

APPEARANCE:

Shri Arun Kurian Joseph, Advocate for the Appellant

Shri Harendra Singh Pal, Assistant Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 40748 / 2023

DATE OF HEARING: 11.08.2023

DATE OF DECISION: 01.09.2023

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

The brief and admitted facts leading to the present dispute are that the appellant is engaged in the manufacture and export of Full Shoes and Shoe Uppers falling under TSH 64 of the Schedule to the Central ExciseTariff Act, 1985 and is utilizing the services under 'goods transport agency service' and commission agents located outside India under 'business auxiliary service' in relation to export of goods.

1.2 It appears that the appellant had filed Form EXP-1 dated 20.11.2009 to avail exemption from payment of Service Tax relating to two specified services, under Notification No. 18/2009-S.T. dated 07.07.2009. The appellant filed Form EXP-2 dated 31.12.2010, based on which they claimed exemption from payment of Service Tax.

2. The Revenue appears to have noticed that the appellant had claimed exemption from payment of ServiceTax in respect of 52 shipping bills, out of which 51 shippingbills related to the period from 08.12.2009 to 31.03.2010 for which the details were submitted only on 31.12.2010 instead of the due date i.e., 15.10.2010. The Revenue alsoappears to have noticed that the appellant had not complied with the stipulated condition that original documents reflecting actual payment of commission alongwith a copy of the contract must be enclosed in terms of paragraph 4 under Col. (4) of Sl. No. 2 of the said Notification. The same thus resulted in the issuance of Show Cause Notice dated 11.08.2011.

3. Considering the explanation offered by the appellant, in adjudication, the original authority passed the Order-in-Original No. 8/2012 (Service Tax) dated 16.08.2012, thereby confirming the

demand as proposed in the Show Cause Notice.

4. It is against the order confirming the demand that the appellant approached the first appellate authority, buthowever, even the first appellate authority, having rejectedtheir appeal vide impugned Order-in-Appeal No. 23/2014 (M-III) ST dated 10.02.2014, the present appeal has beenfiled before this forum.

5. Heard Shri Arun Kurian Joseph, Ld. Advocate and

Shri Harendra Singh Pal, Ld. Assistant Commissioner.

6.1 In the impugned order, the Commissioner (Appeals) has observed that the adjudicating authority had denied the benefit of exemption since the appellant did not fulfil the conditions specified under Notification No. 18/2009-
S.T. *(supra).* He has further observed that the appellant did not produce the documents namely, (i) shipping bills,
(ii) agreement/contract with the agent and (iii) original documents showing the actual payment of commission to the agent.

6.2 Further the first appellate authority has also observed regarding delayed filing of the EXP-2 return; thatin terms of proviso (c) to the Notification *(supra),* the sameshould be filed every six months of the financial year, within fifteen days of the completion of the said six months.In this regard he has relied on the following decisions: -

- *Government of India v. Indian Tobacco Association [2005(187) E.L.T. 162 (S.C.)]*

- *Commissioner of C.Ex., Shillong v. Sanganariya WoollenMills (P) Ltd. [2001 (138) E.L.T. 381 (Tri. – Kol.)]*

7.1 Ld. Advocate contended that the appellant had utilised the services of commission agents located outsideIndia; that when the Show Cause Notice was issued proposing to deny the exemption, they had submitted all the details and that the appellant was paying the commission only after realization of sale proceeds from their buyers, which would normally take about two to threemonths from the date of export clearance from theirfactory and hence, the exemption from Service Tax on the commission could only be claimed at the time of payment of commission to its foreign commission agents and not atthe time of shipping of the goods; hence, full details of thecommission paid in respect of clearance is mentionedunder Table A could not be furnished as per Table B withinthe time-limit prescribed and that since the goods exportedby them would not have reached their buyers as the shipments were made through sea, the commission wouldnot become payable.

7.2 It is contended that it is a case of only a procedurallapse and that no exporter could fulfil the conditionsprescribed under the said Notification i.e., filing of the documents within 15 days from the date of export; exemption is thereafter claimed on the service tax payableon commission paid to foreign commission agent and as such, the forms have been duly filed within the stipulated time from the date of payment of commission and hence the date of dispatch of goods cannot be made relevant datefor denying the exemption. They have relied on the following orders: -

i. HEG Ltd. v. Commissioner of Cus., C.Ex. & S.T., Bhopal[2019 (29) G.S.T.L. 730 (Tri. – Del.)]

ii. Praj Industries Ltd. v. Commissioner of Central Excise,Pune-III [2017 (3) G.S.T.L. 341 (Tri. – Mum.)]

iii. Radiant Textiles Ltd. v. Commissioner of C.Ex.,Chandigarh-II [2017 (47) S.T.R. 195 (Tri. – Chan.)]

8. *Per contra*, the Ld. Departmental Representative supported the findings of the lower authorities.

9. The only point of dispute is whether the claim of exemption made by the appellant is correct in all respectsand in compliance with the Notification No. 18/2009-S.T. *(supra).*

10. When the benefit of an exemption Notification is sought to be availed, the Hon'ble Supreme Court has heldin the case of *Commissioner of Customs (Import), Mumbai v. Dilip Kumar & Company [2018 (361) E.L.T. 577 (S.C.)]*that such exemption Notifications should be construedstrictly, that is to say the appellant should strictly adhere to the conditions specified under such exemption Notification.

11.1 We find from a perusal of the Order-in-Original thateven as on the date of personal hearing, the appellant wasasked to furnish the details of clearances effected during the half-year for which the return was filed under Table A along with the details of specified services used for export, which should be filed under Table B. Further, out of the 52clearances shown under Table A, only one clearance involved under shipping bill no. 3763008 dated 27.05.2010was relevant and to this extent, therefore, the original authority accepts the exemption claim towards commissionpaid.

11.2 Further, the original authority also observes that theappellant did not produce the original documents showingactual payment of commission to their foreign commissionagents during the period from 01.04.2010 to 30.09.2010 and that they also did not file corresponding Table B in thisregard.

11.3 He further observes that the EXP-2 return itself contains a declaration to the effect that failure to file the return within the stipulated period would debar from availing exemption from payment of Service Tax. He thus concludes that the exporter-appellant had failed to substantiate their claim for exemption in terms of Notification No. 18/2009-S.T. dated 07.07.2009.

12. Neither from the pleadings before the lower authorities nor before us, either in the statement of facts or in the grounds of appeal, do we see any effort being made by the appellant to dislodge the above factual findings of the original authority. Though they have contended *inter alia* that the details of exemption paid could not be furnished within the time-limit prescribed forfiling EXP-2 return, the issue was only procedural factor and no exporter can fulfil the above condition, the exemption was claimed on Service Tax payable on commission paid to foreign commission agents, etc., the fact however remains that the production of shipping bills showing commission paid, agreement with such foreign agents and original documents, which were necessarydocuments, are not filed by the appellant. It is therefore clear that the appellant has not fulfilled the conditions of the exemption Notification.

13. In this regard, the following observations of the Hon'ble Supreme Court in the case of *Dilip Kumar &Company (supra)* are relevant wherein, after considering various decisions, it was ruled as under: -

"52. To sum up, we answer the reference holding asunder -

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notificationwhich is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) ....

.."

14. In view of the above discussion, we do not find any merit in the appellant's case and

consequently, the appealis dismissed.

(Order pronounced in the open court on **01.09.2023**)

Sd/-	Sd/-
(M. AJIT KUMAR)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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Back

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

CHENNAI

REGIONAL BENCH – COURT No. III

Service Tax Appeal No. 40232 of 2014

(Arising out of Order-in-Original No. 07/2013-ST dated 07.10.2013 passed by Commissioner of Customs, Central Excise and Service Tax, No. 1, Foulk's, Compound, Annai Medu, Salem – 636 001)

Commissioner of GST and Central Excise **...Appellant**
Salem Commissionerate, No. 1, Foulkes Compound,Anaimedu,

Salem – 636 001.

Versus

M/s. King Network **...Respondent**
No. 162,

Mettur Road, Parimalam Complex,Erode – 638 011.

And

Service Tax Appeal No. 42699 of 2014

(Arising out of Order-in-Original No. 07/2013-ST dated 07.10.2013 passed by Commissioner of Customs, Central Excise and Service Tax, No. 1, Foulk's, Compound, Annai Medu, Salem – 636 001)

M/s. King Network **...Appellant**
Proprietor : N. Sivakumar, No. 85, Gandhiji 2nd Street,Carmel School Opp.,

Erode – 638 002.

Versus

Commissioner of GST and Central Excise **...Respondent**
Salem Commissionerate, No. 1, Foulkes Compound,Anaimedu,

Salem – 636 001.

APPEARANCE:

For the Assessee : Ms. P. Jayalakshmi, Advocate

For the Revenue : Mr. Rudra Pratap Singh, Additional Commissioner / A.R.

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL) HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 22.11.2023DATE OF DECISION : 10.01.2024

FINAL ORDER Nos. 40036-40037 / 2024

Order :- [Per Mr. VASA SESHAGIRI RAO]

Service Tax Appeal No. ST/ 42669 /2014 has been filed by M/s. King Network, Erode assailing the Order-in-Original No. 07/2013 dated 07.10.2013 passed by the Commissioner of Central Excise, Salem Commissionerate confirming demands of Service Tax of Rs.2,89,84,753/- and Rs.20,31,400/- under the Category of "Cable Operator including Multi System Operator Service" for the periods from 01.07.2006 to 31.03.2010 and April 2010 to June 2010 respectively, Rs.8,77,118/- under Business Auxiliary service for the period from 01.12.2006 to 31.03.2010, under proviso to Section 73(1) of the Finance Act, 1994 by invoking the extended period and also levy of interest under Section 75, late fee under Section 70 and imposition of penalties under Sections 76, 77(2) and 78 of the
Finance Act, 1994.

2. The Service of Cable Operator has been introduced into Service Tax net with effect from 16.08.2002. The services of Multi System Operator has been included in the category of Cable Operator Service w.e.f. 10.09.2004 by virtue of Notification No. 25/2004– ST dated 10.09.2004. As per Section 65(21) and 65(22)of Finance Act, 1994, "cable operator" shall have the meaning assigned to it in clause (aa) of Section 2 of the Cable Television Networks (Regulation) Act, 1995 (7 of 1995); (22) "cable service" shall have the meaning assigned to it in clause (b) of section 2 of the Cable Television Networks (Regulation) Act, 1995 (7 of 1995). As per the definition contained in Cable Television Network (Regulation) Act, 1995 (7 of 1995), Cable Operator means:-

"any person who provides cable service through a Television Network or otherwise controls or is responsible for the management and operation of cable television network'.

Similarly, Cable Service in the Act ibid means, "the transmission by cables of a programme including re-transmission by cable of any broadcast televisionsignals".

As per Section 65(105)(zs) of Finance Act, 1994, "taxable services' means any service provided or to be provided "to any person by a cable operator including a multi system operator in relation to cable services". As such cable operator as well as Multi System Operator who sends signals through a cable operator or otherwise are taxable under Cable Operator service w.e.f 10.09.2004.

3. Brief facts leading to the institution of the present appeals are that the Assessee, started business on 13.07.2006, obtained registration on 31.07.2006 and were engaged in rendering taxable services under the service categories "Cable Operator including Multi System Operator Service" and "Business Auxiliary Service". Though, the Assessee got registered on 31.07.2006 for "Cable Operator including Multi System Operator Service" but failed to get endorsement in the registration certificate for "Business Auxiliary Service". The Department was of the view that the Assessee had rendered services in as much as he received "Link Charges" from the cable operators and received commission from various pay channels such as Sepro Holding (P) Ltd., New Delhi Television, S.S. Music, Raj
T.V. etc. from December 2006 onwards till March 2010 on which appropriate Service Tax was not paid. It was also found that the Assessee had not filed periodical ST-
3 returns in respect of services rendered by them andnot paid Service Tax. Thus, the Assessee hascontravened the provisions of Section 69 and 70 of the Finance Act, 1994 read with Rules 4 and 7 of the ServiceTax Rules, 1994. As such, the interest is leviable on the Service Tax payable under Section 75 and penalty imposable under Section 76, 77 and 78 *ibid*.

4. Consequently, a Show Cause Notice No. 25/2011 dated 18.04.2011 was issued to the Assessee by the Commissioner of Central Excise, Salem proposing to demand the Service Tax of Rs.2,89,84,753/- on CableOperator including Multi System Operator Service for the period from 01.07.2006 to 31.03.2010 and Rs.8,77,118/- on Business Auxiliary Service for theperiod from December 2006 to March 2010 besides proposing to levy interest under Section 75 and to propose penalties under Sections 76, 77 and 78 of Finance Act,1994. The SCN also proposed to appropriate amounts of Rs.31,36,046/- paid towards demand on Cable operator service and Rs.5,65,026 paid towardsinterest. Subsequently another Show Cause Notice dated 17.10.2011 was issued to the Assessee proposing to demand Service Tax of Rs.20,31,400/- on Cable Operator including Multi

System Operator Service for the period April 2010 to June 2010. After due process oflaw, the Adjudicating Authority confirmed the above demands, appropriated an amount of Rs.66,74,966/- already paid by the Assessee under Cable Operator including Multi System Operator Service, besides levying interest under Section 75 after appropriating an amount of Rs.9,24,341/- paid towards interest and imposed equal penalty under Section 78 by invoking extended period **from July 2006 to March 2010** and penalty under Section 76 and 77 and demanded late feeof Rs.54,000/- for delayed filing of ST-3 returns under Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994 while appropriating Rs.20,000/- already paid by the Assessee towards late fee.

5. Aggrieved by the above Order, the Assessee is on appeal before this forum.

6. Service Tax Appeal No. ST/40232/2014 has been preferred by the Department against the impugnedOrder-in-Original No. 07/2013 dated 07.10.2013 seekingimposition of Penalty under Section 78 of the Finance Act, 1994 instead of under Section 76 *ibid*, fornon-payment of Service Tax during the period April 2010to June 2010.

7.1 The Ld. Advocate Ms. P. Jayalakshmi representing the Assessee submitted that the Assessee started business on 13.07.2006 and obtained registration on 31.07.2006 after which the Range Officer, Erode-I Range *vide* letters dated 27.06.2007 and25.07.2007 directed him to pay Service Tax with appropriate interest which makes it clear that the existence and activities of the Assessee were under the watch of the department. The Assessee wished to submit that they could not pay the Service Tax due to insurmountable financial crisis they were facing then. In the meantime the Divisional Preventive officers sought for details and based on the documents furnished by the Assessee, a statement was recorded from him on 24.12.2008 in which the assessee haddeposed that he was broadcasting channels to the cable operators, that the charges to the networks were paid along with service tax and such Service Tax paid was eligible as service tax credit; that proper accounts were maintained for the same and the service tax credit wouldbe adjusted against the tax dues and the remaining amounts would be paid before 29.12.2008 and accordingly an amount of Rs.31,36,046/- was paid on 29.12.2008 followed by payments on various dates.

7.2 It was averred that the firm was audited by the Central Excise Audit party during August 2009 wherein the Audit party while raising objections, took cognisance of the tax paid after adjustment of the CENVAT credit in Para 3/3A and worked out the interest but theRespondent Department have not considered the CENVAT credit while working out tax liability for theperiod April 2009 to June 2009.

7.3 The Ld. Counsel further contended that the Ld. adjudicating authority failed to consider the various submissions and evidences on record while passing the impugned order. In this regard, the Ld. Counsel would refer to the observations in Para 23 of the impugned order that the adjudicating authority was not concerned with the Assessee's eligibility for CENVAT credit was badin law and liable to be set aside. The Assessee averred that the entire exercise is revenue neutral in as much as the invoice raised would contain the tax particulars which are eligible for availing credit; thatwhen a substantial portion of demand is available as credit, the intention to evade tax is unsustainable rendering the whole situation revenue neutral; the non- consideration of this vital fact vitiates the whole proceedings rendering the impugned order liable to be set aside. Regardless of the fact, the Assessee wished tosubmit that it is settled law, even in the case of clandestine removal, demand would be made only after appropriating CENVAT credit and in this regard cited the judgements in the case of

(i) *Rukmini Inustries Vs. Commissioner of Central Excise,Hyderabad reported in [2014 (308) ELT 649 (AP)]* and

(ii) Dhananiwala Textiles Vs. Commissioner of Central Exicse reported in [2001 (130) ELT 233].

7.4 It was contended that subsequent to the above, he had received a letter dated 14.07.2010 from thedepartment calling for details in respect of Commission received from the pay channels from

01.02.2009 to 31.03.2010 which was followed by a summon and hence both the notices were hit by limitation.

7.5 It was pointed out that ST-3 returns for the period 01.07.2006 to 31.03.2008 were submitted by registered post on 03.06.2009 itself along with a late fee. Further, it was mentioned that except the sum of Rs.6,93,446/- paid under challan dated 02.08.2011 all other amounts have been paid prior to issue of SCN.

7.6 It was submitted that out of the total demand ofRs.3,18,93,277/- (First SCN for Rs.2,98,61,877/- plus Rs.20,31,400/- for second SCN), the Assessee had CENVAT credit of Rs.2,37,87,918/- which was sought as adjustment and an amount of Rs.68,09,156/- was already remitted in cash. Of the amounts paid, exceptthe sum of Rs.6,93,446/- paid under challan dated 02.08.2011, all other amounts were paid prior to issue of Show Cause Notice and the Assessee was making arrangements to pay the balance amount of Rs.12,96,196/-. Further, an amount of Rs.9,23,341/-was paid towards interest and Rs.20,000/- was paidtowards late fee for belated filing of ST-3 returns and hence the provisions of Section 73(3) are squarely applicable as the entire amount was paid along with interest 22 months prior to issuance of Show CauseNotice.

7.7 It was submitted that delayed payment or non- payment of tax cannot be construed as suppression of fact and hence extended period could not be invoked.The Assessee being highly law abiding always took pleasure in discharge of their statutory obligations even in the face of unmanageable financial crunch. It was stated that the question of imposing penalty does not arise in view of the fact that the Assessee had already discharged their liability due. It was pointed out that theentire demand was worked out based on details providedby the Assessee sourced from books of accounts maintained thereby obviating any room for allegation of suppression warranting invocation of extended period. Inthis regard, reliance was placed on the following judicial pronouncements: -

(i) Orissa Bridge and Construction Corporation Vs. CCE,Bhubaneshwar reported in [2011 (264) ELT 14 (SC)].

(ii) Commissioner Vs. Gammon India Ltd. Reported in[2002 (146) ELT A313 (SC)].

(iii) Commissioner of Central Excise, Mangalore Vs. PalsMicrosystems Ltd. reported in [2009 (234) ELT 428 (Kar.)].

(iv) CCE, Mangalore Vs. Pals Microsystems Ltd. Reported in[2011 (270) ELT 305 (SC)].

(v) Right Resources management Services Vs. Commissioner of CGST,CE & Customs Dehradun & Ors.-[2023 (11) TMI 100-CESTAT, New Delhi].

(vi) Rangoli Division Vs. Commissioner (Appeals) CE & CGST, Jaipur– [2023 (9) TMI 930-CESTAT- New Delhi)].

(vii) Kushal Fertilisers (P) Ltd. Vs. Commissioner of Customsand Central Excise, Meerut-[2009 (5) TMI 13-SC].

(viii) Borana Pumps Vs. Commissioner of CGST, Customs &C.Ex, Jodhpur-I- [2021 (378) ELT 189 (Tri.-Del)].

(ix) Birla Corporation Ltd.- [2003 (152) ELT 428 (Tri.-Del.)].

(x) Shri Balaji Industrial Products Ltd. Vs. Commissioner of Customs & C.Ex, Jaipur– [2019 (370) ELT 280 (Tri.- Del.)].

(xi) Reliance Life Insurance Company Ltd. Vs.Commissioner – [2018 (19) GSTL J66 (Tri.-Mumbai)].

(xii) Tally Solutions Limited Vs. Commissioner of C.Ex, Bangalore – [2020 (41) GSTL 520 (Tri-Bang.)].

(xiii) Ace Creative Learning Pvt. Ltd. Vs. Commissioner of C.T, Bengaluru South GST Commissionerate – [2021
(51) GSTL 393 (Tri.-Bang.)].

(xiv) Kanak Metal Industries Vs. Commissioner of CGST, Jodhpur – [2022 (61) GSTL 598 (Tri.-Del.)].

(xv) Nizam Sugar Factory Vs. Collector of Central Excise, APreported in [2006 (4) TMI 127-SC].

8.1 The Ld. Authorised representative Shri RudraPratap Singh representing the Revenue reiterated the findings of the lower Adjudicating Authority and submitted that the impugned order dealt with findings covering both the Show Cause Notices and has not givenseparate finding for each of the SCN. It was pointed out that in Para 38 of the impugned order Penalty wasimposed under Section 78 for the period up to31.03.2010 and under Section 76 for the period April 2010 to June 2010, though the adjudicating authority had held that offence of suppression had continued even after issuance of Second Show Cause Notice and in Para

27 of the impugned order, the charge of contravention the provisions of Service tax with a deliberate intention and failure to pay service tax was proved.

8.2 The Ld. Authorised Representative has referred to the decision rendered in the case of *Lok Priya Travels Vs. Commissioner of Service Tax, Ahmedabad [2012 (25) STR 499 (Tri.-Ahmd.)]* wherein it was held *inter alia*that, "though it was a fact that they have taken Service Tax registration, they never disclosed the nature of services rendered nor they furnished ST-3 returns, whichwas mandatory for a person providing taxable services. The question naturally arises that if they were not awarethat they had to pay Service Tax, why should they take a Service Tax registration. We are of the opinion that non-furnishing of information or non-filing of returnsresulted in non-payment of Service Tax and this actionon the part of Assessee tantamount to deliberate non- compliance with the provisions. In other words, this is only implying suppression of facts with an intent to evade payment of Service Tax. Therefore, the extended period, under Section 73(1) is rightly invoked by the Revenue". Hence, the allegation of suppression and the consequent invoking of the extended proviso in this caseis amply justified.

8.3 He has also referred to the decision in the case of *M/s. Safe & Sure Marine Service Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai [2012 (28) STR (Tri.-Mumbai)]* wherein it was held *inter alia* that the Assessee, after having collected the tax from their customers, have never informed the Department of the same and have suppressed the facts from the Department and therefore, the extended period of time has been rightly invoked in the instant case. The above ratio is squarely applicable in this case.

9. Heard both sides and carefully considered the submissions and evidences on record.

10. The following issues arise for decision in this appeal:

(i) Whether the Assessee is eligible to avail and utilise the input service credit on various services availed?

(ii) Whether invocation of extended period in terms of proviso to Section 73(1) of the Finance act, 1994 is maintainable or not considering the facts of the case?

(iii) Whether imposition of penalties under Section 76, 77 and 78 of the Finance Act, 1994 are justified and whether in accordance with the provisions of the law or not?

11. We find from appeal records that the Assessee commenced business on 13.07.2006 and obtainedregistration for Cable Operator Service from the Department on 31.07.2006 though failed to take anendorsement for BAS. A Show Cause Notice dated 18.04.2011 was issued to the Assessee proposing todemand Service Tax of Rs.2,89,84,753/- on Cable Operator service for the period from July 2006 to March 2010 and Rs.8,77,118/- on Business Auxiliary Service forthe period December 2006 to March 2010.

Subsequently, another Show Cause Notice dated 17.10.2011 was issued to the Assessee proposing todemand Service Tax of Rs.20,31,400 on Cable Operator service for the period April 2010 to June 2010. Wefurther find that, out of the total demand of Rs.3,18,93,277/- in the two show cause notices, theAssessee paid an amount of Rs.68,09,156/- in cash and Rs.2,37,87,919 by way of utilising CENVAT credit and the balance amount payable was Rs.12,96,196/- towards Service Tax dues. The adjudicating authority while confirming evidence of payment of Rs.68,09,156/- by the Assessee in the schedule of payments discussed in Para 22 of the impugned order, has appropriated an amount of Rs.66,74,996/- *vide* the impugned order. The Assessee also paid Rs.9,24,341/- towards interest due and R.20,000/- towards late filing of ST-3 returns which were appropriated by the lower authority vide the impugned order. The above amounts were paid wellbefore issuance of the first Show Cause notice.

12.1 On the issue of eligibility of CENVAT Credit on input services availed, we find that in the case of *Rukmini Inustries Vs. Commissioner of Central Excise, Hyderabad* reported in *[2014 (308) ELT 649 (AP)]*, it was held that there is no specific rule rendering manufacturer ineligible for availing MODVAT credit when such manufacturer is involved in suppression of turnoveror clearance of goods out of record and benefit of MODVAT credit to the extent of input utilized in manufacture of dutiable finished product cannot be denied under Rule 57B of erstwhile Central Excise Rules, 1944. The relevant portion of the judgement is reproduced below:-

"16. *The very premise on which a show cause notice was issued resulting in the adjudication order fastening liability of the excise duty, is that appellant had in fact purchased raw material in 27 third parties names and utilized the said raw material in manufacture of a dutiable product and cleared the finished product without payment of duty. In the process of adjudicationthe authorities recorded a finding that in fact the appellant was involved in procurement of raw material and manufacture and sale of dutiable product and demanded tax. It is not in dispute that in normal circumstances the appellant would have been eligible toavail Modvat credit on the purchase of LAB, raw material, which was used in the manufacture of the dutiable product. The Modvat credit is sought to be denied to the appellant on the ground that the appellant had involved in suppressing the turnover. A perusal of the Rules would show that there is no rule prohibiting extending the benefit of Modvat credit in a case where it is found that there was a suppression of manufacture and clearance of dutiable goods. Thoughin the context of the Income Tax Act, we may refer to the judgment of the Supreme Court referred to above, wherein the Hon'ble Supreme Court in Commissioner of Income Tax, Gujarat v. S.C. Kothari [AIR 1972 SC 391] held as follows :-*

The approach of the High Court in the present case has been thatin order to arrive at the figure of profits even of an illegal business the loss must be deducted if it has actually been incurred in the carrying on of that business. It is the net profit after deducting the out goings that can be brought to tax. It certainly seems to have been held and that view has not been shown to be incorrect that so far as the admissible deductions under S. 10(2) are concerned they cannot be claimed by the, assessee if such expenses have been incurred in either payment of a penalty for infraction of law or the execution of some illegal activity. This, however, is based on the principle that an expenditure is not deductible unless it is a commercial loss in trade and a penalty imposed for breach of the law during the course of the trade cannot be described as such. Penalties which are incurred for infraction of the law is not a normal incident of business and they fall on the assessee in some character other than that of a trader; (See Haji Aziz & Abdul Shakoor Bros. v. Commissioner of Income-tax, Bombay City(2). In that case this Court said quite clearly that a disbursement is deductible only if it falls within S. 10(2)(xv) of the Act of 1922 anda penalty cannot be regarded as an expenditure wholly and exclusively laid for the purpose of the business. Moreover disbursement or expense of a trader is something "which comes out of his pocket. A loss is something different. That is not a thing which he expends or disburses.

That is a thing which comes upon him abextra" (Finlay J., in Allen v. Farquharson Brothers & Co.) (3). If the „business is illegal neither the profits earned nor the losses incurred would be enforceable in law. But that does not takethe profits, out of the taxing statute. Similarly the taint of illegality of the business cannot detract from the losses being taken into account for computation of the amount which can be subjected to tax as "profits" under S. 10(1) of the Act of 1922. The tax collectorcannot be heard to say that he will bring the gross receipts to tax. He can only lax profits of a trade or business. That cannot be done without deducting the losses and the legitimate expenses of the business. We concur in the view of the High Court that for the purpose of S.10(1) the losses which have actually been incurred in carrying on a particular illegal business must be deducted before the true figure relating to profits which have to be brought to tax can be computed or determined. This will, however, not conclude the answer to question No. 2 because it seems to have been framed with the other aspect relating to "set off under S.24 of the Act.

17. *Applying similar analogy, in the absence of a specific rule making the manufacturer to be ineligible for availment of Modvat credit when such manufacturer is involved in suppression of turnover/clearance of goods out of the record, we are of the view that Modvatcredit to the extent of input utilized in manufacture of dutiable finished product is leviable and the benefit of the same cannot be denied. In that view of the matter, question No. 3 is required to be answered in favour of the appellant and against the Revenue."*

12.2 In *Dhananiwala Textiles Vs. Commissioner ofCentral Excise* reported in *[2001 (130) E.L.T. 233 (Tri. - Chennai)]*, it was held that the order of denial of MODVAT Credit is not correct in law when duty paid goods were used in the manufacture of dutiable final products. The relevant portion of the judgement has been reproduced below:-

"3.(b) Our findings are as under :-

(i) There is no finding or allegation that POY, procured from M/s. Sanghi and texturised and cleared without duty determination thereon was non-duty paid. In fact the SCN and the findings link the invoices in different names issued by M/s. Sanghi as payment of duty. If that be so, it can be concluded that it is an admitted position that texturising was done on duty paid POY. There is no dispute that the assessee had filed declarations under Rule 57A, the duty paying invoices are available, goods are being found to have beenbrought to the factory, therefore we see no reason not to grant the Modvat credit, if on the final product (Textured yarn) duty is being determined and demanded. The bar of Rule 57E is applicable only to non duty paid or inadequate duty paid inputs and not tofull duty paid inputs as in this case. Therefore, the order of denial of Modvat credit by the Commissioner is not correct in law. His reliance on the case of Mihir Textiles [1997 (92) E.L.T. 9 (S.C.)] is not correct as that decision is with regard to classification of imported goods under registered contract and is not applicable toModvat credit. Once inputs (POY in this case) is held to be duty paid and duty is demanded on Texturised yarn and also in 1996-97 the exemption granted under mnotification is being denied and goods are being treatedas dutiable. Therefore, we find Modvat credit cannot be denied as the issue is no longer res integra there being a catena of judgments supporting the eligibility of the same, even in cases of clandestine removal viz. GujaratAmbuja Cement v. C.C.E. - 1996 (85) E.L.T. 154;
Indian Oxygen Ltd. - 1995 (80) E.L.T. 573; Saphire

Steels (P) Ltd. - 1994 (71) E.L.T. 1049.

(ii) Not only we find that Modvat credit eligibility willbe required to be worked out

but the demand on the final texturised yarn and its value may need not be worked out for purposes of duty and turnover by applying the Supreme Court decision on the appeal of Modvat credit on Valuation in the case of Dai Ichi Karkaria [1999 (112) E.L.T. 353 (S.C.)].

(iii) for the above purposes, the orders are requiredto be set aside and remanded for determination of the actual amounts of duty to be payable and thereafter a re-determination of penalty is required to be arrived at under Rules 9(2), 52A and 226."

12.3 We find that the in Paragraph 23 of the impugned order, the lower authority dismissed the claim for adjustment of CENVAT credit against Service Tax dues on the ground that the question of admissibility is not the subject matter in the Show Cause Notice. The said view cannot be accepted. CENVAT Credit being a substantive right, same ought to have been extended at the time of quantifying the demand. The law under CENVAT Credit Rules, 2004, does not say that the adjustment of Credit is not to be allowed, if the returns are filed belatedly. On such score, disallowance of creditis not legal and proper. Eligible credit has to be allowed for adjustment to compute the assessee's tax liability. However, the amount of credit has to be verified. The assessee has furnished the table showing the details of the credit available. Even as per Audit report, it was informed that they are eligible for CENVAT Credit. However, we are of the opinion that matter ofcomputation on CENVAT Credit eligible needs to be remanded to the original adjudicating authority for the limited purpose of verifying the amount of credit asfurnished in the table and allow the adjustment towards liability. As such, the lower adjudicating authority is directed to requantify the duty liability after adjusting the CENVAT Credit amount.

13.1 Regarding, the invocation of extended period, on a perusal of Section 73 it is amply clear that any tax not levied or paid, short levied or short paid is recoverable from the petitioner. The show cause notice for realization of tax not levied or paid or short levied or short paid could be issued within one year from the relevant date. After amendment with effect from 28th May, 2012 by the Finance Act, 2012, the period of limitation is 18 months instead of one year. However, in view of the Proviso, where Service Tax has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud, collusion, willful mis-statement, suppression of facts or contravention of any of the provisions of Chapter V ofthe Finance Act, 1994 with intention to evade ServiceTax notice may be issued within five years instead of oneyear. Admittedly, in this case, notice has been issued on18th April, 2011 for the years 2006-07, 2007-08, 2008- 2009 and 2009-2010 by invocation of the extended period. The question is whether the conditions precedentfor invocation of the extended period of limitation existed or not? The reasons for invoking the extended period of time are stated in paragraph 4.01 of the Show Cause Notice dated 18.04.2011 which are that the Assessee have willfully suppressed the facts to gain unlawful monetary benefitsby evading payment of Service Tax though received linking charges from the cable operators and hence the extended period under the proviso to Section 73(1) is invokable in the case. Again, in Para 25of the impugned order, the adjudicating authority has confirmed invocation of Section 73(1) on the ground thatthe Assessee had not paid Service Tax and not filed Service Tax returns with an intention to gain financial accommodation.

13.2 It is not in dispute that the assessee though hadcommenced business in July 2006 has not filed the returns and has not paid the Service Tax. The assessee was found recording the CENVAT Credit eligible on their payment to various TV channels and he was collecting link charges from various cable operators. The first cashpayment

of Service Tax was made on 29.12.2008 andthe statutory returns were filed only on 03.06.2009 which was three year after the commencement of business. Service Tax dues were paid at various intervals from 29.01.2008 to 02.06.2011. There are many decisions by the Tribunal and Higher Courts to support the view that extended period is invokable whenthe assessee has failed to pay the Service Tax and failed to file the ST-3 returns though conducting his business throughout the Notice period. Due to persistent efforts by Audit and preventive sections could only make the assessee to pay the tax and file returns.

13.3 The non-payment of Service Tax collected along with the link charges from the cable operators had resulted in undue financial accommodation and therefore the suppression indulged has all necessary elements to be considered as having been resorted to with intent to evade payment of Service Tax. In such a situationextended proviso is rightly invokable as held by theCESTAT, Mumbai in the case of *M/s. Safe & Sure Marine Service Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai [2012 (28) STR (Tri.-Mumbai)]* wherein it was held *interalia* "*that the appellant, after having collected the tax from their customers, have never informed the Department of the same and have suppressed facts fromthe Department and, therefore, the extended period of time has been rightly invoked in the instant case*. The above ratio is squarely applicable in this case". Considering the facts and circumstances of this case and relying upon the above decision, we have no hesitationto hold that the extended period of limitation in terms of the proviso to Sub-Section (1) of Section 73 of ChapterV of the Finance Act, 1994 is rightly invokable in this case.

13.4 Non-payment of Service Tax and non-filing of returns would tantamount to clear cut suppression of facts committed with intention to evade payment of duty, as held in the case of *Lok Priya Travels Vs. Commissioner of Service Tax, Ahmedabad [2012 (25) STR 499 (Tri.-Ahmd.)]* wherein it was held *interalia* that,*"Though it was a fact that they have taken Service Tax registration, they never disclosed the nature of services rendered nor they furnished ST-3 returns, which was mandatory for a person providing taxable services. The question naturally arises that if they were not aware thatthey had to pay Service Tax, why should they takeService Tax registration. We are of the opinion that non-furnishing of information or non-filing of returns resultedin non-payment of Service Tax and this action on the part of appellants tantamount to deliberate non-compliance with the provisions. In other words, this is only implying suppression of facts with an intent to evade payment of Service Tax. Therefore, the extended period, under Section 73 (1) is rightly invoked by the Revenue"*. Hence the allegation of suppression and the consequent invoking of the extended proviso in this caseis amply justified.

14.1 The Ld. Advocate for the assessee has drawnour attention to the decision in the case of *Orissa Bridge and Construction Corporation Vs. Commissioner of Central Excise, Bhubaneshwar [2011 (264) ELT 14 (SC)]*, contending that the Show Cause Notice in the instant case was issued after more than 2 years from undertaking the Audit of the assessee and so the Department is not justified in invoking extended period. He has also relied upon the decision rendered by the Hon'ble High Court of Karnataka in the case of *Commissioner of Central Excise, Mangalore Vs. Pals Microsystems Ltd. [2009 (234) ELT 428 (Kar.)]* whereinit was held that Show Cause Notice alleging suppression issued in much delayed manner as time-barred. Many other decisions were cited by the Ld. Advocate in support of his contention that extended period is not invokable as all the facts were in the knowledge of the Department and the duty amount was computed on the basis of assessee's records.

14.2 We have carefully gone through all these decisions. It is not disputed that the assessee though has collected linking charges from the cable operators, but not

paid the due Service Tax for the period from 2006 to 2009 and also not filed returns which were done belatedly consequent to conducting the Audit of the assessee's unit and also due to investigations started by the Department. The facts obtaining in this appeal are so distinguishable.

15. The Ld. Advocate has argued that the Service Tax dues have been paid substantially before the issuance of the Show Cause Notice and requested for extension of the benefit of Section 73(3) of the Finance Act, 1994. The impugned order No. 07/2013-ST dated 07.10.2013 has recorded the payments made by the Assessee amounting to Rs.68,09,156/- and the last instalment being on 02.06.2011 whereas the Show Cause Notice issued was dated 18.04.2011 covering the period from July 2006 to March 2010.

16. We find, the Department has filed an appeal*vide* No. 40232 of 2014 for non-imposition of penalty under Section 78 of Finance Act, 1994 for Service Tax demanded and confirmed in the second Show CauseNotice No. 98/2011-ST dated 17.10.2011 which was issued demanding and confirming Service Tax of Rs.20,31,400/- for the period from April 2010 to July 2010. Though the Show Cause Notice dated 17.10.2011 was issued invoking extended period, the adjudicating authority has imposed the penalty under Section 76 of Finance Act, 1994 and not under Section 78 of theFinance Act, 1994. The Show Cause Notice was issued covering four Months period. The appellant has paid the Service Tax dues except for one instalment of Rs.6,93,446/- on 02.06.2011. There is no justification for invoking the extended period in this case. The adjudicating authority has rightly imposed only the penalty under Section 76 of the Finance Act, 1994. We do not find any merit in Department's appeal.

17. Imposition of Penalties:-

i. As has been already held that extended period is invokable as above, the assessee is liable for penalty under Section 78 of the Finance Act, 1994.However, the penalty amount will be equivalent to the tax payable after adjustment of the CENVAT Credit eligible to the assessee which has to be computed on remand.

ii. The first Show Cause Notice covers the periodfrom July, 2006 to June, 2010. With effect from 10.05.2008, a proviso was inserted in the Finance Act, 2008 which reads as follows.

"Provided also that if the penalty is payable under this Section, the provisions of Section 76 shall not apply."

The above makes it clear that there is no statutoryprovision prior to 15.05.2008, restraining imposition of penalty under both Sections i.e., Section 76 and 78 of the Finance Act, 1994.

In respect of second Show Cause Notice, penalty was imposed on the appellant under Section 76 of the Finance Act, 1994 for non-payment or delayed payment of Service Tax for period from April, 2010to June 2010.

Considering the peculiar circumstance of the case as the appellant has paid substantially the Service Tax amount before the issuance of the Show Cause Notice No. 25/2011 dated 18.04.2011, we consider it as sufficient cause to waive the penalties imposed under Section 76 of the Finance Act, 1994 in terms of provisions of Section 80 of the Finance Act, 1994 in respect of both the ShowCause Notices.

iii. However, penalties imposed under Section 77 ofthe Finance Act, 1994 are not disturbed.

18. The original adjudicating authority is directed asdiscussed in Paragraph 12.3 to arrive at the Service Tax payable after allowing the adjustment of CENVAT Credit eligible. Thus, the appeal No. 42699 of 2014 filed by theassessee is partly allowed

and partly remanded. The appeal No. 40232 of 2014 filed by the Revenue is dismissed.

(Order pronounced in open court on 10.01.2024)

Sd/-	Sd/-
(VASA SESHAGIRI RAO)	**(SULEKHA BEEVI C.S.)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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Back

IN THE CUSTOMS, EXCISE & SERVICE TAXAPPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.41287 to 41290 of 2013

(Arising out of Order in Original No. 117 to 120/2012 dated 28.11.2012 passed bythe Commissioner of Service Tax, Chennai)

Aban Offshore Ltd. **Appellant**
(formerly Aban Loyd Chiles Offshore Ltd.)Janpriya Crest, No. 11, Pantheon Road Egmore, Chennai- 600 008.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai North Commissionerate 26/1, Mahatma Gandhi Road Nungambakkam, Chennai – 600 034.

APPEARANCE:

Smt. Radhika Chandrasekar, Advocate for the AppellantShri Harendra Singh Pal, AC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial) Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40078 to 40081/2024

Date of Hearing : 20.09.2023Date of Decision: 24.01.2024

Per M. Ajit Kumar,

These appeals are filed by the appellants against Order inOriginal No. 117 to 120/2012 dated 28.11.2012 passed by the Commissioner of Service Tax, Chennai. (impugned order)

Brief facts of the case are that the appellant is engaged in providing offshore drilling services to oil majors. They are also registered with the Service Tax Department for providing other taxableservices. While providing the offshore drilling service, the appellant engaged the services of various service providers located outside India,to provide engineering consultancy, management consultancy, testing & inspection and banking service. On receiving intelligence that the appellant has neither obtained service tax registration for receiving thesubject services nor paid service tax on reverse charge basis in termsof Rule 2(1)(d)(iv) of Service Tax Rules, 1994, the Directorate Generalof Central Excise Intelligence (DGCEI), Chennai Zonal Unit'sinvestigated the matter culminating in issuance of Show Cause Notice'sfor the period from 2003 – 04 to September 2011 as detailed in the annexure to the impugned order, under the relevant provisions of theFinance Act, 1994 (FA, 1994). After due process of law, the adjudicating authority revised and confirmed the demand for service tax of Rs.7,31,87,545/- with equal penalty under section 78 of FA 1994for the extended period and Rs 55,40,497/- along with penalty under section 76 of FA 1994 for the normal period. A penalty was also imposed for non-filing of ST3 Returns. Aggrieved by the said order, theappellant is now before the Tribunal assailing the findings and the demand confirmed.

2. No cross-objection has been filed by Revenue.

3. We have heard learned Counsel Smt. Radhika Chandrasekar forthe appellant and Shri Harendra Singh Pal, learned AC (AR) forRevenue.

3.1 The learned Counsel for the appellant made a preliminary technical objection that Show Cause Notice No.23/2009 has been issued by the Additional Director General (ADG), DGCEI and is hence not maintainable. With respect to demand of duty for Management Consultancy Services she stated that M/s. India Offshore Inc., (IOI) is
required to provide technical documentation and know-how for efficientoperation of the rigs and service. The Appellant had correctly registered the service under the category of Intellectual Property Services and had discharged service tax. With respect to Consulting Engineering Services, the Appellant has entered into agreement for supply of manpower. Having accepted registration under the categoryof Manpower Recruitment or Supply Agency Service (MRSAS), the department cannot tax the same under a different head. In terms of Section 65A of Finance Act, 1994 specific description prevails over general description. With respect to Banking and Financial Services shesaid that the Appellant had entered into an agreement with Barclays Bank PLC to advise and assist the Appellant in acquiring funds throughissue of Foreign Currency Convertible Bond (FCCB). The proceeds havebeen received outside India after deduction of amount due to the foreign consultant. Hence the charge is not tenable. With respect to Technical Inspection and certification services she said that the appellant had rendered service with respect to rigs situated in the non-designated area and therefore there is no liability to pay service tax. With respect to Legal Consultancy Services she stated that the impugned order accepts that the legal fees were paid in connection with legal issues outside India. Having accepted that the entire activityhas taken place outside India the confirmation of demand under legalconsultancy services is not tenable. Further since the Show Cause Notice No.23/2009 is barred by limitation, extended period is not invocable as there is no suppression, fraud etc. as required under proviso to Section 73. She prayed that the impugned order be set aside

3.2 The learned AC (AR) stated that the Appellant has all along beenreluctant to share details of their activities as pointed out in the impugned order, which has discussed all the issues elaborately. The non-submission and late submission of the information was deliberateand hence the extended period of time has been invoked correctly. Hereiterated the points given in the impugned order on behalf of Revenueand prayed that the appeal may be rejected.

3.3 Having gone through the appeal papers and having heard the rival parties, we proceed to examine the dispute relating to theclassification of various services. The issues examined in this order aregiven in the table below:

S. No.	Subject	Para No.	Page No.
1.	**Jurisdiction of ADG DGCEI to issue SCN**	5	4
1(a)	Complexities of Administration and Shared Jurisdiction	5.7	10
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3.	**Consulting Engineering Services Vs. Manpower Recruitment Service**	7	15
3 (a).	The Test Of Employer and Employee or Master and Servant relation	7.8	20
4.	**Management Consultancy Services Vs. Intellectual Property Service**	8	22
4(a)	Additional Evidence – The Legal Issues Involved	8.7	29
5.	**Banking and Financial Services**	9	31
5(a)	The Entire Activity Takes Place Outside India, Hence Not Taxable	9.3	32

4. Jurisdiction of ADG DGCEI to issue Show Cause Notice

4.1 The appellant is of the opinion that the show cause notice issuedby the ADG, DGCEI, is untenable in terms of the Hon'ble Supreme Court judgment in the case of **M/s Canon India Pvt Ltd. Vs. Commissioner Of Customs** [Civil Appeal No.1827 of 2018], whereinit was held that by virtue of sections 2(34) and 28 of the Customs Act,1962, the ADG, Department of Revenue Intelligence (DRI) is not a proper officer to issue SCN demanding the customs duty in respect ofgoods which have already been assessed and cleared by the Deputy Commissioner of Customs.

4.2 We find that in **Hari Khemu Gawali Vs Deputy Commissionerof Police, Bombay and another** [AIR 1956 SC 559], a **ConstitutionBench** of the Apex Court stated:

"It has been repeatedly said by this Court that it is not safeto pronounce on the provisions of one Act with reference todecisions dealing with other Acts which may not be in pari materia."

It would hence not be proper to examine the issue of jurisdiction of DGCEI officers under the Service Tax law based on the Canon India Judgment (supra).

4.3 The various other sub-issues raised by the Appellant regarding the disability caused by DGCEI issuing the SCN are listed below.

A) Where the statute confers the same power to perform an act ondifferent set of officers, as in this case, the said officers i.e. ADG, DGCEIand Commissioner of Service Tax, Chennai, cannot exercise their powers in the same case, especially when they belong to different departments. In the Appellant's view, this would result in an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.

B) When the Legislature employed the definitive article 'the' under Section 73 of Finance Act, 1994, the same is with the intention to designate the power to such proper officer. In the case of ***Shri Ishar Alloy Steels Ltd Vs Jayaswals Neco Ltd (2001) 3 SCC 609*** it washeld that 'the' is the word used before nouns with a specifying or particularizing effect as opposed to the indefinite or generalizing forceof 'a' or 'an'. Therefore, in the absence of specific power vested on theDGCEI through Section 73, the Show Cause Notice issued by him is notlegally maintainable and liable to be quashed.

C) The words 'Assistant Commissioner of Central Excise' or 'Deputy Commissioner of Central Excise' was substituted with the word 'CentralExcise Officer' only with effect from 13.05.2005 vide Finance Act, 2005,hence a DGCEI officer who has vested with the powers that are exercisable by the Central Excise Officer from that day only and couldnot have issued the SCN earlier. When the laws specifically provides that SCN has to be issued only by the Commissioner of Central Excisethe notice issued by the Assistant Commissioner is not valid.

D) It is submitted that even post 13.05.2005 the officers appointedby the Board cannot be considered as Central Excise Officer for the purpose of Section 73 in the absence of specific power vested on the DGCEI through Section 73 and therefore the Show Cause Notice issuedis not legally maintainable.

4.4 We find that these issues have been addressed comprehensivelyby the Original Authority in the impugned order. Para's 6.0 to 6.2. of which is reproduced below, with approval.

"6.0 The assessee contended that the issuance of SCN by the ADG, DGCEI is without jurisdiction and hence notmaintainable in law. They further argued that theCommissioner of Service Tax is not empowered to adjudicate the notice issued by ADG, DGCEI. I have examined the contentions made by the assessee. I find thatthe same has been raised without noticing and appreciatingthe changes made in this regard. The

Central Government vide Notification No. 3/2004-ST dated 11.3.2004 have appointed ADG (DGCEI) as a Central Excise Officer for wholeof India and have vested in him all the powers that are exercisable by the Central Excise officers. Further, by virtueof the provisions of section 12E of Central Excise Act, 1944,which is made applicable to service tax matter, a Central Excise Officer is empowered to exercise the powers and duties of any other central excise officer, who is subordinateto him. Therefore, when an Assistant / Deputy Commissioner in competent to issue Show Cause Notice fordemand of service tax under section 73, then the ADG (DGCEI) having all India jurisdiction by virtue of NotificationNo. 3/2004-ST dated 11.3.2004 is fully competent to issuethe present Show Cause Notice under consideration.

6.1 Further, it is well settled proposition of law that the provisions prevailing as on the date of issue of Show CauseNotice are alone applicable for determining the level of officers to issue Show Cause Notice. Accordingly, the provisions of section 73 as amended vide Finance Act, 2005are applicable for issue of Show Cause Notice on or after 13.5.2005 irrespective of the period of demand. I also referto the order passed by the Hon'ble Tribunal in the case of **ETA Travel Agency** 2007 (7) STR 454 (TRI), wherein the Tribunal rejected identical objections raised by the appellantof the case regarding the competency of ADG (DGCEI) in issue Show Cause Notice. Hence I find no force in the argument that ADG, DGCEI is not empowered to issue subject SCN and I reject the same. I hold that SCN has beenissued properly and legally by the ADG (DGCEI) and the same is valid in the eyes of law.

6.2 It is also pertinent to see Board's Circular No. 80/1/2005-ST dated 10.8.2005 instructing that all pendingShow Cause Notices shall be disposed of in terms of revisedpower of adjudication which makes it clear that the Commissioner is empowered to adjudicate the Show CauseNotice issued within his monetary powers. Hence, I reject the contentions of the assessee as not sustainable and holdthat the ADG, DGCEI is competent to issue Show Cause Notice and the Commissioner of Service Tax is empowered to adjudicate the same."

Further the Board vide **Circular No. 80/1/2005–ST, dated 10.08.2005** has clarified that with the objective of enabling expeditious adjudication of service tax cases, section 73 of the said Actwas amended vide Finance Act, 2005, whereby the words — 'Assistant/Deputy Commissioner of Central Excise' were substituted by the words
— 'Central Excise Officer'. Section 83A was also inserted in the said Actfor the purpose of conferring powers on the Central Excise Officer for adjudging a penalty under the provisions of the said Act or the rules made thereunder. The above provisions came into force with the enactment of Finance Bill, 2005 on 13/05/2005. Since the earliest SCNin this case was issued on 26/03/2009 we do not find any infirmity in this regard.

4.5 It may further be added that over the years State activities havebecome multifarious and the role of the State's Administrative machinery has grown to at times co-exist with the powers of one another. Considering the wide ramifications of sovereign functions, it would not be wrong to say that we live in an age of overlapping and concurring regulatory jurisdiction. This is reflected in the very definitionof 'Central Excise Officer' as per **section 2 of the Central Excise Act1944**, which is reproduced here under;
SECTION 2. Definitions

In this Act, unless there is anything repugnant in the subject or context, -

(a) . . . . .

(aa) . . . . .

(aaa) . . . .

[(b) "Central Excise Officer" means the [Principal Chief Commissioner of Central Excise, Chief Commissioner of Central Excise, Principal Commissioner of Central Excise],Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, [Joint Commissioner of Central Excise] [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] or any other officer of the Central ExciseDepartment, or any person (including an officer of the State Government) invested by the Central Board of Exciseand Customs constituted under the Central Boards ofRevenue Act, 1963 (54 of 1963) with any of the powers ofCentral Excise Officer under this Act.]

The section empowers the Board to invest any person (including an officer of the State Government) with any of the powers of Central Excise Officer under this Act.

4.6 Once a person is empowered under the Act there is no statutorybar on his exercising the powers given there under even if administrative instructions proscribe his activities. His actions will remain legally valid as there is no jurisdictional error even if there mayhave been the transgression of an administrative circular. The Hon'bleSupreme Court in **Pahwa Chemicals Private Limited Vs Commissioner of Central Excise, Delhi,** [2005 (181) E.L.T. 339 (S.C).] examined a similar matter and held that the Board can only issue such direction as is necessary for the purpose of and in furtherance of the provisions of the Act. The instructions issued by theBoard have to be within the four corners of the Act. If, therefore, the Act vests in the Central Excise Officers jurisdiction to issue show- cause-notices and to adjudicate, the Board has no power to cut down that jurisdiction. However, for the purposes of better administration oflevy and collection of duty and for purpose of classification of goods the Board may issue directions allocating certain types of works to certain Officers or classes of Officers. These administrative directions cannot take away jurisdiction vested in a Central Excise Officer under the Act. At the highest all that can be said is Central Excise Officers, as a matter of propriety, must follow the directions and only deal with thework which has been allotted to them by virtue of these Circulars. Butif an Officer still issues a notice or adjudicates contrary to the Circularsit would not be a ground for holding that he had no jurisdiction to issuethe show cause notice or to set aside the adjudication.

Complexities of Administration and Shared Jurisdiction

4.7 Hence statutes that parcel out authority or jurisdiction to multipleagencies are perhaps the norm, rather than an exception. Hon'ble Justice Krishna Iyer of the Supreme Court in the case of **Avinder Singh Etc vs State Of Punjab & Anr. Etc,** [1979 AIR 321 / 1979 SCR (1) 845 / 1979 SCC (1) 137] had stated that, 'this is a trite proposition but the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies, difficulties and need for flexibility . .' There are many variants of shared jurisdiction regimes, and all need not be treated identically by the law. The **University of Chicago Public Law & Legal Theory Working PaperNo. 161, 2007**, has examined the matter academically and stated that:

"Combining the dimensions of exclusivity and completenessyields four potential statutory schemes.

1. Congress could delegate complete and exclusive jurisdiction. Agency A is given the authority to regulate X1, where X1 is a subset of X (X1⊂ X). Agency B is given authority to regulate X2, where X2 is a subset of X (X2⊂ X). In the complete and exclusive regime, there is no policy authority held simultaneously by both agencies; that is, $X1 \cap X2 = \emptyset$. And the combination of the policyspace regulated by both agencies is the entire policy space, X1UX2 = X. If the space X is represented with a circle, a single line dissecting the circle marks the jurisdictional divisions, with A getting all authority on one side of the line and B all authority onthe other.

2. Congress could delegate incomplete and exclusive jurisdiction.If the policy space X continues to represented by a circle, this statutory scheme excepts a subset of the policy space from the jurisdiction of either agency A or B. The remainder of the space is exclusively within either the jurisdiction of agency A or B. Thatis, the sets of authority delegated to agencies A and B remain disjoint, $X1 \cap X2 = \emptyset$. However, the union of A and B does not occupy all of the policy space; X1U X2 ⊂ X. The important difference between regimes (1) and (2) is that some potential authority in the policy field that could have been given to an agency is not given to either agency. This is jurisdictional underlap.

3. Congress could delegate complete authority to agencies A and B, but with nonexclusive jurisdictional assignments. In this regime, all of the potential authority within space X is delegated,but some authority is given to both agencies. The authority mightbe perfectly overlapping, such that X1=X2=X. Or more likely, each agency is given some exclusive jurisdiction, but some subsetof authority is also jointly held by both agencies such that$X1 \cap X2=X3 \subset$ X. That is, jurisdiction is partially overlapping.

4. Lastly, Congress might generate a non-exclusive shared jurisdiction scheme in which the grant of authority is incomplete (or non-exhaustive). At least some portion of each agency's authority is also shared with the other agency. What differentiatesregime (4) from regime (3) is that there is also some subset of the policy space not clearly given to either agency, such that X1 U X2 ⊂ X. Regime (4) carves out a portion of

potential authority that is not given to either government entity, although of coursethe scope and existence of this pocket will usually be ambiguous.Jurisdiction in this scheme is both overlapping and underlapping. [Jacob Gersen, "Overlapping and Underlapping Jurisdiction in Administrative Law" (University of Chicago Public Law & Legal Theory Working Paper No. 161, 2007)]." (emphasis added)

This illustration using set theory showing the many potential schemesfor allocation of jurisdiction available to a foreign democratic government is not the last word on the subject and is only to show thecomplex area of shared jurisdiction that Government across the world grapple with. Hence grant of jurisdiction to administrative functionariesis a matter of individual State policy. The Appellants view, that this would result in an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute, is not anuniversally accepted view.

4.8 The appellant has stressed on the article 'the' before the words 'Assistant Commissioner or Deputy Commissioner of Central Excise'. InEnglish usage "the" is termed as the "definite article" while indefinite articles are "a" and "an." Therefore, it is the Appellants view that in theabsence of specific power vested on the DGCEI officers through Section73, the Show Cause Notice issued by him is not legally maintainable and liable to be quashed. As noted earlier, Section 73 of the FA, 1994was amended with effect from 13.5.2005 much before the issue of thefirst SCN, to enable expeditious adjudication of Service Tax cases. Furter definite article only specifies that the noun referred to is one which is an already known one. What it is, must be identified by the context of the matter under consideration. In this case it refers to theauthority competent to adjudicate the matter as empowered by law and not by 'any' Assistant Commissioner. Further the appointment andjurisdiction of Central Excise Officers are as per **Rule 3 of the CentralExcise Rules, 2002**. Rule 3 as it stood on 01/03/2002 states:

RULE 3. Appointment and jurisdiction of Central Excise Officers-

(1) The Board may, by notification, appoint such person asit thinks fit to be Central Excise Officer to exercise all or anyof the powers conferred by or under the Act and these rules.

(2) The Board may, by notification, specify the jurisdictionof a Chief Commissioner of Central Excise or Commissionerof Central Excise or Commissioner of Central Excise (Appeals) for the purposes of the Act and the rules made thereunder.

(3) Any Central Excise Officer may exercise the powers and discharge the duties conferred or imposed by or underthe Act or these rules on any other Central Excise Officer who is subordinate to him.

Certain changes in the designation of officers were made in Rule 3(2) on 30/06/2017 only to accommodate newly designated officers. In thelight of Rule 3(3) any officer superior to the officer who is empoweredto issue demand notice and adjudicate notice under Section 73 of Finance Act, 1994 can do the same if the officer designated is subordinate to him. Hence so long as the officer has the jurisdiction to issue a notice there is no infirmity in his action. Having issued a notice,as discussed above, it cannot be insisted that the same officer shouldalso adjudicate the matter. There is no such legal necessity as seen from the Pahwa Chemicals judgment (supra). There can be a segregation between the preventive and assessment functions amongofficers who share concurrent jurisdiction on a tax collection matter. Adjudication can be done by the other officer who enjoys concurrent jurisdiction in the matter, more so if he happens to be the jurisdictionalofficer looking after assessment work relating to the Appellant in the normal course.

4.9 Whether DGCEI officers are "Central Excise Officers" or not was examined by the Hon'ble Madras High Court in **M/S. Redington (India) Limited vs Principal Additional Director, Directorate General of Goods and Services Tax, Chennai** [2022 (62) GSTL 406(Mad)] dated 17/06/2022. It was held that without doubt, the officersfrom the Directorate are "Central Excise Officers" as they have been vested with the powers Central Excise officers.

4.10 As per the discussions, the averments of the Appellant fails to convince us of any jurisdictional error in the maintainability of the SCN.Having found no merit in the preliminary technical objection, we now examine the other issues raised by the Appellant.

5. <u>Contracts / Agreements and the Best Evidence Rule</u>

5.1 The dispute between the contesting parties is based on the Agreement entered into by the Appellant

with various service providerslocated outside India. Every agreement that is enforceable in law is a contract in the realm of private law. Section 91 of the Indian Evidence Act, 1972 gives immense importance to documentary evidence over oral ones. Hence when written agreements and documents are available they are the best evidence to demonstrate a fact or to understand it. Further, as per section 106 of the Evidence Act, the factwithin the knowledge of a person must be proved as the burden is castupon him. The Apex Court in **Mohan Lal Sharma Vs. UOI and Another** [1981 AIR 1346] observed that the cardinal rule in the law ofevidence is that only the best available evidence should be brought before the court of law to prove a fact or the point in issue. The Apex Court again in its judgment in **Smt. J. Yashoda Vs Smt. K. Shobha Rani** [AIR 2007 SC 1721], went on to define the best evidence rule stating that 'so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proofin relation to it'. It has been held by courts that the nomenclature of any contract, of document, is not decisive of its nature otherwise cleverdrafting can camaflouge the real intention of the parties. In itsjudgment in **Great Eastern Shipping Company Ltd. Vs State Of Karnataka [2020 (32) G.S.T.L. 3 (S.C.)]** the Apex Court stated at para 13 as under:

13. It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designedto actualize. It comprises the joint intent of the parties. Every such contract expresses the autonomy of the contractual parties'private will. It creates reasonable, legally protected expectationsbetween the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required todetermine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It isnot the intent of a single party; it is the joint intent of both the parties and the joint intent of the parties is to be discovered fromthe entirety of the contract and the circumstances surrounding itsformation.

The above principles shall be a guide for the discussions below.

6. Consulting Engineering Services Vs. Manpower Recruitment Service

6.1 As regards the first classification dispute, traditionally under manpower supply, employees whose services are supplied on a temporary basis or otherwise are hired under a contract of service, andthe hirer, i.e., the employer, has complete control over the work and manner in which it is done (apart from other tests of an employer- employee relationship which will be discussed later). Consultants on the other hand are hired under a contract for service to advice on specific tasks with minimal supervision.

6.2 It is the Appellants contention that they have entered into an agreement with M/s. International Offshore Management Inc., USA (IOMI) Noble Denton Agency, OCS Services Ltd. and Transworld International, for temporary supply of manpower falling under MRSAS.The Appellant has registered under the category and has reportedly discharged service tax which is taxable with effect from 16.06.2005. It's the Departments case that as per the agreement IOMI has to provide the Appellant, Drilling Services Consultancy with experienced Consultants for the safe and sound operation of its Offshore Drilling Units and the activity come under the taxable service of "consulting engineer". The Agreement with IOMI has been examined in theimpugned order.

6.3 It would be essential at this stage to examine the definition of 'consulting engineer service' and MRSAS.

Section 65(13): "consulting engineer" means any professionally qualified engineer or an engineering firm who,either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to a client in one or more disciplines of engineering." (emphasis added)

Section 65(48): "taxable service" means any serviceprovided- (g) to a client, by a consulting engineer in relationto advice, consultancy or technical assistance in any mannerin one or more disciplines of engineering."

6.4 The definition of "Manpower Recruitment or Supply Agency'sServices" (MRSAS) under section 65(68) of the Finance Act, 1994 provides that "Manpower Recruitment or Supply Agency Service''means 'any person engaged in providing any service directly orindirectly in any manner for recruitment or supply of manpower, temporarily or otherwise in any manner to any other person". (emphasis added).

6.5 The 'Agreement' between the Appellant and IOMI as placed in the Appeal booklet is given as under. The abbreviation IOM in the Agreement refers to IOMI as used in this order:

SERVICE AGREEMENT

This agreement made and entered into this 15th of December20001 by and between **Aban Loyd Chiles Offshore Ltd. (*)**a company incorporated under the Companies Act of 1956 and having its registered office at No. 113, Janpriya Crest, Pantheon Road, Egmore, Chennai – 600 008 (herein referredto as 'ABAN') and International Offshore Management Inc. a company incorporated under the Laws of Texas, USA and having its registered office at 8303, Southwest Freeway, Suite 335, Houston, Texas 77074, USA (herein referred to as'IOM') on the part.

ABAN and IOM is hereby agree as follows:-

1. IOM shall provide ABAN Drilling Services Consultancy with experienced Consultants for the safe and sound operation of its Offshore Drilling Units ABAN – II or ABAN – III and HITDRILL – 1.

2. The services shall include Consultants for Drilling Technology, Electrical and Mechanical maintenance andRig move operations.

3. As compensation ABAN shall pay IOM USD 1750 per Rigper day and the amount shall be remitted to IOM's BankAccount within 30 days of presentation of monthly invoices. In the event of any change in the number of consultants deployed, the amount payable by ABAN shall be adjusted upwards for additions and downwardsfor reductions as mutually agreed from time to time.

[Per day for each position USD]

Drilling Consultant	400.00	On 28 days on
Mechanical, Electrical, Barge, maintenance Consultants	400.00	28 days offbasis

4. In order to render Drilling Services as required under Clause – I IOM shall provide sufficient experienced technical manpower teams as per mutual requirementsfrom time to time.

5. ABAN shall give IOM 28 days written notice of intent tochange the team complement or any individual consultant team members.

6. IOM shall be responsible for all payments to the consultants except otherwise expressly provided in theagreement.

7. ABAN shall pay all transportation costs and air fare as provided below, food and lodging costs while in India (including catering while on the Rigs of European / US Standards), safety equipment and all other costs in India, such as local reception, stopover, meals, additional travel etc. IOM shall bear the cost of insurance of their team of Technical Consultants provided by them.

8. IOM will ensure that the Technical Consultant providedvide Clause – I above are professionally competent, experienced and qualified in their respective areas andshall agree to conform to all reasonable rules andregulations promulgated by ABAN or ONGC for drilling operations on the Rigs. Should ABAN feel for just causethat the conduct of any of the Technical Consultant is detrimental of ABAN's interests. ABAN shall notify IOMin writing for removal giving the proper reasons. IOM shall remove and replace such member / members of Technical Consultant at IOM's expense within seven days. ABAN shall effect a reduction in the amount payable to IOM at the rates mentioned in paragraph 3 above. The person / persons so removed shall not be again included as a Technical Consultant without the prior written consent of ABAN.

9. The rates provided for in paragraph (3) above are validthrough March 31, 2003.

10. This agreement is effective 1st January 2002 and may be terminated only by giving IOM a written notice by either party of 90 days to the other.

11. The agreement is subject to applicable Indian laws.

12. ABAN shall withhold corporate tax from payments to IOM on the basis of deemed profit of 10% as providedunder section 44BB of the Indian Income Tax Act.

ABAN shall furnish to IOM quarterly the copies of challans evidencing payment of such taxes.

In the event that corporate tax liability in India of IOM is determined in excess of the rate pursuant to section 44BB ofIndian Income Tax Act 1961 such excess would be fully compensated by ABAN to IOM by immediately upward revision of individual day rate.

All taxes in the country of incorporation of IOM including corporate income tax, if any, assessable on IOM under the laws of that country shall be borne by IOM.

Any dispute between ABAN and IOM shall be resolved throughmutual discussions and if the resources has not obtain through negotiation the matter shall be referred to arbitrationunder the Laws of International Chamber of Commerce,London.
(emphasis added)

(*) - Now known as Aban Offshore Ltd. i.e. the Appellant

7.5 The Agreement may now be examined in terms of FA 1994. Withrapid changes in the work environment and the highly specialized andsophisticated nature of work it is doubtful whether the search for a formula in the nature of a single test to identify a Consultant is possible. However, in the impugned context it may be profitable to lookat some of the definitions of the term 'consultant'. In **CIT v. Bharti Cellular Ltd.** [2009] 319 ITR 139 / [2008] 175 Taxman 573 (Delhi), the Hon'ble High Court of Delhi has observed that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. The Appellant has also drawn attention to thejudgment of the Tribunal in the case of **Basti Sugar Mills Co. Ltd. vs.CCE Allahabad** [2007 (7) STR 431 (Tri-Del)] wherein it was held thatthe activity of a mediator Service cannot fall in to the category of business consultant service. That what is envisaged from a consultantis primarily an advisory service and not the actual performance of themanagement function. This case was upheld by Supreme Court [2012(25) STR 3154 (SC)].

7.6 In the context of the discussions above two points emerge.

Firstly, a contract is to be interpreted according to its purpose [see Great Eastern Shipping Company (supra)]. Secondly "consultant" is aderivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. However highly skilled operations may require the hiredconsultant to be present at site, temporarily or otherwise depending on the needs of the industry or hirer, to facilitate an immediate consultation.

7.7 It is the contention of Revenue that clause 1 of the Agreement begins by stating that IOMI shall provide the Appellant Drilling ServicesConsultancy with experienced Consultants for the safe and sound operation of its Offshore Drilling Units. We find that the term 'consultant' permeates the entire agreement, ruling out a linguistic mistake. The compensation that the Appellant has to pay IOMI is in USD per Rig per day (clause 3). The agreement states that IOMI shallbe responsible for all payments to the consultants. Hence the paymentsreceived by the person hired does not reflect as being between the appellant as an employer to an employee. The fact that the hired personnel are available at site on a continuous 28-day basis before taking a break (clause 4), could be due to administrative exigencies and convenience, necessitating such an arrangement. The Consultantsare hired for the safe and sound operation of its Offshore Drilling Unitswhich would by and large involve them advising the Appellant at the spot and not for operating the rigs, as would be expected of hired
labour. Thus, the matrix of fact regarding the engagement of 'consultants' and the intention of parties can prima facie be discernedby the term consultant being repeatedly used to denote the relationship of the hired team and its members with the appellant in the agreement. Moreover, the words "in any manner" emphasized in the definition extracted above i.e. 'consultancy or technical assistancein any manner to a client', is of the widest import and is equivalent to"every manner". The term 'in any manner' also appears in MRSAS, which pertains to a more general taxable service. A more generalised service must yield to the more specific one for classification.
The Test Of Employer and Employee or Master and Servant

7.8 Looked at from another angle the department in the SCN has submitted evidence in the form of the Agreement which was interpreted to allege that the Appellant was in receipt of the services of consultants at its rigs, and thus discharged its primary onus which was sufficient to raise a presumption in its favour with regard to the existence of facts sought to be proved. [See; **Collector of Customs,Madras & Ors. v. D. Bhoormul** [1974] 3 S.C.R. 833]. Once an allegation, which is based on a written Agreement, has been raised byRevenue regarding the nature of services received by the appellant, adverse inference could be drawn against the Appellant if they are notable to provide a satisfactory reply. The initial burden of rebuttal is onthe Appellant, because the basic facts are within their special knowledge. The appellant has thus not been able to explain their contention that the engagement of the persons was only in the natureof supply of manpower. The Appellant could have rebutted the Departments allegation by showing that:

i) the Appellants level of control over the persons engaged was very high and the persons could be directed about not only what work to do, but also how to do it. (Control and Supervision Test)
[See **Shivnandan Sharma v. Punjab National BankLtd**.[955 AIR 404 / 1955 SCR (1)1427]

ii) the persons were integrated within the employer's business during the course of their engagement. This test (organisation test) looks at the degree of integration in workcommitted in the Appellants primary business with theunderstanding that the higher the level of integration, the more likely the worker is to be an employee. (OrganisationIntegration Test)
[See **Silver Jubilee Tailoring House vs Chief Inspectorof Shops & Establishments** (1974) 3 SCC 498]

iii) the Appellant had the power to select, appoint and dismiss the persons without restriction. The persons, like any typical employee enjoyed benefits such as leave/paid time off, holidays, bonus, perquisites, social security, insurance coverage etc (Mutual Obligation Test)
[See **Ram Singh vs U.T. of Chandigarh** (2004) 1 SCC 126(Supreme Court)]

iv) they are provided with and use company equipmentduring their engagement. (Provision of Equipment Test) [See **Silver Jubilee Tailoring House vs Chief Inspectorof Shops & Establishments** (1974) 3 SCC 498]

v) they were bound to provide their services being on the rigs or any place as directed by the appellant, and do not have the flexibility to provide the services from any remotelocation not approved by the Appellant. They are required to adhere to the same specified times of work and rules thatapply to the Appellants permanent employees. (Control andSupervision Test) [See **Shivnandan Sharma vs Punjab National Bank Ltd**.955 AIR 404 / 1955 SCR (1)1427] There is not a straightjacket formula nor are the above 'tests' exhaustive, but are pointers to discern the relationship between the parties considering the facts of this case. In facts courts in different cases, have used 'multiple sets of factors' test while deciding these relationships. **Boards Circular F No B1/6/2005-TRU dated 27/07/2005** relied upon by the Appellant, does not obviate the necessity of establishing an employer–employee relationship for temporary supply of manpower. Hence in the present matter the Appellant has failed to rebut the allegations in the SCN and findings inthe impugned order satisfactorily and hence their pleading fails to disturb the findings in the impugned order.

8. Management Consultancy Services Vs. Intellectual Property Service

8.1 The Appellant and M/s India Offshore Inc (IOI) have entered intoa collaboration agreement. The name of the Company was "ABAN LOYDCHILES OFFSHORE LTD", (ALCOL) a limited company incorporated under the Indian, Companies Act of 1956. The object of the Collaboration was to locate customers who need oil exploration, production and transportation services; participate in bids and secure orders; execute them by using the technical capability of IOI and infrastructure facilities of ALCO (and its promoters) and deliver them to the customers. The impugned order has examined the host of services provided to the Appellant by the service provider as being pre-dominantly one of consultation service. Para 11.1 and 11.2 of the impugned order is reproduced below:

"11.1 It is evident from the various clauses of the agreement including the clauses reproduced above that India offshore has undertaken to provide a host of servicesto the

assessee. The services provided by India Offshore arenot only limited to merely providing 'know-how' but they assist the assessee to locate customers who are in need of oil exploration, production, transportation services, participate in the bids and secure orders and execute themby using technical capability of India offshore, provide pre bid services viz. locating suitable rigs and other equpmentsagainst enquiries floated by operators and supply of all technical and commercial documentation comprising of equipment specifications, copies of necessary certificates, data on the number, categories and cost of expatriate manpower required and any other data required for submission of bids. It is seen that India offshore is further required to provide supplementary information and specialists necessary during discussions with the operators of clients and once contract is awarded, they shall negotiatewith equipment suppliers, obtain documentation and certificates required by statutory authorities for import clearances and coordinate between supplier and other departmental agencies of the exporting country. India offshore is also responsible to select and employ the expatriate manpower and provide material procurement services, recommend organization structure and proceduresfor sound system of planning, administration, financial control and project management, provide training, maintenance, repair, tests and service of rigs, advise and assistant in emergent situations.

11.2 In view of the above facts, the nature and scope of services provided by India offshore to the assessee are predominantly consultation service in the overall effective and efficient management of the operations, right from locating customers, procuring orders, employment of necessary manpower, procurement of materials to equipments and spares. It is pertinent to state that apart from providing the aforesaid services, India offshore isrequired to recommend the organization structure and procedures and sound system of planning, administration and financial control and project management. Further, India Offshore shall also provide advise and arrange maintenance, repair, tests and certification of rigs andequipment besides advise and assistance in emergencysituations of operations of the rigs."

8.2 The Appellant has questioned the classification of the services as Management Consultancy Services and have felt it liable to be taxed under the category of Intellectual Property Service (IPS). The coverageof 'consultant' and 'consultancy' has been discussed elaborately above.

As per Boards **Circular No. 80/10/2004-S.T., dated 17-9-2004,** intellectual property emerges from application of intellect, which may be in the form of an invention, design, product, process, technology, book, goodwill etc. The definition of taxable service includes only suchIntellectual Property Rights (IPRs) except copyright that are prescribedunder law for the time being in force. As the phrase "law for the time being in force" implies such laws as are applicable in India. The taxableService has been defined under Section 65(105)(zzr) to mean any service provided or to be provided to any person, by the holder of intellectual property right, in relation to intellectual property service. The requirements of Section 65 (105) (zzr) read with the definition ofIPR in section 65 (55 a) should meet the following conditions -

(a) service should be provided to any person
(b) service should be provided by the holder of IPR
(c) service should be any service in relation to IPS.
(d) IPR should be transferred temporarily or permitted to usewithout transfer.
(e) IPR should not pertain to copyright.
(f) Such IPR should be recognised under Indian laws.

8.3 The Appellant has raised the following grounds for challenge of the impugned order:

a) Scope of services is not merely providing technical know-how butalso to assist the Appellant hence the service is liable to be taxed underthe category of IPS.

b) Rigs are located in non-designated area and that the services pertaining to these rigs are not received in India.

c) IOI is not an associated enterprise. Shareholding pattern given by M/s.Cameo who is the Registrar and Share Transfer Agent of the Appellant to prove that IOI held 19.15% of shares which is less than 26% prescribed under Section 92A of Income Tax Act, 1961 to be considered as associated enterprise, even though in terms of the agreement there is a reference to 40% of the issue and paid-up capitalto be picked up by IOI.

d) They have not made the payments and have only made the provisions in the books and the same is shown as 'trade payables'. It is a commercial call taken by the Appellant.

8.4 The main terms of the Agreement under dispute are;

2. The object of the Collaboration is to locate customers who are in need of oil exploration, production andtransportation services and to participate in the bids and secure orders and execute them by using the technicalcapability of IOI and infrastructure facilities of ALCO (and itspromoters) and deliver them to the customers. For thispurpose, IOI shall provide the following services to ALCO.

i) **Pre-bid services** such as locating suitable rigs or other equipment against inquiries floated by operators and supply of complete technical and commercial documentation comprising:

a) Specifications of the equipment offered.

b) Copies of necessary certificates from chartered valuers/surveyors etc.

c) A list of additional equipment, their specifications,prices, spare-parts, consumables and their costs required for operating and maintaining the equipment as per operators' specifications.

d) Data on the number, categories and cost ofexpatriate manpower required for executing theproject.

e) Any other data required for due submission of thebids.

ii) Supplementary information and specialists necessary during discussions with operators or clients on the equipment offered.

iii) On award of contract, to

a) Negotiate with the equipment suppliers and to use its best efforts to obtain the best possible price andterms of payment based on existing market conditions.

b) Use its best efforts to provide necessary documentation and certification required by statutory authorities for clearing the import of such equipment asare required to execute the project.

c) Coordinate between the supplier and other governmental agencies of the exporting country for duecertification and arrangement for shipping of the equipment.

d) Select and employ as necessary the agreed expatriate manpower required for operating, maintaining and managing the equipment.

e) Provide material procurement services including preparation of purchase specifications and assistance inworld-wide procurement of operating and maintenance spares and other equipment required for the performance of the project.

iv) All necessary technical documentation and "Know How"for the efficient operation of the rigs and the "services".

v) Recommend the organizational structure and procedures and sound systems of planning, administration and financial control and project management.

vi) Provide training for ALCO's personnel in various aspectsof operating, managing and maintaining the equipment, planning and coordination etc. both on job as well as in arrangement with specialist institutions if any.

vii) Advise and arrange, as needed, maintenance, repair tests and certification of the rigs and equipment.

viii) Advise and assist in 'emergency' situations of operation of the rig.

Hence the main activities provided by IOI to ALCO involve pre-bid andpost-bid activities as detailed above. All these activities satisfy the essential character of consultancy and relate principally to activities performed by management or business consultants. We find from the Agreement that the services provided IOI is a composite service and isclassifiable as per sub clause (b) of Section 65A (2) of FA 1994 as 'management or business consultant'.

8.5 On the contrary, apart from the fact that technical documentation and "Know How" is a very small part of the activities provided, the Appellant has not been able to show that this service is provided by the holder of intellectual property rights or that the payments received were 'royalty'. Hence the services rendered by IOIis not Intellectual Property Service related. This pleading of theAppellant fails.

8.6 As regards the Appellants plea that the rigs are located in non- designated area and that the services pertaining to these rigs are not received in India, it is to be stated that the demand pertains to the period from 2003-04 to 2008-09. While Central Excise Law and ServiceTax (Chapter V of Finance Act, 1994) have been extended to designated areas in Continental Shelf and Exclusive Economic Zone ofIndia vide notification No 166/87-CE dated 11-6-1987 and 1/2002-STdated 1-3-2002 respectively. It is seen from para 15 of the SCN dated26/03/2009 that the Appellant had not provided the best evidence at the stage of enquiry by providing details of rigs operated in the designated areas, which is very much in their knowledge and if true could very easily have been rebutted the allegations at the preliminarystage itself. It was stated by Revenue during the oral hearing before us that the documents were still not produced. On the other hand, Revenue has been able to show that the Agreement was governed by and construed in accordance with the laws of India. The approvals forthe collaboration were issued by the Secretariat of Industrial Approval, (Foreign Collaboration Section of Department of Industrial Approval, Development) and Reserve Bank of India. Without the rigs being withindesignated areas in the Indian Territory the above laws could not havebeen made applicable to them. The Appellant is having its registered office in Chennai, Tamil Nadu. Having discharged the primary burden of proof to show that the services were taxable in India, it was for theAppellant to rebut the same. Information that was in the special knowledge of the Appellant, if any, should have been disclosed to the Department. Hence it was correctly pointed out in para 11.7 of the impugned order, that all activities were centered around India and thebeneficiary was also the Appellant in India. Further we find that Section66A imposes two conditions which need to be satisfied for the levy of service tax on import of Services i.e.

(i) Service must be received by a person (recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of thissection, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India

(ii) Service is provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence,in a country other than India.

The service provided by the service provider satisfy both the conditionsand hence are exigible to tax as per the reverse charge mechanism. Hence this argument of the Appellant does not succeed.

8.7 'Associated enterprise' has been defined as per section 65B(13)as having the meaning assigned to it in section 92A of the Income-taxAct, 1961.

Additional Evidence – The Legal Issues Involved

The appellant has drawn attention to the shareholding pattern statedlygiven by M/s. Cameo, Registrar and Share Transfer Agent, to state thatIOI shares which was less than that prescribed under Section 92A of Income Tax Act, even though in terms of the Agreement there is a reference to 40% of the issue and paid-up capital of ALCO to be subscribed by IOI. It is seen that this information was not placed beforethe Original Authority as recorded at para 11.8 of the impugned order.Rule 23 of the **Customs Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982** states that the parties to the appeal shall not be entitled to produce any additional evidence, either oral or documentary, before the Tribunal. Thus, the general principle is that the appellate court should not travel outside the record of the OriginalAuthority, unless the Tribunal

itself feels the need to do so. No application was filed and prayer made by the Appellant to produce additional evidence before us. Had it been done it would have given Revenue a chance to file additional grounds / evidence as a rebuttal and to test whether the evidence was of an unimpeachable character.The power to allow additional evidence at the Tribunal level, whether on fact or law, oral or documentary is discretionary in nature. The parties are not entitled, as of right, to the admission of such evidence.As per judicial pronouncements an application for additional evidence is not allowed when:

1. no reasonable care or due diligence was shown in presenting theevidence at the Original forum.

2. the evidence would introduce a new cause of action whichcompletely alters the appeal and would aid the appellant to establish a new case in an appeal, which seeks to take awaya vested right of limitation or any other valuable right accrued tothe other party. This could then lead to unending legal disputes.

3. no compelling reason or substantial cause has been shown to permit the additional evidence

4. the additional evidence seeks to fill in gaps or restore weak areasin the case.

5. the rival party has not been given an opportunity to rebut it.

6. the additional evidence is not of an unimpeachable character.

Thus, it is clear, the admission of additional evidence is not intended to be done routinely and merely for the asking. In the present case there has not even been a formal application to admit additional evidence. This is quite surprising as the appeals have been filed with legal advice. Hence the question of examining any additional evidenceat this stage for which there is no formal request does not arise.

8.8 As regards the appellants pleading that they have not made the payments and has only made the provisions in the books and the sameis shown as 'trade payables'. That it was a commercial call taken by the them and the amended provisions for demanding service tax in respect of transactions between associated enterprises has been introduced only in May 2008. They however did not substantiate theirplea with factual data. The matter has been addressed at para 11.9 ofthe impugned order. The learned Adjudicating Authority has admittedthat demand made on accrued expenses as on 16/05/2008, if any, is not sustainable and is liable to be dropped in line with the judgment ofthe Tribunal in Sify Technologies (supra). However, he has lamented the lack of duty paid details for the period to tally the payments made.

This should have been provided by the Appellant as it was in their knowledge and interest but was surprisingly not responded to nor sought to be placed before us. The doctrine of 'laches' is commonly construed as the equitable doctrine by which a court denies relief to aclaimant who has unreasonably delayed in asserting one's legal right or privilege. In this case by not providing verifiable details, the same is now hit by the doctrine of 'laches'. Hence their unsubstantiated pleadings merit no relief.

8.9 The prayer of the Appellant that service classified as Management Consultancy Services merits to be classified asIntellectual Property Service does not succeed.

9. Banking and Financial Services

9.1 The Appellant had entered into an agreement with Barclays Capital for advice and for assistance in raising funds by issue of bondsabroad through a bundle of financial service-related activities. No attempt was made to adhere to the best evidence rule and make available a copy of the contract between the parties, hence the onus of disclosing the terms of the services rendered and stating demonstrable tests to show adherence to it are the burden of the Appellant as the matter is in their special knowledge. The appellant states that service tax cannot be levied as the entire activity takes place outside India. Further, Show Cause Notice No.23/ 2009 dt.26.03.2009 at para 8.6 specifically states that for arriving at the service tax liability apart from the fee of 2% paid, reimbursable expenses have been included in the value of the service. It was their view that in the light of the decision of the Supreme Court in the case of **Union Of India vs M/S Intercontinental Consultants and Technocrats Pvt Ltd** [Civil Appeal No. 2013 OF 2014/ 2018 (10)

G.S.T.L. 401 (SC)], decided on 7 March, 2018, reimbursable expensescannot form part of the assessable value.

9.2 Two issues have been raised by the appellant:

(i) the entire activity takes place outside India hence the service isnot taxable under FA 1994.
(ii) Reimbursables cannot form a part of the value.

The Entire Activity Takes Place Outside India, Hence Not Taxable

9.3 Para 8 of the SCN covers the allegations for classifying the activity under the 'Merchant Banking Services' head as per section 65(12)(a)(iii) of FA 1994 with effect from 16.07.2001. However,Service Tax liability on any taxable service provided by a nonresident or a person located outside India, to a recipient in India, would arise w.e.f 18/04/2006, i.e, the date of enactment of Section 66A of the Finance Act, 1994. The impugned order at para 15 states that the demand of service tax on services imported prior to 18/04/2006 has been dropped ispo facto.

9.4 As stated in the Show Cause Notice, the service provider is Barclays Capital PLC, UK (herein after referred to as 'Barclays UK') whodo not have an office in India. Based on an application made by the Appellant through Barclays UK, the Reserve Bank of India issued a Loan Registration Number (LRN) for the Appellant's Foreign Currency Convertible Bond (FCCB) to be subscribed by investors abroad. As perRBI's permission cited in the SCN the borrower (Appellant) is requiredto give the details of the drawls, utilization, repayment, conversion, redemption etc on a monthly basis to the RBI. Barclays UK is paid a consideration by the appellant for advice and assistance to the Appellant in raising funds through issue of FCCB and in the process receive a fee of 2% of the gross proceeds received in respect of the issue of the FCCB bonds. It is seen that the activity is not linked to anidentifiable immovable property, the benefits of these services are received in India and are provided for the benefit of the IndianCompany. Although the appellant states that service tax cannot be levied on this activity as the entire activity takes place outside India, they do not indicate what is the service being referred to and who arethe provider and recipient of the service abroad. Pleadings are not proof.

9.5 FCCB is a type of convertible bond issued for raising capital abroad in a currency different than the issuing Company's domestic currency. An FCCB investor abroad can purchase these bonds at a stockexchange, and has the option to convert the bond into equity in the Appellants company after a certain period of time. The question then arises as to who is the recipient of service provided by Barclays UK when the Appellant is allowed by RBI to access funds abroad by the issue of FCCB? Is it the FCCB investor abroad or the Indian company issuing the FCCB?

9.6 From the nature of payment and the minimal description of the service provided, it is seen that Barclays UK advices the issuing company (Appellant) on all aspects of the FCCB issuance. It provides all related service only to the Appellant for a consideration. A similar issue came up before a Coordinate Bench of this Tribunal in Final Order No. 40876/2023, dated 10.10.2023, in the case of **M/s. Vodafone Idea Ltd. Vs Commissioner of GST & Central Excise**. The fact of the case was that the appellants (Vodafone) as part of the telecommunication services provided by them, had tied up with severalForeign Telecommunication Operators (FTO) so that the appellants customers, when on foreign tour, continue to receive telecom related services. This service is known in the telecommunication parlance as 'International outbound roaming'. The FTO's charge the appellant(Home Network Operator – HNO) for the said connectivity provided bythe FTO to the appellant's/ HNO's subscribers. The appellant in turn charges their customers for the said services. Therefore, it appeared to the department that the appellant had received services from their FTO's for international outbound roaming services. The Tribunal takinginto consideration the majority view in **M/s Vodafone Idea Limited Vs Commissioner of Central Excise and Service Tax, Coimbatore**[2023 990 TMI 68 – CESTAT Chennai], held that during international outbound roaming the HNO was the service recipient of the services provided by the FTO, although it (FTO) provided seamless connectivityto the appellant's subscribers on foreign soil.

9.7 The providing of advice and assistance to the Appellant, who is ajuristic person based in India and the only one who entered into a contract / agreement to receive the service from Barclays

UK as per the terms of the Agreement, constitutes the taxable event. The liabilityto pay Service Tax under FA 1994 arises whenever a taxable event occurs. Taxable events in fulfillment of an agreement / contract may arise at several stages across a period of time. Collection of tax is normally at a subsequent stage depending on administrative convenience and as per Rules made in this regard. The consideration that Barclays UK receive is only for the contractual obligations of Banking and Financial Services rendered to the Appellant Company based in India. No contractual obligation exists between Barclays UK and the investors or any third party abroad in relation to the Appellantissuing FCCB, even if the investor / third party's participation may have been caused based on consultancy and advice received from BarclaysUK and implemented by the Appellant. To what use the Appellant putsthe contractual services and where, post the taxable event, is not thesubject matter of the levy. The amount received as consideration by Barclays UK is a lumpsum fee of 2% of the gross proceeds received inrespect of the issue of the FCCB bonds. The person who is legally entitled to receive a service is the one obliged to pay the considerationas per the Agreement which in this case is the appellant only. Further,the question to be asked is did the parties have in mind or intend separate payments for separate activities demarcated in the agreement. If there was no such intention, then it is a composite agreement for a service which cannot be vivisected. Hence it is the Appellant who facilitates the foreign currency investors by offering them the opportunity to invest in their (Appellants) company through the bonds with the potential for equity conversion. In the absence of an agreement, it was deduced that all such activity which takes place outside the taxable territory in connection with the FCCB and involving investors, third parties etc. abroad are on account of the Appellant andare not to be counted as service rendered by Barclays UK to such investor or third party abroad.

9.8 A negative test may also be of help in deciding the issue involved.

If the launch offering and sale of the FCCB abroad fails on the very firstday, it is the Appellant who will feel the direct pinch of any deficiency in service from Barclays UK or for any other reasons and not the investors or any third party. As per the agreement Barclays UK will stillbe eligible for their fee calculated as a percentage of the gross proceedsreceived in respect of the issue of the FCCB from the Appellant. Hencethe services provided from outside India by Barclays UK is received bythe Appellant in India with a reverse flow of consideration for the saidactivity and the service is exigible to tax under the Reverse Charge Mechanism as per section 66A(1) of FA 1994. The appellants averments on this count thus fails.

Reimbursables Cannot Form a Part of the Value.

9.9 The Appellant has further stated that in view of the decision of the Supreme Court in the case of Intercontinental Consultants (supra),reimbursable expenses cannot form part of the value. We find that in Intercontinental Consultants (supra) the Hon'ble Supreme Court held that the expression 'such' occurring in Section 67 of the Act assumes importance. That for valuation of taxable services for charging servicetax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount whichis calculated not for providing such taxable service cannot be a part ofthat valuation as that amount is not calculated for providing such 'taxable service'. Hence the value of taxable service shall be the grossamount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.

9.10 The Apex Court in **Commissioner of Service Tax Etc. Vs. M/s. Bhayana Builders Pvt. Ltd.** [Dated 19/02/2018 / 2018 (10) GSTL 118 (SC)] has examined the phrase 'the gross amount charged by the service provider for such service provided or to be provided by him', as per Section 67 of FA 1994. The relevant portion is reproduced below:

"12. On a reading of the above definition, it is clear that bothprior and after amendment, the value on which service taxis payable has to satisfy the following ingredients:

a. **Service tax is payable on the gross amount charged**:- the words "gross amount" only refers to the entire contract value between the service provider and the service recipient. The word "gross" is only meant to indicatethat it is the total amount charged without deduction of anyexpenses. Merely by use of the word "gross" theDepartment does not get any jurisdiction to go beyond the contract value to arrive at the value of taxable services. Further,

by the use of the word "charged", it is clear that the same refers to the amount billed by the service providerto the service receiver. Therefore, in terms of Section 67, unless an amount is charged by the service provider to theservice recipient, it does not enter into the equation for determining the value on which service tax is payable.

b. The amount charged should be for "for such serviceprovided": Section 67 clearly indicates that the grossamount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which istaxable under the Act. By using the words "for such serviceprovided" the Act has provided for a nexus between the amount charged and the service provided.

Therefore, any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxableunder Section 67. The cost of free supply goods provided bythe service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined" (emphasis added)

As stated by the Apex Court in the Bhayana Judgment (supra), the words "gross amount" refers to the entire contract value between theservice provider and the service recipient. The word "gross" is only meant to indicate that it is the total amount charged without deduction of any expenses. Any amount charged which has no nexus with the taxable service and is not a consideration for the service provided doesnot become part of the value which is taxable under Section 67. Thusreading both the judgments harmoniously it is clear that the authoritiesare to find what is the gross amount charged for providing 'such' taxable services and any amount charged which has no nexus with thetaxable service and is not a consideration for the service provided doesnot become part of the value which is taxable under Section 67. Hencethe agreement needs to be examined to see the intention of parties asto what the nature of reimbursable expenses are. It is noticed from theimpugned order at para 11.8, 11.9, 13.2, 16.0 etc. that the Appellanthas not been forthcoming with information even before the learned Adjudicating Authority although it is in their exclusive knowledge. Theimpugned order notes that details called for by DGCEI was submitted in a piece meal manner stretching over a period of two years. Even now we have not been able to discern what the reimbursable expensessought to be claimed and due to a lack of descriptive information about the same. As stated by the Hon'ble Supreme Court in **AC Arulappan Vs. Smt. Ahalya Naik** [Appeal (Civil) 5233 of 2001 dated 13.8.2001]law courts never tolerate an indolent litigant since delay defeats equity.We hence find no reason to differ with the impugned order on this matter.

10. Technical Inspection

10.1 The Appellants pleadings are that technical inspection and certification services were rendered with respect to rigs situated in thenon-designated area and therefore there is no liability to pay service tax. This issue has been discussed elaborately above and found against the appellant hence the same is not being repeated. Further paras 13to 13.2 of the impugned order states that no documentary evidence was provided by the appellant to substantiate their claim and rebut theallegations contained in the SCN. Neither have they alluded to the availability of such information before us. We hence do not find any reason to differ from the findings in the impugned order on this issue.

11. Legal Consultancy Services

11.1 The Appellant does not dispute the classification of the service but hold that that since the entire activity has taken place outside India the confirmation of demand under legal consultancy services is not tenable. As discussed earlier, Consultancy is a knowledge or technique-based service and is not linked to any identifiable immovable property.We find that

the consultancy with the service providers relate to adviceand consultancy in legal matters. Consultancy was provided to the Appellant who is situated in India and hence satisfies the provisions pfSec 66A to be exigible to Service Tax as discussed in connection with other consultancy services above.

12. Judgments

12.1 The Appellants have referred to the judgments listed below in their favour. It may be stated at the outset that a three Judge Bench of the Apex Court in the case of **Municipal Committee, Amritsar v.Hazara Singh** (1975 (1) SCC 794) has been pleased to record that on facts, no two cases could be similar and the decision of the court whichwere essentially on question of facts could not be relied upon as precedent, for decision of the other cases. We now examine the judgments cited by the Appellant.

12.2 Consulting Engineer Service

1. Future Focus Infotech India (P) Ltd. Vs. CST – 2010 (18) STR308
2. Dinesh Kumar & Co. Vs. CCE – 2008 (9) STR 472
3. CCE & ST Vs. Molex (India) Ltd. – 2007 (7) STR 592
4. Commissioner Vs. Molex (India) Ltd. – 2011 (24) STR J50 (Kar.)

In Future Focus (supra) the issue was whether the services rendered fell under the category of 'Consulting Engineers Service' or "business Auxiliary Service' or under 'IT Service'. The decision was based on thevarious clauses in the agreement between the contracting parties. There is nothing to show that the agreements are in pari materia and is hence distinguished. The judgment in Dinesh Kumar & Co (supra) isinterim in nature and is hence not decisive of the issue. In Molex (india)Ltd the Tribunal and the Hon'ble High Court examined an issue relating to the receipt of Royalty for technical know-how received from foreigncollaborator and not regarding consultancy and is hence distinguished.

12.3 Management Consultancy Service

1. BST Ltd. Vs. CCE – 2006 (4) STR 40
2. Day International Inc. Vs. CCE – 2009 (14) STR 333
3. Sify Technologies Ltd. Vs. LTU – 2011 (24) STR 449
4. Enmas Engineering Pvt. Ltd. Vs. CCE – 2013-TIOL-695

In BST Limited (supra) the Tribunal examined an issue relating to technical know-how received from foreign collaborator and not regarding consultancy and is hence distinguished. In Day International(supra) a Single Member Bench of the Tribunal examined to an issue relating to the receipt of Royalty for technical know-how received fromforeign collaborator to modify the existing machinery and is distinguished. The Tribunal judgment in Sify Technologies and Enmas Engineering (supra) is pertaining to pre-deposit and is interim in natureand does not finally adjudicate on an issue and has no precedential value.

12.4 Legal Consultancy, Banking and Financial and TechnicalInspection and Certification Services:-

1. All India Federation of Tax Practitioners Vs. UOI – 2007 (7) STR625
2. Rajasthan Textile Mills Vs. CCE – 2010 (17) STR 405
3. Ishikawajma Harima Heavy Industries Ltd. Vs. DIT – 2007 (6) STR 3
4. Stone & Webster International Inc. Vs. CCE – 2011 (22) STR 467
5. Enso Secutrack Ltd. Vs. CCE & ST – 2019 (22) GSTL 43
6. Jubilant Life Sciences Ltd. Vs. CCE – 2013 (29) STR 529
7. Genom Biotech Pvt. Ltd. Vs. CCE – 2016 (42) STR 918
8. CCE, Bangalore Vs. Northern Operating Systems (P) Ltd. – 2022(138 Taxmann.com

In All India Federation (supra) the Hon'ble Supreme Court was called upon to decide whether the State Legislature alone has an absolute jurisdiction and legislative competence top levy service tax. TheHon'ble Court in its ratio rejected the appeal. The judgment of the Tribunal in Rajasthan Textiles is interim in nature and does not have any precedential value. The Judgment of the Hon'ble Supreme Court in Ishikawajma Harima Heavy Industries (supra) relates to the question of payment of Income Tax by a resident to a non-resident andwhether it had sufficient territorial nexus with India for imposition of tax. As stated earlier the Hon'ble Apex Court in Hari Khemu Gawali (supra) a Constitution Bench of the Apex Court had cautioned that it isnot safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia. InStone & Webster (supra) the Tribunal examined the issue regarding the transfer of technical know-how design and drawing which took place in USA to an Indian Company, wherein it was held that no servicewas involved. None of these which appear to be in the nature of goodsare related to Legal Consultancy, Banking and Financial Services and Technical Inspection and is hence distinguished. In Enso Secutrack (supra) the entire loan was raised and used outside India only the amounts figured in the Appellants books of account in India was held to be not taxable under FA 1994. However, in the present case, no Contract / Agreement has been produced to examine whether they are identical to the case cited. Further, the issue is not of raising loan andconsuming it, the services of Barclays UK is a consultancy service rendered to the Appellant based in India, to advice and assist in raisingfunds through the issue of FCCB bonds abroad, which is also for the appellant's benefit. The matter has been discussed elaborately above.Hence the consultancy service is consumed in India and the facts are distinguished. In Jubilant Life Sciences (supra) the Tribunal held the issue was regarding tax to be paid on Underwriter Service when the appellant was paying tax as Lead Manager and the two services were distinct in nature with separate renumeration fixed for the two servicesand the dominant service was not that of Lead Manager Services. In Genom Biotech (supra) the Tribunal the primary contention was that no service was rendered in India and hence tax liability will not arise as it is in relation to the export of goods by a HEOU. The issues are distinguished on facts. The Hon'ble Supreme Courts judgment inNorthern Operating Systems (P) Ltd. has been cited by the appellant to state that the overseas employer of the engineers are under the appellants control and hence are liable to be classified under Manpower Recruitment Service and not under Consulting Engineering Services. This issue has been discussed elaborately above and is not being repeated here.

12.5 For the reasons discussed none of the judgments cited by the appellant comes to their rescue based on the peculiar nature of the facts under consideration.

13. <u>Limitation and Penalty</u>

13.1 The Appellant has stated that the Show Cause Notice No.23/2009 is barred by limitation as there is no suppression, fraud etc. as required under proviso to Section 73. It is submitted by them that the entire issue involves interpretation of the statute. Hence penalty is liable to be set aside. The Appellant also seeks for the benefitof Section 80 of the Finance Act as amended which provides that notwithstanding anything contained in the provision of Section 76, Section 77 or Section 78 no penalty shall be imposed if there is reasonable cause for the failure to pay tax. They have relied upon thefollowing judgments:

Limitation:-

1. ECE Industries Ltd. Vs. CCE – 2004 (164) ELT 236
2. Nizam Sugar Factory Vs. CCE – 2006 (197) ELT 465

In ECE Industries Ltd (supra) and in Nizam Sugar Factory (Supra) theHon'ble Supreme Court held that the extended period would not applywhere the department has earlier issued SCN. We find that in this casethe extended period has been invoked only in the first SCN dated 26/03/2009 and the impugned order is compliant with the citedjudgments.

13.2 Any breach of a civil obligation under the Act is a blameworthy conduct by the assessee. Generally, mens rea is not required to be proved for a statutory offence. However, Section 78 of FA 1994, includes mens rea by incorporating intent to evade service tax. Once

the section is found to be satisfied and is applicable in the case, the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty involved. Thebelief, knowledge and intention of the parties involved are essentially to be ascertained so as to decide whether it formed the foundation of the blame worthy act. What needs to be examined is whether the default was committed with a view to evade tax by concealing the transaction whereby the breach was deliberate or whether it was a bonafide dispute, without any fraudulent / reckless intentional or thatthe circumstances were special of which he had no knowledge to havetaken sufficient safeguard against the same. Care must however be taken to ensure that excuses are not passed off as special circumstances.

13.3 As per **Blacks Law Dictionary** 'tax evasion' means, 'the willfulattempt to defeat or circumvent the tax law in order to illegally reduceone's tax liability'. When the department comes across such an instance it is expected to issue to the assessee a show cause notice detailing the charges including the provision of law involved and the material on which the case is sought to be made. Particulars of the actions proposed to be taken should also be included. The departmentneed not prove its case at this stage. It has to give the person charged a reasonable opportunity to defend himself. An adverse inference couldbe drawn against the appellant-assessee if they fail to rebut the allegations with material and documents very much in their possessionas per the best evidence rule. Hence while the onus of establishing thatthe conditions of taxability are fulfilled lies on Revenue, this is done through a process described in law of evidence as shifting of the onusin the course of the proceedings from one person to the other. The Apex Court in **Commissioner of Income Tax Vs. Best and Co. Pvt.Ltd. [AIR 1966 SC 1325]** stated as under":-

"When sufficient evidence, either direct or circumstantial, in respect of its contention was disclosed by the Revenue, adverse inference could be drawn against the assessee if he failed to put before the Department material which was in his exclusive possession. Theprocess is described in the law of evidence as shifting of the onus in the course of a proceeding from one party to the other."

13.4 The impugned order notes that the appellant was not co- operative and took a long time to respond to simple queries. The timetaken to answer the queries set the SCN back by more than two years.There is no satisfactory reply to this charge by the Appellant. We havealso noted above that many details are still pending from the Appellants side. Although all the services received by the Appellant arebased on agreements and payment details to service providers would be available in their records, they have not adhere to the best evidencerule to establish their case for reasons best known to them. The matterhas been examined in the impugned order in detail. The question is whether this would amount to indicating mens rea on the part of the Appellant to evade payment of duty. If the Appellant had a good causeof action they should have pursued and supplied the information required from them by the department, with reasonable diligence. Such delays do not serve a larger public interest and only help privategain by retaining tax money in private hands, while at the same time the operation of limitation reduces the tax burden on them. This adversely affects the steady inflow of revenues and thereby affects thefinancial stability of the State while benefitting the assessee. These delays are hence to be viewed very strictly. It is a matter of common knowledge that every businessman will arrange his affairs to his best advantage. Hence there is a legitimate rebuttable presumption that theunexplained delay is deliberate. The Appellant has not put forward anyspecial circumstance beyond their control in submitting information. Hence the appellants actions has to be viewed as being intentional or deliberate with conscious disregard of their obligations to law and points to an intention to evade payment of duty. The SCN alleges thatthe Appellant chose to misclassify the service of Management or Business Consultants as IPR and Consulting Engineer as Manpower Supply only to evade duty and reduce their tax liability. This has beendenied by the Appellant. However, we find from the discussions above that the alternative classification was done by the Appellant after investigation were started against them and these classifications werenot found to be correct. Further the Appellants action cannot be said to be caused by a bonafide dispute, on technical grounds because the sections are clear and the appellant is also one who has been availingof legal and consultative advice in various matters and have not shownthat they were in receipt of valid and cogent

contrary advice not to paytax. They have also not sought any clarification from the department for any of the impugned service. Hence the benefit of Section 80 of theFinance Act as amended is also not available to them as there is no reasonable cause for the failure to pay tax. We do not find any demeritin the impugned order covering the extended period of demand and imposition of penalty.

14. Summary

14.1 For the sake of brevity, we have summarized the position in relation to the issues raised in the appeal:

A. Over the years State activities have become multifarious and therole of the State's Administrative machinery has grown to at times co-exist with the powers of one another. Considering the wide ramifications of sovereign functions, it would not be wrong to say that we live in an age of overlapping and concurring regulatory jurisdiction.

B. The Central Government vide Notification No. 3/2004-ST dated 11.3.2004 have appointed ADG (DGCEI) as a Central Excise Officer forwhole of India and have vested in him all the powers that areexercisable by the Central Excise officers and is hence fully competentto issue the present Show Cause Notice under consideration.

C. Whether DGCEI officers are "Central Excise Officers" or not wasexamined by the Hon'ble Madras High Court in **M/S. Redington (India) Limited** (supra). It was held that without doubt, the officers from the Directorate are "Central Excise Officers" as they have been vested with the powers Central Excise officers.

D. Rule 3(3) makes it clear that any Central Excise Officer may exercise the powers and discharge the duties conferred or imposed byor under the Act or Rules on any other Central Excise Officer who is subordinate to him. Hence any officer superior to the officer who is empowered to issue demand notice and adjudicate notice under Section 73 of Finance Act, 1994 can do the same if the officerdesignated is subordinate to him.

E. In **Pahwa Chemicals Private Limited** (supra), the Apex Court held that the instructions issued by the Board have to be within the four corners of the Act. If, therefore, the Act vests in the Central Excise Officers jurisdiction to issue show-cause-notices and to adjudicate, theBoard has no power to cut down that jurisdiction.

F. A **Constitution Bench** of the Apex Court in **Hari KhemuGawali** (supra), stated that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia. Hence it would be improper toexamine the issue of jurisdiction of DGCEI officers based on the **CanonIndia Judgment** rendered in a case under the Customs Act 1962.

G. Section 91 of the Indian Evidence Act, 1972 gives immenseimportance to documentary evidence over oral ones. Hence when written agreements and documents are available they are the best evidence to demonstrate a fact or to understand it. Further, as per section 106 of the Evidence Act, the fact within the knowledge of a person must be proved as the burden is cast upon him. The Apex Courtin its judgment in **Mohan Lal Sharma** (supra) observed that the cardinalrule in the law of evidence is that only the best available evidence should be brought before the court of law to prove a fact or the point in issue.

H. We find that the Appellant who seeks to classify the service rendered by IOMI under MRSAS has not demonstrated having been incompliance with any set of 'Tests', like 'control and supervision test', 'organisation integration test', 'mutual obligation test' or the 'multiple sets of factors' test, now preferred by courts etc to show the prevalenceof a master-servant or employer–employee relationship between themand the persons on contract. The dominant element running through the Agreement is that of engaging consultants ruling out a linguistic mistake.

I. The Appellant has questioned the classification of the services as Management Consultancy Services rendered by IOI and are of the viewthat it is liable to be taxed under the category of Intellectual PropertyService. They have however not been able to show that the service isprovided by the holder of intellectual property rights although it wouldbe very much in their knowledge, if true.

J. The appellant has sought to refer to the shareholding pattern toshow that IOI shares was less than that prescribed under Section 92Aof Income Tax Act to be termed as an Associate Co. It is seen that thisinformation was not placed before the Original Authority. As per Rule

23 of the **Customs Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982** parties to the appeal shall not be entitled to produce any additional evidence, either oral or documentary, beforethe Tribunal. No application was filed and prayer made by the Appellantto produce additional evidence before us. Hence the question ofexamining any additional evidence at this stage without a proper request does not arise.

K. A Foreign Currency Convertible Bond (FCCB) is a type of convertible bond issued for raising capital abroad in a currency different than the issuing Company's domestic currency. The taxable services provided from outside India by Barclays UK, who advices the issuing company (Appellant) on all aspects of the FCCB issuance, is received by the Appellant who is a juristic person situated in India, which constitutes the taxable event. This service is exigible to tax under the Reverse Charge Mechanism as per section 66A(1) of FA 1994. All such activity which takes place outside the taxable territory in connection with the FCCB and are consumed by investors, third parties etc abroad are on account of the Appellant and are not to be counted as service rendered by Barclays UK to such investor or third party.

L. The Appellants action cannot be said to be caused by a bonafidedispute, on technical grounds because the sections are clear and the appellant is also one who has been availing of legal and consultative advice in various matters and have not shown that they were in receiptof contrary advice not to pay tax or sought clarification from the department. Hence we do not find any demerit in the impugned ordercovering the extended period of demand and imposition of penalty.

15. We have considered the submissions of the rival parties elaborately above. We find that the lower authority has taken a view which is reasonable, legal and proper and we find ourselves in agreement with the same. The impugned order is hence upheld. The appeals are disposed off accordingly.

(Pronounced in open court on 24.01.2024)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

Rex

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IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO. 2

Service Tax Appeal No. 244 of 2012
(Arising out of Order-in-Appeal No. 39/PAT/S.Tax/Appeal/2012 dated: 28.02.2012passed by Assistant Commissioner of Central Excise & S.Tax. Muzaffarpur.)

M/s. Panjab National Bank
(Aghoria Bazar, Muzaffarpur-842002.)

…Appellant

VERSUS

Commr. of CGST & CX, Patna
(CR. Building, Bir Chand Patel Path, Patna.)

…Respondent

APPERANCE :

None for the Appellant

Mr. Krishnendu Chaudhary, Authorized Representative for the Respondent

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

FINAL ORDER No. 77717/2023

DATE OF HEARING : 01.12.2023 DATE OF DECISION : 01.12.2023

PER: BENCH :

Though the Appeal was filed on 2012, the Appellant has not been appearing for the Hearing posted from time to time. In the interest of justice, the Appeal itself was taken up for Hearing with the help of the Ld. AR and the grounds of Appeal filed by the Appellant.

2. The Appellant is engaged in providing banking and financial services. They filed the refund claim for Rs.4,05,934/- on 29.03.2011. As per them, they were recovering telephone, and courier charges from customers and have paid Service Tax even on such receipts. They submitted that they are not required to pay Service Tax on suchamounts. Having paid the same, they have filed the refund claim. Afterdue process, the lower authorities rejected the refund claim.

3. Being aggrieved, the Appellant is before the Tribunal.

4. After going through the Order-in-Original and Order-in-Appeal, it is seen that the lower authorities have held that the Appellant has notfiled documentary evidence in support of their refund claim. It is also held that the Appellant has not been able to satisfy the fact that the Service Tax in question was not passed on to their clients.

Therefore, the lower authorities have held that the Appellant is not in a position to provide proof that the incident of Service Tax has not been passed on totheir clients and accordingly they have rejected the refund claim.

5. From the ground of Appeals, we see that the Appellant has not brought in any specific evidence to the contrary. Therefore, we uphold the impugned Order and dismiss the Appeal.

(Dictated and pronounced in the open court)

Sd/-

(R. Muralidhar)Member (Judicial)-

(K. Anpazhakan)Member (Technical)

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

EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.1

Service Tax Appeal No.76481 of 2014

(Arising out of Order-in-Appeal No.809/Pat/S.Tax/Appeal/2014 dated 12.08.2014 passed by Commissioner(Appeals), Customs, Central Excise & Service Tax, Patna.)

M/s. S. Ranjan & Associates
(Nath Ice & Cold Storage, Mogalpura, Patna City, Patna-800008.)

…Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Patna

…..Respondent

(C.R. Building, Bir Chand Patel Path, Patna, Bihar.)

APPEARANCE

NONE for the Appellant (s)

Shri S.S.Chattopadhyay, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL) HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 77185/2023

DATE OF HEARING : 20 September 2023
DATE OF DECISION : 20 September 2023

Per : ASHOK JINDAL :

Despite notice, none appeared on behalf of the appellant, nor any request for adjournment has been received. Considering the fact that the appellant pertains to the year 2014, therefore, the same is taken upfor disposal.

2. The facts of the case are that the appellant is a service provider under the category of 'Clearing and Forwarding Agency Service', was issued a show cause notice for short payment of service tax amounting to Rs.1,25,495/- during the period October 2011 to December 2011. The case of the revenue is that the appellant is required to pay service

tax at the time of issuance of bill for the service provided by the appellant irrespective of the amount received. The appellant contended that they have paid the service tax on the amount received and not on the amount billed, therefore, the impugned demand has been confirmed against the appellant. Against the said order, the appellant isbefore us.

3. On going through the records before us, we find that during the impugned period, the appellant was required to pay service tax at the time of issuing invoice to the service recipient not on the receipt basis. Therefore, we do not find any infirmity in the impugned order, thesame is upheld.

In these terms, the appeal is dismissed.

(Operative part of the order was pronounced in the open Court.)

Sd/

(ASHOK JINDAL) MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division BenchCourt – I

Service Tax Appeal No. 2675 of 2012

(Arising out of OIA No.63/2012 (H-II) S.Tax dt.15.06.2012 passed by Commissioner of Central Excise, Customs & Service Tax (Appeals-II), Hyderabad)

Nizam Club
Saifabad, **.....Appellant**
Hyderabad,
Telangana – 500 *VER*
004 *SUS*

Commissioner of Central Excise &
Service Tax, Hyderabad - II **……Respondent**

LB Stadium Road, Basheerbagh,
Hyderabad, Telangana – 500 004

Appearance

Shri T. Rama Murthy, CA for the Appellant. Shri V. Srikanth Rao, AR for the Respondent.

Coram:

HON'BLE MR. R. MURALIDHAR (JUDICIAL)

HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30280/2023

Date of Hearing: 13.09.2023
Date of Decision: 13.09.2023

[Order per: R. MURALIDHAR]

The Appellant is a club, wherein, basically the services are provided to its Members and not to any other third party. The Appellant was issued ShowCause Notice on the following grounds.

a) On account of non-payment of Service Tax on the Membership Fee andother fee collected from the Members – Rs.16,24,627/-

b) On account of letting out space for advertisement and hoardings –Rs.1,52,786/-

c) On account of receiving rental income from the shop leased out forcommercial purpose – Rs.29,775/-

2. The Lower Authorities confirmed the demands along with interest andpenalty. Being aggrieved, the Appellant is before the Tribunal.

3. Learned Consultant appearing on behalf of the Appellant submits thatsince the services are provided to their own Members, the same amounts to

self-service. On this issue, he relies on the case law of State of West Bengal vs Calcutta Club Ltd [2019 (29) GSTL 545 (SC)]. In this judgment, the Hon'ble Supreme Court has held as under:
"73. It is, thus, clear that companies and cooperative societies which are registered under the respective Acts, can certainly be said to be constituted under those Acts. This being the case, we accept the argument on behalf of the respondents that incorporated clubs or associations or prior to 1st July, 2012 were not included in the Service Tax net.

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84. We are therefore of the view that the Jharkhand High Court and the Gujarat High Court are correct in their view of the law in following Young Men's Indian Association (supra). We are also of the view that from 2005 onwards,the Finance Act of 1994 does not purport to levy Service Tax on members'clubs in the incorporated form."

4. Since there is no dispute that in the present case the Appellant is a club having no shareholders and neither declaring any dividends nor distributing anyprofits, the same is to be treated as an association of their Members. Respectfully following the decision of the Hon'ble Supreme Court, we set aside the confirmed demand of Rs.16,27,627/-.

5. So far as the other two services are concerned, the Appellant is not able to bring any evidence or case law in his support to argue that the confirmed demands are not legally sustainable. Therefore, we reject their Appeal inrespect of confirmed demand of Rs.1,52,786/- on account of hoarding services and Rs.29,775/- on account of renting of immovable property services. These amounts are required to be paid along with interest.

6. However, considering the fact that the entire issue is that of interpretation of applicability or otherwise of the Service Tax on a club, we set aside all the penalties.

7. The Appeal is disposed of thus.

(Dictated and pronounced in the Open Court)

(R. MURALIDHAR) MEMBER (JUDICIAL)

Veda

(A.K. JYOTISHI) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD
REGIONAL BENCH - COURT NO. – I

Service Tax Appeal No. 1148 of 2012

(Arising out of Order-in-Original No.03/2012 (RS) dated 23.01.2012 passed by Commissioner of Central Excise & Customs, Visakhapatnam - II)

Chaitanya Industrial Service **..**
APPELLANT

Co-operative Society Ltd., Narsapur, West Godavari District, AP – 534 275

VERSUS

Commissioner of Central Tax **..**
RESPONDENT

Visakhapatnam– II

GST Commissionerate, Port Area, Visakhapatnam, Andhra Pradesh – 530 035.

APPEARANCE:

None for the Appellant.

Shri Chittaranjan Wagh Prakash, AR for the Respondent.

CORAM:
HON'BLE Mr. R.MURALIDHAR, MEMBER (JUDICIAL) HON'BLE Mr. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30287/2023

Date of Hearing:13.09.2023 Date of Decision:22.09.2023

[ORDER PER: R. MURALIDHAR]

No one is present on behalf of the Appellant. During the last hearing on 10.08.2023, it was made clear that if the Appellant does not appear during the next Hearing, the appeal will be disposed off ex-parte. As the appeal pertains to the year 2012, we have taken up the same and perused the documents with the help of Learned AR. In this case, the allegation is that the Appellant, who is registered as a Society, has provided Manpower Recruitment or Supply Agency services to ONGC during the period 2005-06 to 2009-10. After due process, the Adjudicating Authority has confirmed the demand. Being aggrieved, the Appellant is before the Tribunal.

2. On going through the grounds of appeal, it is seen that the appellant has taken a similar ground that they are a Society registered under Andhra Pradesh Co-operatives Societies Act 1964. Therefore, they are not required to pay any Service Tax for the Manpower Supply Services rendered by them. Learned AR submits that the Service Tax is required to be paid when the services are rendered by "any person" to "any person", even the Society falls under the category of person. There is no exclusion or exemption granted to societies who has to avoid payment of service tax. On going through the Order-in-Original, it is observed that the appellant has not attended the PH though several opportunities were given. The Appellant is continuing the same attitude even in respect of the present Appeal by not appearing in spite of Notices being served.

3. The Adjudicating Authority has given very detailed findings and has held that the Appellant's arguments cannot be legally sustained. The relevant paragraphs are reproduced below:

20. In the present case, the service provider is supplying manpower to their client i.e. M/s ONGC for monetary consideration during the subject period. As could be seen from the terms of the service agreement between the service provider and the receiver (M/s ONGC), as stated in para VI of the agreement, the members of the society shall be providing jobs/services to ONGC and shall be under the supervision of supervisors appointed by society and remain the members of the society and shall in no way be construed to create an employee-employer relationship between the members of the society and ONGC. The Central Board of Excise & Customs (the Board) vide Circular No. 96/7/2007-ST (F.No. 354/28/2007-TRU) dated 23.08.2007 that *"in the case of supply of manpower, individuals are contractually employed by the manpower recruitment or supply agency. The agency agrees for use of the services of an individual, employed by him, to another person for a consideration. Employer- Employee relationship in such case exists between the agency and the individual and between the individual and the person who uses the services of the individual. Such cases are covered within the scope of the definition of the taxable service [section 65(105)(k)] and, since they act as supply agency, they fall within the definition of 'manpower recruitment or supply agency' [section 65(68)] and are liable to service tax"* . In the present case also, it is observed that the contract workers payrolls are being maintained by the service provider and statutory obligations of the contract workers are being discharged by the service provider only. M/s ONGC is paying the wages along with statutory obligations pertaining to the workers engaged for the work to the service provider only but not to each contract worker. The contract workers deployed by the service provider is on the pay rolls of the service provider and the service provider discharges all the statutory obligations like PF, ESI etc. It is also evident from Para II at page No. 3 of the agreement entered with M/s ONGC Limited for job contract works of miscellaneous and intermittent nature that the service provider is engaged in supply of manpower to M/s ONGC. Further, under Para VI at page 6 of the said agreement, it was clearly mentioned that the Service Provider shall deploy the members for doing jobs / performing services. From the above observation, I find that the activities rendered by the service provider are clearly falling under the definition of "manpower recruitment or supply agency" service and they are liable to pay service tax on the amount received from M/s ONGC for providing the said service.

21. The notice was issued in pursuance of the Hon'ble AP High Court judgment in writ petition No. 28875 of 2009 dated 26.04.2010 wherein it was directed to pass an order of assessment. It is seen from the records that following the court direction, the department has asked the service provider to file the required details for assessing the liability vide jurisdictional divisional office letter dated 27.07.2010. But the service provider has failed to respond to the correspondence made and has not come forward to submit the particulars called for, that are required to assess the liability of the service provider. Following non co-operation of the service provider, the department has to follow up the matter with M/s ONGC to gather the details. Service Tax is an indirect tax where under the provisions of the Finance Act, 1994, - except in few specified cases, not applicable to the present case – the service providers as in the present issue are liable to pay service tax to the government on the services provided. So M/s CISCSL contention before the jurisdictional authorities that the notice be served on the service receivers i.e., M/s ONGC is not proper.

22. I find from the record that M/s ONGC Contract Workers Federation, Rajahmundry, corresponding on behalf of its members (of whom M/s CISCSL is a member) vide their letter dated 1.12.2009 addressed to jurisdictional office at Rajahmundry have contended that the cooperative societies being service oriented and functioning on no profit and no loss basis cannot be placed within the ambit of the definition, "commercial concern" and accordingly not being a commercial concern is not liable to levy of service tax. As per the corresponding definitions relating to Manpower Recruitment or Supply Agency Services, the manpower supply services provided by a commercial concern are liable to service tax during the period 16.06.2005 to 30.04.2006 and services provided by 'a person' are liable to service tax with effect from 01.05.2006. The word 'Person' in the context of taxation refers to a juristic person. The Hon'ble High Court of Calcutta while discussing the definitions in the context of service tax, in the case of MN Dastur and Co. Ltd. vs Union of India (reported vide 2006 (4) STR 3 (Cal)) has stated

the following:

“Section 65: The definitions: Scheme and context:

12. In order to ascertain the situation, the principles of interpretation have to be followed. The court in order to construe the definition comprehensively may apply the golden rule of interpretation according to the ordinary grammatical meaning having regard to the scheme of definitions and in the context of the provisions contained in the statue. And the object and purpose for which it was enacted. It is apparent that the expressions “person”, “concern” or “commercial concern” have been used to define all other assessees liable to pay service tax except section 65(13) defining “consulting engineer”. **The Word “person” as defined in section 3(42) of the General Clauses Act includes an individual, a company or an association of persons. A “person” includes a juristic person.** (emphasis provided) A company is a juristic person and therefore would be no difficulty to include a company when the definition uses the expression “person”. Similarly, a “concern” without any qualification can include any business or professional establishment and the “commercial person” would include all concerns connected with commerce carrying on trade or profession or any kind of commercial activities and includes a company.”

23. A society is an association of individuals for common ends i.e. especially, an organized group working together or periodically meeting because of common interests, beliefs, or profession and accordingly is an association of individuals. Section 3(42) of the General Clauses Act, 1897 defines that a “person” “shall include any company or association or body of individuals, whether incorporated or not”. In the present case, the co-operative society being a registered body and a juristic person, it would be falling within the meaning of person for purpose of taxation as defined under the provisions chapter V of the Finance Act, 1994. The contention is that their being a co-operative society, they cannot be considered as a commercial concern and levied to service tax during the period 16.6.05 to 01.05.06 when only commercial concerns engaged in providing manpower supply services are liable to service tax. In this regard as already brought out above, Hon’ble High Court of Calcutta (cited supra) has observed that the commercial concern would include all concerns connected with commerce carrying on trade or profession or any kind of commercial activities. This aspect of commercial concern is discussed in detail by CESTAT, New Delhi, in the case of Punjab Ex-Servicemen Corpn. Vs CCE, Chandigarh (reported vide 2009 (13) STR 529 (Tri-Del)) where in it was held that a test for determination as to whether a concern is commercial concern would be as to whether it charges fully commercial price for goods or services sold by it. Monitoring of performance by preparing balance sheets and profit and loss accounts also relevant. From mere objectives of an organisation like welfare of ex-servicemen or other sections of the society requiring help, promotion of sports, etc., it cannot be concluded that it is not a commercial concern. The relevant para 5.3 from the said case law is reproduced hereunder.

“5.3 Hon’ble Supreme Court in its judgment in the case of Indian Chamber of Commerce and others v. Commissioner of Income Tax, West Bengal-II (Calcutta) reported in 1976 (1) SCC 324 while examining the scope of the term “charitable purpose” in Section 2(15) of the Income-tax Act has observed as under :-

“The definition of ‘charitable purpose’ in that clause is at present so widely worded that it can be taken advantage of even by commercial concerns which, while ostensibly serving a public purpose, get fully paid for the benefits provided by them, namely, the newspaper industry, which while running its concern on commercial lines, can claim that by circulating newspapers it was improving the general knowledge of the public. In order to prevent the misuse the definition in such cases, the Select Committee felt that the words “not involving the carrying on of any activity for profit” should be added to the definition.”

The above observations of the Hon’ble Supreme Court, though with regard to the scope of the term “charitable purpose”, also throw light on the question as to what is a “commercial concern” and according to the above-mentioned observations of the Hon’ble Supreme Court, a “commercial concern” is the one which get fully paid for the services provided by it. Therefore, in our view, the test for determining as to whether a concern is a “commercial concern” would be as to whether it charges fully commercial price for the goods or services sold by it and monitors its commercial performance by preparing annual balance sheet and profit and loss

account. From mere objectives of an organization - like welfare of ex-servicemen or other sections of the society requiring help, promotion of sports etc. it cannot be concluded that it is not a commercial concern. The Appellant - corporation is charging fully commercial price from its clients, - which includes besides the salaries of the security personnel, its commission to cover the administrative expenses and profit. It prepares annual profit and loss account and balance sheet. It is expected to generate resources to sustain itself and not fall into insolvency. It is free to deploy its funds in carrying out its functions which include marketing, processing, supply and storage of agricultural produce, small scale industry, building construction, transport and other business, trade or activity, as approved by the Government and it can invest the surplus funds generated in Government securities or in such other manner as it may decide. The Appellant - corporation, therefore, functions like a 'commercial concern'."

24. I find that, in fact the service provider is a society registered under the Andhra Pradesh Co-operative Societies Act, 1964. The society is providing the services to M/s ONGC on commercial basis at commercially agreed upon terms and conditions. However, in the present case there is nothing on record to show that they were providing the services on a non-commercial basis and without any profit to the society. Thus in the absence of any evidence in this regard to show that the society is providing the services on non-commercial basis, the service provider's contention that they are not commercial concern cannot be accepted and hence they are liable to pay the service tax w.e.f 16.6.2005 onwards. As regards period after 1.5.06, the society is liable to pay service tax within the meaning of 'Person' included in the definition in the statute.

25. Further, at clause IX (iv) (page 10) of the agreement, it is provided that the sums specified in sub clauses (ii) and (iii) are inclusive of all existing taxes, duties, cesses or other levies whatsoever payable by the society for or in connection with the provision of the said services. In para (v) it is provided that if any new tax is imposed with respect to the services provided by society after effective date, such new tax shall be reimbursed by ONGC to society in addition to the price of the services as specified in sub clauses (ii) and (iii) hereof above. In clause XXIX of the contract it is provided that the responsibility of the payment of all taxes is with the society only. The above clauses of the agreement clearly speak about the responsibility of the service provider to pay all the taxes to the government. Further, I observe that the service provider has been providing the said services from the year 2005 onwards.

26. Further, on verification of the case records, it is seen that certain amounts received prior to 16.06.2005 i.e., introduction of service tax on supply of manpower against services previously provided have been included in the notice. The details of the same are as follows:

Month of provision of service	Dt of receipt	Value of service	ST amount	Ed. Cess amount	Remarks
April 2005	12.05.05	9,74,372	97.437	1,949	Shown against May 2005
May 2005	09.06.05	12,05,031	1,20,503	2,410	Shown against June 2005
			2,17,940	4,359	

These amounts are liable to be reduced from the demand and accordingly, an amount of Rs.91,03,830/- (Rs.88,71,106/- towards service tax, Rs.1,77,422/- towards Education Cess and Rs.55,302/- towards Secondary & higher education cess) are liable to be confirmed.

29. Regarding invoking of extended period, I find that the reasons for invoking extended period have been brought out in the notice. Further, there is clear mention about the all taxes leviable for providing the service which are to be borne by the service provider only. I also find that M/s ONGC is ready to reimburse the taxes (as stated by M/s ONGC in the High Court order cited). The service provider has been engaged in the said service from 2005 onwards. Further, it

is observed that the service provider was reluctant to furnish the information relating the payments received from M/s ONGC. The department has obtained the information from M/s ONGC only but not from the service provider, in respect of payments received for the services provided. This attitude of the service provider clearly shows the malafide intention to evade payment of service tax. Thus, issue of show cause notice invoking the extended period of five years under the proviso to Section 73 of the Finance Act, 1994 is justified. Since the service provider has suppressed the facts to evade payment of service tax, I find that the assessee is liable for penal action under the provisions of Section 76 and 78 of hte Finance Act, 1994. However, as I am proposing to impose penalty under Section 78 of the Finance Act, in view of the proviso under section 78 that if penalty is payable under this (section 78) section, the provisions of section 76 shall not apply, I do not propose to impose any penalty under section 76 of the Finance Act, 1994. Further, I find that the service provider neither obtained registration nor filed any periodical returns despite persuasion by the department. Thus, they are also liable for penalty under section 77 of the Finance Act, 1994.

30. In view of the above findings, I pass the following order;

a) I confirm the demand of Rs.91,03,830/- under the category of "Manpower Recruitment or Supply Agency Service" for the period from 16.06.2005 to March, 2010, under Section 73(2) of the Finance Act, 1994;
b) I confirm the demand of interest on the service tax amount as mentioned at

(a) above under Section 75 of the Finance Act, 1994;

c) I impose penalty of Rs.50,000/- under Section 77(1) of the Finance Act, 1994 for failure to get registered themselves under section 69 of the Finance Act, 1994 read with Rule 4 of the Service Tax Rules, 1994 under the category of 'Manpower Recruitment or Supply Agency services';
d) I impose penalty of Rs.5,000/- under Section 77(2) of the Finance Act, 1994 for failure to file returns as required under section 70 of the Finance Act, 1994; and
e) I impose penalty of Rs.91,03,830/- under Section 78 of the Finance Act, 1994;

f) Under first proviso to section 78 of the Finance Act, 1994, the penalty imposed at (e) above, stand reduced to twenty five percent of the service tax determined, in case the service provider pays the entire service tax determined under Section 73 of the Finance Act, 1994 along with interest under Section 75 ibid and the reduced penalty of twenty five percent, within thirty days of the receipt of this order." [emphasis supplied]

4. We do not see any reason to interfere with the detailed and considered decision given by the Adjudicating Authority. Accordingly, we dismiss the appeal filed by the Appellant.

(Pronounced in Open Court on 22.09.2023)

(R.MURALIDHAR) MEMBER (JUDICIAL)

(A.K. JYOTISHI) MEMBER (TECHNICAL)

Veda

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT HYDERABAD

Division Bench Court – I

Service Tax Appeal No. 28537 of 2013

(Arising out of OIO No. HYD-EXCUS-004-COM-057-13-14 dt.24.09.2013 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-IV)

L & T Infocity Ltd
First Floor, Cyber Towers, Hitech City, Madhapur, Hyderabad – 500 032 **……. Appellant**

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SUS

Commissioner of Central Excie & Service Tax, Hyderabad - IV Posnett Bhawan, Tilak Road, Ramkoti Hyderabad, Telangana – 500 001 **……Respondent**

Service Tax Appeal No. 21334 of 2015

(Arising out of OIO No. HYD-EXCUS-004-COM-020-14-15 dt.20.03.2015 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-IV)

L & T Infocity Ltd
First Floor, Cyber Towers, Hitech City, Madhapur, Hyderabad – 500 032 **……. Appellant**

VER

SUS

Commissioner of Central Excie & Service Tax, Hyderabad - IV Posnett Bhawan, Tilak Road, Ramkoti Hyderabad, Telangana – 500 001 **……Respondent**

Appearance

Shri K. Vijay Kumar, Advocate for the Appellant. Shri V.R. Pavan Kumar, AR for the Respondent.

Coram:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL) HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30303-30304/2023

Date of Hearing: 18.07.2023
Date of Decision: 27.09.2023

[Order per: A.K. JYOTISHI]

The Appellants are providing the service of 'renting of immovable property' and maintenance of common areas of the building under separate Agreements. They are registered with the Department and complying regularly. Taking a view that the amounts collected by the Appellant towards - electricity, diesel charges for DG sets, water and parking charges would be liable for service tax under the category of 'Management, Maintenance or Repair Service', SCN dated 15.10.2012 was issued for the period 2007-08 to 2011-12, demanding service tax of Rs. 10,76,89,485/- towards (i) electricity charges, (ii) diesel charges and (iii) water charges received by the Appellants from their tenants/occupants as reimbursable expenditure and (iv) Rs.86,13,978/- towards non-inclusion of parking charges in the value of taxable services. Another SCN dated 04.11.2013 was also issued on the similar grounds for the period 2012 to 2013. Both these SCNs were adjudicated on contest by the concerned Adjudicating Authorities vide OIO dated 24.09.2013 & OIO dated 20.03.2015, respectively.

2. Since the issue is common in both the Appeals (SCNs), even though the Adjudicating Authorities have taken different stand, in so far as confirming the demands, the Appeals filed by the Appellant/Assessee against both the impugned orders are taken up for Hearing together. The issue involved in both the Appeals is whether the service tax is payable on reimbursable expenses viz., amounts collected towards provision of water, electricity, diesel and parking charges under the category of 'Management, Maintenance or Repair services', in the given facts of the case or otherwise. The stand of the Revenue in both the Appeals has been that the Appellants were found to have not included the charges incurred on water, electricity, diesel and parking in the taxable value of services provided under the head - Management, Maintenance or Repair service. The Department observed that the Appellants were rendering services of management, maintenance of immovable properties to the occupants by entering into Agreements with them and they are paying service tax on maintenance charges, but they are not including water, electricity and diesel charges being reimbursed by the occupants in the value of the taxable service. It was also observed that the Appellants are collecting parking charges but not including these charges in the value of taxable services. The Department verified sample Agreements to come to the conclusion that the Appellants are collecting reimbursable expenditure incurred towards water, electricity, diesel and also parking charges.

3. In order to understand the exact scope of this reimbursement charges being collected by the Appellant, the relevant paras of SCN are reproduced below.

*"**i) Section 5: Reimbursement of Electricity charges:***

LTIL shall provide independent energy meters for lighting, UPS and AHU Power loads for each module. LTIL shall provide a separate common meter for the chillers, the consumption of which will be apportioned to various

modules based on the AHU meter consumption of each module. The electricity consumption for common area lighting, elevators, pumps, etc., shall be apportioned pro rata to the space occupied by the Occupant. LTIL will submit invoices to the Occupant

by the 25th of each month and Occupant shall reimburse the amounts paid by the LTIL towards electricity charges on or before 10th of succeeding month.

ii) Section 6: Reimbursement of Water and Diesel consumption charges:

6.1. *In the event LTIL arranges for additional water supply due to any scarcity in the water supply by Municipality/HMWSSB or fall in the ground water level at the demised premises, such charges shall be apportioned pro rata to the space occupied by the Occupant. LTIL will submit invoices to the Occupant by the 25th of each month and Occupant shall reimburse the amounts paid by the LTIL towards water consumption charges on or before 10th of succeeding month.*

6.2. *In the event of providing power through Diesel generator system due to power cuts/power failures, the Occupant shall pay Diesel charges which shall be charged in proportion to the additional raw power if consumed. LTIL will submit invoices to the Occupant by the 25th of each month and Occupant shall reimburse the amounts paid by the LTIL towards Diesel consumption charges on or before 10th of succeeding month.*

iii) Section 3: Maintenance charges & Parking

3.2. Parking Charges:

(a) Occupant shall pay parking charges as follows.

- *At the rate of Rs.2000/- per slot per month for a covered 4 wheeler parking*
- *At the rate of Rs.400/- per slot per month for an uncovered 4 wheeler parking*
- *At the rate of Rs.100/- per slot per month for a covered 2 wheeler parking*
- *At the rate of Rs.50/- per slot per month for an uncovered 2 wheeler parking*

(b) LTIL shall allot parking slots to the Occupant in proportion to the space occupied by such occupant in the building.

(c) Occupant shall pay to LTIL an upfront parking deposit amounting to the parking charges for each slot for three months.

None of the above charges collected by them is included in the value of the taxable services in respect of services rendered in respect of Management or maintenance service."

4. Therefore, relying on the provisions under Sec 67(3) which provides for inclusion of any amount received towards taxable service and also in terms of Rule 5(1) of Service Tax (Determination of Value) Rules, 2006, which provides for that where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax for the said service. Since the Appellants have received various amounts towards electricity, water and diesel from their tenants/occupants as reimbursable expenditure and also certain amount as parking charges, but they failed to include in the value of taxable services and therefore, they have failed to pay service tax.

5. Essentially the Department is relying on Rule 5(1) of Service Tax Valuation Rules, 2006 to bring certain reimbursable expenses within the ambit of gross value. The Adjudicating Authority while considering various aspects in relation to this SCN, *inter alia*, came to the conclusion that the impugned reimbursable expenses collected from tenants at actual, are akin to the CMC charges collected, at actual from the customers and all these charges are necessary for maintenance of building. Without maintenance no tenant would come forward to occupy the premises. Since the reimbursable nature of these charges has been clearly spelt out in the Agreements, they are liable to pay service tax on these amounts. He has relied on the provisions of Rule 5(1) of Service Tax Valuation Rules, 2006, as also on the judgment of the Tribunal in the case of Pioneer Services vs CST, Chennai [2012 (27) STR 285 (Tri- Chennai)] wherein, it was held that CMC charges which are charged separately from the customer on actual basis

would be liable for inclusion in the assessable value of the taxable services provided by the Custom House Agent in terms of Rule 5 of Service Tax Valuation Rules, 2006.

6. In so far as the SCN dated 04.11.2013 is concerned, covering the identical issues but for the period 2012-2013, the Adjudicating Authority, after going through the submissions made by the Appellants held that when any person who is acting as pure agent and satisfying the conditions mentioned i.e., from (i) to (viii) of Rule 5(2), the consideration received on such account shall be excludible from the taxable value. He found that in the facts of the case, on examination of electricity bill and statement of electricity consumption and proportionate distribution of charges, he came to the conclusion that Appellants have acted as 'pure agent' as defined under Rule 5(2) and hence, consideration received on this account was liable for exclusion from the value of taxable services. Similarly, in the case of water charges, he came to the same conclusion that it shall not form part of the taxable value. In fact, such charges collected by the Appellants in the course of provision of service are totally independent of the Maintenance or Repair service. He observed that in respect of electricity consumed for common use at lifts and lights in common areas, the assessee is already paying service tax and those charges were not part of the present proceedings.

7. In so far as the amount collected towards diesel charges is concerned, the Adjudicating Authority felt that these could not be considered as reimbursable expenses under the category of 'pure agent' as they are not transferring such amount to any other person or agency on actual basis. Therefore, this activity does not get covered under exemption clause of Rule 5(2) of Service Tax Valuation Rules, 2006 and held that this amount is liable for service tax under the category of Management, Maintenance or Repair service. On the liability of service tax on the amount collected towards parking charges, he held that these were akin to maintenance charges and they necessarily become part of the maintenance of building and therefore, they are liable to pay service tax on parking charges.

8. Learned Advocate for the Appellant has mainly relied on certain judgments wherein it has been held that they are not liable to include reimbursements on account of water, electricity and diesel charges. The learned Advocate also points out that the Adjudicating Authority has already dropped the demand on electricity and water charges in their own case for the subsequent period, and that the same appears to have been accepted by the Department, as no Appeal has been filed against the same. They have also submitted that Commissioner (Appeals) has set aside the demand on diesel charges also for the period 01.10.2014 to 14.05.2015.

9. They have mainly relied, apart from various Tribunal judgments, on Hon'ble Supreme Court judgment in the case of Inter Continental Consultants & Technocrats Ltd [2012-TIOL-966-HC-DEL-ST], wherein upholding the decision of the Hon'ble Delhi High Court, *inter alia*, the Hon'ble Supreme Court held that only with effect from 14.05.2015, such reimbursable expenditure and costs also form part of valuation of taxable services for charging service tax. In the Order of Hon'ble Delhi High Court, Rule 5(1) of the Service Tax Valuation Rules, 2006 was struck down, and later on Hon'ble High Court was upheld by Hon'ble Supreme Court. Therefore, the Department cannot place reliance on Rule 5(1) for including the cost incurred by them on reimbursable basis in the gross value charged towards Management, Maintenance or Repair Service. He has also relied on this Tribunal's Final Order dated 08.07.2022 in the case of VITP Pvt Ltd vs CCT, Hyderabad-IV, wherein the Tribunal considered, *inter alia*, issue relating to service tax demanded on amount received towards reimbursement of expenditure in respect of water, electricity and diesel charges under the category of Management, Maintenance or Repair service. After going through their submissions as also the judgment of Hon'ble Supreme Court in the case of Intercontinental Consultants & Technocrats Ltd (supra), came to the conclusion that the expenses are mere reimbursement based on total cost incurred by the Appellant, and there is no profit element involved and the Department has not been able to contradict these facts, therefore, having regard to the judgment of the Hon'ble Supreme Court, the Tribunal held that the Appellant cannot be saddled with the liability on such expenses and therefore, demand cannot be sustained.

10. On the other hand, the Department has relied on certain judgments of the Tribunal, especially, Modern Business Solutions vs CST, Ahmedabad [2019 (24) GSTL 353 (Tri-Ahm)] where the Tribunal has, *inter alia*, observed that while in terms of decision of Hon'ble Supreme Court in the case of Intercontinental Consultants & Technocrats

Ltd (supra), reimbursements cannot be included in the assessable value, however, what constitutes reimbursements has to be determined in the light of Larger Bench in the case of Sri Bhagavathy Traders vs CCE, Cochin [2011 (24) STR 290 (Tri-LB)]. Therefore, the Department appears to dispute that in the instant case it is not in the nature of reimbursement relying on this judgment as well as Tribunal's judgment in the case of Saurashtra Kutch Stock Exchange Ltd vs CCE & ST, Rajkot [2019 (26) GSTL 50 (Tri-Ahm)] and Tribunal's Final Order dated 19.07.2018 in the case of Sri Gayathri Medical Agencies vs CC & CE, Guntur.

11. Learned AR further urges, in so far as the liability of service tax on parking charges is concerned, they have relied on the Principal Bench of Tribunal's Final Order dated 03.02.2020 in the case of MGF Event Management vs CCE, Delhi (Final Order No. 50154/2020 dated 03.02.2020).

12. Perusal of both the SCNs and OIOs clearly brings out the fact that the Appellants were recovering certain amount towards electricity, water and diesel on reimbursement basis, though in respect of parking charges no such grounds have been raised. Therefore, in so far as the amount collected in the nature of reimbursement is concerned, with respect to electricity, water and diesel consumption, they are not in dispute. The Original Authority in this case has relied heavily on Rule 5(1) to include these charges in the gross value of taxable services. Even in respect of parking charges, he has relied on Rule 5(1) despite it not being in the nature of reimbursement expenses. The Adjudicating Authority has already considered the reimbursement charges collected in respect of electricity and water as not includible in the assessable value. Whereas, he found the amount collected towards diesel consumption and parking charges as includible in the value and therefore, confirmed the demand to that extent. He has mainly relied on the clarification issued by CBEC vide Letter F.No.B1/4/2006-TRU dated 19.04.2006, wherein, the CBEC has explained the nature of reimbursable expenditure. However, in cases where the service provider acts as a pure agent or not, in a given situation, is to be decided in terms of Explanation (i) of Rule 5(2) and if that criteria is not met, the service provider cannot be treated as pure agent. Therefore, while holding that the amount collected towards electricity and water which were collected on actual basis only and hence, can be called as reimbursable expenses, the same cannot be termed as reimbursable expenses, in so far as it is related to the amount collected towards diesel charges as the activity is not getting covered under the exemption clause of Rule 5(2), holding that such charges are in the nature of incidental charges, therefore, liable for inclusion.

13. Heard both sides.

14. Having regard to the Order passed by this Tribunal in the case of VITP Pvt Ltd (supra), wherein the reliance has also been placed on Hon'ble Supreme Court's judgment in the case of Intercontinental Consultants & Technocrats Ltd (supra), as also factual matrix brought out in the SCNs as well as in the OIOs, the amount collected towards water, electricity and diesel are in the nature of reimbursable expenses and therefore, not liable for inclusion in the taxable value towards provision of Management, Maintenance or Repair services by the Appellant. There is nothing in the SCNs or impugned orders, which states that they have been collecting anything over and above the amount incurred towards payment of electricity bill and water bill or diesel consumption or that there was any profit involved therein. When they were only collecting actual charges, those will be nothing else, but only collection of amount on reimbursement basis. The fact that the reimbursable expenses, have been specifically brought under the coverage of gross value w.e.f. 14.05.2015, further supports the Appellant's argument that the amounts collected on reimbursable basis were not liable for inclusion before that. In fact they have stated that in their own case itself for the subsequent period, Commissioner (Appeals) has also set aside the demand for the period 01.10.2014 to 14.05.2015 on "diesel charges".

15. Therefore, demand on these three charges viz., electricity, water and diesel cannot sustain for the reasons discussed, supra. Learned DR has relied on the judgment of MGF Event Management (supra) in support of his contention that the parking charges are liable for inclusion in the value of Management, Maintenance or Repair services, being provided by the Appellants. Relying on this service, the parking charges were considered as liable to service tax under the category of Management, Maintenance or Repair service. It is also not disputed

that he has not collected the parking charges on reimbursable basis. There is nothing on record to indicate anything to the contrary. Therefore, the argument that no service tax is payable is not sustainable. The Appellants were required to provide parking space and it's clearly part of maintenance service. Hence the amount collected also needs to be included in the gross value. The case cited is clearly distinguishable on the facts of the case, hence will not help the Appellants and therefore, no need to interfere with the OIO to this extent. Accordingly, the following order is passed.

16. The OIO is set aside to the extent of water, electricity and diesel charges and the Appeal is partially allowed. So far the demand of tax on parking charges is concerned, the same is confirmed. In the facts, all the penalties are set aside. Appellant shall be entitled to consequential benefits.

17. Appeal allowed in part.

(Pronounced in the Open Court on 27.09.2023)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Veda

(A.K. JYOTISHI) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division BenchCourt – I

Service Tax Appeal No. 2547 of 2012

(Arising out of OIA No.43/2012 dt.07.06.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Visakhapatnam)

Adani Gangavaram Port Ltd
Pedagantyada, VUDA Colony,
Visakhapatnam, AP – 530 004 **.....Appellant**

VERSUS

Commissioner of Central Tax
Visakhapatnam - II
Port Area, Visakhapatnam,Andhra
Pradesh – 530 035 **……Respondent**

Appearance

Shri C.S. Srinivas, Advocate for the Appellant. Shri K. Srinivas Reddy, AR for the Respondent.

Coram:

HON'BLE MR. ANIL CHOUDHARY (JUDICIAL) HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30417/2023

Date of Hearing: 05.12.2023
Date of Decision: 05.12.2023

[Order per: ANIL CHOUDHARY]

The issue involved in this Appeal is whether the Appellant is entitled to Cenvat credit for credit taken during the period May 2007 to September 2008 on various items being inputs/capital goods – MS items like angles, channels, beams, etc., falling under Chapter 72 & 73 of CETA. The Appellant availed Cenvat credit to the extent of Rs.77,21,700/- under the category of capital goods, as defined under Rule 2(a) of CCR. The next issue is that the Appellant had taken another credit of Rs.60,88,605/- during the period April 2007 to September 2007, which was reversed by the Appellant in the month of April 2008. Demand for interest has been raised for Rs.6,59,207/-.

2. SCN dated 30.01.2012 was issued invoking the extended period of limitation. According to the SCN, in the course of audit, it appeared to Revenue that Appellant had wrongly taken Cenvat credit and the same is recoverable along with interest. Further the amount of credit *suo moto* reversed for the inputs used in foundation work, of Rs.66,88,605/- was not disputed and reversed in April 2008. It appeared that Appellant is required to pay interest on the same under Rule 14 of CCR.

3. Heard the parties.

4. Considering the issues involved, so far the issue of taking credit ofRs.77,21,700/- on MS items is concerned, we find that the issue is no longerres integra and it has been held by the Hon'ble Gujarat High Court in Mundra Ports and SEZ Ltd [2015 (39) STR 726 (Guj)], wherein under similar circumstances, the Assessee had used cement and steel for construction ofport, the same is held to be eligible input. Similarly, Hon'ble High Court of AP inSai Samhita Storages Pvt Ltd [2011 (270) ELT 33 (AP)] have held that inputs like cement, steel, etc., used for construction of warehouses from which taxableservices under the head 'renting of immovable property' are performed, the inputs are eligible for Cenvat credit.

5. Accordingly, following the rulings aforementioned, we allow this ground infavour of the Appellant and against the Revenue. We further find that disallowance was made in view of the Larger Bench ruling of CESTAT in thecase of Vandana Global Ltd, wherein it was held that on the inputs used for fabrication/construction of capital goods, which are immovable, Cenvat credit is not available. The said judgment has been reversed by the Hon'ble Chattisgarh High Court and it has been held that Credit is available, reported at [2018 (16) GSTL 462 (Chattisgarh)].

6. So far the second issue is concerned, regarding chargeability of interest under Rule 14 of CCR on the amount of Cenvat credit taken and reversed of Rs.60,88,605/-, learned Counsel for the Appellant urges that there has been subsequent amendment in Rule 14, wherein it has been provided that interestis chargeable on Cenvat credit taken and utilized. This amendment was broughtvide Finance Act 2012 w.e.f. 17.03.2012. He further relies on the ruling in Bill Forge Pvt Ltd [2012 (26) STR 204 (kar.)]. On the other hand, learned AR for Revenue relies on the ruling of Hon'ble Chattisgarh High Court in CCE & C vs Vandana Vidyut Ltd [2016 (331) ELT 231 (Chattisgarh)], wherein, after considering the ruling of Hon'ble Karnataka High Court in Bill Forge Pvt Ltd (supra) and the ruling of the Hon'ble Apex Court in Ind-swift Laboratories Ltd [2011 (265) ELT 3 (S.C.)], it was held that interest is payable even when the credit is taken and reversed prior to the utilization of the same.

7. In view of the ruling of Hon'ble Apex Court in Ind-swift Laboratories Ltd (supra) and as the period falls prior to the amendment of Rule 14, and there is no specific mention in the amending Act that amendment shall apply retrospectively, we uphold charging of interest.

8. In view of our aforementioned observations and findings, we allow the Appeal in part to the effect that Cenvat credit has been rightly taken and also hold that interest is rightly charged. All penalties imposed are set aside, in the facts and circumstances of the case.

(Dictated and pronounced in the Open Court)

(ANIL CHOUDHARY) MEMBER (JUDICIAL)

Veda

(A.K. JYOTISHI) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNALREGIONAL BENCH AT HYDERABAD

Division BenchCourt – I

Service Tax Appeal No. 1186 of 2012

(Arising out of OIO No. 13/2012 (RS) dt.09.02.2012 passed by Commissioner of CentralExcise & Customs, Visakhapatnam-II)

Akash Engineering Services
LV Nagar, Drivers Colony, Gajuwaka,Visakhapatnam, AP – 530 026 **.....Appellant**

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Commissioner of Central TaxVisakhapatnam - I

Port Area, Visakhapatnam,Andhra Pradesh – 530 035 **……Respondent**

Appearance

Ms A.S.K. Swetha, Advocate for the Appellant.

Shri P. Amaresh & Shri V.R. Pavan Kumar, AR for the Respondent.

Coram:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL) HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

INTERIM ORDER No. IO/25/2023

Date of Hearing: 11.07.2023Date of Decision: 10.11.2023

[Order per: ANIL CHOUDHARY]

The issue involved in this appeal is whether the Appellant is liable to pay service tax with respect to "Works Contract Service" as a sub-contractor, under the admitted fact that the main contractor has already paid the service tax including the turnover achieved by the Appellant. Further issue is whether extended period has been rightly invoked for issue of the show cause notice.

2. The Appellant is a service provider and registered under the head "Erection, Commissioning and Installation service" and "Maintenance or Repair service" with effect from 07/01/2003 and is registered with the service tax department since 17.12.2005. The Appellant was regularly filing the returns anddepositing the admitted taxes. The records of the Appellant like Balance-Sheet, Ledger account, Copies of Work Orders, Bills, TDS certificate – Form 16A, forthe period 2004-05 to 2009-10, were scrutinized. Further, in the course of investigation, statement of Shri Choppa Suribabu, power-of-attorney holder of the Appellant was recorded on 24/09/2010 who, inter alia, stated that they

have received the amounts from the clients/ main contractors for the services rendered, but they neither charged nor paid service tax, nor filed ST3 returns during the year 2005-06, due to non receipt of service tax amount from their principal contractors. They presumed that their clients might have paid the service tax as they have not mentioned such tax details in the Work Orders. So far the service tax amount received during the year 2009-10 from their clients for the service rendered, the same has been deposited under challans, as well as shown in ST3 returns filed. They have not received any free supply material from their principal contractor during the period 2005-06 to 2009-10. Further the amount received by them does not include cost of raw material, rather it isa net amount, after deducting cost of all free supply materials. Upon scrutiny ofProfit & Loss account for the period 2005-06 to 2009-10, it appeared that the Appellant have received the following amounts, but have not correctly reflected the amounts in their ST3 returns filed with the Department.

Year	Gross Amounts received towards MRS (Maintenance & Repair service)	Gross Amounts received towards CAI (Erection, Commissioning & Installation service)	Total/ Income as per P & L Account
2005-06	11,20,300/-	2,23,30,085/-	2,34,50,385/-
2006-07	46,31,856/-	2,55,63,916/-	3,01,95,772/-
2007-08	63,69,053/-	5,18,57,781/-	5,82,26,834/-
2008-09	95,93,073/-	4,26,78,949/-	5,22,72,022/-
2009-10	1,00,39,650/-	10,52,60,820/-	11,53,00,470/-
Total	3,17,53,932/-	24,76,91,551/-	27,94,45,483/-

3. On the aforementioned turnover, the Department calculated service tax liability (denying abatement for material component) as follows:

(a) Maintenance or Repair Service

Year	Gross amount received as per statement dated 24.09.2010 under summons	Rate of ServiceTax	Service Tax payable including E.Cess and SHE Cess	ST Paid As Per ST3 returns including E.Cess and SHE Cess	Differential ST to be received
2005-06	11,20,300/-	10.20 %	1,14,271/-	0	1,14,271/-
2006-07	46,31,856/-	12.24 %	5,66,939/-	1,40,833/-	4,26,106/-
2007-08	63,69,053/-	12.36 %	7,87,215/-	95,159/-	6,92,056/-
2008-09	95,93,073/-	12.36 %	11,85,704/-	7,14,160/-	4,71,544/-
2009-	1,00,39,650/-	10.30	10,34,084/-	6,76,437/-	3,57,647/-

10		%			
Total(a)	3,17,53,932/-		36,88,213/-	16,26,589/-	20,61,624/-

(b) Erection, Commissioning & Installation Service:

Year	Gross amount received as per statement dated 24.09.2010 undersummons	Rate of Service Tax	Service Tax payable including E.Cess and SHE Cess	ST Paid As Per ST3 returns including E.Cess and SHE Cess	Differential ST to be received
2005-06	2,23,30,085/-	10.20 %	22,77,669/-	--	22,77,669/-
2006-07	2,55,63,916/-	12.24 %	31,29,023/-	--	31,29,023/-
2007-08	5,18,57,781/-	12.36 %	64,09,622/-	--	64,09,622/-
2008-09	4,26,78,949/-	12.36 %	52,75,118/-	--	52,75,118/-
2009-10	10,52,60,820/-	10.30 %	1,08,41,864/-	31,25,490/-	77,16,374/-
Total(a)	24,76,91,551		2,79,33,296/-	31,25,490/-	2,48,07,806/-
Grand Total (a+b)	27,94,45,483/-		3,16,21,509/-	47,52,079/-	2,68,69,430/-

4. It further appeared that Appellant have paid only an amount of Rs.47,52,079/- (Rs.16,26,589/- towards MRS and Rs.31,25,490/- towards CAI) including cess and accordingly, they are liable to pay the balance tax. It is further alleged that Appellant have not filed the periodical ST3 returns for October 2005 to March 2006, for April 2007 to September 2007, for April 2008 to September 2008 for Maintenance and Repair service and for April 2009 to September 2009 for Erection, Commissioning and Installation service.Accordingly, it appeared to Revenue that extended period of limitation is applicable as per proviso to section 73(1) of the Finance act. Thus SCN dated 20.10.2010 was issued proposing to demand differential service tax of Rs.2,68,69,430/- plus Rs.20,61,624/- including cess with interest and further penalty was proposed under section 76 and section 78. Further penalty was proposed under section 77 for failure to file ST3 returns under section 70 as mentioned above.

5. The SCN was adjudicated on contest and vide impugned OIO the proposed demand was confirmed with interest. Further penalty was imposed under section 76, under section 77(2) Rs.5,000/- for non-filing/delay in filing the returns, Rs.5000/- as per section 69, and further equal amount of penalty under section Rs. 78 for Rs.2,68,69,430/-.

6. Assailing the Impugned Order, learned Counsel for the Appellant, inter- alia, urges that the Appellant had stated during investigation stage itself, that

wherever they have worked in the capacity of sub-contractor, they have not paid service tax as they have been guided by the principal contractor not to collect tax and/or pay tax, as the service tax has been paid or is being paid by the principal contractor on the whole contract amount (including the work done by the Appellant as sub-contractor).

7. During adjudication, letters were issued by the Asst. Commissioner of Central Excise and Service Tax, during September/October 2010 to all the principal contractors for confirmation about the service tax payments made by them, in respect of the work done, by the Appellant, as the sub-contractor. In response to the query most of the principal contractors had replied as follows: –

a) L & T Ltd vide their letter dated 5/10/2010 addressed to the Department,confirmed that they have deposited the service tax on the whole contract Value, copies of the letters are annexed in the appeal paper book.
b) EDAC Engineering Ltd had also given reply dated 4/10/10 stating that they have paid the service tax on the whole contract Value.
c) Similarly, Power Mech Projects Ltd vide their letter dated 9/3/2010 had also confirmed about payment of service tax on the whole contract Value including the sub-contractor amount given to the Appellant. Power Mech also furnished copy of challan in evidence of tax payment for the financialyears 2005-06 to 2008–09.
d) Utility power Tech Ltd vide their letter dated 27/8/10 certified that servicetax was paid on the entire contract Value.
e) Manne Projects who are sub-contractors to Power Mech Projects Ltd also certified that Power Mech have paid the service tax on the declared turnover with respect to the whole contract Value in their returns vide their letter dated 9/3/10.

8. The Appellant have mainly provided the job of Erection, Commissioning and Installation services on sub-contract basis for the various principal contractors, besides providing Maintenance or Repair services mainly to Utility Power TECH Ltd, Vishakhapatnam and NTPC Ltd, Vishakhapatnam. In Para 10of the SCN it is admitted that Appellant have not received any free supply of material from the principal contractor in execution of the composite work under the head ECIS during the period 2005-06 to 2009–10, and the amount receivedby them does not include any cost of materials. It appeared to Revenue that Appellant is not entitled to abatement for the material component used in the execution of composite contracts – ECIS. It further appeared that in view of the Board Circular No. 96/7/2007–ST dated 23/8/2007, a sub-contractor is essentially a taxable service provider. The fact that the services provided by thesub-contractor are used by the main contractor–service provider, for completionof the work, does not in any way alter the fact of provision of taxable services by the sub-contractor. Services provided by sub-contractor are in the nature of input services to the principal contractor, and the service tax is therefore leviable on any taxable services, provided or not such services are used as input services by the main contractor. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the tax liability on the service provided as the sub-contractor. Thus, under the scheme of service tax there is no distinction between the services provided by the sub-contractor or by the main contractor. Service tax is leviable on each stage of service provided, and is not influenced by the tax payment at the anterior stage or later stage by contractor or sub-contractor. Accordingly, it appeared to Revenue that the Appellant is liable to pay service tax irrespective of the fact that the main contractor or principal contractor have discharged service tax on the whole contract value during the period 2005–06 to 2009–10.

9. Learned Counsel further urges that admittedly Appellant have done the work under composite contract which includes supply of materials. Further, wherever the Appellant have worked as the sub-contractor, the principal contractor viz., L&T, EDAC Engineering, Power Mech Projects, Manne Projects, Utility Power Tech, etc., have paid service tax on the full contract value. Thus,in such admitted facts the Appellant as a sub-contractor is not required to discharge service tax. Service tax is leviable as a 'destination tax' and this taxis chargeable only once, as per the charging section 66 of the Finance Act, 1994which provides – There shall be levied a tax at the rate of 12% of the value of taxable services and collected in such manner as may be prescribed.

10. Thus, Revenue is in error by demanding service tax on the value of sub- contract – composite works contract done by the Appellant, wherever service tax has been deposited by the principal contractor on the whole contract Value. Such demand of service tax is hit by Article 265

of the Constitution. Further such demand of service tax is also hit by the judicial precedents.

11. Learned Counsel further states that admittedly some of the work done by them as sub-contractor of L & T, is execution of structural and piping works in the premises of APL Mundra Power Plant, which is a notified SEZ. Hence for the work done or services provided in the SEZ premises, the Appellant is not liable to pay service tax, in support thereof letter issued by L & T dated 15/9/2010 and a certificate issued vide F.No.MPSEZ/IUA/02/2009 dated 1/4/2009 issued by the Officer on Special Duty, MPSEZ was also furnished. Despite furnishing such evidence, the Adjudicating Authority has erred in observing and disallowing the claim alleging absence of appropriate documentary evidence.

12. Learned Counsel also stated that admittedly Appellant was registeredwith the department and was filing regularly returns and paying the admitted tax. It was the view of Revenue till 23/8/2007, that a sub-contractor is not liable to pay service tax where the main contractor has discharged the service tax liability on the whole contract Value. This view was not erroneous, but under the conscious understanding that service tax is a destination-based tax and tax cannot be collected twice on the same service. It was only after issue ofthe Board Circular dated 23/8/2007, wherein, it was provided that the sub- contractor should also deposit the tax which will be available to the main contractor as Cenvat credit. Under such premises, the demand from the Appellant of service tax as a sub-contractor, wherein, admittedly the main contractor paid the tax, is wholly revenue neutral. Further, admittedly Appellant have maintained proper books of accounts and vouchers of the transactions. Further such books are also audited regularly both by the Chartered Accountant/Auditor appointed by the Appellant as well as by the Revenue departments. Thus extended period of limitation is not invokable there being noelement of suppression, fraud, mis-statement, etc. The only allegation in the SCN for invocation of extended period of limitation is, that had the audit or verification not been done by the Revenue, the same would have resulted in escapement of tax. Evidently, the only discrepancies pointed by the Revenue upon verification was regarding the turnover of the Appellant as sub-contractor,where the main contractor has already paid the service tax on the whole contract Value.

13. Learned Counsel placed reliance on the ruling of the Coordinate Bench of this Tribunal in Dotcom Advertising vs CCE, Lucknow [2019 (5) TMI 1482] wherein the issue was – demand of service tax from Dotcom as a sub- contractor. The Tribunal observed – it is an admitted fact that Dotcom have received Rs. 37.12 lakhs from M/s A.D. Point, who were the principal advertisers/contractors and they have certified that they have charged service tax on such activity or services, which were provided by the Appellant through them, to their client/principal. The service tax was further deposited with the Central Government. The Revenue for demanding service tax, are relying upon the Board circular dated 23/08/2007. This Tribunal relying on the ruling of Hon'ble Patna High Court in the case of Hindustan Dorr-Oliver Ltd and another vs Union of India and others [1989 (9) TMI 355], observed that the High Court in the matter of sales tax, under similar facts and circumstances of Works Contract, where the main contractor had claimed deduction of the turnover achieved through the sub-contractor, on the ground that the sub-contractor is also registered with the department and have paid tax on such turnover, the High Court held that in the case of works contract there is one transaction –one sale. The work may be done either by the main contractor or through the sub-contractor. Service Tax being the other part of the same transaction, there cannot be two services and/or two transfer of services, one from the sub- contractor to the main contractor and again from the main contractor to the principal. In the case of works contract – composite contract, the transfer of materials/service is based on the theory of accretion as has been held by the Hon'ble Supreme Court in the case of Imagic Creative Pvt Ltd [2008 (09) STR
337 (SC)]. Thus, the demand of service tax from the Appellant as sub- contractor, is hit by the ruling of the Hon'ble High Court (supra) which have been relied upon by Coordinate Bench of this Tribunal.

14. Learned Counsel further relies on the ruling in the case of Hindustan Coca-Cola Beverages Private Limited, which was under the Income Tax provisions, wherein the passing officer in charge was required to deduct TDS from the payments made to the assessee/deductee, but the deductor failed to deduct the tax at source. However, the deductee/assessee had admittedly paid the income tax. In such circumstances, the Apex Court observed that Circular No. 275/201/95 – IT (B) dated 29/1/97 issued by the CBDT, in our considered opinion, should put an end to the controversy. The circular declares – no demand visualized under section 201 (1) of the IT Act should be enforced

after the tax deductor has satisfied the officer in charge of TDS, that taxes due have been paid by the deductee/Assessee.

15. Relying on the aforementioned ruling of the Apex Court in Hindustan Coca-Cola Beverages and the ruling of Patna High Court in Hindustan Dorr- Oliver (supra), the Coordinate Bench of this Tribunal held – that the payment made by main contractor on the activity/work conducted by the sub-contractor-Dotcom is considered as discharge of service tax liability by Dotcom. It was alsoobserved that payment by the main contractor has not been disputed byRevenue. Thus, in the facts and circumstances, payment of tax by the main contractor, was held, that the same shall be treated as payment of tax also by the sub-contractor. As regards the extended period of limitation, learnedCounsel relies on the following rulings: –

a) Vinod Shipping Services vs CCE, Tirunelveli [2021 (8) TMI 1117 – CESTAT Chennai]

b) Vishal Engineering Company vs CCE, Panchkula [2023 (7) TMI 260 – CESTAT Chandigarh]

c) Pramukh Earth Movers vs CCE & ST, Vapi [2023 (8) TMI 851 – CESTAT Ahmedabad]

16. Learned Counsel further urges that the learned Commissioner has erredin denying the abatement or set off for the material component, under the admitted fact that the Appellant have executed work which includes supply of materials. Under the provisions of the Finance Act read with the rules thereunder for service tax, the taxing power under the Constitution is only with respect to service and not with respect to material. Learned Counsel relies on the ruling of the Hon'ble Supreme Court in the case of L & T wherein it has beenheld that prior to 01/06/2007 (the date on which Works Contract service was introduced as a taxing head under section 65(105)(zzzza) in respect of composite contract), no service tax is leviable or chargeable under the existing heads of service being CCS, ECIS, CICS etc. Thus, the demand for the period prior to 01/06/2007 is fit to be set aside on this score alone. Learned Counsel further urges that in respect of free supply of materials, no service tax can be demanded, in view of the ruling of the Apex Court in the case of BayanaBuilders [2018 (2) TMI 1325].

17. So far the demand of service tax is concerned, with respect to service rendered admittedly in the SEZ premises, the same is exempt and the demand of tax for the work in SEZ is fit to be set aside. The Appellant relies on the ruling of Coordinate Bench in case of CST vs FEDCO paints and contracts [2017
(5) TMI 338 (CESTAT-Mumbai)].

18. Learned Counsel further urges that by a way of alternative argument it is urged that even if tax is found to be payable by the Appellant as a sub- contractor, under the admitted fact that the Appellant have not charged or collected the tax, the gross receipts by the Appellant should be considered as cum-tax basis. The Appellant also relies on the ruling of Hon'ble Punjab & Haryana High Court in CCE & ST vs Lone Star Engineers [2019 (3) TMI 1515] wherein the question of law before the High Court was – whether the Tribunal isright in holding that service tax paid by the main contractor on behalf of the sub-contractor can be treated as payment made by the sub-contractor, when the service tax law in the instant case, provides for assessment and payment ofthe due tax by the service provider. The High Court held – since the payment made by the main contractor had not been disputed by the Revenue, it was treated as payment made by the Assessee/sub-contractor. Further in view of section 97 of the Finance Act, 2012, it was recorded that the assessee was not liable to pay service tax on the activity of maintenance and repair of roads, and demand on this account/ground was set-aside. As a result, the matter was remanded back to the Adjudicating Authority for verification purpose whether the Assessee paid service tax for the remaining part of the demand. On such observations, the Appeal by Revenue was dismissed. The High Court relied onits earlier ruling in the case of Vijay Sharma & Co.

19. Accordingly, the learned Counsel for the Appellant prays for setting aside of the demand and to further hold that the extended period of limitation is not invokable and further urges to allow the abatement for the material component or 67% of the work/turnover achieved by them under composite contracts. Further to allow exemption from payment of service tax in respect of service rendered in the SEZ area, and further prayed to set aside the penalties imposedunder section 76, 77 & 78 of the Act.

20. Opposing the appeal, learned AR for the Revenue relies on the Impugned Order. He further

relies on the ruling of the Larger Bench of this Tribunal in CST, New Delhi vs Melange Developers Private Limited [2020 (33) GSTL 116 (Tri–LB)], wherein, the issue before the Larger Bench was – whether the sub- contractor is liable to pay service tax even if the main contractor has discharged service tax liability on the gross amount. The Larger Bench observed that it is not in dispute that Melange as sub-contractor has done Works Contract/composite service including supply of materials through various work orders, wherein, the main contractors have already discharged the service tax liability on the entire contract amount. The Larger Bench noticed that prior to 23.08.2007, under various notifications/Circulars/instructions, a sub-contractor was considered to be exempt from payment of service tax under various heads of services like Customs House Agent/ Travel Agent/ Broker with respect to the service provided through the main contractor. When an architect or interior decorator sub contracts a part or whole of his work to another architect or interior decorator, then no service tax was required to be paid by the sub- contractor provided the principal architect/decorator had paid the service tax. However, the trade notice/ instructions/ circulars were superseded by the Master Circular No. 999.03/23-8-2007 dated 23.08.2007. This Master Circular clarifies that services provided by sub-contractors are in the nature of input services and since a sub-contractor is essentially a taxable service provider, service tax would be leviable on such taxable service provided. It has also been clarified that even if the taxable service is intended for use as input service by another service provider, it would still continue to be a taxable service. As regards the ground taken of double taxation, the Larger Bench examined the issue in light of the credit mechanism introduced or available under CCR, granting benefit of tax paid or credit on input service, if the input service isused for rendering output services which are taxable. In view of Rule 3 of CCR, Cenvat credit can be taken on input services and utilized for payment of servicetax on any output taxable service. It is for this reason that the Master Circular superseding the earlier clarification/notifications, provided for payment of service tax both by sub-contractor as well as main contractor. It was further held that it is not in dispute that sub-contractor renders taxable service to the main contractor. Sec 68 of the Act provides that every person, which includes a sub-contractor, providing taxable service to any person shall pay service tax at the rate specified. Therefore, in the absence of any exemption granted, a sub- contractor has to discharge the tax liability. The service recipient i.e., main contractor can however, avail the benefit of input service credit under the provisions of CCR. When such a mechanism has been provided under the Act and the Rules framed thereunder, there is no reason as to why a sub-contractorshould not pay service tax merely because main contractor has discharged the tax liability. Thus, there can be no possibility of double taxation because the CCR allows the provider of output service to take credit of service tax paid at preceding stage (by input service provider).

21. The Larger Bench took notice of the Ruling of the Division Bench in BCC Developers and Promoters Pvt Ltd vs CCE [2017 (52) STR 22], wherein, it was held that no double taxation is permissible under the law. The Constitution (Article 265) provides to collect the exact amount of tax as per mandate of law i.e., neither more nor less. In the instant case, if the principal had already paid service tax then the same cannot be demanded from the sub-contractor. As perclarification of the Board Circular dated 23.08.2007 as well as earlier Circular dated 07.10.1998, if the principal had not paid service tax then the same canbe charged. If the service tax has already been paid by the principal, then the same cannot be demanded again.

22. The Larger Bench observed that the Division Bench in the case of BCC Developers and Promoters and other rulings did not take into consideration the impact of CCR. It would therefore, not be correct to conclude that double taxation would result, if a sub-contractor is required to discharge the servicetax liability, even if the main contractor had discharged the tax liability. The Larger Bench of the Tribunal also referred to another Larger Bench ruling of thisTribunal in Vijay Sharma & Co., vs CCE [2010 (20) STR 309 (Tri-LB)], wherein, also the issue was as to whether service provided by sub-broker is covered under the ambit of service tax and taxable or not. After noticing that sub- contractor is liable to pay service tax, the Larger Bench examined as to whether this would result in double taxation if the main contractor has also paid service tax, and observed that if the service tax is paid by a sub-contractor in respectof same taxable service provided by the stock broker, the stock broker is entitled to credit of the tax so paid, in view of the provisions of the CCR.

23. The Larger Bench also took notice of the ruling of the Hon'ble Supreme Court in the case of L & T Ltd vs Addl. Deputy Commissioner of Commercial Taxes [2016-TIOL-155-SC-VAT] which was relied upon by the Assessee. In this case, L & T had assigned part of the work to the sub-

contractor who was also registered, and had submitted the returns and paid the tax for the execution of Works Contract. During the course of assessment of L & T, it was submittedthat the sub-contractor had already been taxed and, therefore, the Appellant – L& T cannot be taxed again under Sec 6B of the Karnataka Sales Tax Act. It was held that the value of work entrusted to the sub-contractor could not be taken into account while computing the total/taxable turnover of L & T for the purpose of taxation under Karnataka Sales Tax Act.

24. The Larger Bench of the Tribunal diferred with the ruling of Hon'ble Supreme Court observing that this will not be applicable in the facts and law of service tax, in view of the specific provisions of Sec 66 & 68 of the Finance Act read with CCR. Further, it was observed that there is no provision for input tax credit under the Karnataka Sales Tax Act. The Larger Bench further observed that ground taken of revenue neutrality is also not acceptable, in view of the specific provisions of Sec 66 & 68 of the Act. The sub-contractor has todischarge service tax liability when he renders taxable service. The main contractor, as noticed under CCR, can take credit under the CCR. The Larger Bench of Tribunal answered the reference in the following terms:

"A sub-contractor would be liable to pay service tax even if the main contractorhas discharged service tax liability on the activity undertaken by the sub- contractor in pursuance of the Contract."

25. Learned AR places reliance also on the following rulings:

a) Anju Engineering Works vs CCE, Nagpur dated 05.01.2018.

b) Shree Gurukrupa Construction Co. vs CCE, Rajkot dated 05.08.2019.

c) Sew Infrastructure Ltd vs CCE & C, Raipur [2015 (37) STR 984 (Chattisgarh)].

26. Having considered the rival contentions, we find that the charging Sec 66 of the Finance Act, 1994 provides for levy of service tax on the service renderedonly once or destination based, and does not provide for multiple point levy. Further Article 265 of the Constitution of India provides that no tax shall be collected only except as provided by law. We further find that similar issue under the provisions of Sales Tax Act was in issue, being similar nature ofWorks Contract involving both supply of material and service. Hon'ble Patna High Court in the case of Hindustan Dorr-Oliver (supra) had held that in a composite contract involving deemed transfer of materials to the principal thereis only one sale, the work may be done either by the main contractor or by the sub-contractor. It was categorically held under the admitted fact that the sub- contractor of Hindustan Dorr-Oliver had already paid the Sales Tax, hence, the main contractor could not be again subjected to Sales Tax on the turnover achieved through the sub-contractor.

27. Further, similar issue was before the Hon'ble Supreme Court in L & T Ltd vs Addl. Deputy Commissioner of Commercial Taxes (supra) and the Apex Courtheld that the value of work entrusted to the sub-contractor or the tax payment made by them shall not be taken into consideration while computing total taxable turnover of L & T for the purpose of Sec 6B of the Karnataka Sales Tax Act, as the same would amount to double taxation. We further find that Hon'bleChattisgarh High Court in the case of Sew Infrastructure Ltd (supra), wherein the sub-contractor had contended that the demand has been raised on him of service tax after the main contractor had deposited the service tax. The High Court held – There was substance in contention of Assessee that demandshould not be raised when main contractor had deposited the service tax. The High Court remanded the matter for the limited issue to verify service tax paid by the main contractor and in principle held that tax cannot be demanded againwhere the main contractor had already paid service tax.

28. We further observed that the ruling of the Larger Bench of this Tribunal inMelange Developers (supra) does not override the ruling of the Hon'ble High Courts and Hon'ble Supreme Court particularly in the case of L & T (supra). We find that Hon'ble Punjab & Haryana High Court have held in the case of Vijay Sharma & Co. (supra), that when service tax has been deposited by the main contractor, it cannot be again demanded from the sub-contractor. Further, we find that similar is the view of Hon'ble Chattisgarh High Court in the case ofSew Infrastructure (supra). We further find that the demand of service tax again from the sub-contractor- Appellant herein, under the admitted position that main contractor has already paid the service tax is also hit by Article 265of the Constitution, which provides that no tax shall be collected or retained except with the authority of law, as Sec 66 of the Finance Act provides for destination based levy, or levy of service tax only once on a particular service. The view of Revenue that in view of the CCR providing

Cenvat credit, service tax can be again demanded and collected from the sub-contractor is erroneous and is hit both by Article 265 of the Constitution as well as the charging Sec 66 of the Finance Act. CCR being subordinate legislation cannot override theprovisions of Sec 66 of the Finance Act. Accordingly, the Appeal stands allowed on merits.

29. Further, in the facts and circumstances, we also hold that as Cenvatcredit is available on the service tax, if paid again by the Assessee/sub-contractor, thus the situation is wholly 'revenue neutral'. In such situation and further taking notice that Appellant have maintained proper books of accounts and records of transactions, who are registered with the Department anddepositing the admitted taxes regularly as well as filing returns, no case is made out of any concealment, suppression or fraud. Thus, we hold that extended period of limitation is not available to Revenue.

30. With regard to the alternative prayer raised by the Appellant that theyare entitled to abatement for the material component in execution of compositecontract/WCS, we hold that the Appellant is entitled to abatement of 67% towards material used in rendering composite services as per Notification No. 01/2006. The abatement for material component is also available as there is no taxing power under the Finance Act, 1994 on the material component. It is only the service component which can be subjected to service tax. We also allow thebenefit of cum-tax calculation.

31. So far the service provided in the SEZ area is concerned, we hold that thesame is exempt from the levy of service tax as the provisions of SEZ Act read with Rules thereunder have overriding effect on the provision of Service Tax.

32. We also hold that, in the facts and circumstances, Appellant is not liableto pay any penalty and accordingly, we set aside all penalties imposed.

33. Thus, in view of aforementioned findings and observations, we allow the Appeal and set aside the Impugned Order. The Appellant shall be entitled to consequential benefits, in accordance with law.

(Pronounced in the Open Court on 10.11.2023)

(ANIL CHOUDHARY)MEMBER (JUDICIAL)

(A.K. JYOTISHI) MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70455 of 2019

(Arising out of Order-In-Appeal No.35-ST/APPL/LKO/2019 dated 30.01.2019passed by Commissioner (Appeal) Customs, CGST & Central Excise, Lucknow)

M/s BNG Contractors Pvt. Ltd., **…..Appellant**
(6/90, Kachora Bazar,Belanganj, Agra)

VERSUS

Commissioner of Customs, CGST & Central Excise,Lucknow ….Respondent

APPEARANCE:

Shri Shambhu Chopra, Sr. Advocate & Shri Brijesh Verma, Advocatefor the Appellant

Shri Santosh Kumar, Authorised Representative for the Revenue

CORAM: **HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)**
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70203/2023

DATE OF HEARING	:	20.11.2023
DATE OF DECISION	:	20.11.2023

P.K. CHOUDHARY:

The present appeal is arising out of Order-In-Appeal No.35-ST/APPL/LKO/2019 dated 30.01.2019 passed by Commissioner (Appeal) Customs, CGST & Central Excise, Lucknow.

2. Heard both sides and perused the records.

3. Learned Senior Advocate Shri Shambhu Chopra assisted byShri Brijesh Verma, Advocate has relied upon the decision of the Hon'ble High Court of Karnataka in the case of A. Dasnivas Fernando V/s Commissioner of Central Excise and Service Tax, Bangalore-III in C.E.A. No.28 of 2018.

4. We find that the Order-In-Original dated 07.06.2018 was received by the appellant on 12.06.2018 and they were required to file a appeal before the First Appellate Authority on or before 12.08.2018 but the appeal was filed only on 24.09.2018 i.e. beyond the condonable period and accordingly the appeal is timebarred. The appellant is in appeal before this order. We also find that the judgment relied upon by the learned counsel for the appellant is not applicable to the facts of the present case. In thecase of **Singh Enterprises V/s CCE Jamshedpur** reported in **2008 (221) ELT 163 (SC)** the Hon'ble Supreme Court has heldthat the delay before the First Appellate Authority beyond the condonable period cannot be condoned by the Tribunal.Accordingly the present appeal is dismissed.

(Dictated and pronounced in open court)

(P.K. CHOUDHARY)MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)MEMBER (TECHNICAL)

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[Order per: A.K. JYOTISHI]

1. I have perused the Order drafted by learned brother (Member Judicial) in the instant case. As I am unable to fully agree, I record my separate Order.

2. To me, the core issue is whether service tax is liable to be paid by a person (sub-contractor), who provides a taxable service to another person (main contractor) for a consideration, in a situation where the service tax ispaid by another person (main contractor) on the entire contract value, a part ofwhich he has passed to the said person (sub-contractor) or otherwise.

3. Sec 66 of the Finance Act, 1994 provides that there shall be levied a tax (herein after referred to as service tax) at the rate (as specified) of the value of taxable services. Therefore, once the taxable services are levied to service tax,it needs to be paid or discharged. The question is, who will discharge this service tax. Sec 68 of the Act provides that every person who is providing taxable service to any person, shall pay service tax at the specified rate and in such manner and within such period as may be prescribed. The manner in which the payment of service tax is to be paid is covered by Rule 6 of Service Tax Rules, 1994. A combined reading of these three provisions would entail thatit is the person who is providing taxable service, who is required to pay service tax and not any other person. The exception to this is where in specified cases recipient of service is required to pay (Reverse Charge) instead of provider, which is not the case here.

4. Therefore, the statutory framework under the service tax laws provide that whenever there is a provision of service from any person to another person, the person providing the taxable service has to pay the service tax except in certain situations, where the service recipients are required to pay theservice tax.

5. The admitted fact in the present Appeal is that Appellants were sub- contractor of the principal contractors, who had received the contract and that sub-contractor (Appellant) had not discharged any service tax on their own. Itis also not disputed that they were providing taxable service to the contractor.It is also not disputed that their principal contractors have discharged the total service tax liability on the entire contract value, a part of which was outsourced to the Appellant. Therefore, when the principal contractor has paid the service tax, can it be considered as payment of service tax under Sec 68, or otherwisein the given facts of the case.

6. Learned brother has relied on certain judgments in support of the fact that demand of service tax from the sub-contractor cannot be made, when the principal contractor has paid the service tax on the entire contract value as service tax is destination based tax leviable only once on a service. Whereas, I rely on the judgment passed by the Larger Bench of this Tribunal in the case of CST, New Delhi vs Melange Developers Private Limited (supra), wherein, inter alia, it was held that in the absence of any specific exemption granted, a sub- contractor has to discharge the tax liability. However, the main contractor can avail the benefit of input credit under CCR.

7. To me, the reliance placed by learned brother on the Coordinate Bench judgment in the case of Dotcom Advertising vs CCE, Lucknow [2019 (5) TMI 1482], which had in turn relied on the judgment of Hon'ble Patna High Court in the case of Hindustan Dorr-Oliver Ltd and another vs Union of India and others [1989 (9) TMI 355], is not correct, in as much as the principles which were followed in the case of Hindustan Dorr-Oliver Ltd case, and relied upon in the case of Dotcom Advertising case, are not squarely applicable to the service tax, which is a different statute under the Finance Act, 1994 and having its own distinct nature of levy, collection, discharge of duty and set off for credit taken at different stages to avoid tax cascading. The issue before the Hon'ble Patna High Court was in relation to levy of sales tax on the goods portion in the WorksContract Service (WCS), where the Hon'ble High Court said that in a project, if the goods are already charged to

VAT once, it cannot be charged to VAT again as the goods are transferred in the Works Contract only once and cannot be levied to VAT twice. To draw an analogy of this judgment in support that the whole service provided is only one service, and therefore, the duty needs to be discharged only at one point of time and not at intermittent stage irrespectiveof clear provisions in service tax, is not correct. The law covering the chargingof VAT on the goods portion of the WCS under given set of Rules under the applicable VAT Act, which may have its own different set of rules for providing credit, etc., cannot be, ipso facto, made applicable to service tax law, which hasits own set of rules, procedure for levy and discharge of service tax in accordance with the provisions under the Act. Therefore, to me, it appears that the said judgments are not squarely applicable to the facts of the instant case.

8. However, there is also no dispute that in the earlier clarifications and circulars, the Board itself had felt that there is no need for any payment of service tax by the sub-contractor when the main contractor had paid the servicetax. However, the entire concept of this understanding was reviewed in the lightof different changes which took place over a period of time and specifically afterintroduction of CCR, which provided for taking input credit in respect of goods or services which are used as inputs in manufacture or provision of services.

9. The principle of revenue neutrality would also not be relevant in the caseswhere there is a provision for taking credit at each stage of provision of service by different manufacturers or service providers coming in the chain of provision of entire services or manufacture of goods. Therefore, once credit mechanism has been provided in respect of duty collected, then, obviously, it cannot be said that the same service is being taxed twice. Moreover, revenue neutrality cannot be an absolute ground for non-payment of duty or service tax otherwise leviable in all situations. There are provisions where credit is allowed even in respect of past entitlement, subject to certain conditions and it is not absolute. Essentially, the principle of revenue neutrality can help in understanding whether there was any intent to willfully evade tax or otherwise in a given setof facts, and such understanding would have bearing in deciding whetherextended period can be invoked or otherwise as also whether penalty is leviableunder Sec 78.

10. Therefore, in my view, Revenue's reliance on the Larger Bench ruling in Melange Developers Pvt Ltd (supra) is squarely applicable to the facts of this case. This judgment has covered entire gamut of circulars issued from 1997 till 2007, as also various judgments relied upon by the Appellants including BCC Developers and Promoters Pvt Ltd vs CCE, Jaipur [2017 (52) STR 22 (Tri-Del)], L & T Ltd vs Addl. Deputy Commissioner of Commercial Taxes [2016-TIOL-155- SC-VAT] & Power Mech Projects Ltd vs CC, Guntur [2017 (48) STR 165 (Tri- Hyd)], and finally after appreciating the cited case laws and entire relevant provisions under the service tax laws, came to the conclusion that it was not possible to accept the contention of the Counsel for the Respondent i.e.,Melange Developers, that a sub-contractor is not required to discharge service tax liability, if the main contractor has discharged the liability on the work assigned to the sub-contractor. In fact, it went on to the extent of recordingthat all decisions, including those referred to in this Order, taking a contrary stand overruled and finally reference was answered in the following terms: "A sub-contractor would be liable to pay service tax even if the main contractor discharged service tax liability on the activity undertaken by the sub-contractorin pursuance of the contract."

11. Therefore, respectfully following the judgment in the case of Melange Developers Pvt Ltd (supra), the Appellants would be required to discharge service tax in respect of services provided to the main contractor, irrespectiveof whether main contractor had already discharged service tax on the entire contract value or otherwise. It may be further added that from the questionnaire sent by the Department to the principal contractor(s) and their responses received, it is obvious that in none of these responses, the principal contractors have categorically said that they have discharged the service tax onbehalf of their sub-contractors. In fact, their common plea has been that they have discharged service tax on the entire contract.

12. In so far as issue for not charging service tax on the service provided by the Appellant to the contractor and not to the SEZ unit or SEZ developer, the reliance has been placed on CST vs FEDCO Paints and Contracts [2017 (5) TMI 338 (CESTAT-Mumbai)]. Respectfully following the said judgment, in the given facts of the case, when the service has not been admittedly provided to a developer, will still be not required to discharge service tax as it was provided within SEZ and I, therefore, concur with learned brother for arriving at the conclusion at Para 31.

13. There is another aspect which also needs to be discussed. The Appellants have, inter alia, in their grounds to Appeal prayed that, in view of the issues involved, which are mostly in the nature of interpretation of statute and that no malafide intent has been alleged or proved, the penalty imposed under Sec 76, 77 & 78 of the Finance Act is liable to be set aside.

14. It is an admitted fact that prior to 2007 Circular, the department was alsoapparently under the impression that there is no liability for sub-contractor to pay service tax when the main contractor has paid the service tax and it is only after the review in 2007, they came to the new conclusion that even sub- contractor is required to discharge service tax, when he is providing services through the main contractor. In the instant case, the SCN was issued on 20.10.2010 for the period 2005-06 to 2009-10. The SCN has been issued basedon certain intelligence that certain service tax payers were suppressing the actual taxable value and pursuant thereto the documents including balance sheet, ledger account, etc., submitted by such providers were scrutinized. The statements were also recorded, wherein, inter alia, Shri Choppa Suribabu,power-of-attorney holder of the Appellant, admitted that they have rendered services under MRS/CAI but neither paid service tax nor filed ST3 returns during the period, due to non-receipt of amounts from their clients and have presumed that their clients might have paid. In fact, Department proceeded to check the veracity of the payment by principal contractor. They also admitted that when amount of service tax was received during the year 2009-10 hasbeen paid under challans, as shown in ST3 returns filed. However, while adjudicating the SCN on the issue, the original authority came to the conclusionthat service provider had willfully suppressed the value of taxable service and therefore, proviso to Sec 73(1) is invokable and also liable for penal action under Sec 78.

15. It is a very peculiar situation where the entire demand is being made heavily relying on the 2007 Master Circular, when the earlier Circulars were taking a contrary stand, irrespective of the fact that the law itself had changed much before 2007 concerning Cenvat credit, and the provisions under Sec 66 and 68 discussed supra have remained more or less the same. Therefore, this appears to be an issue of interpretation and under the circumstances, neither extended period can be invoked nor penalties can be imposed under Sec 78 etc.There is no sufficient strong evidence on record to suggest that Appellants have deliberately decided not to discharge service tax. The fact that Department asked the details of payment from principal contractor shows that department also had doubt as to whether the Appellants were still required to pay if the principal contractors have already paid. Therefore, in the absence of any other cogent and strong evidence to suggest any willful suppression or deliberate misstatement, it would not be proper to invoke extended period or impose penalty under Sec 78 etc., of the Finance Act, 1994 in the facts of the case. Thus, all penalties are set aside.

(A.K. JYOTISHI) MEMBER (TECHNICAL)

Veda

DIFFERENCE OF OPINION

16. As there is difference of opinion between the Members, the following questions arise for determination by learned Third Member:

Question:

The Appellant/sub-contractor is not liable to pay service tax as admittedly, service tax has been paid by the main contractor on the whole contract value as held by Member (Judicial)

OR

Service Tax is payable on the value of sub-contract/work done by the Appellant in spite of the fact that the main contractor has discharged theservice tax on the whole contract value (including the value of sub-contract) as held by Member (Technical).

17. The Registry is directed to place the record before the Hon’ble President for necessary Orders including appointment of the Third Member for Hearingthe question of difference.

(Pronounced in the Open Court on 10.11.2023)

(ANIL CHOUDHARY)MEMBER (JUDICIAL)

(A.K. JYOTISHI) MEMBER (TECHNICAL)

Veda

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Miscellaneous Application No.70274 of 2018
(On behalf of the appellant)

Service Tax Appeal No.404 of 2010

(Arising out of Order-in-Original No.73/Commissioner/LKO/ST/2009 dated 30/11/2009 passed by Commissioner of Customs, Central Excise & Service Tax, Lucknow)

M/s Origin Advertising Pvt. Ltd., **…..Appellant**
(2nd Floor, 382-383, Akarshan Complex,Vibhuti Khand, Gomti Nagar, Lucknow)

VERSUS

Commissioner of Central Excise &

Service Tax, Lucknow **….Respondent**

(7-A Ashok Marg, Lucknow)

APPEARANCE:

Shri Nishant Mishra, Advocate &

Ms Vedika Nath, Advocate for the Appellant

Shri Manish Raj, Authorised Representative for the Respondent

CORAM: **HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)**
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70227/2023

DATE OF HEARING : 06 October, 2023DATE OF PRONOUNCEMENT : 29 November, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original No.73/Commissioner/LKO/ST/2009 dated 30/11/2009 passed byCommissioner of Customs, Central Excise & Service Tax, Lucknow. By the impugned order following has been held:-

ORDER

In view of the facts and circumstances of the case anddiscussions and findings supra, I pass the following order-

1. *I confirm the demand of service tax amounting to Rs.30,33,510.00 (Rupees Thirty Lacs Thirty Three Thousand Five Hundred Ten only) on M/s Origin Advertising Pvt. Ltd., IInd Floor, 382-383, Akarshan Complex, Vibhuti Khand, Gomti Nagar, Lucknow under Section 73(1) of the Finance Act, 1994 and direct them to pay the same forthwith alongwith interest as applicable as per Section 75 of the Finance Act, 1994.*
2. *I also confirm the amount of Rs. 10,46,676.00 (Rupees Ten Lacs Forty Six Thousand Six Hundred Seventy Six only) upon M/s Origin Advertising Pvt. Ltd., IInd Floor, 382-383, Akarshan Complex, Vibhuti Khand, Gomti Nagar, Lucknow for wrong availment of cenvat credit under Rule 14 of Cenvat Credit Rules, 2004 read with Section 73(1) of the Finance Act, 1994 and direct them to pay the same forthwith along with interest as applicable as per Section 75 of the Finance Act, 1994.*
3. *I drop the demand amounting to Rs.5,96,383.00 relating to short payment of Service Tax and Rs.8,17,382.00 relating to wrong availment of cenvat credit as the same was rot found sustainable under law.*
4. *I impose a penalty of Rs.40,80,186.00 (Rupees Forty Lacs Eighty Thousand One Hundred Eighty Six only) under Rule 15(4) of the Cenvat Credit Rules, read with Section 78 of the Finance Act, 1994. However, I give them the option to pay the amount alongwith interest within 30 days of the communication of this order in terms of first proviso to Section 78 read with Section 11AC and on doing so the amount of penalty payable would be 25% of the amount which would also bepayable within the said 30 days referred above.*"

2.1 Appellants are engaged in providing "Advertising Agency Services" to the clients which falls under the taxable category as defined under Section 65(105)(e) read with Section 65(3) of the Finance Act, 1994.

2.2 As per Instruction letter No.341/43/96-TRU dated 31.10.1996 advertisement agency is legally obliged to collect and pay service tax. However, in case where the advertisement agency fails to collect the service tax, the liability for payment ofservice tax so remaining undischarged has to be borne by the Advertisement Agency itself. Therefore, appellant could not haveclaim any exemption from payment and could not be collectedby them on account of pay service tax. Appellant continued to make payment of service tax beyond the prescribed time limit and filed ST-3 returns after the due dates. The returns were filedby the appellant on 11.02.2004 for ST-3 returns pertaining tothe period from April, 2002 to September, 2002, October2002 toMarch2003 and April 2003 to September 2003. The returns werecleared for the period from April, 2002 to September, 2002 weresubmitted by the appellant on 11.02.2004 against the due date on 25.10.2002. Thus, extended period has been invoked for making the demand in respect of the period from April, 2002 towards the date of filing of return.

2.3 Revenue was of the view that appellant has short paid the service tax under the provisions of Section 66, 67, 68 & 70 ofthe Act read with Rule 6 and 7 during the period April, 2002 to March, 2008. They have short paid service tax amounting to Rs.35,19,222.00 + Cess. Rs.80,534.00 + Higher Ed. Cess Rs.30,136.00 amounting in aggregate to Rs.36,29,893.00. This amount though short paid was to be recovered from them by making the demand in terms of Section 73 (1) of the Finance Act, 1994 alongwith applicable interest as per Section 75 of the Act and appellant was also liable for penalty under Section 77 of the Act.

2.4 Further, scrutiny of ST-3 returns for the period from 2002-03 to 2007-08 it was revealed that appellant have taken the credit on the strength of certain invoices which do not containthe requisite details as prescribed under Rule 4 (A) of the Rules and no conformity with Rule 5 of Service Tax Credit Rules, 2002 read with Rule 9 of Cenvat Credit Rules, 2004 as amended from time to time. Cenvat credit on these invoices is not admissible.

In respect of these invoices Cenvat credit amounting to Rs.18,64,058.00 was not admissible to them.

2.5 Show cause notice dated 05.02.2009 was issued to the appellant asking them to show cause as to why-

a. *(i) The Service Tax amounting to Rs 36,29,893/- (Thirtysix lakhs twenty nine thousand eight hundred and ninety three rupees only) should not be demanded and recoveredfrom them under proviso to Section 73(1) of the Act.*

(ii) The interest at appropriate rate should not be recovered from them under Section 75 of the Act.

(iii) The penalty under section 76 and 78 of the Actshould not be imposed upon them.

b. *(i) The Cenvat Credit along with Education cess amounting to Rs. 18,64,058/-*

(Eighteen Lakhs Sixty Four Thousand and Fifty Eight only) should not be recovered from them along with applicable interest under Rule 6 of Service Tax Credit Rule 2002 and Rule 14 of Cenvat Credit Rules, 2004.

(ii) The penalty under Rule 15 of Cenvat Credit Rules, 2004 read with Section 78 off the Act should not be imposed upon them."

2.6 This show cause notice has been adjudicated as per the impugned order referred in para-1 above. Aggrieved appellant has filed this appeal.

2.7 When the appeal was fist listed on 06.09.2010 following order was made:-

"Let the Appellant appear before the Adjudicating authorityon 20.09.2010 and reconcile the discrepancy. Let revenue get reconciliation by 10.10.2010. Call on 18.10.2010."

2.8 In terms of this order a verification was conducted by the Departmental officers and a discrepancy report dated 10.01.2011 was prepared and given to the concern Additional Commissioner Adjudication. Thereafter, the stay application dated 06.06.2010 filed by the appellant was decided by Stay Order No.ST/197/2011 dated 28.03.2011 directing the appellant to deposit an amount of Rs.13 lakhs within 8 weeks. Compliance to the said order has been noted by Miscellaneous Order No.ST/134/11 dated 10.08.2011.

3.1 We have heard Shri Nishant Mishra and Ms Vedika Nath advocate for the appellant and Shri Manish Raj learned Authorised Representative appearing for the respondent.

3.2 Arguing for the appellant learned Counsel submits that-

- Extended period of limitation cannot be invoked for makingthis demand and relies upon the decision in the case of Commissioner of Central Excise and Customs, Surat Vs Sun Pharmaceuticals Industries Ltd. and Others 2020 (10) SCC 583. On merit also the demand is not sustainable.
- Breakup of the demand is made as indicated bellow:-

A	Full benefit of abatement to the extent of 85%, in terms of Circular No. 341/43/96-TRU dated 31.10.1996 not provided in Order-in-Original	Rs 4,38,694.92/-
B	Demand of service tax on services provided by appellant as sub-contractor prior to Sep 2004, on which service tax liability has been discharged by the contractor	Rs 5,04,247.52/-
C	Non-consideration of payment of service tax through CENVAT while calculating amount of service tax paid	Rs 3,52,356/-
D	Application of tax rateprovision of services	the of on date of	Rs 2,66,019/-
E	Grossing up of taxable amount due to inadvertent mentioning of service tax with taxable value of services in some returns	Rs.14,65,840.40/-
Rs 30,27,159/-		

- In the report submitted by the officers for resolving discrepancies following observations are made about the demands in dispute:
  - The appellant is entitled to abatement on print mediato the extent of 85% as per Circular No 341/43/96- TRU dated 31.10.1996 and the same was allowed in OIO to the extent of sample invoices produced before the adjudicating authority. On scrutiny of all the invoices in dispute it is evident that appellant is entitled for further reduction of demand on this

account by an amount o Rs 4,38,694.92/- against Rs4,40,087.72 as claimed by the appellant.

- Deduction of Rs 5,04,247.52/- from the demand at SNo 2 claimed by the appellant is not admissible in terms of Master circular No 96/7/2007 dated23.08.2007.
- The fact of payment of service tax of Rs 87,606 + Rs2,64,750/- = 3,52,356/- has not been taken into account in the OIO and the said amount has been included in the total demand confirmed.
- Deduction from the demand to the extent of Rs2,66,019/- needs to be applied because the rate of service tax for calculating the tax liability is to be on the date of provision of service.
- Deduction of Rs 14,65,840/- on account of amounts received inclusive of service tax resulting in excess demand of Rs 14,65,840/- being a new issue needs to be considered by the CESTAT.
- Thus as per this reconciliation report prepared by therevenue officers, demands at "A", "C" and "D" in the table above cannot be upheld

- In respect of demand at "B", the issue is covered by the decision of Larger Bench of this Tribunal in the case of Commissioner of Service Tax Vs Melange Developers (P) Ltd. 2019 (106) Taxmann.com 52 (LB).Further, as theissue is completely interpretational one and conflicting views were taken by the different Benches of the Tribunal, there cannot be any allegation for willful suppression or invocation of extended period, as has been held by this Tribunal in the case of Vinoth Shipping Services Vs Commissioner of Central Excise & Service Tax 2021 (132) Taxmann.com 275 (Tri.-Chennai).

- Demand at "E" is in respect of certain clerical errors, as theamount mentioned in the column of value of taxable services regarding represented the gross amount realized by the appellant i.e. included the service tax amount though on verification team of officers found this contention of the appellant to be correct but did not express any opinion in this regard, and the Order-in- Original is also silent on this issue.
- In respect of recovery of Cenvat credit, the credit has beensought to be denied on the ground that the invoices against which the credit has been taken does not contain minimum information as required under Rule 4(A) or 9 (2) of the Rules. Appellant has submitted a detailed chartcontaining all the details with registration details of supplier of the supplier of input services that being so this demand cannot be sustained.
- As the demand itself is not sustainable the demand for interest also fails and penalty imposed cannot be sustained.

3.3 Arguing for the revenue learned Authorized Representative reiterates the findings recorded in the impugned order and the Order-in-Original.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 For confirming the demand against the appellant, Adjudicating Authority has recorded the following findings:-

The Revenue's contention in light of Department's instruction letter No. 341/43/96-TRU dt. 31.10.96 that the liability for payment of service tax has to be borne by the advertising agency on the amount not received is notrelevant after amendment to Rule 6 of Service Tax Rules, w.e.f. 16.10.98 which reads as under:

Rule 6: Payment of Service Tax

"The service tax shall be paid to the credit of the Central Government by the 5th of the month immediately following the calendar month in which the payments are received, towards the value of taxable service "

Hence the liability to pay service tax accrues only on the amount which has been received during the month.

The Noticee have repeatedly contested that the Department has demanded service tax on the amounts which were never collected by them and no evidence was placed by the Department that the amounts as stated tobe realized in the show cause notice has been in fact realized by them. They have also not given any lead to establish that the figures quoted in the SCN are not correct. They have, however, furnished the details of the amount realized by them in the Annexure 1 of their submission dated 28.02.09 and the amount shown as collected by them therein are almost matching the amountquoted in the Annexure A-1 of the notice in respect of several half yearly periods. There are only minor variationsin figures relating to certain other half yearly periods as tabulated hereinfra-

Period	*Amt shown as realized (as per SCN)*	*Amt collected as per Annexure 1 of the Noticee*
April 02 to Sept 02	*5526082*	*5526082*
Oct 02 to Mar 03	*11784942*	*11784942*
April 03 to Sept 03	*3157761*	*3157761*
Oct 03 to Mar 04	*10309589*	*10309589*
April 04 to Sept 04	*17717770*	*17717770*
Oct 04 to Mar 05	*22666564*	*22292796*
April 05 to Sept 05	*23585537*	*21845675*
Oct 05 to Mar 06	*30534804*	*27869624*
April 06 to Sept 06	*26387422*	*30634830*
Oct 06 to Mar 07	*34027892*	*36401541*
April 07 to Sept 07	*37435126*	*34562519*
Oct 07 to Mar 08	*40572816*	*36957673*
Total	*263706305*	*259060802*

The assessee is required to indicate the amount realized in their ST-3 returns which is statutory document and the figures quoted therein are supposed to be the correct one. But, the comparative details of amount realized and service atx paid in the notice and the amount reflected in the noticee's ST-3 return as received are varying substantially in respect of first three half yearly periods i.e April 02 to Sept 02, Oct 02 to Mach 03 and Apr 03 to Sept 03 as reflected hereinfra:-

	Amount as per SCN		*Amount as per ST-3 return*		
Period	*Amt shown as realized*	*S Tax paid*	*Amt realized*	*S Tax paid*	*Deduction of Value*
April 02 to Sept 02	*5526082*	*134994*	*134994**	*134994*	
Oct 02 to Mar 03	*11784942*	*22226 7*	*222266**	*22226 6*	
April 03 to Sept 03	*3157761*	*20347 5*	*203474**	*20347 4*	
Oct 03 to Mar 04	*10309589*	*70607 2*	*10309589*	*70607 2*	
April 04 to Sept 04	*17717770*	*13811 97*	*17717770*	*12935 91*	
Oct 04 to Mar 05	*22666564*	*20224 42*	*22666564*	*17576 92*	
April 05 to Sept 05	*23585537*	*20981 66*	*23585537*	*20981 66*	
Oct 05 to Mar 06	*30534804*	*26652 34*	*30534804*	*26652 45*	

April 06 to Sept 06	*263874 22*	*22950 20*	*306348 27*	*29342 13*	*42574 05*
Oct 06 to Mar 07	*340278 92*	*39674 45*	*364015 45*	*41257 42*	*23736 53*
April 07 to Sept 07	*374351 26*	*41754 41*	*380387 91*	*41754 35*	*60382 5*
Oct 07 to Mar 08	*405728 16*	*44472 82*	*414049 55*	*44472 82*	*85722 2*
Total	*263706 305*	*24319 035*	*251294 382*	*24764 172*	*80921 05*

Looking in to the table above, it is clear that sincethe amount shown as realized and the amount of service tax paid as shown in the ST - 3 for half yearly periods fromApril 02 to Sept. 03 are one and the same, it is abundantlyclear that the realized amount has not been shown correctly by the Noticee in their ST - 3 returns as the amount of service tax paid in any case cannot be equal to the amount realized for the respective half yearly period. The rate of service tax during the relevant period is 5%and later 8% w.e.f. 14.05.2003. Hence, in respect of the said half yearly periods, the value for calculation of taxableliability is being taken as the amount shown in the notice. The Noticee have also admitted the same (the amount shown as realized in the notice) as amount collected during the respective half yearly periods in their Annexure
1 enclosed with their submission dated 28.02.09 and therefore the correct amount realized for the respectivehalf yearly periods can be taken for calculation of service tax liability, as under-

Period	***Amt. shown as realized***
April 02 to Sept.02	5526082
Oct. 02 to March 03	11784942
April 03 to Sept. 03	3157761

Hence, the Noticee's assertion that the service tax liability was calculated on hypothetical figures is not correct and the real issue which emerges here in view of the above is whether the benefit of deduction in taxable value while calculating the service tax liability would be available to them especially in respect of the servicesrendered to the print media and services where service tax liability has been discharged by the principal contractor. The Noticee have not explained as how the certain collection received by them as shown in the Annexure A-I are exempted. As regards their contention that contractors / sub-contractors are not required to discharge the service tax liability as the main contractor have discharged the same. This issue has been clarified by the Master Circular No. 96/7/2007 dated 23.08.07 under reference code no 999.03 -"A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main serviceprovider for completion of his work does not in any way alter the fact of provision of taxable service by sub-contractor.

Service provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether ornot the services are provided by a person in his capacity as a sub-contractor and whether or not suchservices are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alterthe taxability of the service provided."

The assessee is therefore not entitled to deductionon this score and relief sought by them cannot be accorded. Sub-contractors are also liable for payment of service tax which can be taken as input service credit by the principal contractor. The other ground for seeking reliefis deduction claimed on print media which are liable for exemption as per reference code 004.01/23.08.07 of Circular No. 96/7/2007-ST dt. 28.08.07. According to themthe amount payable to print media shall not be included in the value of taxable services and only the commission received by advertising shall be liable to tax. This has also been clarified by the Board under Circular No. 341/43/96- TRU dated 31.10.96 and letter No. 332/4/2008 dt.

05.05.08. *Hence they would be entitled for deduction in value on this account, and*

therefore they would be entitledfor the benefit to the extent of the evidences furnished by them in this regard. In this connection a report was called from the jurisdictional Assistant Commissioner, Central Excise Division-I, Lucknow vide his letter C.No. 5-STC/EA- 2000/Lko-1/06. According to him the facts on record as submitted by the Noticee, reveal the following:

(i) The amount where service tax liability has been discharged by the principal contractor : *Rs.8,42,740.00*

(ii) The amount where services have been Rendered to the print media : *Rs 23,69,654,00*

As regards (i), the issue has already been discussed aboveand in view of the clear guidelines of the Master Circular, no relief can be granted to the Noticee. But the Department under instruction letter F.No.341/43/96-TRU dated 31.10.1999 has clarified regarding the deductionabout print media as under-

"the amount paid, excluding the own commission, bythe advertising agency for space and time in getting the advertisement published in the print media (i.e., newspapers, periodicals, etc) or the electronic media (Doordarshan, private TV channels, AIR, etc.) will not be includible in the value of taxable service for the purpose of levy of service tax. The commission received by the advertising agency would, however, be includible in the value of taxable service".

As regards the amount at SI.No-(ii), the same wouldnot be available to them in toto. They would be entitled fordeduction in the value on the amounts charged from the print media for publishing news items and the Service Tax would be payable on the commission in respect of the relevant invoices. Out of the total invoices produced by theNoticee, the following invoices which pertain to the period April 03 to March 06 in respect of which the Noticee have not claimed any deduction in value, were found eligible for deduction in value-

DETAILS OF INVOICES ISSUED		*TO THE PRINT*	*MEDIA*
INVOICE NO	*Gross Amt.*	*Commission*	*Deduction Allowed*
PB03043622 DT. 18.08.03	*15066*	*2260*	*12806*
PB03043646 DT 28.10.03	*94259*	*14139*	*80120*
PB040533001 DT. 10.05.04	*201370*	*30206*	*171165*
PB040533008 DT 26.06.04	*45726*	*6859*	*38867*
PB040533028 DT. 03.01.05	*48300*	*7245*	*41055*
PB050633027 DT 07.11.05	*55000*	*82500*	*467500*
	954721	***143208***	***811513***

However, the Noticee have already claimed the deduction in value in their ST-3 returns for the period April 06 to March 08, and therefore the invoices produced by them pertaining to this period are not relevant for computation of value of deduction as it is also not in dispute under the Show Cause Notice. It is further observed that they have not discharged theirService Tax liability correctly throughout the period right from April 2002 to March 2008 and their correct service tax liability after permitting deduction in respect of the above invoices and deduction claimed by them for the period April 06 to March 08 istabulated as under:

Period	*Amt realized as per S tax return*	*Deduction permissible on bills/ invoices raised for print media/ principal contractor*	*Taxable Value*	*Servicetax payable*	*S Tax paid*	*Short Payment*
April 02 to Sept 02	*5526082*	*0*	*5526082*	*276304*	*134994*	*141310*
Oct 02 to Mar 03	*11784942*	*0*	*11784942*	*589247*	*222226*	*367021*
April 03 to Sept 03	*3157761*	*12806*	*3144955*	*251596*	*203474*	*48122*
Oct 03 to Mar 04	*10309589*	*80120*	*10229469*	*818358*	*706072*	*112286*
April 04 to Sept 04	*17717770*	*210032*	*17507738*	*1400619*	*1293591*	*107028*

Oct 04 to Mar 05	*22666564*	*41055*	*22625509*	*2307802*	*1757692*	*550110*
April 05 to Sept 05	*23585537*	*0*	*23585537*	*2405725*	*2098166*	*307559*
Oct 05 to Mar 06	*30534804*	*467500*	*30067304*	*3066865*	*2665245*	*401620*
April 06 to Sept 06	*30634827*	*4247405*	*26387422*	*2933335*	*2934213*	*-878*
Oct 06 to Mar 07	*36401545*	*2373653*	*34027892*	*4125790*	*4125762*	*28*
April 07 to Sept 07	*38038791*	*603825*	*37434966*	*4618182*	*4175435*	*442747*
Oct 07 to Mar 08	*41404955*	*857222*	*40547733*	*5003839*	*4447282*	*556557*
Total	*27176316 7*	*8893618*	*26286 9549*	*2683 9130*	*24764 192*	*303 351 0*

As regards the noticee's objection that they have notbeen provided the basis of computation of service tax, the same is not acceptable as Annexure A-I to the notice is selfexplanatory, in which short payment has been calculated. This contain complete details such as respective period, amount of taxable value, rate applicable, service tax payable, service tax paid through GAR and paid through cenvat credit. Similarly the objection relating to rate of service tax is also ethereal as different rates applicable at the different period of time have been given in the chart and tax liability has been calculated accordingly and the Noticee have not furnished any evidence to substantiate their contention regarding the services during some prior period of time and therefore their objection that the rate applicable at the time of providing service has been ignored is not acceptable."

4.3 When the matter was earlier listed, as noted above on 06.09.2010, the Bench had directed for reconciliation of discrepancy and the same was got reconciled through the concerned Adjudicating Authority. The report dated 10.01.2011 was prepared by officers on the issue, relevant paras are reproduced bellow:-

1. *In this regard it is found that the appellants-have agitated that total amount of abatement admissible to them during the period April 2002 to March 2008 should have been Rs.1,40,20,935.22 instead of Rs.88,93,618/- as accepted by the Hon'ble Commissioner in o-in-o dt. 30.11.2009. Theparty had relied on following letters which they had already submitted to the department before issue of o-in-oeither to the Superintendent I/C Service Tax Group -III, Central Excise, Division-l, Lucknow or to the Commissioner, Central Excise, Lucknow.*

(i) Point No. 1 & 5 Letter No. NIL Dated29.11.2008

(ii) Point No. 3 letter No. NIL daled 29.01.2008

(iii) Point No. 1-3 letter No. NIL dated. 25.08.2008

(iv) Point No.A-5 letter Nc. OA/228/0950 dated28:02.2009

(v) Point No.1 letter No.NIL dated 30.11.2009

(vi) Point No. 2 letter No. OA/0809/228 dated13.03.2010

All the above letters relied by the appellants have been examined and it is found that the party has quantified the value of abatement half yearly ST-3 return wise vide their letter dated 28.02.2009 only wherein the value of abatement shown by the party is as under:-

Period	*Abatement shown by the party in their letter Dt 28.02.2009*	*Abatement found by officers*	*Abatement allowed in OIO*	*Difference in tax claimed by the party*	*Difference in tax examined by the officers*
April 02 to Sept 02	*778537.95*	*778537.95*	*0*	*38926.90*	*38926.90*
Oct 02 to Mar 03	*337588.55*	*337588.55*	*0*	*16879.43*	*16879.43*
April 03 to Sept 03	*216180.50*	*216180.50*	*12806*	*16269.96*	*16269.96*
Oct 03 to Mar 04	*909307.90*	*891598.00*	*80120*	*66335.03*	*64942.03*
April 04 to Sept 04	*280754.15*	*280754.15*	*210032*	*5657.77*	*5657.77*
Oct 04 to Mar 05	*486060.60*	*486060.60*	*41055*	*45390.57*	*45390.57*
April 05 to Sept 05	*1221990.06*	*1221990.06*	*0*	*124642.99*	*124642.99*
Oct 05 to Mar 06	*1739749.40*	*1739749.40*	*467500*	*129769.44*	*129769.44*
April 06 to Sept 06	*4240615.15*	*4240615.15*	*4247405*	*-755.03*	*-755.03*
Oct 06 to Mar 07	*2373674.55*	*2373674.55*	*2373653*	*-0.66*	*-0.66*
April 07 to Sept 07	*594798.55*	*594798.55*	*603825*	*-1113.86*	*-1113.86*
Oct 07 to Mar 08	*841704.85*	*841704.85*	*857222*	*-1914.82*	*-1914.82*
Total	*14020962.21*	*14003252.31*	*8893618*	*440087.72*	*438694.72*

In this regard it shall be important to point cut that abatement on print media is admissible to the extent of 85% as per circular No.341/43/96-TRU dt. 31.10.1996 in the instant case the Hon'ble Commissioner has allowed abatement for the period April 2003 to September 2005 in respect of those invoices which were submitted by the appellants as sample invoice of print media vide their letterdt. 30.11.2009 addressed to Superintendent Service Tax Group-III, in connection with instant show cause notice. It is found that they have shown their abatement value with their ST-3 returns

w.e.f. half year ending Sept 04 on a separate, calculation sheet which they had enclosed with all ST-3 returns. Invoices on print media have been scrutinized with the calculation chart of the party andfigures of ST-3s and the discrepancies noticed is shown in the chart as shown above.

2. *The party's contention that the total amount of Rs.5,04,247.52 is on account of excess tax demand confirmed in respect of exempted services / sales is not correct as this pertains to the issue of taxability of servicesof sub-contractors and this issue has been fully discussed and decided in detail in o-in-o, wherein, there is difference of Master Circular No.96/7/2007 dt. 23.08.2007 whereby itis stated that- 'a sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the factof provision of taxable service by sub-contractor. Service provided-by-sub-contractors are in the nature of input service. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub- contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service providerdoes not alter the taxability of the service provided."*

Hence, it is correct to say that they are not entitled to deduction on this score and relief sought by them cannot be accorded. Sub-contractors are also liable for service tax which can be taken as Input service credit by the main contractor. However, the amount of suo moto exemption availed in the guise of services of sub- contractors for the different period is as under:-

Period	*Difference in Tax due to exempt services*
Apr 02 to Sept'02	*102381.8*
Oct'02 to Mar'03	*350016.2*
Apr 03 to Sept'03	*0*
Oct '03 to Mar04	*45950.64*
April 04 to Sept'04	*5898.88*
Oct 04 to Mar 05	*0*
Apr 05 to Sept'05	*0*
Oct'05 to Mar'06	*0*
Apr 06 to Sept.'06	*0*
Oct '06 to Mar'07	*0*
Apr 07 to Sept.07	*0*
Oct '07 to Mar'08	*0*
Total	*504247.52*

3. *Party's contention that in some cases the amount of collection includes the amount of service tax collected and by this way the tax has been calculated twice due togrossing up of amount which has resulted into an excess tax demand of Rs. 14,65,040. The party's contention that the details of these calculation mistake due to clubbing of service tax with value of taxable service realized was already communicated by them to the various authorities vide their letter dt. 25.08.2008, 29.11.2008 and 20.12.2009 is not fully correct as vide letter dt. 02.12.2009 they have merely pointed out that the amount of Service Tax as shown in service tax returns is correctly mentioned and all the amount realized as service tax was correctly paid by them. However, the mistake in mentioning of taxable value of Service Tax is due to clerical error- and without any intention to evade tax thereon, which is non-intentional and due to ignorance as necessary explanations were filed with the department as soon as the mistake was traced by them. However; the party had not quantified the value of twice valuation due toclubbing of service tax with the taxable value in theirrepresentation dt. 02.12.2009. There is no reference of this issue in their any other letter/representation including letter dt 25.08.2008 and 29.11.2008 this issue has cropped up after passing of this OIO by the Commissioner.The half-yearly return wise excess value so accounted for against which the party has contested that the total amount of Rs.14,65,840/- is included in the confirmeddemand of Rs.30,33,510/- is as under-*

Period	*Amount of taxable value*	*Amount of tax demanded in o-in-o.*

October 2004 to March 2004	*Rs. 3,73,768/-*	*Rs 38,125.25*
April 2005 to September 2005	*Rs. 17,45,823/-*	*Rs. 1,78,073.95*
October 2005 to March 2006	*Rs. 26,66,247/-*	*Rs 2,71,854.89*
April 2007 to September 2007	*Rs. 34,75,962/-*	*Rs 4,28,991.71*
October 2007 to March 2008	*Rs. 44.47,282/-*	*Rs: 5,48,794.60*
Total	*Rs. 1,27,09,082/-*	*Rs. 14,65,840.40*

It shall be important to point out that this is a fresh issue and can only be taken up by CESTAT as this issuewas not included in concerned show cause notice issued bythe Hon'ble Commissioner.

4. *Regarding point no.4 it is found that the party has rightly contested that the rate of tax as applicable at the time of rendering of services should be applied. Accordingly, half yearly return wise excess demand raised and confirmed or account of difference in service lax rate isas under-*

Period	*Difference in Tax due rate of tax*
April'02 to Sept'02	*0*
Oct'02 to Mar'03	*0*
April'03 to Sept'03	*31851.00*
Oct'03 to Mar'04	*0*
April'04 to Sept'04	*28.00*
October 2004 to March 2005	*201844.00*
April 2005 to September 2005	*5155.00*
October 2005 to March 2006	*20.00*
April 2006 to September 2006	*0*
October 2006 to March 2007	*0*
April'07 to Sept'07	*21142.00*
Oct'07 to Mar'08	*5979.00*
Total	***266019.00***

The party had pointed out in their representation dt.28 02.2009 against show cause notice dt. 05.02.2009.

5. *Regarding point No.5 the party's contention regarding ignoring the payment of service tax of Rs. 87,606/- and Rs.2,64,750/- for the period April 2004 to Geptember 2004 and October 2004 to March 2005 respectively, appears quite correct as in Annexure - A-I of the show cause notice this amount of service lax has been shown to have been paid from cenvat credit in Annexure - A-1. However, Ih o-in-o this amount of Service Tax has notbeen taken into account rather treated it as non-payment and included this amount in the tolai confirmed demand of Rs, 30,33,510/- . This plea of the party can out rightly be considered for reducing the confirmed demand. So far as party's contention that no reason has been recorded in theoriginal demand cum order for not allowing payment of cenvat credit is crystal clear.*

6. *Regarding disallowing of cenvat credit in o-in-o the party's contention that no evidence has been placed by thedepartment, a list of such credits actually utilizedmonthwise by the party is enclosed as Annexure -A. This fulfills the requirement of the appellants as given in para 6 of their letter dt. 08.12.2010."*

4.4 From the above, it is evident that the revenue authorities have acknowledge that revenue agrees that the abatement as claimed by the party i.e. Rs.14,02,0962.21 is correct. However, in the

Order-in-Original abatement has been allowed to the extent of Rs.88,93,618/- resulting in confirmation of the demandof Rs.4,38,694.72. However, if the abatement claim as claimed by the party and verified by the officers is allowed. The net demand which is made on this account cannot survive and the same needs to be set aside, we do so.

4.5 On the issue with regards to the payment of service tax bythe sub-contractor, when the main contractor has paid the entiretax liability the demand of Rs.5,04,247.52 has been confirmed. Officers have found that this amount is recoverable and appellants have contested the demand relying upon the decision of Larger Bench of this Tribunal in the M/s Melange Developers Pvt. Ltd. (supra) wherein the Larger Bench of this Tribunal has held that in the absence of any exemption granted sub- contractor is required to discharge the tax liability, the service recipient i.e. the main contractor can avail the benefit of Cenvat credit. Accordingly, it is the view that has been canvassed by thedepartment in the matter. The relevant paras of the decision are reproduced bellow:-

15. It is not in dispute that a sub-contractor renders a taxable service to a main contractor. Section 68 of the Act provides thatevery person, which would include a sub-contractor, providing taxable service to any person shall pay Service Tax at the rate specified. Therefore, in the absence of any exemption granted, asub-contractor has to discharge the tax liability. The service recipient i.e. the main contractor can, however, avail the benefitof the provisions of the Cenvat Rules. When such a mechanism has been provided under the Act and the Rules framed thereunder, there is no reason as to why a sub-contractorshould not pay Service Tax merely because the main contractor has discharged the tax liability. As noticed above, there can be no possibility of double taxation because the Cenvat Rules allow a provider of output service to take credit of the Service Tax paid at the preceding stage.

16. It is in this light that the main contention of LearnedCounsel for the Respondent that if a sub-contractor is requiredto pay Service Tax when the main contractor has actually discharged Service Tax liability, it would amount to 'DoubleTaxation', has to be examined. For this contention, reliance has been placed by the Learned Counsel for the Respondent on the following decisions of this Tribunal :

(i) Urvi Construction v. Commissioner of Service Tax, Ahmedabad, reported in 2010 (17) STR 302 (Tri. - Ahmd.);

(ii) BCC Developers and Promoters Pvt. Ltd. v. Commissioner of Central Excise, Jaipur, reported in 2017 (52) S.T.R. 22 (Tri. - Del.);

(iii) M/s. Dhaneshra Engineering Works v. Commissioner of Central Excise, Allahabad, reported in 2018 (2) TMI 788 - CESTAT - Allahabad;

(iv) Power Mech Projects Ltd. v. Commissioner of Customs, Guntur, reported in 2017 (48) S.T.R. 165 (Tri.- Hyd.); and

(v) M/s. Edac Engg. Ltd. v. CST, Chennai, reported in 2017

(6) TMI 685 CESTAT Chennai.

17. In Urvi Construction a Learned Member of the Tribunal observed :

"2. ..... Further the learned advocate also submits that in the Master Circular issued by the Board vide Circular No. 96/7/2007-S.T., dated 23-8-2007, a stand has been taken that there is no exemption to a sub-contractor from payment of service tax merely because the contractor pays the tax. However, he submits that for the period circular issued late by the Board in 1997 was applicable and according to this Circular where the services have been provided by the sub-contractors such sub-contractors are not liable to pay service tax and service tax liability is on the main contractor. Taking note of the fact of the contention that main contractor has paid the service tax and charging service tax on the sub-contractor again would amount to taxing the same service twice and also taking note ofthe circular cited by the learned advocate and the decisions of the Tribunal cited, I find that if the appellant is required to pay the service tax it would amount to taxing the same service twiceand the circular and the Tribunal's decision are squarely applicable to the facts of this case and accordingly appeal is allowed with consequential relief to the appellant."

18. In BCC Developers and Promoters Pvt. Ltd. it was observed

:

"6.1 We agree with the submission of the Ld. Counsel that no double taxation is permissible under the law. The Constitution (Article 265) provides to take the exact amount of tax i.e.neither more nor less. In the instant case, if the principal has already paid the Service Tax, then the same cannot be

demanded from the appellant. As per the clarification of the Board's Circular dated 23-8-2007 as well as dated 7-10-1998, if the principal had not paid the Service Tax then the same can be charged. If the Service Tax has already been paid by the principal, then the same cannot be demanded again."

19. M/s. Dhaneshra Engineering Works followed the aforesaid decision in BCC Developers and Promoters Pvt. Ltd.

20. In M/s. Edac Engg. Ltd., the Division Bench, after placing reliance upon the decision of the Tribunal in Urvi Construction, observed :

"6.2 We are therefore of the considered opinion that thesecase laws are distinguishable from the decision taken by this very Bench in the case of the present appellants Edac Engineering Ltd. in Final order dated 19-12-2016. We also find that the very same Board's Circular No. 97/8/2007-S.T., dated 23-8-2007, relied upon by the Ld. AR has been taken note of by the Tribunal in Urvi Construction (supra). This being so, we haveno hesitation in ruling that when Service Tax has been paid by the main contractor, charging the sub¬contractor again willamount to taxing the same service twice. In the circumstances, the issue at hand also requires to be remanded to the adjudicating authority to verify whether the service rendered by the appellant has suffered tax in the hands of the principal contracts. If that aspect is able to be proved by the appellants, no tax liability will accrue to them. Towards this end, the adjudicating authority will give suitable opportunity to the appellants to present their case. Appellants are also produce all evidence and documents to establish their claim that the tax liability required to be discharged by them has already been paid up by the main contractor. If that is provided, their will obviously be no demand for interest unless such demands have been made belatedly. Once this aspect is also able to be proved by the appellant, imposition of penalty will also not arise."

21. The aforesaid decisions do not take into consideration the impact of the Cenvat Rules. It would, therefore, not be correctto conclude that double taxation would result if a sub-contractoris required to discharge the Service Tax liability even if the maincontractor has discharged the tax liability.

22. The decisions of the Tribunal holding that double taxation will not result if a sub-contractor discharges the tax liability because of the Cenvat Rules, now need to be referred to.

23. In Max Tech Oil & Gas Services Pvt. Ltd. v. Commissioner ofService Tax, Delhi, reported in 2017 (52) S.T.R. 508 (Tri. - Del.), the Division Bench has held :

"6. Regarding the contention of the appellant that they have acted only as a sub-contractor and demanding service tax from them will amount to double taxation as the main contractor also is rendering similar service to ONGC, we find no legal basis for the contention of the appellant. The service tax leviable at the hands of each service provider is decided by nature of activities undertaken by them. If the same is covered by scope of the taxable entry under Finance Act, 1994 tax liability arises. The said service becomes part of final service rendered by main contractor is of no consequence to determine the tax liability of each and every service provider. If at all, the service tax paid bya sub-contractor which becomes part of service further providedby the main contractor, the scheme of credit as envisaged bythe Cenvat Credit Rules, 2004 will come into play subject to fulfilment of conditions therein. It is nobody's case that the sub-contractors per se are not liable to service tax even if they rendered taxable service. "

[emphasis supplied]

24. The same view was taken by the Division Bench of the Tribunal in CCE & S.T., Raipur v. M/s. J.K. Transport, reported in2017 (9) TMI 993 - CESTAT New Delhi. The relevant paragraph is reproduced below :

"5. We find that the CBEC vide Circular dated 23-8-2007 has clarified that the services provided by the sub-contractor is a taxable service, even if the same is used for completion of the work by the main service provider. Thus, for providing thetaxable service, the sub-contractor is liable for payment of service tax on provision of such service. ..... "

25. Similar views were taken by the Tribunal in (i) Max Logistics Ltd. v. Commissioner of Central Excise, Raipur, reported in 2017 (47) S.T.R. 41 (Tri. - Del.); (ii) Hargovind Electric Decorators v. Commissioner of Central Excise, Jaipur-I, reported in 2016 (43) S.T.R. 619 (Tri. - Del.); and (iii) Sew Construction Ltd. v. Commissioner of Central Excise, Raipur, reported in 2011 (22) S.T.R. 666 (Tri. - Del.).

26. At this stage, it would also be useful to refer to a Larger Bench decision of the Tribunal in

Vijay Sharma & Company v. CCE, Chandigarh, reported in 2010 (20) S.T.R. 309 (Tri. - LB). The issue that arose before the Larger Bench was as to whether service provided by a sub-broker are covered under the ambit ofService Tax and taxable or not. After noticing that a sub-contractor is liable to pay Service Tax, the Larger Bench examined as to whether this would result in double taxation if the main contractor has also paid Service Tax and observed thatif service tax is paid by a sub-broker in respect of same taxable service provided by the stock broker, the stock broker is entitledto the credit of the tax so paid in view of the provisions of the Cenvat Credit Rules. The relevant paragraph 9 is reproduced below :

"9. It is true that there is no provision under Finance Act, 1994 for double taxation. The scheme of service tax law suggest that it is a single point tax law without being a multiple taxation legislation. In absence of any statutory provision to the contrary, providing of service being event of levy, self same service provided shall not be doubly taxable. If Service tax is paid by a sub-broker in respect of same taxable service provided by the stock-broker, the stock broker is entitled to the credit of the tax so paid on such service if entire chain of identity of sub-broker and stock broker is established and transactions are provided to be one and the same. In other words, if the main stock broker is subjected to levy of servicetax on the self same taxable service provided by sub-broker to the stock broker and the sub-broker has paid service tax onsuch service, the stock broker shall be entitled to the credit of service tax. Such a proposition finds support from the basic rule of Cenvat credit and service of a sub-broker may be inputservice provided for a stock-broker if there is integrity between the services. Therefore, tax paid by a sub-broker may not be denied to be set off against ultimate service tax liability of the stock broker if the stock broker is made liable to service tax for the self same transaction. Such set off depends on the facts andcircumstances of each case and subject to verification of evidence as well as rules made under the law w.e.f. 10-9-2004. No set off is permissible prior to this date when sub-broker was not within the fold of law during that period."

27. The Commissioner did express in the impugned order that under the Cenvat Scheme every stage of provision of service is required to be taxed and if a sub-contractor discharges the Service Tax liability, it will not result in double taxable even ifthe main contractor discharges the Service Tax liability because the credit of the earlier tax paid is available at a subsequent stage, but it is because of the decision of the Tribunal in Urvi Construction, that the Commissioner held that double taxation would result if a sub-contractor is also required to discharge Service Tax liability when the main contractor has discharged the entire liability.

28. Learned Counsel for the Respondent has, however, relied upon the decision of the Supreme Court in Larsen and Toubro Ltd. v. Additional Deputy Commissioner of Commercial Taxes and Anr., reported in 2016-TIOL-155-SC-VAT. In this case, the contracts which were secured by the Appellant therein were works contract and a part thereof was assigned to the sub- contractor who had submitted returns and paid taxes for the execution of the works contract. During the course of the assessment, the Appellant submitted that the sub-contractors had already been taxed and, therefore, the Appellant cannot be taxed again under Section 6B of the Karnataka Sales Tax Act. The submission, therefore, was that the value of the workentrusted to the sub-contractors could not be taken into accountwhile computing the total turnover of the Appellant for thepurpose of taxation under the Karnataka Sales Tax Act. It is in view of the provisions of the Karnataka Sales Tax Act that the Supreme Court observed that the value of the work entrusted tothe sub-contractors or payments made to them shall not be taken into consideration while computing total turnover for the purposes of Section 6B of the Karnataka Sales Tax Act. This decision of the Supreme Court will not come to the aid of the Respondent in this case in view of the specific provisions of Section 66 and 68 of the Act as also the Cenvat Rules discussed in the foregoing paragraphs of this order. It also needs to be noted that there is no provision for input tax credit on deemed sales in levy of VAT.

29. The submission of the Learned Counsel for the Respondent regarding 'revenue neutrality' cannot also be accepted in view ofthe specific provisions of Section 66 and 68 of the Act. A sub-contractor has to discharge the Service Tax liability when he renders taxable service. The contractor can, as noticed above, take credit in the manner provided for in the Cenvat CreditRules of 2004.

30. ***Thus, for all the reasons stated above, it is not possible to accept the contention of the Learned Counsel for the Respondent that a sub-contractor is not required to discharge Service Tax liability if the main contractor has discharged liability on the work assigned to the sub-contractor. All decisions, including those referred to in this order, taking a contrary view stand overruled.****"*

4.6 The submissions made by the appellant relying on this decision cannot be upheld as he argues contrary to what have been stated in the said decision. Appellant had relied upon the decision in the case of Vinodh Shipping Services (supra) to arguethat the issue was of interpretational and there were conflicting views taken by the different fora. We are not in a position to agree with the said submission of the appellant, as he has not shown a single decision which was taken during the period in dispute. In the verification report officers have referred to MasterCircular No.96/7/2007 dated 23.08.2007 wherein similar views has been taken. Hence, in absence of any contrary verification/decision at the relevant time, this argument for setting aside the demand is rejected and the order of this account needs to be confirmed.

4.7 In respect of demand of Rs.3,52,356/-, officers have agreed that this demand has been made without considering the payments made from the Cenvat Account. This resulting in confirmation of the demand which was already paid by theappellant. In view of the categorical recommendation made by the officers, we do not find any merits in this demand and set aside the same.

4.8 In view of the demand of Rs.2,66,019/- has been confirmed on account of application of rate of tax which was different from the tax on the provision of service. Officers in para 4 have concluded that the rate as applicable at the time of rendering of the service should have been applied. Accordingly, this demand is based on application of erroneous rate of taxationis a basic foundation for his correct application on rate of tax thisdemand made by application, incorrect rate of taxes needs to be set aside, we do so.

4.9 On the issue of grossing up this demand has been made bytaking the taxable value as indicated in the claim for taxable value in the ST-3 returns. However, appellant has contested this demand stating that the amount of taxable value indicated in ST-3 returns advertently included the service tax also. Officers verifying the same agree to the contention raised by the appellant. However, they refuse to comment on admissibility of the same as this issue was not raised at the time of adjudication.We find merits in the contention raised and the benefit forcomputing the taxable values the service tax paid has to be detected from the gross value as per Section 67 (2) of the Finance Act, 1994. Thus the amount of Rs.14,65,840/- as determined by the officers in their report in respect of such clerical error needs to be deleted from the total demand as confirmed by Order-in-Original.

4.10 Thus we summarize our findings in respect of the demand of service tax made as per OIO and indicated in para 3.2 abovein table below:

	Demand on account of	Demand as per OIO	Demand Upheld
A	Full benefit of abatement to the extent of 85%, in terms of Circular No. 341/43/96-TRU dated 31.10.1996 not providedin Order-in-Original	Rs 4,38,694.92/-	0
B	Demand of service tax on services provided by appellant as sub-contractor prior to Sep 2004, on which service tax liability has been discharged by the contractor	Rs 5,04,247.52/-	Rs 5,04,247.52/-
C	Non-consideration of payment of service tax through CENVAT while calculating amount of service tax paid	Rs 3,52,356/-	0
D	Application of rate of tax on thedate of provision of services	Rs 2,66,019/-	0

E	Grossing up of taxable amount due to inadvertent mentioning ofservice tax with taxable value ofservices in some returns	Rs.14,65,840.40/-	0
Rs 30,27,159/-			**Rs 5,04,247.52/-**

4.11 In respect of wrong availment of Cenvat credit Commissioner has observed as follows:-

2. Wrong availment of Cenvat Credit

It has been alleged that the Noticee have takencredit on the strength of certain invoices which do not contain the requisite details as prescribed under Rule 4(A) of the Rules and therefore these invoices are not in conformity with Rule 5 of Service Tax Credit Rules, 2002 and Rule 9 of the Cenvat Credit Rules, 2004, and thereforecenvat credit on such invoices would be inadmissible.

The Noticee have denied the allegation and havestated that the cenvat credit has been utilized by them on the strength of documents conforming to the conditions of Rule 4(A), Rule 5 and Rule 9 of Cenvat Credit Rules, 2004.They have also submitted the copies of documents containing the requisite details as prescribed under Rule 4(A) of the Cenvat Credit Rules. They have also submitted that they have complied with provisions of Rule 9(2) requiring prescribed details on documents for taking credit and Rule 9(9) requiring submission of half yearly return.

The Rule 4A of the Service Tax Rules, 1994 reads as "Taxable service to be provided or credit to be under

distributed on invoice, bill or challan- Every person providing taxable service shall issue, not later than fourteen days from the date of completion of such taxable service or receipt of any payment towards the value ofsuch taxable service, whichever is earlier, an invoice, a bill or, as the case may be, a challan signed by such person ora person authorized by him in respect of such taxable service provided or to be provided and such invoice, bill or,as the case may be, challan shall be serially numbered andshall contain the following, namely:-

(i) the name, address and the registration no. of such person

(i) the name and address of the person receivingtaxable service.

(ii) Description, classification and value of taxableservice provided or to be provided, and

(iii) The service tax payable thereon."

The relevant sub-rule (1) and (4) of Rule 5 of theService Tax Credit Rules, 2002 reads as under:

(1) The service tax credit shall be availed on the basis of an invoice or bill or challan issued by the service provider of input service on or after 16th day of August 2002, indicating clearly the serial number of document, date of issue, description and value of the input service, the service tax paid/payable, service tax registration No. and address of input service provider.

(2)…… (3)……

(4) The output service provider availing service tax credit shall submit to the Superintendent of Central Excise, a return in the form annexed to these rules along with the Form ST -3 as specified in rule 7 of the Service Tax Rules, 1994

The relevant sub-rule 9(2) and 9(9) of the Cenvat Credit Rules, 2004 read as under:

Rule 9(2)

No CENVAT credit under sub-rule (1) shall be taken unless all the particulars as prescribed under theCentral Excise Rules, 2002 or the Service Tax Rules, 1994, as the case may be, are contained in the said document.

Provided that if the aid document does notcontain all the particulars but contains the details of duty or service tax payable, description of the goods or taxable service, [assessable value, Central Excise or Service Tax registration number of the person issuing the invoice, as the case may be], name and address of the factory or warehouse or premises of first or second stage dealers or provider of taxable service and the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, is satisfied that the goods or services covered by the said

document have been received and accounted for in the books of the account of the receiver, he may allow the CENVAT credit.

Rule 9(9)

The provider of out put service availing cenvat credit shall submit a half yearly return in the form, specified by Notification, by the Board the Superintendent of Central Excise by the end of the month following the particular quarter or half year.

In this connection detailed enquiry and verification of invoices were carried out and the Assistant Commissioner, Central Excise Division-I, vide his letter C.No. 5-STC/EA- 2000/Lko-I/06/3039 dt. 19.11.09 has submitted detailed report which is summed up as under:

1. Out of 417 invoices / bills, disputed in the show cause notice, 114 invoices /bills involving service tax amounting to Rs. 5,32,156.00 and 15 invoices/bills involving Central Excise Duty amounting to Rs. 2,99,226.00 contain details relating to registration etc. and the credit can be allowed.

2. 94 invoices / bills involving service tax amounting to Rs. 6,36,682.00 do not contain details of registration and 194 invoices involving service tax amounting to Rs. 3,95,994.00 could not identified for want of details of invoice no. and dated thereon.

3. Credit amounting to Rs. 79,619.00 relating to invoices nos, 204,202,210, 222 and 232 have been taken repeatedly more than once.

4. Excess credit of Rs. 14,000.00 was taken by the noticee against invoice no 5212 & 3010 dated

07.02.07 of M/s BSNL. Thus, as per the AC's report, 114 Invoices involving Service Tax amounting to Rs.5,32,656/- and 15 Invoices pertaining to Central Excise duty amounting to Rs.2,99,226/- contained details relating to Registration etc. and therefore Cenvat Credit amounting toRs.8,31,382.00 (532156+ 299266) in respect of the 114 and 15 invoices referred supra which contain the details of Service Tax and Central Excise Registration etc. would be available to the noticee as they conform to the requirement as laid down under the Rule 5(1) of Service Tax Credit Rules, 2002 and Rule 4(A) of Cenvat Credit Rules, 2004 read with Rule 9(2) ibid.

The report also indicates that 94 Invoices involving Service Tax Registration amounting to Rs.6,36,682/- do not contain details of Registration and 194 Invoices involving Service Tax amounting to Rs.3,95,994/- are not identifiable and therefore credit would not be available in respect of the same, as the concerning invoice / bills donot contain certain minimum information, as required under Rule 4(A) or 9(2) supra, as alleged in the notice andconfirmed by the Assistant Commissioner, Central Excise Division-I in his report dated 19.11.09 referred supra. The noticee themselves vide their letter dated 29.10.09 to the Superintendent, Service Tax, Gr.Ill, Central Excise Division-1, Lucknow have shown their inability to identify the documents for verification, whereas they are required to maintain proper records for receipt and consumption of the input service under Rule 9(6) of the Cenvat Credit Rules, 2004. It is imperative that the invoices must indicate the service tax registration no. alongwith Sl. No.of the invoice. This credit therefore is inadmissible.

The excess credit of Rs 14,000/- taken by the noticee against the Invoice No.5212 and 3010 dated 07.07.2007 of M/s B.S.NL. would not be also available to them and the correct position regarding availability of thecredit would be as under-

Eligible credit	Ineligible credit
Rs.8,31,382/-	Rs.10,32,676/-
- 14,000/-	+ 14,000/-
Rs.8.17,382/-	Rs 10,46,676/-

The details of the credit to be allowed and to be disallowed are tabulated here as under:-

No. of disputed invoices	*Amount alleged tobe disallowed in the notice*	*Amount fo undeligible for the credit after verification*	*Amount liable to bedisallowed*
417	***18,64,058.00***	***Rs.8,17,382/-***	***Rs.10,46,676/-***

Further out of the inadmissible amount, the assesseehas also taken credit on certain invoices repeatedly which apart from inadmissibility shows gross negligence and casual attitude of the Noticee, which is not acceptable and makes them liable for penalties under law.

The allegation against the Noticee for not filing ST-3 returns as required under provisions of Ruie 7(2) of the Service Tax Rules, is contradictory to the fact mentioned inthe notice as the notice itself mentions the dates of receiptof ST-3 returns submitted by the noticee from time to time. The Noticee were liable for delayed submission of ST-3 returns and they have deposited the late fee for the same, therefore no penalty under Section 77 was proposedagainst them.

3. Delayed payment of service tax and delayed submission of ST-3 return

It has been alleged that from April 2002 to March 2008, the Noticee has continued to make payment ofservice tax beyond the period of prescribed limit and also filed the ST-3 returns after the specified dates. As detailed in the notice there has been continued and consistentdelay in submission of ST-3 returns beyond the specified date. The notice also mentions that although penalty underSection 77 of the Act is imposable on the noticee for late filing of ST-3 returns, the noticee have already deposited due penalty with reference to late filing of each ST-3 and therefore no penalty under Section 77 is being proposed.

Hence the allegation on this count needs no further discussion.

As regards delayed payment of service tax which attracts interest under Section 75 of the Act, the noticee vide their submission no. OA/228/0959 dt. 28.08.09 have stated that all the taxes due for the period has beendeposited by them to the Government account alongwith the due interest. Hence liability to pay interest has been squared up by the noticee."

Out of total demand made in the show cause notice Rs.18,64,058/- demand of Rs.10,46,676/- has been confirmed. Appellant has relied upon the decision of this Tribunal in the caseof M/s Laxmi Organic Industries Ltd. and others Vs Commissioner of Central Excise 2017-VIL-1116-CESTAT-MUM- ST, to contest this demand. It is seen from the order that credit of Rs.6,36,682/- has been disallowed only for the reason that the invoices did not contain the details of registration otherwise all other details were available on the invoice. Proviso to Rule 9(2) of the Cenvat Credit Rules has been reproduced by Commissioner in the Order-in-Original, this proviso provides thatif same details are missing also the credit should not have been disallowed subject to the satisfaction of the concern originalofficers. Tribunal in the case of Laxmi Organic Industries Ltd. (supra) has held that denial of credit in similar situation cannot be upheld. Going by the above decision and specifically the proviso to Rule 9(2), we do not find any merits in disallowance ofthe credit for the remaining amount of Rs.3,95,994/- wherein some other details also were missing and after causing due verification said details were not verifiable has been recorded in the impugned order. We do not find any merits in the contention raised by the appellant that they had submitted a detailed chart along with the miscellaneous application of 2010. It is not opento the appellant to bring in additional documents charts contrary to the verification that was made at the time of adjudication and these charts, on verification, has not been confirmed by the officers verifying the same. We do not find any merits in these submissions of the appellant. Accordingly, credit of Rs.3,95,994/- as disallowed is upheld.

4.12 For invoking the extended period Commissioner has recorded as follows:-

Invocation of Extended Period - The notice mentions that the returns for the period from April 2002 to Sept. 2002 were submitted by the Noticee as late as on 11.02.04instead of by 25.10.02, which has resulted into a situation wherein the period of five years would be invokable from 11.02.04 in terms of Section 73(1). The Noticee have also been alleged to have failed to explain the short payment despite being given ample opportunities and therefore,they have not discharged their service tax liability consciously with an intent to evade payment of the same.

The Noticee have submitted that they are registered with service tax department w.e.f. 31.03.2000 and have been continuously filing Service Tax Returns and the Department has been also continuously undertaking ExciseAudit of their books of accounts. The Department is fully aware about all the assessee and its business, no evidencehas been placed by the Department that there has been any fraud, collusion, willful misstatement, suppression of facts, contravention of any provision or Rules made there under with intent to evade payment of service tax on their part and no such allegation is substantiated by the Department. In their subsequent submission dated 28.08.09 they have also made reference to the following cases in support of their defence:

(1) *M/s K.K. Nag Ltd., Vs. CCE dated 01.08.03*

(2) *M/s Elite Detectives Pvt. Ltd. Vs. Commr. ofService Tax dt. 13.9.06*

4.13

(3) *Margdarshi Marketing (P) Ltd. Vs. CCE dt. 09.02.07*

In all the above cases the Tribunals have inter-alia held that invocation of the longer period is not justified if there is no evidence of suppression of facts or willful misstatement etc.

The noticees's assertion that they have beencontinuously filing their ST-3 returns is culpably incorrect as they have submitted their ST-3 returns en-bloc from time to time after a gap of more than one year from the due date. The first submission of three ST-3 returns pertaining to the period for April to Sept. 02, Oct '02 to March 03, April to Sept. 03 was made on 11.02.04 and subsequently the returns for the period for Oct. 03 to March 04, April 04 to Sept. 04 and Oct 04 to Sept. 05 weresubmitted on 08.02.06. They have never submitted their ST-3 returns on due dates. The noticee in their letter dated

09.02.04 *while submitting 3 ST-3 returns have requested for condonation of delay which is a clear admission on theirpart that they have not disclosed the facts of their business and discharge of their tax liability to the Department. Non submission of ST-3 returns will tantamount to suppression of material facts from the Department. Further, as discussed supra the information supplied in the returns was found contrary to the facts andfigures submitted by the assessee themselves in course of these proceedings. Important figures like amount realized etc. are found mis-reported in the ST - 3 returns alongwithinadmissible credit availed without exercising due precautions. I, therefore, hold that the Noticee has contravened the various provisions with the intention of evading the service tax due and invocation of extended period is rightly invoked in the show cause notice.*

In the following cases the Tribunals have held the conduct of non-filing of return can be termed assuppression -

1. *Shri Ram overseas Finance Ltd. Vs. Commissioner 357(Tri. Chennai) 2007(6)STR-*

2. *Suprasesh GIS & Brokers Pvt. Ltd. Vs. Commissioner - 2009(13)STR-641(Tri. Chennai)*

Hence the contention of the noticee is not maintainable and I hold that the extended period is invokable keeping in view the facts and circumstances of this case."

The findings recorded by the Commissioner as observed is based upon various decisions of the Tribunal, wherein it has been held that delay in not filling of ST-3 returns amounts to suppression of facts for invoking the extended period. We agree with the said findings as it was the statutory obligation imposed on the appellant to have filed ST-3 returns in time. In absence ofthe same the charge of suppression during the material period has to be upheld that being so invocation of extended period in the present case is justified and upheld. In the case of Union Of India Versus Rajasthan Spinning & Weaving Mills 2009 (238) ELT

3 (SC) wherein Hon'ble Supreme Court have held that the demand invoking the extended period of time is upheld, penalty under Section 78 is also upheld. As we have upheld the demand only to the extent of Rs.5,04,247.52 + Rs.3,95,994/- = Rs9,00,241.52/- the penalty imposed under Rule 15 of CENVAT Credit Rules,2004 read with Section 78 of the Finance Act,1994 is reduced to that extent. We are modifying the demand and if the appellant pay the modified demand along with interest, penalties imposed under Section 78 will have to be reduced to 25% of the penalty that is imposed.

4.14 In respect of the amounts confirmed the demand for interest under Section 75 is upheld.

4.15 With the modifications indicated in para 4.10, 4.12, 4.13 &

4.14 impugned order is upheld.

5.1 Appeal is partially allowed as indicated above. Miscellaneous Application also stands disposed of.

(Pronounced in open court on-29/11/2023)

Sd/-

(P.K. CHOUDHARY)MEMBER (JUDICIAL)

Sd/-

(SANJIV SRIVASTAVA)MEMBER (TECHNICAL)

akp

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.55429 of 2013

(Arising out of Order-in-Original No.38/Commissioner/Meerut-I/2012 dated23/10/2012 passed by Commissioner of Customs & Central Excise, Meerut-I)

M/s Patanjali Yogpeeth Trust, **…..Appellant**

(Maharishi Dayanand Gram, Delhi, Haridwar-NH)

VERSUS

Commissioner of Central Excise, Meerut-I **….Respondent**

(Opposite CCS University, Mangal Pandey Nagar, Meerut)

APPEARANCE:

Shri Atul Gupta, Advocate &

Shri Prakhar Shukla, Advocate for the Appellant

Shri Sarweshwar T. Khairnar, Authorised Representative for theRespondent

CORAM: **HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)**
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70104/2023

DATE OF HEARING : 28 August, 2023DATE OF PRONOUNCEMENT : 05 October, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original No.38/Commissioner/Meerut-I/2012 dated 23/10/2012 passedby Commissioner of Customs & Central Excise, Meerut-I. By the impugned order following has been held:-

ORDER

i. I hereby confirm the demand of Service Tax amountingto **Rs.4,94,33,027/- (Four Crore Ninety Four Lac**

Thirty Three Thousand and Twenty Seven Only) including E. Cess & S.H.E Cess, under proviso to Section-73(1) of the Finance Act, 1994.

ii. The above said noticee is also liable to pay interest at applicable rates on above said confirmed demand of Service Tax amount, under Section 75 of the Finance Act, 1994.

iii. I hereby impose a penalty on noticee under Section 76 of the Act, for their failure to pay service tax by due dates. The penalty is imposed @ Rs. 200/- (Rs. Two hundred only) for every day (up to 09.05.2008) during which such failure continues or at the rate of 2% of such tax, per month, whichever is higher starting with the first day after the due date till the date of actual payment of the outstanding amount of Service Tax.However, the total amount of the penalty payable in terms of this section shall not exceed the amount of Service Tax payable upto 09.05.2008.

iv. I further, impose a penalty of **Rs.4,94,33,027/- (FourCrore Ninety Four Lac Thirty Three Thousand and Twenty Seven Only)** under Section 78 of the Finance Act, 1994 for their failure to pay Service Tax by suppressing the value of taxable service & also various acts of omission and commission.

v. I also impose a penalty under Section 77 for theirfailure to take registration in accordance with the provisions of Section 69/ rules made thereunder at the rate of two hundred rupees for every day during which such failure continued, starting with the first day after the due date, till the date of actual compliance;"

2.1 The appellant is engaged in activity of providing services relating to health & fitness by way of teaching yoga and meditation. During the relevant period in dispute appellant had not taken any registration, which is requisite under the Finance Act, 1994 as amended. They were not paying any service tax on the services provided by them.

2.2 Based on the intelligence that appellant-trust working under the aegis of Baba Ramdev and Acharya Balkrishna are inter-alia engaged in providing Yoga training to various residential and non-residential camps. For participation in such camps, a charge of participation fees from the participants on the name of donation was taken. Though this amount was collected at donation but it was fees for providing the saidservices and hence covered under the definition of consideration.

2.3 Inquiries/investigations were made by Directorate General of Central Excise Intelligence and statements of Shri Shyamvir Singh Saini, Chief Accounts Officer of appellant and Shri AcharyaBalkrishna were recorded. Enquiries were made from the variousYog Shivir Ayojan Samities at Varanasi. On the basis of above investigations a show cause notice dated 24.04.2012 was issued to the appellant, asking them to show cause as to why-

31.1 "An amounting to ***Rs.4,94,33,027/- (Four Crore Ninety Four Lac Thirty Three Thousand and Twenty Seven Only)*** *being Service Tax, E. Cess & H.E Cess, not paid during the period from 01.10.2006 to 31.03.2011, should not be demanded from them under proviso to Section- 73(1) of the Finance Act, 1994;*

31.2 Interest under Section 75 of Finance Act, 1994 should not be demanded from them; and

31.3 Penalty should not be imposed upon them under Section 76, 77 & 78 for their various acts of omission and commission as detailed in the previous paras."

2.4 This show cause notice was adjudicated through the impugned Order-in-Original referred in para-1 above. Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Atul Gupta & Shri Prakhar Shukla learned advocates appearing for the appellant and Shri Sarweshwar T. Khairnar learned Authorised Representative appearing for the revenue.

- Arguing for the appellant learned Counsel submits that following questions need to be determined in the present case:-
  - Whether providing education to patients regarding Yoga falls under "health and fitness service" defined under Section 65 (51) of the Finance Act, 1994?
  - Whether the donation received in respect of yoga camp was not in quid pro quo for educating regarding yoga because such education was providedfree of cost also?
  - Whether the donation received in respect of residential Yoga camp was not in quid pro quo for educating regarding yoga as such amount was used to meet various costs such as food, lodging, medicines, medical tests, etc. and education regarding yoga was free of cost?
  - Whether the amount received as donation was charity and such amount does not form considerationfor providing any health and fitness service?
  - When the fact regarding such alleged service/or activity was known to the department then extendedperiod of limitation is available to the department forissuance of the show cause notice?
  - Whether the appellant was entertaining a bona fide belief that the alleged activity was not a taxable service in the facts where the department made a thorough investigation during 2002 to 2005 for the same activities and on contest the department did not take any action to raise a demand of service tax?
  - When the alleged activity was known to public in general as the same was highly publicized activity, then the department was unaware about same activity, so, whether the demand under extendedperiod of limitation can be raised?
  - Whether penalties imposed are sustainable in thefacts and circumstances of the case and benefit of Section 80 is not available?

- The activities of the appellant are not taxable under the category of Health and Fitness Services as defined bySection 65 (105) (zw) read with Section 65 (51) and 65 (52) of the Finance Act, 1994 for the reason that word ‘yoga’ in the said definition has been used in connection with various other words like sauna and steam bath, Turkish bath, solarium, spas, reducing or slimming salons, gymnasium, meditation, massage etc. by applying the principle of noscitur a sociis. It would be evident that only such yoga courses which are for general well-being and not for curing specific ailments not covered yet. Appellant was providing cure for specific agents so not covered under thisdefinition. In residential yoga camps the amounts were charged only for lodging and boarding and not for imparting instructions of yoga which were free of cost. It isevident from the facts that there was no difference inimparting instructions during residential camp to the participants in respect of donations paid by them even some of the participants were not paying any donations.

- Donation was voluntary and was not a consideration for any service to be provided. Income Tax Appellate Tribunal in appellant’s own case has held that such receipt of the amount was for charitable purpose and this finding of ITAT was upheld by Hon’ble Delhi High Court.
- Most of the demand is barred by limitation as there was nocase for alleging suppression

etc. for invoking extended period of limitation, only a small portion of demand of Rs.1,62,957/- falls within the normal period of limitation.

 During 2004-05 certain detailed correspondence were made by the department and M/s Divya Yog Mandir (DYM) in which Shri Acharya Balkrishna, Secretary General of the appellant-trust is also the Secretary of DYM and that timeit was stand of DYM that the services are not taxable and all the relevant information has persuaded by thedepartment was furnished and no show cause notice was issued. Accordingly, the appellant-trust headed by the same person Shri Acharya Balkrishna was under impression that the services are not taxable. Accordingly, invocation of extended period as per proviso to Section 73 (1) is erroneous.

 As extended period cannot be invoked so penalty under Section 78 cannot be imposed on them.

 Further, all the activities in respect of these camps were well advertised in the media and through the news-papers.Any of such residential and non-residential camps werealso telecasted all the activities of the trust in relation to organization of these camps was well within the knowledgeof public atlases including Department. Hence, extended period could not have been invoked. In support of the above proposition that extended period could not have been invoked, reliance is placed on following judgments:-

- Shriram Chits Pvt. Ltd. [2023 (69) G.S.T.L. 397 (Tri.-Hyd.)] upheld by dismissing the Civil Appeal filed by the department as reported at 2023 (69) G.S.T.L.338 (SC);
- DCM Textiles [2012 (26) S.T.R. 359 (Tri.-Del.)];
- Hindalco Industries Ltd. [2003 (161) ELT 346 (Tri.- Del.)];
- Zee Media Corporation Ltd. [2008 (18) GSTL 32 (All.)];
- M/s. Mount Everest Breweries Limited [FINAL ORDERNO. 50802/2023 dated 03.07.2023];
- Anand Nishikawa Co. Ltd. [2005 (188) E.L.T. 149(S.C.)];
- Cosmic Dye Chemical [1995 (75) E.L.T. 721 (S.C.)];
- Uniworth Textiles [2013 (288) E.LT. 161(S.C.)];
- Padmini Products [1989 (43) ELT 195 (SC)];
- Chemphar Drugs & Liniments [1989 (40) ELT 276(SC)];
- Continental Foundation Jt. Venture [2007 (216) ELT 177 (SC)];
- Pushpam Pharmaceuticals Company [1995 (78) ELT 401 (SC)];
- Bharat Hotels Ltd. [2018 (12) GSTL 368 (Del.)];

3.2 Arguing for the revenue learned Authorised Representativesubmits that-

- Appellant's first length of argument that they are providing these yoga teaching as specific cure for specific diseases. However, such claim is not supported by any documentary or any otherevidence. These yoga camps are attended by a general public and the numbers of people attending such camps were resulted into 20 to 25 thousand. The appellant is an establishment as defined under Section 65 (52) for providing health and fitnessservices from their permanent establishment andthrough various camps organized at various locations. Thus, even if they are a trust they qualify to be termed as health and fitness establish center under the provisions of service tax law. Hence, they are liable to pay service tax on the amounts collected by them for providing these services.
- The appellants were charging fees under the nameof donation and the same has been confirmed by Shri Shyam Singh Saini, Chief Accounts Officer inhis statement dated

17.10.2011 & 17.11.2011.

- Different types of members are entitled to participate in residential yoga science camps or any other person is entitled, subject to payment of afees of Rs.7,000/- or Rs.11,000/-, for which, a receipt is being issued. Though these amounts are termed as donation and in actual, they areconsideration for providing these services.
- From the different types of donation coupons issuedfor participation in non-residential yog science camps and the different or donation coupons carry seating privileges, this facts has been confirmed by Shri Shyamvir Singh Saini as well as from Shri Alok Jain of Ayojan Samiti in their statement recorded stating that sitting arrangements are of three orfour types and sitting arrangements were made according to the denomination of donation coupons i.e. donation coupons of higher denominations puts the person in the front seating and people withlower denominations were made to sit in the back seat of the camp.
- Contention of the appellant that these amounts were collected as donation to the trust, hence, cannot be considered as consideration for providing these services is itself pointing to the suppression made by the appellant. Appellant have been very cleverly taking the consideration received by use of these donation coupons in order to get exemption from payment of service tax.
- Appellant neither registered themselves with the Department nor paid any service tax, a case for suppression is clearly made out against them. Accordingly, extended period of limitation cannot beinvoked.
- Contention of the appellant that the investigation/inquiries were made in the year 2004- 05 by the department against DYM in which Shri Balkrishna were Secretary General do not obligate the charge of suppression made against theappellant. Charge of suppression is to be examined on the facts of which case and the view taken in the present case when all the evidences pointed thatthe appellant has wilfully disguised the considerationreceived as donation, charge of suppression established against them extended period of limitation has been rightly invoked for the confirmeddemand.
- As extended period of limitation has been invoked penalties under Section 78 of the Act are justified.
- Commissioner has given appropriate reasons for imposition of penalties under Section 76 and alsothe demand of interest under Section 75. Appeal needs to be dismissed.

4.1 We have considered the impugned order alongwith the submissions made in the appeal and during the course of arguments.

4.2 In the impugned order Commissioner has observed asfollows:-

“4.6 The perusal of case record, show cause notice as well defence reply has revealed that the noticee is engaged in rendering the activity of teaching Yoga. It has been admitted by the noticee in their defence reply dated 24.09.2012 stating therein that they are providing serviceswhich are for curing ailments but such services are not taxable under "health and fitness service".

Section 65(51) defines the "health and fitness service" as under:

"health and fitness service" means service for physical well-being such as, sauna and steam bath, turkish bath, solarium, spas, reducing or slimming salons, gymnasium, yoga, meditation,

massage(excluding therapeutic massage) or any other like service;

A bare perusal of definition reveals that it is a servicefor physical well being encompassing sauna and steam bath, Turkish bath, solarium, spas, reducing or slimming salons, gymnasium, yoga, meditation, massage (excluding therapeutic massage). The only exception is with regard to massage as it does not cover the therapeutic massage.

4.7 *The noticee has contended that the term 'yoga' in the said definition would include such yoga, which is being provided for physical wellbeing and therefore, it would not include services which are therapeutic in nature, whether it is in the nature of yoga or otherwise. It has further submitted that for a service to be covered under 'health or fitness' service, it is, first of all quintessential that it shouldbe for physical well-being. Thus, yoga provided for such purposes would be covered and not yoga for therapeutic purposes.*

4.8 *I observe that dispute revolved on the word yoga as appearing in above said definition of "health and fitness service". The notice has alleged that the noticee is providing the health and fitness service by teaching yoga whereas noticee contends that yoga provided for physical well being would only be covered and not yoga for therapeutic purposes.*

4.9 *I find that the above definition encompasses the activity of Yoga among others, as falling under the category of 'Health and Fitness Services' and the provision of 'health & fitness service' attracts Service tax. Therefore,it is necessary to understand as to what the yoga means interms of definition of health and fitness service in view of claims of notice and the noticee. It is observed that the meaning of Yoga as described in Wikipedia, (the free encyclopaedia) is as under:*

a. *"Yoga (Sanskrit, Päli: jaoga/yoga) is a commonly known generic term for physical, mental and spiritual disciplines which originated in ancient India. Specifically, yoga is one of the six ästika("orthodox") schools of Hindu philosophy. It is based on the Yoga Sutras of Patanjali. Various traditions of yoga are found in Hinduism, Buddhism,Jainism and Sikhism".*

b. The website further details that in contemporary times, the physical postures of yoga are used to alleviatehealth problems, reduce stress and make the spinesupple. Yoga is also used as a complete exercise programme and physical therapy routine.

4.10 *Essentially, Yoga means union of the mind, body and spirit with the Divine and while this refers to a certain stateof consciousness both individual and Universal, it is also a method to help one reach that goal. The teaching of Yoga philosophy can be summarized in 5 principles or the Five Points of Yoga, so as to enable the complex teachings of yoga easy to understand. The following are the five points of yoga:*

FIVE POINTS OF YOGA

1. ***Proper Exercise (Asanas)*** *- Yoga poses help develop a strong, healthy body by enhancing flexibility and improving circulation.*
2. ***Proper Breathing (Pranayama)*** *- Deep, consciousbreathing reduces stress and many diseases.*
3. ***Proper Relaxation*** *- Helps keep the body fromgoing into overload mode, easing worry and fatigue.*
4. ***Proper Diet-*** *Eating simple, healthy and vegetarian foods that are easy to digest*

notably have a positive effect on the mind and body, as well as the environment and other living beings.

5. ***Positive Thinking (Vedanta) and Meditation (Dhyana)-*** *These are the true keys to achieving peace of mind and eliminating negativity in our lives.*

The above points are basics to the teachings imparted in respect of yoga. In fact, these are essential to teach a traditional, exact and easy-to-learn system that aims at naturally achieving the goal through creating a healthy body and mind that leads to spiritual evolvement.

4.11 It is observed that the detailed narrations as above about yoga simply reveal that it cannot be undertaken by anyone without first gaining the in-depth knowledge of the yoga as enumerated above. The yoga encompasses a tough curriculum which has to be gone through meticulously in order to achieve the benefits of yoga in longer term. The knowledge/teaching about yoga essentially has to be imparted by someone who is adept in such teachings. Further, the study of five points of yoga reveals that it is a curriculum/system of functioning which helps to keep and maintain the physical well being. It is also true that practicing yoga help in curing specific ailment depending upon the body resistance of the person concerned.

4.12 In view of above backdrop, the contention of noticee, that yoga for therapeutic purposes will not be covered by the said definition of "health and fitness service" onlytends to impart a new meaning to the definition not provided by the statute. The noticee argues that yoga provided for physical well being would only be covered andnot yoga for therapeutic purposes. I find that the definitionprovides exception only in respect of massage and not to any other activity be it yoga or any other, included in the definition. Thus, it is clear that yoga of all sorts is included in the definition of "health and fitness service". Moreover, had it been the case, the provision would have been made in the statute itself, as had been done in the case of massage (excluding therapeutic massage). Accordingly, the contention of noticee runs contrary to the statutory definition of the 'health and fitness service' and therefore cannot be accepted.

4.13 In this regard, it is observed that the services of Health and Fitness Services, which came under service tax net with effect from 16-08-2002. Accordingly, a Circular F. No. B11/1/2002-TRU, dated 01-08-2002 was issued by theBoard on the issue pertaining to Health and fitness services. The said circular has interalia clarified as under:

3. Health and fitness services are provided by clubs, fitness centers, health saloons, hotels, gymnasium and massage centers. The services which fall under this category might be for weight reduction and slimming, physical fitness exercise, gyms, aerobics, yoga, meditation, reiki, sauna and steam bath, Turkish bath, sun bath and massage for general well being. However, therapeutic massage does not comein the ambit of taxable service. Therapeutic massage basically means a massage provided by qualified professionals under medical supervision for curing diseases such as arthritis, chronic low back pain and sciatica etc. Ayurvedic massages, acupressure therapy, etc. given by qualified professionals under medical supervision for curing diseases/disorders willcome under the category of therapeutic massages. Ifthe massage is performed without any medical supervision or advice but for the general physical well being of a person, such massages do not come under the purview of therapeutic massages and they would be liable to service tax.

Thus, it is very much clear that the contention of noticee that yoga provided for physical well being would only be covered and not yoga for therapeutic purposes is untenable and

therefore cannot be accepted as there no separate demarcation for yoga has been provided, one for physical well being and other for therapeutic purposes. There is no blanket exemption to the activities of therapeutic nature in respect of any other activity in the statutory definition, except of massage. Thus, I find that the activity of teaching yoga undertaken by the noticee would correctly fall under the category of 'Health andFitness Services'.

The case law relied upon by the noticee is not of much help since the statutory provision are very much clear and do not support their contention.

4.14 Further, as regards the issue of taxability of theservice, the taxable service is defined under Section 65(105) (zw) as below:

Section 65(105) - "taxable service" means any service provided or to be provided "(zw) - to any person, by a health club and fitness centre in relationto health and fitness services"

The definition of 'health club and fitness centre' under Section 65(52) is as under: (52) "health club and fitness centre" means any establishment, including a hotel or a resort, providing health and fitness service;

Accordingly, 'health and fitness services' will be taxable only if it is provided by a health club and fitness centre in relation to health and fitness services".

4.15 It is observed that the service of health and fitness are liable to service tax if the same are provided by a health club and fitness centre. The issue to be decided isas to whether M/s PYPT situated at Maharishi Dayanand Gram, Delhi Haridwar NH, Near Bhadarabad, Haridwar is a health club and fitness centre or not.

ii. It is an admitted fact that M/s Patanjali Yog Peeth Trust is an organization interalia carrying out the activities of teaching yoga at the above said place. The notice has alleged that M/s Patanjali Yogpeeth Trust is covered under the ambit of 'any establishment', as provided under health club and fitness centre, subject to the condition that theymust be providing the services of health and fitness. Since they are providing services of health and fitness by teaching Yoga, therefore it is to be decidedwhether they would come under the ambit of 'any establishment within the meaning of health club and fitness centre.

iii. The meaning of Establishment is not defined in the Finance Act, 1994 therefore the dictionary meaning has to be seen. The meaning of establishment under various dictionaries is as under:

a. Accurate and Reliable dictionary (a free English- English online dictionary)

i. establishment - an organization founded and united for a specific purpose.

ii. establishment a public or private building structure (business or governmental or educational) including buildings and equipmentfor business or residence.

iii. establishment - any large organization

iv. establishment the persons (or committees or departments etc) who makeup a body for thepurpose of administering something.

b. dictionary.com-an online dictionary

i. establishment - a business organization or largeinstitution

ii. establishment any large organization, institution,or system

iii. establishment - A household or place of residence

iv. establishment - a body of employees of servants

4.16 Thus, from above it can be summarized that an'establishment' is essentially a large organization or institution founded for a specific purposes. M/s Patanjali Yog Peeth Trust, is no doubt an organization engaged in providing the service of health and fitness by way of teaching yoga. There is no denying of the fact that it is a large organization. Thus, from above, discussion, it is established that M/s PYPT situated at Maharishi Dayanand Gram, Delhi Haridwar-NH, Near Bhadarabad, Haridwar is an establishment and would come under the purview of health club and fitness centre. Thus, I find that M/s PYPT isan establishment falling under the definition of 'health cluband fitness centre', rendering the services of health and fitness by way of teaching Yoga and is therefore, liable to pay service tax in accordance with the provisions of servicetax.

4.17 *Further as regards the receipt of consideration by the noticee is concerned there is denying of the fact that Chief Accounts Officer of noticee-company, Shri Shyamvir Singh Saini in his statements dated 17.10.2011 and 17.11.2011 has admitted that the main source of income of M/s Patanjali Yogpeeth Trust is from different types ofdonation, such as the donations received for participationin residential and non-residential yoga shivirs; as membership; and as general donations. The statement and evidences on record like their website http://www.divyayoga.com/free-services.html, whichmentions that they are organizing Yoga Science Camps and the people below poverty line are permitted to participate in the Residential and Non Residential Yoga Science Camps held in towns and cities of India from time to time in the benign presence of Yogrishi Swami RamdevjiMaharaj. This clearly goes on to show that other persons have to pay an entry fees for attending the Yog -Science camps. The fees collected from participant ranges from Rs.7000/- onwards and the facilities provided during the camp varies with the amount of entry fees such as AC Rooms, sitting in front row.etc. Thus, it is amply clear that noticee is charging the said fees in the name of donation inrendering the teaching of Yoga. Accordingly, the receipt of money for providing the above said services is nothing but "consideration".*

4.18 *In the light of discussion as in above said paras, I amof the view that the noticee has admittedly rendered the activity of teaching yoga, which falls under the health and fitness service. As the definition of above said serviceincludes the activity of Yoga as a taxable service, thereforethe noticee is liable to pay the service tax amounting to* ***Rs.4,94,33,027/- (Four Crore Ninety Four Lac Thirty Three Thousand and Twenty Seven Only)*** *in respect ofservices of health and fitness rendered by them during the period from 01.10.2006 to 31.03.2011, as demanded inthe instant SCN, under proviso to Section 73(1) of the Finance Act, 1994.*

4.19 *As regards charging of interest, since the demand of service tax stands confirmed, therefore the assessee isalso liable to pay interest under Section 75 of the Finance Act, 1994, as applicable during the relevant period on the above said confirmed amount of service tax.*

4.20 *Regarding issue of imposition of penalty under Section 76 of the Finance Act, 1994 (upto 09.05.2008), the perusal of case records has revealed that the noticee has not paid service tax on services rendered by them by due date in violation of Section 68 of the Finance Act, 994.*

4.21 *I find that the noticee has a liability as well responsibility to discharge service tax on services renderedby them but they failed to pay the service tax in time continuously for such a*

long period. Since, they have violated the provisions of Section 68 of the Finance Act, 1994, therefore they have rendered themselves liable for imposition of penalty under Section 76 of the said Act.

Further, I find that the Section 78 has undergone an amendment in the year 2008, wherein vide Finance Act, 2008, following proviso was inserted:

F) in section 78, after the fourth proviso, the following proviso shall be inserted, namely:- "Provided also that if the penalty is payable under this section, the provisions of section 76 shall not apply".

In view of above proviso w.e.f. 10.05.2008, the penalty under this Section shall be liable to be imposed only up to 09.05.2008).

4.22 As regards imposition of penalty under Section 77, I find that noticee has failed to take registration in accordance with the provisions of Section 69 or rules madethereunder, therefore the noticee is also liable to pay a penalty under this Section.

4.23 Further, as regards the imposition of penalty under Section 78 of the Act, the noticee has submitted thatpenalty under Section 78 of the Act can be imposed onlyfor reasons identical to those required for invoking extended period or suppression of any fact with an intention to evade payment of service tax. Therefore, penalty under Section 78 of the Act cannot be imposed.

4.24 It is observed that a trust has been reposed on the service provider so far as the service tax is concerned & accordingly measures like self assessment based on mutual trust & confidence have been put in place. As a result, the private records maintained by the service provider for transacting the normal business are accepted for the service tax purposes. From the evidence laid beforeme, I find that the assessee had not taken into account theconsideration received by them for rendering taxable service for the purpose of payment of service tax and thereby refrained from paying their tax liabilities. The non-payment of service tax on the above said services was a deliberate, conscious attempt to suppress the material factof receipt of consideration against services rendered by thenoticee so as to avoid payment of due service tax asenvisaged under Section 68 in utter disregard of Law.Thus, such an act in defiance of law had rendered them liable for stringent penal action in terms of provisions of Section 78 of the Act, ibid for suppression, concealment and furnishing of incorrect value of taxable service with an intent to evade payment of service tax. In the light of above said discussion, the noticee is liable for penaltyunder Section 78 of the Finance Act, 1994.

4.25 Further, the noticee has pleaded that penalty under Section 76 & 78 are not imposable simultaneously and has cited a number of case law.

4.26 I have seen the case laws cited by the noticee.However, I find that Hon'ble Kerala High Court in the case of ACCE, vs. Krishna Poduval 2006 (1) STR 185 on the above issue has held as under:

a. "Penalty (Service tax) Sections 76 and 78 of Finance Act, 1994 Incidents of imposition of penalty are distinct and separate under two provisions and even if offences are committed in course of same transaction or ariseout of same act, penalty imposable for ingredients of both offences Person who is guilty of suppression deserve no sympathy under Section 80 ibid Order of Single Judge withdrawing penalty under Section 76 ibid,set aside. [para 11]"

b. *Similarly, the Hon'ble High Court of Delhi in anothercase of Bajaj Travels Ltd. vs. CST- 2012 (25) S.T.R. 417(Del.) has held as under:*

"Penalty Imposition of Under Sections 76 and 78 of Finance Act, 1994, prior to amendment of Section 78 w.e.f. 16-5-2008 HELD: They operated in two different fields- Penalty was imposable under both separately, even if offences were committed in course of sametransactions or arose out of same act" [paras 15, 16]

4.27 *Thus, in view of above judgements, I find that thereis no bar as to not impose the penalty under both the sections simultaneously since both are separate and for* distinct purposes. Therefore, in view of above, the plea of noticee fails to sustain."

4.3 It is very clear that appellant itself observed that at the time of hearing the stay application after considering the variousarguments on the issue of taxability of activities undertaken by the appellant, the Bench had observed as follows:-

"6. The subject matter of dispute in this case is various residential as well as non-residential yoga courses being organized by the appellant. There is no dispute that in respect of residential as well as non- residential yoga courses being organized by the appellant some amount are being collected from the participants. Section 65 (105) (zw) of the Finance Act, 1994 makes the services provided by "health club and fitness centre", as defined under Section 65 (52) to any person taxable. Under Section 65 (52) of the Finance Act, 1994 'health club and fitnesscentre means any establishment including the hotel or a resort, providing health and fitness service. Under Section 65 (51), 'health and fitness service' means "service for physical well being such as sauna and steam bath, Turkish bath, solarium, spas, reducing or slimming salons, gymnasium, yoga, meditation, massage (excludingtherapeutic massage) or any other like service. Thus, whatis covered under the definition of health and fitness service' is basically the services for physical well being andthe definition specifically mentions yoga as the servicemeant for physical well being. Therefore, we are of the prima facie view that the various yoga courses, residential as well as non- residential, being organized by the appellant are for general physical well being and there is nothing on record to prove, that these courses are meant for specific element. In view of this, we do not accept the appellant's plea that their services are not covered by the definition of health and fitness service. Beside this, there isalso no dispute that the appellant, which are a trust, are covered by the definition of "health, club and fitness centre" as this definition covers any establishmentincluding a hotel or a resort providing the health and fitness service. We also of prima facie view that there is nosubstance in the appellant's plea that the amounts being charged by them in respect of residential courses are not for yoga courses but are the amount charged only for food and accommodation, and for this reason, no service tax is payable, as in terms of provisions of Section 67, the service tax on this services is chargeable on the gross amount charged, which, in any case, would include even the expenses incurred accommodation as well as for organizing the courses."

4.4 We do not have any reasons before us to differ with the findings recorded by the bench earlier. In our view the appellant was engaged in providing the services that were classifiableunder the taxable category of services provided by "health club and fitness centre", as defined under Section 65 (52) to any person. The phrase *"Yoga"* and *"Meditation"* have

been specifically mentioned in the definition of *'health and fitness service'* as defined under Section 65 (51) of the Finance Act, 1994. The claim of the appellant that they are providing treatment for specific ailments being suffered by the person isnot supported by any positive evidence. Instructions on 'Yoga' and "Meditation" in these camps are not imparted to individual but to the entire gathering together. No prescriptions are made for any individual in writing, diagnosing and treating the specific ailment/ complaint of any individual. In para 4.6 to 4.16 of the impugned order, Commissioner has thread bare discussed this aspect and we are in complete agreement with the findings recorded.

4.5 Appellant has in fact collected the entry fee to event organized as Yoga camp - both residential and non residential from the participants, disguising it as "Donation". They issuedthe entry ticket of various denominations. The holder of the ticket was granted different privileges depending on the denomination of the ticket. In return the appellant provided the person entry to camp where, Swami Baba Ramdev would give instructions in respect of Yoga and Meditation. Appellant has relied upon the decision rendered by the Hon'ble Delhi High Court in their own case in ITA 886/2017, (Order date 23.10.2017). The said order is in respect of series of question of law framed by the Income Tax department and finding that many of the questions do not give rise to the question of law or the decision of ITAT was based on appreciation of fact in hand have refused to admit some of these questions and have admitted only following questions for their consideration-

"12. So far as the other issues are concerned, the following questions of law arise:

I. "Whether ld. ITAT erred in law in holding that assessee is entitled to exemption u/s 11 & 12 of the Income Tax Act, 1961?

II. Whether ld. ITAT has erred in law in allowing capital expenditure though the assessee has no legal right on the land on which capital expenditure has been incurred?

III. Whether ld. ITAT has erred in law and on the facts ofthe case in holding that the corpus donations received by the assessee in the form of immovable propertieswill not be liable to tax?"

13. The appeal is admitted, restricted to the above questions of law."

4.6 Word Donation has roots in Latin word *donationem* "give as a gift" from Sanskrit *danam* "offering, present" a voluntary gift, to give without wanting anything in exchange, a voluntary and anonymous financial gift. As per general understanding A donation is a gift - usually one of a charitable nature. A donation is a voluntary transfer of property (often money) from the transferor (donor) to the transferee (donee) with no exchange ofvalue (consideration) on the part of the recipient (donee). The recipient gives nothing in exchange for the donated money/property.

4.7 Fee, originally denoting an estate held on condition offeudal service: from Old French feu, from Latin feodum; related to FEUDAL, FIEF. A fixed charge for a privilege or for professionalservices, for entrance or a payment made in exchange for adviceor services, a charge made for a privilege such as admission.

4.8 Explanation given on University of Cambridge, FinanceDivision webpage assessed at *https://www.finance. admin.cam.ac.uk/policy-and-procedures/financial-procedures/ chapter-14-accounting-donations-and-grants/scope-2, reads asfollows:*

“Definition - What is a donation?

To be classed as a donation or grant, a receipt of funds or assets must have been freely given, with no consequent obligation on the University to provide goods or services tothe benefit of the donor.

Income is often described as a 'donation' when in reality, ifyou look a little deeper into where it has come from and why you may find that it is not. Therefore, in deciding whether income may be treated as donation income, Departments need:

- *to identify whether the funded activity is research which needs to be processed through the Research Operations Office (ROO); and*
- *whether the funded activity creates a tradingrelationship with the funder.*

What income should be processed through ROO?

It is not always easy to differentiate a donation from a research grant. As a general rule, a research grant will be for a specific piece of research activity e.g. to examine the relationship between shark migration and global warming, whereas a donation will be much more general e.g. to fundthe research and other activities of Professor Plum.

…..

What makes income a trading activity?

Trading income is income earned by a department from either another university department or an external customer, for the provision of goods or services, or for the use of space or facilities. ***Therefore, for the income to be a donation it is important to ensure that a funder, or provider of a grant, receives nothing in return.”***

From the above it is quite evident that the amounts received by the appellant as donation, was nothing but theconsideration for the provision of service taxable under the category of Health and Fitness services. This fact these donations were the source of income of the trust has been admitted by the Chief Accounts Officer of noticee-company, Shri Shyamvir Singh Saini in his statements dated 17.10.2011 and 17.11.2011. The entire submission made by the appellant in their defence is contrary to the Income & Expenditure Statementwhich is part of their balance sheet for the period 2010-11. The relevant extract from the said statement is reproduced below:

		Schedule No	Current Year	Previous Year
			2010-11	2009-10
1	**2**	**3**	**4**	**5**
I	Income			
	Donation Received	11	800026159.91	559026871.31
	Patient Treatment Charges		22723603.00	6637023.00
	Interest Income	12	1129205.63	271922.35
	Other Income	13	6984409.00	548561.00
	Total		830863377.54	566484377.66
II	Expenditure			
	Shivir Expenses		426603.00	1911484.00
	Total		235733760.	114301467.

			18	46
Excess of Income over Expenditure T/T Balance Sheet			595129617.36	452182910.20

From the above it is quite evident that the patient treatment charges are which collect from their patients for providing specific treatments is not the part of the donation received and is accounted separately. Thus the argument that these amounts collected by them as donations in the residential camp and non residential camps is towards the patients treatment is demolished by their balance sheet. Further it is observed that the appellant is earning profits reflected as excess income over expenditure and same is reflected in their balance sheet. As per the balance Sheet for the year ending 31.03.2009, Appellant hasreceived total donation of Rs 69,88,84,257/-. As per the Certificate of their Chartered Accountant dated 09.04.2012 (page 177 of paper book) the breakup of donation is as follows:

	Particulars	Amount (Rs)
1	General Donations	39,32,81,331.00
2	Donation Membership	14,76,01,036.00
3	Donation Received in Camps	15,80,01,890.50
	Total	69,88,84,257.50

From the annexure 1 to show cause notice it is quiteevident that the demand for the year 2008-09 is made only by taking the donations received in camps and not any other donations. The entire case of the revenue is that these amounts received as donation for the camps are nothing but consideration charge from the participants for the taxable service provided by the appellant in these residential and non residential camps.

4.9 The demand has been made on the amounts received by the trust in the garb of donation. Annexure 1 to the Show Cause Notice whereby the amount of demand has been worked out is reproduced below:

Period	Amount of Camp Donations (In Rs)	Value taxable Service	Rate of Service tax, Education Cess & Higher Education Cess	Service Tax (In Rs)	Education Cess (In Rs)	Higher Education Cess (In Rs)	Total (InRs)
01.10.06 - 10.05.07	148301133.8	132128593.9	12% + 2%	15855431	317109	0	16172540
11.05.07 - 23.02.09	254166461.2	226207245.7	12% +1% 2% +	27144869	542897	271449	27959216
24.02.09- 31.03.11	56769930.1	51468658.3	12% +1% 2% +	5146866	102937	51469	5301272
TOTAL	459237525	409804498		48147167	962943	322917	49433027

Figures of donations have been worked out in the Annexure 1 a to the Show Cause Notice. Relevant parts of said Annexure is reproduced below:

	Period	Amount of DonationReceived During the period	Remark
I	01.10.2006 to 31.03.2007	134589683.64	
	01.04.2007 to 10.05.2007	13711450.16	Pro-rata 40 days
	01.10.2006 to 10.05.2007	148301133.8	
II	11.05.2007 to 31.03.2008	111748318.84	Pro-rata 326 days
	01.04.2008 to 23.02.2009	142418142.40	Pro-rata 329 days
	11.05.2007 to 23.02.2009	254166461.24	
III	24.02.2009 to 31.03.2009	15583748.10	Pro rata 36 days
	01.04.2009 to 31.03.2010	29604372.00	As per CA Certificate
	01.04.2010 to 31.03.2011	11581810.00	As per CA Certificate
	24.02.2009 to 31.03.2011	56769930.10	

The figures of donations received at camp have been furnished by the appellant as per the Chartered Accountant Certificate dated 21.01.2012 (Page 355 of Paper Book) as per the following table:

Period	Residential Camps	Non Residential Camps		Donation Received Yoga Teacher	Total Amount as per Books of Accounts
		Coupons Donation	General Donation		
2006-07 From 01.10.2006)	5538171	99936219	3441845	1000	108917235
2007-08	1245000	86962528	7878630	29373611	125459769
2008-09	22899200	72137521	713854	62251316	158001891
2009-10	0	0	0	29604372	29604372
01.04.10 to 30.09.10	7126930	0	0	2879375	10006305
1.10.10 to 31.03.11	7000	0	0	1568505	1575505
Total	36816301	259036268	12034329	125678179	433565077

From the figures as indicated in the two tables above it is quite evident that the total value of donations received during the period from 01.04.2007 to 31.03.2011 are completely tallying. There is some difference in the value of donation as indicated in the table for making the demand for period from 01.10.2006 to 31.03.2007, which needs to be reconciled. Further benefit of cum tax price as per Section 67 has been allowed while working out the value of taxable service in Annexure 1. Entire issue of determination of taxable value and quantification of service tax demand has been dealt in para 4.17 of the impugned order.

4.10 The serious challenge has been made to the demand onthe issue of Limitation. Appellant submit that they were under a bonafide belief that no service tax was leviable on the activitiesof rendering services of teaching of yoga and meditation. This belief was based on certain correspondences undertakenbetween Divya Yoga Mandir (DVM) in which Shri

Acharya Balkrishna was Secretary General and the department in theyear 2004-05. They have produced the copies of the correspondence which are at page 304 to 400 of the paper book.

They have placed reliance on a series of the decisions to buttresstheir argument that extended period of limitation could not have been invoked in this case. It is settled principle in law that existence of ingredients leading to invocation of extended period of limitation is a "question of the fact" and the facts of the casein hand will determine whether the extended period of limitation could have been invoked, unlike the "question of law" where the determination can be made on the basis of the available judicial precedents. Further being a charitable trust or body is not the certificate for holding that the appellant cannot have any intention to evade payment of taxes. In case of Bhatnagar Education and Research Trust [(2021) 9 SCC 439], Hon'ble Supreme Court has upheld the order cancellation of the registration as trust by Commissioner Income Tax on finding the irregularities committed by the trust. Hon'ble Supreme Court held as follows:

"11. The answers given to the questionnaire by the Managing Trustee of the Trust show the extent of misuse of the status enjoyed by the Trust by virtue of registration under Section 12AA of the Act.

These answers also show that donations were received by way of cheques out of which substantial money was ploughed back or returned to the donors in cash. The facts thus clearly show that those were bogus donations andthat the registration conferred upon it under Sections 12AAand 80G of the Act was completely being misused by the Trust. An entity which is misusing the status conferred upon it by Section 12AA of the Act is not entitled to retain and enjoy said status. The authorities were therefore, rightand justified in cancelling the registration under Sections 12AA and 80G of the Act.

12 The High Court completely erred in entertaining the appeal under Section 260A of the Act. It did not even attempt to deal with the answers to the questions as aforesaid and whether the conclusions drawn by the CIT and the Tribunal were in any way incorrect or invalid."

4.11 The fact that in case of sister concern in which Shri Acharya Balkrishna was Secretary General certain investigations/enquiries were being made will not make the appellant immune from the charge of suppression etc., required to be establish for invoking the extended period of limitation. Each case and each period has to be examined for the existence of these ingredients on the facts and evidence available for the said period. More so over in the case of self assessment where the complete trsut hasbeen placed on the assesses to conduct their businesstransparently and file their tax returns accordingly. Anymisdemeanor to suppress the income in guise of donation if established is enough to invoke the charge of suppression forthat period. In our view the appellant has suppressed the fact that they have received consideration for the provision of these services and collected the same from the participants in residential and non residential camps by reflecting the same as donation on the receipts and the book of accounts. This suppression was clearly with the intent to evade payment of service tax. Commissioner has while discussing the issue for imposition of penalty under Section 78, has in para 4.23 and

4.24 considered the issue of suppression and has rendered the finding against the appellant in this respect. We also place reliance on the following decisions wherein various courts and

tribunal has held in invocation of extended period of limitation in similar circumstances. In case of Neminath Fabrics [2010 (256)

E.L.T. 369 (Guj.)], Hon'ble Gujarat High Court has held as follows:

"14. Thus the scheme that unfolds is that in case of non levy where there is no fraud, collusion, etc., it is open to the Central Excise Officer to issue a show cause notice for recovery of duty of excise which has not been levied, etc. The show cause notice for recovery has to be served withinone year from the relevant date. However, where fraud, collusion, etc., stands established the period within which the show cause notice has to be served stands enlarged by substitution of the words "one year" by the words "five years". In other words the show cause notice for recovery of such duty of excise not levied etc., can be served within five years from the relevant date.

15. To put it differently, the proviso merely provides for a situation whereunder the provisions of sub-section (1) are recast by the legislature itself extending the period within which the show cause notice for recovery of duty of excise not levied etc. gets enlarged. This position becomes clear when one reads the Explanation in the said sub-section which only says that the period stated as to service of notice shall be excluded in computing the aforesaid period of "one year" or "five years" as the case may be.

16. The termini from which the period of "one year" or "five years" has to be computed is the relevant date which has been defined in sub-section (3)(ii) of Section 11A ofthe Act. A plain reading of the said definition shows that the concept of knowledge by the departmental authority is entirely absent. Hence, if one imports such concept in sub-section (1) of Section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court. If it is not open to the superiorcourt to either add or substitute words in a statute such right cannot be available to a statutory Tribunal.

17. The proviso cannot be read to mean that because there is knowledge the suppression which stands established disappears. Similarly the concept of reasonableperiod of limitation which is sought to be read into the provision by some of the orders of the Tribunal also cannot be permitted in law when the statute itself has provided fora fixed period of limitation. It is equally well settled that it is not open to the Court while reading a provision to either rewrite the period of limitation or curtail the prescribed period of limitation.

18. The Proviso comes into play only when suppression etc. is established or stands admitted. It would differ from a case where fraud, etc. are merely alleged and are disputed by an assessee. Hence, by no stretch of imagination the concept of knowledge can be read into the provisions because that would tantamount to rendering thedefined term "relevant date" nugatory and such an interpretation is not permissible.

19. The language employed in the proviso to sub-section
(1) of Section 11A, is, clear and unambiguous and makesit abundantly clear that moment there is non-levy or short levy etc. of central excise duty with intention to evade payment of duty for any of the reasons specified thereunder, the proviso would come into operation and theperiod of limitation would stand extended from one year tofive years. This is the only requirement of the provision. Once it is found that the ingredients of the proviso are satisfied,

all that has to be seen as to what is the relevant date and as to whether the show cause notice has been served within a period of five years therefrom.

20. Thus, what has been prescribed under the statute is that upon the reasons stipulated under the proviso being satisfied, the period of limitation for service of show cause notice under sub-section (1) of Section 11A, stands extended to five years from the relevant date. The period cannot by reason of any decision of a Court or even by subordinate legislation be either curtailed or enhanced. In the present case as well as in the decisions on which reliance has been placed by the learned advocate for the respondent, the Tribunal has introduced a novel concept ofdate of knowledge and has imported into the proviso a newperiod of limitation of six months from the date of knowledge. The reasoning appears to be that once knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of Section 11A would be applicable. However such reasoning appears to be fallacious inasmuch as once the suppression is admitted, merely because the department acquires knowledge of the irregularities the suppression would not be obliterated."

4.12 In case of Usha Rectifier [2011 (263) E.L.T. 655 (S.C.)], Hon'ble Supreme Court observed as follows:

"12. Submission was also made regarding use of the extended period limitation contending inter alia that such extended period of limitation could not have been used by the respondent. The aforesaid contention is also found to be without any merit as the appellant has not obtained L-4licence nor they had disclosed the fact of manufacturing of the aforesaid goods to the department. The aforesaid knowledge of manufacture came to be acquired by the department only subsequently and in view of non- disclosure of such information by the appellant and suppression of relevant facts, the extended period of limitation was rightly invoked by the department."

4.13 In the case of Mehta & Co [2011 (264) E.L.T. 481 (S.C.)], Hon'ble Apex Court has held as follows:

"22. Consequently, we propose to look into the first issue in the light of the background facts as stated hereinbefore. The specific case of the appellant is that the respondent having manufactured the excisable goods covered under different chapter headings, removed them without payment of proper duty of excise and that from the aforesaid action it is explicit that there was an intention onthe part of the respondent to evade payment of dutyparticularly when the contract clause between the respondent and M/s. Adyar Gate Hotel Ltd. Clearly mentioned that the contractors quoted rate would alsoinclude excise duty.

23. Although, the respondent has pleaded that it wasdone out of ignorance, but in our considered opinion there appears to be an intention to evade excise duty and contravention of the provisions of the Act. Therefore, proviso of Section 11A (1) of the Act would get attracted tothe facts and circumstances of the present case.

24. The cause of action, i.e., date of knowledge could be attributed to the appellant in the year 1997 when in compliance of the memo issued by the appellant and also the summons issued, the hotel furnished its reply setting out the details of the work done by the appellant amounting to Rs. 991.66 lakhs and at that stage only the department came to know that the work order was to carryout the job for furniture also. A bare perusal of the recordsshows that

the aforesaid reply was sent by the respondent on receipt of a letter issued by the Commissioner of Central Excise on 27-2-1997. If the period of limitation of five years is computed from the aforesaid date, the show cause notice having been issued on 15-5-2000, the demand made was clearly within the period of limitation asprescribed, which is five years."

4.14 In the case of ICICI Econet Internet & Technology Fund [2021 (51) G.S.T.L. 36 (Tri. - Bang.)], Bangalore bench has observed as follows:

46. We find that the appellants have argued that this is a matter of interpretation and all the information being in public domain, suppression of any material fact with intent to evade payment of duty cannot be alleged. The appellants have relied upon this Bench's decision in the case of Gateway Hotels, 2020 (37) G.S.T.L. 210 (Tri. - Bang.). We find that in that case, the fact was that the appellants have been filing the returns regularly and there was a confusion regarding the correct position of law *during the relevant time. The facts of the case are different.* ***It cannot be argued that suppression cannot be alleged as the information is in the public domain. Information being in the public domain is not of any consequence. The information should bein the knowledge or made available to the authorities concerned who need to take a certaindecision depending on such information. It is not thecase of the appellants that they have been paying applicable service tax on getting registered and havebeen submitting regular returns to service tax authorities. It is not the case of the appellants that the material information available in the form of various contracts/agreements and balance sheets/ledgers have been submitted to the Department suo motu by the appellants. It is only after investigation has been initiated, the necessary documents were submitted. Thus, the informationavailable in the public domain is of no avail.*** *We find that Learned Adjudicating Authority has rightly relied upon in the case of CCE, Calicut v. Steel Industries Kerala Ltd., 2005 (188) E.L.T. 33 (Tri. - Bang.) wherein it is held at Para 3 as under :*

"3. We find that in the case of Maruti Udyog Ltd. v. CCE, New Delhi, 2001 (134) E.L.T. 269, the Tribunal has upheld the invocation of the extended period of limitation when the assessees did not declare waste and scrap of iron and steel and aluminium and availment of credit therein either in theirclassification list or modvat declaration or in thestatutory records. The Tribunal held that the theoryof universal knowledge cannot be attributed to the department in the absence of any declaration."

4.15 In case of Air India Ltd. [2017 (3) G.S.T.L. 374 (Tri. – Del)], Delhi Bench has held as follows:

"12. Next, we consider the ground of limitation raised by AIL. The contention of AIL is that no allegation of suppression can be fastened against them since the activities of AIL were within the knowledge of the department during the relevant period. Specifically theappellant had cited a letter dated 7-3-2006 written to the Joint Director of Service Tax to inform the various heads under which it was raising bills on AASL. Further, it has been contended that AIL had not paid service tax under the bona fide belief that it is not payable since AIL had not received payment from AASL.

In the annual report 2003-04, it is mentioned "Non- charging of service tax on certain services". This implies that even where service tax has been collected the same was not deposited pending registration. It has also been recorded by the statutory auditors that service tax was payable on

the services rendered by AIL to AASL. However, on the pretext that consideration has not been received (despite realization of the same from sale oftickets conducted on behalf of AASL), AIL has not discharged the service tax liability. In the light of theobservations of the statutory auditors, We are not convinced with the argument taken by appellants thatservice tax was not paid on the basis of bona fide belief that service tax was not payable. Consequently, we are concluding that Revenue is entitled to invoke the extended period of limitation in this case."

4.16 In case of TATA Steel Ltd. [2016 (41) S.T.R. 689 (Tri. - Mumbai)], Mumbai bench held as follows:

"48. The invocation of the extended period of limitation is a mixed question of facts and law and is mainly basedupon the facts of individual cases. During the relevant period the appellant had not taken registration under the Banking and Financial Services and hence they did not file the ST-3 returns. In the absence of registration and the non-filing of the return, the material fact about the receipt of the above mentioned services was completely suppressed from the department. It is noted that, in the present case, the demand being confirmed is for the period1-4-2006 to 31-3-2007. Even in this period, a demand of `69,132/- is for the period 1-4-2006 to 30-9-2006 and the remaining demand is for the period 1-10-2006 to 31-3- 2007. I find from the chronological sequence of events submitted by the appellant along with the appeal that, department, as early as 12-7-2007 asked the details of overseas payments towards external commercial borrowings for three years. Certain details were furnished by the appellant on 22-8-2007. Thereafter, on 27-8-2007 department informed the appellant, that they are liable to pay Service Tax under Banking and Financial Services as recipient of the service. The appellants, however, did not follow the directions of the department. In the meantime, similar issue relating to convertible alternative reference securities and letter of credit also came up for which the appellant made payments on 12-10-2007 and on 4-1-2008. Since the appellant did not pay the service tax onthe MLA and Agent Bank's service under consideration, thedepartment issued summons to Shri Praveen Sood, anofficer of the appellant. The department again asked the appellant for furnishing the details on 21-7-2008 and from the chronology of events it is evident that the appellant submitted all the required details vide their letter dated 5- 11-2008. Thereafter on 1-4-2009, the demand notice was issued. It would thus be seen that the department had informed the appellant as early as on 27-8-2007 about theduty liability and asked them to pay the service tax andthe delay in the issuance of the show cause notice was only because of the information required for issuance ofthe show cause notice was submitted by the appellant videtheir letter dated 5-11-2008 received in the department on14-11-2008. Further, it is observed that the appellant did not take any registration for the said service and no returns were filed for the relevant period and in the absence of the information either from the return or submission from the appellant it is practically not possible for the department to issue show cause notice. In view of the above factual matrix it is not possible to accept the contention that the appellant had a bona fide doubt. In myview, even if they had a bona fide doubt, they should haveprovided the precise information in July, 2007 itself so that the show cause notice could have been issued within the normal period of limitation. I also find that the Member (Judicial) has observed that the information was available in the balance sheet, etc. In my considered view, theinformation should be provided to the concerned jurisdictional assessing authority. The balance sheet may be providing some details but these generally do

not provide the precise details to enable the department to issue demand notice. In any case the balance sheet maybe a public document but the question is whether the balance sheet or information was given to the assessing authorities. In the present case, the appellants did not provide the information in July, 2007. They did not pay thetax as per the direction of the letter dated 27-8-2007. Under the circumstances, I am of the view that the relevant information was suppressed from the department and extended period of limitation has been correctly invoked."

4.17 In case of Ideal Security [2011 (23) S.T.R. 66 (Tri. -Del.)], Delhi bench held as follows:

"7. When we look into para 7 of the appellate order, we are able to confirm that there was difference in two sets ofdocuments that were relied upon by the appellant. One such document was ST-3 return and the second one is its own balance sheet and profit and loss account. The authority recorded that the appellant failed to explain the difference. Therefore, the disclosure being found to befaulty, adjudication was completed on the basis of figures appearing in its financial statements. The authority did not give any concession on the statutory dues. It comes out from Para 8 & 9 of the appellate order at page 10.

8. So far as the contention of the appellant in respect of time bar issue and also adjudication under Section 73 is concerned, the appellate authority dealt with the issue in para 10 and he found that one of the element like suppression, which is essential ingredient in Section 73 is present. Therefore, he held that the proceeding was well within time. When he found all these aspects, he made theappellant liable to pay penalty also. He did not give any concession in respect of penalty.

9. We do agree with the ld. Appellate Authority in the matter of the discrepancy noticed by him in respect of the considerations received and appearing in different manner in two different statutory documents. While the ST 3 returnwas statutory document under Finance Act, 1994, the balance-sheet and profit and loss account were statutory documents under Companies Act, 1956. Therefore, when the public documents bring the discrepancy, the onus of proof was on the assessee to come out with clean hand to prove its stand. When we did not find any merit on the part of appellant, we agree with ld. appellate authority thatinvoking Section 73 is appropriate."

4.18 Since we have concluded that appellant had suppressedthe material facts with intent to evade payment of service tax, the penalty under Section 78 shall be natural consequence ashas been held by Hon'ble Supreme Court in case of Rajasthan Spinning and Weaving Mills [2008 (239) ELT 3 (SC)]. Relevant extract of the said decision is reproduced below:

"17. The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject

to which and the extent to which the penalty may be reduced.

18. *One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "....by reasons of fraud, collusion or anywilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assessees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section11AC.*

19. *From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.*

20. *At this stage, we need to examine the recent decisionof this Court in Dharamendra Textile (supra). In almost every case relating to penalty, the decision is referred toon behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textile and we see no reason to understand or read that decision in that manner. In Dharamendra Textile the court framed theissues before it, in paragraph 2 of the decision, as follows :*

"2. A Division Bench of this Court has referred the controversy involved in these appeals to a largerBench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr. [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the CentralExcise Act, 1944 (in short the "Act') inserted byFinance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the otherhand referred to Section 271(1)(c) of the IncomeTax Act, 1961 (in short the IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench

made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the "Rules') and a decision of this Court in Chairman, SEBI v. ShriramMutual Fund & Anr. [2006 (5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correctposition in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench."

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows :

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there isno scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannotbe sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The referenceis answered ".

21. From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11ACwould apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph5 of the decision the court noted the submission made on behalf of the revenue as follows :

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZOthere is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. Thisis clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation

and the onus is on the revenue toestablish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statues mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, thereis no variable and, therefore, no discretion. It ispointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q,now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed aparticular limit, that itself indicates scope fordiscretion but that is not the case here."

23. *The decision in Dharamendra Textile must, therefore, be understood to mean that though the application ofSection 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section,once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides."*

4.18 Relying on certain decisions, Commissioner has in the impugned order concluded that penalty can simultaneously imposed under Section 76 and Section 78 of Finance Act, 1994 upto 09.05.2008. In view of the amendments made effective from 10.05.2008 by the Finance Act, 2008, the penalty if imposed under Section 78 the same could not have been imposed under 76. The text of the amendment as effective from 10.05.2008 is reproduced below:

''90 In the Finance Act, 1994,-

(F) in section 78, after the fourth proviso, the following proviso shall be inserted, namely:—

Provided also that if the penalty is payable under thissection, the provisions of section 76 shall not apply.";

Thus impugned order to the extent it imposes penalty under Section 76 for the period prior to10.05.2008 cannot be faulted as it is based on the decisions of High Courts as referred

in the impugned order. Hon'ble Gujarat High Court has in case of Port Officer [2010 (257) E.L.T. 37 (Guj.)] held as follows:

"10. A plain reading of Section 76 of the Act indicates that a person who is liable to pay service tax and who has failed to pay such tax is under an obligation to pay, in addition to the tax so payable and interest on such tax, a penalty for such failure. The quantum of penalty has been specified in the provision by laying down the minimum andthe maximum limits with a further cap in so far as the maximum limit is concerned. The provision stipulates that the person, who has failed to pay service tax, shall pay, in addition to the tax and interest, a penalty which shall not be less than one hundred rupees per day but which may extend to two hundred rupees for everyday during which the failure continues, subject to the maximum penalty not exceeding the amount of service tax which was not paid. So far as Section 76 of the Act is concerned, it is not possible to read any further discretion, further than the discretion provided by the legislature when legislature has prescribed the minimum and the maximum limits. The discretion vested in the authority is to levy minimum penalty commencing from one hundred rupees per day on default, which is extendable to two hundred rupees per day, subject to a cap of not exceeding the amount of service tax payable. From this discretion it is not possible to read a further discretion being vested in the authority soas to entitle the authority to levy a penalty below the stipulated limit of one hundred rupees per day. The moment one reads such further discretion in the provisionit would amount to re-writing the provision which, as per settled canon of interpretation, is not permissible. It is not as if the provision is couched in a manner so as to lead to absurdity if it is read in a plain manner. Nor is it possibleto state that the provision does not further the object ofthe Statute or violates the legislative intent when read asit stands. Hence, Section 76 of the Act as it stands does not give any discretion to the authority to reduce thepenalty below the minimum prescribed."

4.19 It is also noticed that the penalties under Section 76 and77 are for the violation done and are absolute in nature if certain violations are attributable to the appellant. In the present case undoubtedly appellant had failed to take registration as required even though he was providing the taxable services. It is also the fact that they were not paying service tax and not filing the returns as required under provisions of Service Tax law, i.eChapter V of Finance Act, 1994 and Service Tax Rules, 1994. For the contraventions of these provisions penalty imposed on the appellant under Section 76 and 77 cannot be faulted with. In case of Gujarat Travancore Agency [1989 (42) ELT 350

(SC)], Hon'ble Supreme Court has held as follows:

"3. At the instance of the Revenue the Appellate Tribunal referred the question set forth earlier to the High Court of Kerala. It may be mentioned that another question was also referred, which related to the Appellate Tribunal entertaining the additional ground of appeal, but the appeals before us are not concerned with that question. The question with which we are concerned was referred to a Full Bench of the High Court, and the High Court has taken the view that mens rea need not be established before penalty is imposed under Section 271(1)(a) of the Act, and that, therefore, the Appellate Tribunal was not justified in cancelling the penalties levied for the two assessment years.

4. *Learned Counsel for the assessee has addressed an exhaustive argument before us on the question whether a penalty imposed under Section 271(1)(a) of the Act involves the element of mens rea and in support of his submission that it does he has placed before us several cases decided by this Court and the High Courts in order todemonstrate that the proceedings by way of penalty underSection 271(1)(a) of the Act are quasi criminal in nature and that, therefore, the element of mens rea is a mandatory requirement before a penalty can be imposed under Section 271(1)(a). We are relieved of the necessity of referring to all those decisions. Indeed, many of them were considered by the High Court and are referred to in the judgment under appeal. It is sufficient for us to refer to* Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276C which providesthat if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shallbe punishable with rigorous imprisonment for a term whichmay extend to one year or with fine. It is clear that in the former case what it intended is a civil obligation while in the latter what is imposed is a criminal sentence. Therecan be no dispute that having regard to the provisions of Section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serveas a deterrent. The creation of an offence by Statuteproceeds on the assumption that society suffers injury by and the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and

to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish theelement of mens rea it is generally sufficient to prove thata default in complying with the statute has occurred. Inour opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum Volume 85, page580, Paragraph 1023 :

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeitureprovided as punishment for the violation of criminal or penal laws."

5. *Accordingly, we hold that the element of mens rea wasnot required to be proved in the proceedings taken by the Income Tax Officer under Section 271(1)(a) of the Income-tax Act against the assessee for the assessment years 1965-66 and 1966-67."*

4.20 The interest liability for delayed payment of service taxalso cannot be disputed. Appellant has not paid the service tax, payable by them on the taxable services provided by them by the due date and hence demand of interest on the delayed payment of service tax is justified. Hon'ble Bombay High court has in case of P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)]. stated as follows:

"10. So far as interest u/s. 11AB is concerned, on reference to text of Section 11AB, it is evident that there isno discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actualrate of interest applicable from time to time by fluctuationsbetween 10% to 36% is as determined by the Central Government by notification in the Official Gazette fromtime to time. There would be discretion, if at all the sameis incorporated in such notification in the gazette by which rates of interest chargeable u/s. 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest u/s. 11AB at all andwe are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied/short paid/non-levied/unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident from the opening part of sub-section (1) of Section 11, which runs

thus :

"Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as determined under subsection (2) or has paid the dutyunder sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate ..... "

The terminal part in the quotation above, which is couchedwith the words "shall" and "be liable" clearly indicates that there is no option. As discussed earlier, this is a civilliability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional."

Similar views have been expressed in the following decisions:

a) Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)]
b) TCP Limited [2006 (1) STR 134 (T-Ahd)]
c) Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)]
d) Ballarpur Industries Limited [2007 (5) STR 197 (T-Mum)]

4.21 In view of the above we do not find any merits in the submissions made by the appellant in the appeal filed. However as we have observed in para 4.9 that demand for the period 01.10.2006 to 31.03.2007 needs to be recomputed after reconciling the amounts received by the appellant during that period with the accounts of appellant and the certificate dated 21.01.2012 of the Chartered Accountant (Anil Ashok & Associates). According the impugned order is upheld in all respects, but remanded back to original authority for re- computation of demand and penalty under Section 78 only for period 01.10.2006 to 31.03.2007 after taking into account the afore-stated certificate of Chartered Accountant.

5.1 Appeal is thus,-

i. Dismissed for the period 01.04.2007 to 31.03.2011 and the demand of Service tax along with the interest and penalties imposed are upheld.
ii. Partly allowed for the period 01.10.2006 to 31.03.2007and the matter is remanded for

limited purpose of re- computing the demand of Service Tax after taking into account the certificate dated 21.01.2012 of the Chartered Accountant (Anil Ashok & Associates). Penalty under Section 78 for the said period also will be modified accordingly.

(Pronounced in open court on-05/10/2023)

Sd/-

(P.K. CHOUDHARY)MEMBER (JUDICIAL)

Sd/-

(SANJIV SRIVASTAVA)MEMBER (TECHNICAL)

akp

Back

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 54894 of 2023 [SM]

[Arising out of Order-in-Appeal No. 306 (RLM)ST/JPR/2022 dated 29.12.2022passed by the Commissioner of CGST, Excise & Customs (Appeals), Jaipur]

M/s. Hakim Singh Contractor **…Appellant**
Purani Chawani, Bari Road,Dholur (Raj) - 328001

VERSUS

Commissioner of Central Goodsand Service Tax, Customs and Central Excise, Alwar **…Respondent**

A-Block, Surya Nagar, Alwar, Rajasthan - 301001

APPEARANCE:

Shri Ravi Gupta, Advocate for the Appellant

Shri Rohit Issar, Authorized Representative for the Respondent

CORAM: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: 16.11.2023DATE OF DECISION: 16.11.2023

FINAL ORDER No. 51645/2023

DR. RACHNA GUPTA

Present appeal has been filed to assail the Order-in-AppealNo. 306(RLM)ST/JPR/2022 dated 29.12.2022. The relevant facts inbrief for the purpose are as follows:

The appellant is engaged in providing taxable services namelyConstruction Services and the Works Contract Services. On the basis of information about the consideration received by the appellant for the Financial Year 2012-13 and 2013-14 that theappellant was asked vide letter dated 11.02.2014 to give the relevant records about the discharge of their service tax liability for the aforesaid two years. Since no response was received by the appellant and no document was provided for ascertaining the taxable value, the appellant was observed to be liable to payservice tax amounting to Rs.78,68,981/- on the gross amount of Rs.6,36,64,894/- as received during the period from 01.07.2012 to 31.03.2014. Resultantly, vide show cause notice bearing No. 716 dated 26.04.2018, the aforesaid amount was

proposed to be recovered along with the appropriate interest and the proportionatepenalties. The said proposal was initially confirmed vide the Order- in-Original No. 31/2021-22 dated 21.12.2021. The appeal against the said order has been rejected vide the order under challenge. Being aggrieved the appellant is before this Tribunal.

2. I have heard Shri Ravi Gupta, learned Advocate for the appellant and Shri Rohit Issar, learned Authorized Representativefor the department.

3. Learned counsel for the appellant has submitted that theappellant had been discharging their service tax liability and the regular payments were being made. The challan details were also provided to the department. The list of those challans is brought tothe notice as are annexed on the record. Learned counsel further has mentioned that during the disputed period an amount of Rs.8,14,159/- (as apparent from those challans) was deposited by the appellant towards the discharge of their service tax liability. However, the payment was the short payment and an amount of Rs. 2.54 lakhs approximately was still to be deposited by theappellant. The appellant is therefore not challenging the liability as has been proposed and confirmed against the appellant. Learned counsel has impressed upon that the demand for the Financial Year 2012-13 and 2013-14 has been raised vide the show cause notice dated 26.04.2018 i.e. after invoking the extended period of limitation. It is impressed upon that there was no misrepresentation nor there is any evidence proving the same as against the appellant. Hence, the extended period has wrongly been invoked. The order under challenge is prayed to be set aside on the said ground itself. Resultantly, appeal is prayed to be allowed.

4. While rebutting these submissions, learned DR has mentionedthat from the show cause notice itself, it is apparent that the entire time was taken by the appellant as he failed to provide the requisite documents to the department. He was repeatedly being asked till April 2014, receiving no response over these years that the impugned show cause notice was issued. Hence, the same cannot be alleged as invocation of the extended period of limitation. Learned DR has further relied upon the findings in the Order-in- Appeal/order under challenge in Para 8 and 9 thereof. Impressing upon that there is no infirmity committed by Commissioner (Appeals) while relying upon the decision of the superior courts as mentioned in the aforesaid two paragraphs. The order is prayed to be upheld and the appeal is prayed to be dismissed.

5. Having heard the rival contentions and perusing the entire records, I observe and hold as follows:

5.1 It is observed that the narrow scope of the impugned appealis to adjudicate as to whether the show cause notice served upon the appellant hits by the time bar limit and the department was not supposed to invoke the extended period of limitation. The appellanthas otherwise acknowledged the short payment of service tax during the disputed period and has not challenged the quantum of demand proposed and confirmed against the appellant. It is apparent from the record that after receiving the specificinformation that the appellant has short paid service tax, a letter dated 11.02.2014 was served upon the appellant requiring them to produce requisite documents and to submit the reply with the said specific information. It is very much apparent from the show cause notice itself that the said information/documents were never provided by the appellant to the department.

5.2 I observe that the department has repeatedly sent letters on 26.03.2014, 01.05.2014, 25.09.2014, 16.04.2015, 03.10.2017 and lastly on 05.04.2018 to the appellants, asking for the documents asthat of

Income Tax Returns, Balance Sheets, Form 26AS, VATReturns, Work Orders, Invoices etc. for both the Financial Years in dispute (2012-13 and 2013-14). Since nothing was provided nor even appellant responded that the impugned show cause notice wasserved upon the appellant on 26.04.2018. No reason has been brought on record by the appellant nor has been submitted by making submissions even today about the said delay on part of the appellant and about the reason as to why none of those documents were never been provided, the delay for the entire period since February 2014 till April 2018 is held to be appellant's fault. Hence benefit cannot be extended in favour of the appellant for the said fault. Resultantly, it cannot be held that the impugned show cause notice has been issued by invoking the extended period of limitation. Had there been a response by the appellant to the letterdated 11.02.2014, there is nothing on record to even presume that department would have delayed issuing the impugned show cause notice. In view of these observations, I do not find any reason to differ from the findings as mentioned in Para 8 and 9 of the order under challenge (Order-in-Appeal).

5.3 As far as the plea of imposition of penalty is concerned, no doubt the appellant had deposited the amount prior the issuance of show cause notice but apparently and admittedly the amount was short paid. As already discussed above, the appellant failed to come forward to state the true facts, circumstances and to produce the relevant documents. I have no reason to differ from thefindings that the said act and conduct of the appellant amounts to suppression of facts. The penalty under 77(1)(c) has been levied on account of not furnishing the information to the department. As already discussed above, that is an apparent and admitted fact, hence no question arises for setting aside the said penalty. As already held that the act of appellant amounts to an act of suppression of facts, there is no infirmity in the imposition ofpenalty under Section 78 of the Finance Act. Though learnedcounsel had made another submission that the penalty imposed is disproportionate, it has been imposed 100% whereas it is on recordthat an amount of Rs.8,14,159/- was deposited by the appellant even prior the issuance of show cause notice. On this ground learned counsel has prayed for confining the penalty for the balance amount of Rs. 2.57 lakhs approximately. Since the findings of Para 8 and 9 of the order under challenge have been confirmed and it has been held that there is an intentional suppression on part of theappellant. The only possibility of such suppression is an intent to evade the payment of tax as has been appreciated by Commissioner (Appeals) in Para 9 of the order under challenge. I have no reason to differ from the said findings also.

6. In view of the above discussion, I hereby uphold the order under challenge. As the result, the appeal stands dismissed.

[Dictated and pronounced in the open Court]

(DR. RACHNA GUPTA)MEMBER (JUDICIAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI.

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 55295 OF 2023 (SM)

[Arising out of the Order-in-Appeal No. CC (A) CUS/D-II/ICD/TKD/Export/1596

/2022-23 dated 28/03/2023 passed by The Commissioner of Customs(Appeals), New Customs House, New Delhi – 110 037.]

M/s VKV Exports Pvt. Ltd. **Appellant**
Office No. 102, 12 Community Centre No. 2,Ashok Vihar, Phase – II,

Delhi – 110 052.

VERSUS

Commissioner of Customs (Export), **Respondent**
ICD, Tughlakabad, New Delhi – 110 020.

APPEARANCE

Shri Abhas Mishra, Advocate – for the appellant.

Shri Rajesh Jain, Authorized Representative (DR) – for the Department

CORAM : **HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)**

FINAL ORDER NO. 50046/2024

DATE OF HEARING : 11.01.2024

ASHOK JINDAL

The appellant is in appeal against the impugned order for setting aside of imposition of redemption fine and penalty on them.

2. The facts of the case are that the appellant is an exporter of readymade garments, they filed shipping bills and export documents with the department on 24.08.2022. The goods were examined and it was alleged that goods are of inferior quality and overvalued to claim undue export benefits, therefore,examination of goods were conducted and a market enquiry was also conducted in the presence of authorized representative ofthe appellant and in market enquiry it was found goods have been heavily over valued thereafter the appellant took back the goods in town and export did not take place. The adjudicating Authority allowed the goods to be taken back by the appellant, but held the goods which were overvalued are liable for confiscation, consequently redemption fine of Rs.

4,00,000/- and penalty of Rs. 1,50,000/- were imposed. Against the said imposition of redemption fine and penalty appellant is before me.

3. The learned counsel for the appellant submits that in this case the supplier of goods was available and who has issued the invoices to the appellant showing tax paid and it is not disputed that invoices are not genuine. It is further submitted that it is notinvestigated that the supplier has paid GST on the said goods or not, but invoices showed that the supplier of goods has paid the GST. In that circumstances, it cannot be alleged that goods have been highly overvalued. Move over, the goods taken back to the town and no export took place and appellant has not taken any benefits on the goods. He further submitted if the market value determined as per market survey is taken on record, thereafter transportation charges and other handling charges, profit margin are to be included and the same are considered, then the valueof export goods is justified. In that circumstances, redemption fine and penalty is not imposable on the appellant as no benefitof the transaction has taken over by the appellant.

4. On the other hand, learned authorized representative appearing for the department submits that in this case goods have been highly over valued as three times of the value ofgoods determined in market survey. Transportation charges and profit margin cannot be said to be so high that double of the cost of the goods, therefore, the act of the appellant is held liable the goods for confiscation. Accordingly, redemption fine and penalty imposed on the appellant are justified.

5. Heard the parties and perused the records.

6. In this case the main allegation against the appellant is that export goods are of inferior quality and highly over valued goods. To ascertain the value of goods, the Revenue has done market survey in the presence of the representative of the appellant and in the market survey, it was found that the export goods are over valued and the appellant has accepted the same.I do agree with the learned authorized representative of the Revenue that transportation charges and profit margin cannot be the double of the goods in the facts and circumstances of the case. In that circumstances, I hold that the Adjudicating Authority has rightly held the goods are liable for confiscation. Accordingly, redemption fine and penalty are imposable on the appellant.

7. In the facts and circumstances of the case, I find that redemption fine and penalty are on higher side, accordingly, I reduced the redemption fine to Rs. 2,00,000/- and penalty to Rs. 1,00,000/-.

8. In these terms, the appeal is disposed of.

(Dictated and pronounced in open court.)

(ASHOK JINDAL)MEMBER (JUDICIAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI.
PRINCIPAL BENCH – COURT NO.III

Customs Appeal No.54904 of 2023 (SM)

[Arising out of Order-in-Appeal No.CC(A)CUS/D-II/IMP/ICD/TKD/1025/2022-23 dated 26/27.10.2022 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi]

M/s. Petro Lubes India, **Appellant**
Shop No.11/B,

Near D.S. Dharamkanta,Kultana Road,

Haryana-124 501.

Versus

Commissioner of Customs, **Respondent**
New Customs House,Near I.G.I. Airport, New Delhi.

APPEARANCE:

Ms. Sunaina Phul, Advocate for the appellant.
Shri Rohit Issar, Authorised Representative for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

FINAL ORDER No. 51655/2023

DATE OF HEARING:29.11.2023DATE OF DECISION:15.12.2023

BINU TAMTA:

1. The appellant has assailed the Order-in-Appeal No. CC(A)CUS/D- II/IMP/ICD/TKD /1025/2022-23 dated 26/27.10.2022 passed by the Commissioner (Appeals).

2. The facts of the case are that an intelligence was gathered by the officers of DRI, DZU, that the appellant were engaged in clearing 'Automotive Diesel Fuel' by misdeclaring the import

consignments as that of 'Mixed Glycol or Base Oil'. The import of automotive diesel fuel is restricted and allowed for import only by State Trading Enterprises in terms of ITC (HS) Import Policy, 2017, while the import of Mixed Glycol and Base Oil classifiable under CTH 2710 1971 is free. It was also gathered that the appellant were also undervaluing the imported consignments and misdeclaring the net weight of the consignments to evade proper payment of customs duty.

3. Acting on the intelligence, consignments imported by the appellant under 12 containers vide Bill of Entry No.2795056 dated 16.02.2021 was put on hold for examination and sampling. The imported goods were examined in presence of independent witnesses and examinationproceedings were recorded in panchnama dated 19/20.02.2021. During examination, representative samples were drawn from each of the 12 containers. As goods in all the containers were identical and same (as declared), sample from one container was forwarded to CRCL for testing vide department's letter dated 01.03.2021. The sample was again drawn under panchnama dated 18.03.2021 from the same container from which sample was sent to CRCL and the same was forwarded to Society for Petroleum Laboratory (SFPL), Noida, U.P., a Government Laboratory registered under the Union Ministry of Petroleum and Natural Gas for testing of petroleum products vide department's letter dated 22.03.2021 with a request to test the samples for their conformity to the parameters/standards of Automotive Diesel Fuel. Both the laboratories i.e. CRCL & SFPL vide their reports dated 26.03.2021 and 01.04.2021, respectively reported that the samples meet the requirement ofAutomotive Diesel Fuel.

4. As the impugned goods were found to be Automotive Diesel Fuel, which was not freely importable, they were found to be liable for confiscation and therefore were seized vide seizure memo dated 25.06.2021 under Section 110 of the Customs Act, 1962.

5. Statements dated 05.07.2021 and 05.08.2021 of Shri Sachin Singh,Proprietor of the appellant were recorded under Section 108 of the Customs Act, 1962. Test report dated 26.03.2021 of CRCL and testreport dated 01.04.2021 of SFPL were shown to the appellant. The appellant after seeing and understanding the said test reports, put his dated signature on the said reports and accepted the same. He categorically stated that he had nothing to comment on the results of these test reports.

6. On completion of the investigation, show cause notice dated 16.08.2021 was issued to the appellant proposing reclassification of the impugned goods (Automotive Diesel Fuel) from CTH 27101971 to CTH 27101944; rejection of declared assessable value of Rs.66,31,084,29/- of the impugned goods under Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (for short CVR, 2007) and re- determination as Rs.79,57,301/- under Rule 4 & 5 of CVR, 2007 read withSection 14 of the Customs Act, 1962; confiscation of impugned goods under Section 111(d), 111(f) and 111(m) of the Customs Act, 1962 and penal action on the appellant under Section 112(a), 114 A and 114 AA of the Customs Act, 1962. The Adjudicating Authority affirmed the show cause notice, however, the appellate authority modified the Order-in- Original only on limited aspect of quantum of duty being excessive and hence reduced the same.

7. I have heard the learned counsel for the appellant and also the Authorised Representative for the revenue and perused the records of the case.

8. The main challenge in this appeal is to the validity of the test reports on the ground that the samples have not been tested on all the 21parameters specified in IS:1460:2005 (BIS standard for

Automotive Diesel Fuel), therefore it being inconclusive cannot be relied upon. According to the appellant, the two reports have given different findings for same parameters and since there is no other corroborative evidence, the impugned order is unsustainable. I do not find any merit in the submissions made by the learned Counsel for the simple reason that test have been conducted by highly specialized government laboratories, i.e., CRCL and SFPL and no fault can be found on the test reports submitted by them. The test report dated 26.03.2021 by CRCL, the same reads as :

" The sample meets the requirements of Automotive Diesel Fuel as per IS :1460 :2017. It is other than baseoil."

Similarly, the test report dated 1.04.2021 by SFPL also says :

" Certified that the above sample conforms to I S: 1460: 2017 (latest version) specification for automated automotive, diesel fuel HSD in the critical testparameters as detailed in the test report and therefore is not considered to be a suspect case of adulteration"

From the aforesaid two reports, it is clear that the impugned goods are 'Automotive Diesel Fuel' and conform to the standards of IS:1460:2017 and therefore the challenge that the samples have not been tested on all the 21 parameters is baseless and does not establish that the goods are not Automotive Diesel Fuel. The issue is squarely covered by the deicisionof the High Court of Gujarat in the case of **Raj Kamal Industries - 2022 (2) TMI 264,** where after detailed discussion, it was observed that testing even on limited parameters by three laboratories independently clearly established that the goods were nothing but HSD as per IS:1460: 2005, the relevant para is quoted below:-

"40. Thus, what is discernible from the above referred case laws is that it would be too much to ask the department to prove its case with mathematical accuracy. So long as the department has been able to establish itscase with such a degree of preponderance, the existence ofa fact could be said to have been proved. The only groundon which the Tribunal interfered with the findings recorded by the adjudicating authority is that the laboratories were not in a position to conduct all the 21 tests. The Tribunalhas ignored the fact that all the 14 tests carried out in three different laboratories revealed only one thing that the sample showed the characteristics of the High Speed Diesel.If the department is able to lead evidence to this extent, theonus would thereafter shift upon the assessees to establish that these 14 tests cannot be said to be conclusive of the fact that the subject goods is High Speed Diesel. No such attempts have been made by the assessees."

9. The controversy that the goods have not been tested on all 21 parameters would not really make any difference and even on the basis oflimited parameters the identity of the goods stands established in view of cogent and substantive evidence in the form of test reports by the two independent government laboratories. These test reports cannot be said to be incomplete or inconclusive. Consequently, the goods in question imported by the appellant were mis-declared as they were not Mixed Glycol and Base Oil but were Automotive Diesel Fuel, the import whereofis restricted only by State Trading Enterprises in terms of the Import Policy, 2017. Therefore, the impugned goods being Automotive DieselFuel was covered under CTH 2710 1944 and not under CTH 2710 1971 as per the declaration made by the appellant.

10. It also needs to be appreciated that Shri Sachin Singh, the proprietor of the appellant company

in his statement dated 5.08.2021 recorded under section 108 of the Customs Act accepted the findings of both the test reports. The relevant contents of the statement of the appellant (noted by the Adjudicating Authority in extenso) are as under
:

" On being shown the Test report Lab numbers CRCL/27/400 (DRI) dated 26.03.2021, SFPL Test report no. FTL/ HSD/21/3 /76 dated 01.04.2021 bearing SFPL Code no. 21–86, in respect of testing of samples drawn from the containers imported under Bill of Entry No. 2795056 dt. 16.02.2021 filed by M/s Petro Lubes India he stated that he had been shown the aforementioned test reports in respect of testing of samples drawn from the containers imported under Bill of Entry No. 2795056 dt. 16.02.2021 filed by M/s PetroLubes India. On seeing and understanding the same that the samples of imported goods found to be Automotive diesel fuel by the testing agency, he put his dated signature in token of his acceptance. He had nothing to comment on the results of these test reports". (Emphasis laid).

Once the samples have been drawn under proper Panchnama and theyhavebeen tested by two recognized government laboratories as Automotive Diesel Fuel, which stands accepted and admitted by the appellant, there is no scope for any doubt or any further corroboration. The veracity of these test reports given by highly technical experts is not open to challenge on frivolous grounds of cross examination sought to be raised by the appellant and as rightly noted by the adjudicating authority that it is only an attempt by the appellant to delay the proceedings. The statement of the proprietor has been recorded under Section 108 whichis admissible in evidence, wherein he accepted the test reports andrefused to comment thereon and in that view no fruitful purpose would have been served by allowing cross examination. Moreover, the saidstatement has never been retracted by him.

11. The next issue to be considered is the valuation of the impugned goods. The allegation considered by the adjudicating authority is that the appellant has mis-declared the value of the goods as the nature of the goods itself was mis-declared. In the present case, on the basis of the intelligence, the data of live import of subject goods were examined in respect of four individual importers, namely, M/s Mangli Enterprises, M/s Vishal Oil and Lubricants Co., M/s. Shobhag International Private Ltd and M/s Petro Lubes India Ltd. The department relied on the import of Base Oil and Mixed Glycol by M/s Shobhag International Pvt. Ltd., where also the said importer was also importing Automotive diesel fuel by mis-declaring them during the same period and from the same country of origin, i.e., UAE at the rate of US$450 MTS, which was evident from the Whatsapp chat. Finding it to be a case of undervaluation, the valuedeclared was held to be incorrect, which amounts to mis-declaration ofthe valuation by the appellant. Therefore, the value declared by the appellant of Rs.66,31,08,429/- was rejected and the same was re- determined at Rs. 79,57,301/- under Rule 4 and 5 of the Customs Valuation Rules, 2007, read with Section 14 and Section 17(4) of the Customs Act. I, therefore, uphold the demand on account of valuedifference as calculated by the Authority.

12. Having come to the conclusion that the appellant had mis-declared the goods, and therefore mis-classified them, which resulted inmisdeclaration of the value of the goods, the authorities below rightly heldthat the goods were liable to confiscation under section 111(d)(f) and (m)of the Customs Act. The said goods are restricted goods as only State Trading Enterprises could import them and the appellant had no authorization to import the restricted goods. Since the import is contrary to the

restrictions placed on such imports by the Government of India, hence, the seized goods have become prohibited goods in terms of section 2 (33) of the Customs Act and therefore order of absolute confiscation in the present case is justified. I would like to refer to a recent decision of the Delhi High Court in **Nidhi Kapoor Versus Union of India - 2023 SCC, online, Del 5099,** where the learned Division Bench after referring to all the earlier decisions concluded that an infraction of a condition for import of goods would also fall within the ambit of section 2 (33) of the Act and therefore their redemption and release would become subject to the discretionary power of the adjudging officer and therefore did not find any illegality in the orders passed for absolute confiscation of the imported goods. Referring to the definition of "prohibited goods" in Section 2(33), the Supreme Court in **Om Prakash Bhatia Vs. Commissioner of Customs, Delhi** analysed it as under:

"9. From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and
(b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in *Shekih Mohd. Omer* v. *Collector of Customs, Calcutta and Others* [(1970) 2 SCC 728] wherein it was contended that the expression 'prohibition' used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955. The Court negatived the said contention and held thus :-

"…..What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restrictions is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues."

Also, considering the fact that the impugned goods are highly inflammableand require expertise to handle them, requiring special storage facilities, the adjudicating authority rightly rejected the redemption of these goods and ordered absolute confiscation.

13. In view of the discussion above, the penalty both under section 112(a) and section 114AA needs to be imposed on the appellant. The Adjudicating Authority had imposed penalty of Rs. 35 lakhs under Section

112 (a) and Rs. 20 lakhs under Section 114AA of the Customs Act, however, the Appellate Authority reduced the same to Rs. 15 lakhs and Rs 10 lakhs under section 112(a) and 114AA respectively, considering that the section prescribes only the upper limit of penalty that can be imposed and since the goods have been absolutely confiscated, the penalty needs to be moderate. I agree with the impugned order that the penalty as imposed by the adjudicating authority was excessive. Consequently, no interference is called for in the quantum of penalty which has already been reduced by the impugned order.

14. The impugned order is hereby affirmed, and the appeal is accordingly dismissed.

[Order pronounced on 15th December, 2023]

(Binu Tamta)Member (Judicial)

Ckp.

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI.

PRINCIPAL BENCH - COURT NO. 3

Customs Appeal No. 54694 of 2023-SM

(Arising out of Order-in-appeal No. IND-EXCUS-000-APP-107-2022-23 dated 02.03.2023 passed by the Commissioner (Appeals), Customs, Central Goods & Service Tax and Central Excise, Indore (M.P.).

M/s Lupin Limited **Appellant**

Plot No. M-2 & M-2-A, SEZ Phase-IIMISC Zone, Apparel Park Pithampur, Dist – Dhar-454775 Madhya Pradesh.

VERSUS

Commissioner of Customs **Respondent**

B-Zone, 3rd Floor, 12/2/7 & 12/2/8Village Pipliakumar, Nipania Indore-452010, Madhya Pradesh.

APPEARANCE:

Shri Mahesh B. Raichandani, Advocate for the appellant

Shri Mahesh Bhardwaj, Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)FINAL ORDER NO. 51567/2023

DATE OF HEARING: 04.09.2023DATE OF DECISION: 29.11.2023

BINU TAMTA:

Challenging the Order in Appeal No IND-EXCUS-000-APP- 107-2022-23 dated 02.03.2023 whereby the Commissioner (Appeals)dismissed the appeal, the appellant has filed the instant appeal.

2. The appellant is a SEZ unit, engaged in manufacturing and export of pharmaceutical products for which they procured some input goods from DTA unit. Since certain input goods remained unutilised, the appellant supplied back the said goods tothe DTA on payment of duty under protest. Accordingly, they filedthe refund application amounting to Rs. 36,65,884/-. The show cause

notice dated 28.10.2021 was adjudicated whereby the refund claim was rejected being not admissible under the provisions of Special Economic Zone Act, 2005 (hereinafter referred to as SEZ Act, 2005) read with the Customs Act, 1962. The appeal filed by the appellant challenging the order in original dated 01.12.2021 was also dismissedby the Commissioner (Appeals) vide impugned order. Hence thepresent appeal has been filed before this Tribunal.

3. The issue which arises for consideration here is whether the goods removed from SEZ to DTA (initially procured from DTA) arechargeable to customs duties in terms of section 30 of SEZ Act, 2005 read with rule 47 of SEZ Rules, 2006.

4. I have heard the learned counsel for the appellant andalso the Authorised Representative for the revenue and have perused the records of the case.

5. The basic submission of the appellant is that in terms of rule 48 (3) of the SEZ Rules, 2006 if the goods procured from DTAare cleared back to DTA by SEZ unit without undertaking any manufacturing activity, such goods shall be treated as re-import and the said rule postulates deeming fiction with regard to non-leviability of basic customs duty on the re-imported goods. The revenue on the other hand relied on the findings of the authorities below referring to the provisions of rule 47 of SEZ Rules read with section 30 of SEZ Actto say that any goods removed from SEZ to DTA are chargeable to Customs duties.

6. Before adverting to the issue, it is necessary to examine the introduction and the relevant provisions of the SEZ Act. The Government of India introduced the concept of special economic zone (herein after referred to as SEZ) in India on 01.04.2000 under the export and import policy now referred to as foreign trade policy. Subsequently, the Parliament enacted the Special Economic Zones Act, 2005. The Special Economic Zone Rules were brought into effect from 10.02.2006. The Act was enacted with a view to provide for the establishment, development and management of special economic zones so as to encourage and promote exports, generate additional economic activities and employment opportunities.

7. Special economic zones created under the SEZ Act are on a different footing. Section 53 declares a special economic zone to be a territory outside the customs territory of India for the purpose of undertaking the authorised operations. Thus the Act itself treats SEZ as an area outside India and such zones are deemed to be a foreign territory for trade operations, duties and tariff purposes and have therefore been accorded special status. Section 30 of the SEZ Act makes any goods removed from special economic zone to the domestic tariff area, chargeable to duties of customs, including anti- dumping, countervailing, and safeguard duties. Further, Section 51 of the SEZ provides for a non-obstinate clause, conferring overriding effect upon the Act vis-a-vis any other law.

8. The clear and unambiguous provisions of section 30 has been noted in **Roxul Rockwood Insulation India Pvt. Ltd** Vs **Union of India, 2015 (320) ELT 554**, where the High Court observed as under :

―From the above statutory provisions, it can be seen that by virtue of section30 of the SEZ Act, a

SEZ unit on its clearance of goods to any DTA invites duty of customs, including CVD where applicable as leviable on such goods when imported. Such DTA clearance by SEZ unit would, thus, be treated as imports for computation of CVD|.

8.1. The Madras High Court in **Nokia India Sales Pvt. Ltd.**

Vs. **Assistant Commissioner, CT, Chennai, 2015, (325) ELT 259**,where the issue was with regard to levy of purchase tax on interstate stock transfer from warehouse located in SEZ, observed as under:-

—23. It is to be noted that the petitioner had accepted the terms prescribedin the approved letter dated 7-3-2011 for its setting up in SEZ unit, of which,one of the conditions is that the petitioner can supply/sell the goods or services in the domestic tariff area in terms of the provisions of the Special Economic Zones Act, 2005 and rules and orders made thereunder. In this regard, it is relevant to extract Section 30 of the Special Economic Zones Act, 2005, which deals with ‗Domestic clearance by units', which reads as under :

—30. Domestic clearance by Units. - Subject to the conditions specified in the rules made by the Central Government in this behalf

:- (a) any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported; and (b) the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shallbe at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty.|

24. A perusal of the above, it is explicit that if any goods are to beremoved from a special economic zone to the domestic tariff area, they shall be chargeable to duties of customs, including anti-dumping, countervailing, and safeguard duties.|

8.2. In **Essar Project India Ltd.,** Vs. **Commissioner of Customs, Ahmedabad, 2019 (368) ELT 1547**, the Tribunal was dealing with the issue of payment of interest on clearance of the goods from SEZ to DTA and it was observed:
—Analyzing the above provisions, particularly Sec. 30 of the SEZ Act, it is clear that on clearance or removal of the goods from the SEZ to DTA, the applicable duties of Customs as levied under the CTA, 1975 are required to be paid at the rate of duty and tariff valuation, if any applicable, would bethe rate as in force on the date of its removal or payment of duty as the case maybe.‖

8.3. Similarly, in **Suchi Fastners Pvt. Ltd.** Vs.

Commissioner of Central, Excise & ST, Vadodara, 2021 (378) ELT 329 (Tri-Ahmad) the Tribunal was dealing with the refund claimof customs duty and SAD paid in excess on clearance of goods from SEZ unit to DTA customers, held in para 6 :

―However, in the facts and circumstances of this case, I find that findings ofCommissioner (Appeals) are not correct as under section 30 of the SEZ Act, 2005, goods removed from SEZ to DTA are chargeable to customs duties.

From the aforesaid decisions, it is evident that on clearance of goods from SEZ unit to DTA, customs duty etc. ispayable under section 30 of SEZ Act.

9. The learned Counsel for the appellant has placed much reliance on the provisions of Rule 48(3) of SEZ Rules whereas the revenue has referred to section 30 and rule 47 of the SEZ Rules.Since the issue to be decided requires the applicability of theseprovisions, the same are quoted below:
–Section 30. Domestic clearance by Units.- Subject to the conditions specified in the rules made by the Central Government in this behalf,-

(a) any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to duties of customs including anti- dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975 (51 of 1975), where applicable, as leviable on such goods when imported; and

(b) the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shall be at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty.

Rule 47. Sales in Domestic Tariff Area.—

(1) A Unit may sell goods and services including rejects or wastes or scraps or remnants or broken diamonds or by products arising during the manufacturing process or in connection therewith, in the Domestic TariffArea on payment of Customs duties under section 30, subject to the following conditions, namely:—

(a) Domestic Tariff Area sale under sub-rule (1), of goods manufactured by a Unit shall be on submission of import licence, as applicable to the import of similar goods into India, under the provisions of the Foreign Trade Policy: Provided that goods imported or procured from theDomestic Tariff Area and sold as such without being subjected to anymanufacturing process shall be subject to the provisions of the Foreign TradePolicy as applicable to import of similar goods into India.

(b) Domestic Tariff Area sale under sub-rule (1) of rejects or scrap or waste or remnants arising during the manufacturing process or in connectionthere-with by the Unit shall not be subject to the provisions of the Import Trade Control (Harmonized System) of Classification of Export and Import Items:

Provided that the Central Government may notify restrictions, as it deems fit on all or any class of such goods mentioned under this clause.

(2) Scrap or dust or sweeping of gold or silver or platinum may be sent to Government of India Mint or Private Mint from a Unit and returned instandard bars in accordance with the procedure specified by Customs authorities or may be sold in the Domestic Tariff Area on payment of duty on the gold or silver or platinum content in the said scrap:

Provided that the value of samples of gold or silver or platinum sweepings or scrap or dust taken at the time of clearance and sent to the Government Mint or Private Mint for assaying and assessment shall be finalized on the basis of reports received from the Government Mint or Private Mint, as the case may be.

(3) Surplus power generated in a Special Economic Zone‘s Developer‘s Power Plant in the SEZ or Unit‘s captive power plant or diesel generating set may be transferred to Domestic Tariff Area on payment of duty on consumables and raw materials used for generation of power subject to the following conditions, namely:—

(a) proposal for sale of surplus power received by the Development Commissioner shall be examined in consultation with the State Electricity Board, wherever considered necessary: Provided that consultation with StateElectricity Board shall not be required for sale of power within the same Special Economic Zone;

(b) norms for production of a unit of power shall be approved by theApproval Committee;

(c)sale of surplus power to other Unit or Developer in the same or other Special Economic Zone or to Export Oriented Unit or to Electronic Hardware Technology Park Unit or to Software Technology Park Unit or Bio-technology Park Unit, shall be without payment of duty;

(d) for sale of surplus power in Domestic Tariff Area, the Unit shall obtain permission from the Specified Officer and the State Government authority concerned;

(e) duty on sale of surplus power to the Domestic Tariff Area shall be asprovided for in this rule.

(4) Valuation and assessment of the goods cleared into Domestic Tariff Areashall be made in accordance with Customs Act and rules made thereunder.

–Rule 48. Procedure for Sale in Domestic Tariff Area. —

(1)Domestic Tariff Area buyer shall file Bill of Entry for home consumption giving therein complete

description of the goods and/or services namely, make and model number and serial number and specification along with invoice and packing list with the Authorised Officers:

Provided that the Bill of Entry for home consumption may also be filed by aUnit on the basis of authorization from a Domestic Tariff Area buyer.

(2)Valuation of the goods and/or services cleared into Domestic Tariff Area shall be determined in accordance with provisions of Customs Act and rules made thereunder as applicable to goods when imported into India.

(3)Where goods procured from Domestic Tariff Area by a Unit are supplied back to the Domestic Tariff Area, as it is or without substantial processing, such goods shall be treated as re-imported goods and shall be subject tosuch procedure and conditions as applicable in the case of normal re-import of goods from outside India:

Provided that in the case where such goods are supplied back to the Domestic Tariff Area, as it is, and where the import duty on such goods is
Nil' and while procurement of such goods no export benefits were allowed against such goods, the Unit may be allowed to supply back such goods to Domestic Tariff Area on the basis of invoice only and filing of Bill of Entry in such cases shall not be required.

10. The provisions of section 30 of the SEZ Act permits DTA clearances by a SEZ unit on certain conditions and that is goods to beremoved from SEZ to DTA would be chargeable to duties of customs etc. It is a settled principle of law that once the provisions of an enactment are simple and there is no ambiguity there is no scope for interpretation. A three Judge Bench of the Apex Court in **Kalyan Roller Flour Mills Private Limited** Vs **CCE, 2014 (16) SCC 375**, observed that when the language is clear and plain, the courts cannotenlarge the scope by interpretative purposes. The relevant para is quoted below:-

–15. In Oswal Agro Mills Ltd. v. CCE, 1993 Supp (3) SCC 716, this Court has observed that:

"Where the words of the statute are plain and clear, there is no room for applying any of the principles of interpretation which are merely presumptionin cases of ambiguity in the statute. The court would interpret them as they stand. The object and purpose has to be gathered from such words themselves. Words should not be regarded as being surplus nor be rendered otiose. Strictly speaking there is no place in such cases for interpretation or construction except where the words of statute admit of two meanings. The safer and more correct course to deal with a question of construction of statute is to take the words themselves and arrive, if possible, at their meaning, without, in the first place, reference to cases or theories of construction."

Similar view has been reiterated by the Apex Court in **State of Maharashtra** Vs **Shri Vile Parle Kelvani Mandal & Ors. 2022 (2) SCC 725**, that recourse cannot be had to any other

principle of interpretation, when the words are clear and unambiguous. It also noted the observations of the earlier decision in **Giridhar G Yadalam- 2015 (17) SCC 664**, where it has been held that in a taxing statute, it is the plain language of the provision that has to be preferred where language is plain and is capable of one definite meaning. There are catena of judgements on the issue,however, I am not repeating the same.

11. In view of the substantive provisions of section 30 specifically providing for clearance of goods from SEZ to DTA on payment of customs and other duties, the submission sought to be made by the appellant that rule 48(3) carved out a deeming fiction ofnon leviability of BCD and SWS on the imported goods is not correct on the simple principle that the rules cannot go contrary to thesubstantive provisions of the Act. When section 30 in clear terms saysthat goods cleared from SEZ units shall be chargeable to duties of customs etc., and though the same are subject to the conditions specified in the rules made by the Central Government in that regard yet the interpretation given by the appellant is unsustainable. Rule48 sets out the procedure for sale in domestic tariff area and clause
(3) thereof merely says that goods procured from domestic tariff areaby a unit are supplied back to the domestic tariff area without processing, such goods shall be treated as re-imported goods and shall be subject to such procedure and conditions as applicable in the case of normal re-import of goods from outside India. It nowheresays that no duty is chargeable in such case. And as observed by theauthorities below the provisions of re-importation of goods have been provided in section 20 of the Customs Act whereunder the goods are liable to duty. So the appropriate interpretation of rule 48(3) wouldbe that clearance of goods by SEZ units back to DTA shall be treatedas normal re-import but that would not make the SEZ unit as importer. The basic fallacy in the interpretation placed by the appellant was that they completely ignored the provisions of rule 47 which provides for ―Sales in Domestic Tariff Area‖ on payment of customs duty under section 30. Thus rule 48(3) has to be readtogether with rule 47 and not in isolation. Attention is invited to the principle laid down by the Apex Court in **J.K. industries Ltd.,** Vs. **Union of India- 2007 (13) SCC 673**, observing that, ―Therefore, power to make subordinate legislation is derived from the enablingAct and it is fundamental principle of law, which is self evident thatthe delegate on whom such powers is conferred has to act within the limitations of the authority conferred by the Act. It is equally well settled that rules made on matters permitted by the Act in order to supplement the Act and not to supplant the Act, cannot be held to bein violation of the Act. A delegate cannot override the Act either by exceeding the authority or by making provisions inconsistent with the Act. " On similar lines the Apex Court in **Yogender Kumar Jaiswal** Vs. **State of Bihar -2016 (3) SCC 183**, where the rule provided the Special Courts to follow summary procedure whereas the Act provided to follow the warrant procedure for trial of cases before a Magistrate, the Court observed that Rules have to be in accord with the Act. The Rules can supplement the provisions of the Act but decidedly they cannot supplant the same. Therefore, the consequent contentions raised by the learned Counsel for the appellant has no substance and stands rejected. The learned Counsel for the appellant has submitteda compilation of judgements, the reference where of is **The Commissioner of Income Tax, Mysore, Travencore - Cochin andCoorg, Bangalore** Vs. **The Indo Mercantile Bank Limited MANU/SC/0070/1959, State of Odisha and Ors.** Vs. **Khirodini Rout and Ors. –**

MANU/OR/0832/2023, National ThermalPower Co. Ltd., Vs. **Commissioner of Income-Tax - 1998 (99) ELT 200 (SC)** and also in **Collector of Central Excise, Hyderabad** Vs. **Collector of Central Excise, Hyderabad – 1999 (113) ELT 24(SC)**. On perusal of these judgements I am of the view that they arenot relevant in the present context.

12. The Adjudicating Authority made the observations asunder:-

―In a normal import, the importer is the one who discharges the duty,but as per the special provisions of SEZ, the unit which is supplying the goods is discharging the duty liability. The fact that the supplier is discharging the duty does not give the supplier the status of an importer. When goods are supplied by a unit in SEZ to a DTA purchaser, the transaction is an import for the purchaser and the supplier cannot be an importer. The claim of the noticee is that the goods supplied by them shouldbe treated as a re-import of goods which is without any logic because the supplier is not procuring any goods to the Indian territory from a foreign territory and cannot be an importer by any stretch of imagination. The purchaser of goods located in the DTA is the importer who is procuring the goods from the deemed foreign territory of SEZ.

c. Further, Rule 48(3) based on which the entire refund claim is preferred by the noticee only makes it clear that goods initially procured from DTA, by an SEZ unit, if cleared back to DTA without processing, such goods shall be treated as re-imported goods. The Rule does not say that theSEZ supplier will become the importer of goods. The status of the goods involved in such a transaction will be of re-imported goods, but the crucial fact is that it is a re-import for the DTA purchaser since the said goods were initially supplied or exported to the SEZ unit. A bare reading of Rule 48 of SEZ Rules makes it abundantly clear that when the goods are cleared to DTA, it is the Domestic Area Buyer who is required to file the Bill of Entryand without their authorization a unit in SEZ also cannot file such documents. The noticee has mis-interpreted the rule to the extent that though they are the supplier of the goods, they are claiming as re-importersof the goods which is not acceptable. The duty charged at the time of clearance from the SEZ unit is very much in accordance with the provisionsof Rule 48(3) read with Notification No. 45/2017-Cus dated 30.06.2017 and there is no provision for refund of such duties as claimed by the noticee.

d. Moreover, the noticee is claiming the refund on a presumption that allre-imports are duty free. It is not the case at all. As per the provisions of governing re-import of goods under Customs Act, nowhere it is mentioned that all re-imports are duty free. On the other hand Section 20 of the Act provides for levy of duty on all re-imported goods in the same manner as thegoods being imported for the first time. However, some conditional exemption is provided and no benefit of exemption can be claimed without fulfilling these conditions. In the present case the noticee is merely assuming that all re-imports are duty free and they being re-importers of thegoods are eligible for refund of duty charged on the clearances from SEZ. The fact of the matter is that neither they can claim as importer of goods northere is any blanket exemption from customs duties on re-import of goods‖.

13. The appellant has raised the contention that he has been wrongly denied the benefit of the

exemption Notification No. 45/2017-Cus., which provides different levels / measures of exemption benefits to the re-imported goods depending upon which export benefits, like duty drawback, rebate etc., were availed and subject to several conditions. Further, from para 10 of the impugned order, I find that the Commissioner has noted, that the appellant has submitted few sample invoices and on perusal of one tax invoice issued by the DTA, namely M/s Lupin Limited, Palghar to the appellant bearing Invoice No. 0000002152 dated 08.03.2017, it is observed that it has been dispatched on payment of Central Excise duty and drawback too have been claimed, however, the appellate authority has failed to examine the issue of exemption benefit under the said notification in detail, giving specific reasons. I am therefore, of the opinion that the matter needs to be remanded on the applicability of the exemption notification and whether the appellant is entitle to any benefit in terms thereof. I, therefore, partly dismiss the appeal and remand the matter on the limited issue as referred above.

(Pronounced on 29th Nov. 2023).

(BINU TAMTA)

Member (Judicial)

Pant

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH - COURT NO. 2

Customs Appeal NO.52073 of 2022

(Arising out of Order-in-Appeal No.cc(a)CUS/D-II/CD/PPG/1736-1738/2021-22 dated 07.02.2022 passed by the Commissioner (Appeals), New Custom House, Near IGI Airport,New Delhi-110037)

HARJEET SINGH JOHAR **…… Appellant**
A-446, Ground Floor, Defence Colony,New Delhi-110024

VERSUS

Commissioner of Customs, **…..RespondentDelhi**
ICD, PatpargunjDelhi-110096

APPEARANCE:

Mr.Arya Hardik, Advocate for the Appellant

Mr.Mahesh Bhardwaj, Authorized Representative for the Department

CORAM : HON'BLE MR.SOMESH ARORA, MEMBER (JUDICIAL)

FINAL ORDER NO. 51709/2023

DATE OF HEARING/DECISION:20.12.2023

SOMESH ARORA:

The matter pertains to imposition of penalty on the CHA on the groundthat the employee of CHA was dealing with the offending goods andtherefore the conduct of the CHA was doubtful. Accordingly, a penalty of Rs.2 lakh has been imposed under section 114AA as well as Penalty of Rs.2 lakh under section 112 (a) of the Customs Act, upon the appellant by the Commissioner (Appeals).

2. It is submission of the learned Advocate that Appellant CHA had no knowledge about the nature of the goods. The statement has been extracted by officers on the part of the CHA that he did not have knowledge of the goods. He submits that for imposing penalty, it is important to establish *mens rea* against the appellant. He has relied uponthe decision of jurisdictional High Court in the case of Rajeev Khatri vs. Commissioner of Customs (Export) reported in 2023 SCC Online Del 3840 and in the case of Commissioner of Customs (Import) vs.Trinetra Impex Pvt. Ltd. reported in 2019 SCC Online Del 10930:2020 372 ELT 332. He also submits that similar is the requirement under section 114AA. Therefore, the penalty

must be set aside.

3. Ld.AR emphasizes that the statutory provisions under section 112(a).

Same is reproduced below:-

Section 112- Penalty for improper importation of goods, etc.-"Any person,-

(a) Who, in relation to any goods, does or omits to do any act or omission would render such goods liable to confiscation under section111, or abets the doing or omission of such an act."

4. He also supports imposition of penalty under section 114AA on the appellant on the ground of statement of his employee. He also submitsthat the CHA is habitual offender. It was his submission that the Section
112 (a) covers any omission or commission and as per the statement recorded by the authorities is clear that he did not submit KYC documents.In view of this position, the penalty under Section 112(a) is imposable on account of omission or commission upon the appellant. Learned Advocate submits that the KYC was submitted to the authorities though it was not part of paper books but no proof in any case has been brought on record, that the appellant has himself verified KYC documents.

5. Considered. This court finds that offending goods which had beenimported were measuring tapes whereas they were declared as plain rubber sheet, therefore the goods were mis-declared. CHA has not submitted verified KYC for importation of goods. Admittedly, KYC was not verified by the CHA. Such lapse on the part of CHA makes it liable to penalty under section 112(a) as the goods are liable to confiscation under section 111.

6. In view of foregoing discussion, this court is of the view that thepenalty is imposable under section 112 (a). As far as penalty under section 114AA is concerned, the appellant had no knowledge about declaration of offending goods. The Penalty under section 114AA is dispensed with. This Court finds that the penalty under section 112(a) is reducible from Rs.2 lakh (Two lakh) in the light of omission only being there and not the commission to Rs.1 lakh/- (one lakh). The appeal is disposed of in the above terms.

(Order pronounced in the open court)

(SOMESH ARORA) MEMBER (JUDICIAL)

mk

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALNEW DELHI.
PRINCIPAL BENCH
SERVICE TAX APPEAL NO. 55049 OF 2023 (SM)

[Arising out of the Order-in-Appeal No. IND-EXCUS-000-APP-135-2022-23dated 22/03/2023 passed by The Commissioner (Appeals), CGST & Central Excise, Indore.]

M/s Genuine Filter & Fabrics, **Appellant**
Khasra No. 36/3, Gram Limbodi,Khandwa Road, Indore.

VERSUS

The Commissioner, **RespondentCGST & Central Excise,**
Indore.

APPEARANCE

None (request on merit) – for the appellant.

Shri Vishwajeet Saharan, Authorized Representative (DR) – for theDepartment

CORAM : **HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)**

FINAL ORDER NO. 50023/2024

DATE OF HEARING : 08.01.2024

ASHOK JINDAL

The appellant is in appeal against the impugned orderwherein demand of service tax under sub-section (e) of section 66 (E) of the Finance Act, 1994 has been raised against the appellant.

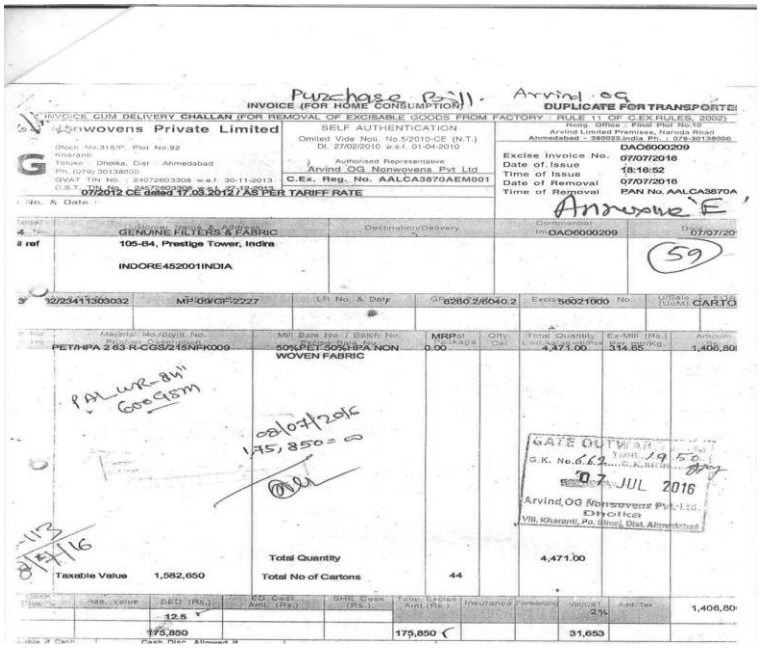
2. The facts of the case are that the appellant received raw material namely 50% PET and 50% HPA non-woven fabric and the same was used in manufacture of their final product. The said raw material purchased by the appellant was found to be of poor quality. The appellant raised the issue with the supplier of the goods, who entertained the claim of the appellant and the appellant received the claim amount and shown in their books of account as 'income from other sources'. During the course of audit, it was found that the said amount should be taxed as service tax under sub-section (e) of section 66 (E) of the Finance Act, 1994 as same is for an act of tolerance for which appellant received compensation from the supplier. The matter was adjudicated, the demand of service tax was confirmed againstthe appellant. The appellant filed the appeal before the learned Commissioner (Appeals) who gave the appellant cum-tax benefit and the demand to that extent was reduced by the Commissioner(Appeals), but on merit demand of service tax was confirmed. Against the said order, the appellant is before me.

3. None appeared on behalf of the appellant. A request has been received that matter be decided on merits on the basis of available records.

4. On the other hand, learned authorized representative appearing for the department opposed the appeal filed by the appellant and submitted that it is an amount of compensation received by the appellant on the act of tolerance by receiving the claim for poor quality of the goods and the appellant has shown the said amount in their books of account as 'income from other sources', therefore, it is prayed that the matter is squarely covered under sub-section (e) of section 66 (E) of the Finance Act, 1994 and the appellant is liable to pay service that thereon.

5. Heard the learned authorized representative appearing for the department and perused the record.

6. On perusal of record, I find that the purchase bill and the credit note issued by the supplier of goods are on record which are extracted here below for better appreciation of the facts ofthe case :-



Purchase Bill - Arvind OG

INVOICE (FOR HOME CONSUMPTION) DUPLICATE FOR TRANSPORTER

INVOICE CUM DELIVERY CHALLAN (FOR REMOVAL OF EXCISABLE GOODS FROM FACTORY - RULE 11 OF C.EX.RULES, 2002)

Nonwovens Private Limited

SELF AUTHENTICATION

Omited Vide Noti. No.5/2010-CE (N.T.) Dt. 27/02/2010 w.e.f. 01-04-2010

Authorised Representative

Arvind OG Nonwovens Pvt Ltd

C.Ex. Reg. No. AALCA3870AEM001

07/2012 CE dated 17.03.2012 / AS PER TARIFF RATE

Excise Invoice No. DAO6000209
Date of Issue 07/07/2016
Time of Issue 18:16:52
Date of Removal 07/07/2016
Time of Removal PAN No. AALCA3870A

Annexure E

GENUINE FILTERS & FABRIC
105-B4, Prestige Tower, Indira
INDORE452001INDIA

Destination/Delivery

Commissionr DAO6000209

Date 07/07/20

59

12/234113/03032 MP/09/GP/2227 ER. No. & Date 6280 2/6040.2 Excise 56021000 No. Ussato (UoM) CARTO

Material No./Style No.	Mill Batch No. / Batch No.	MRP/Pal Package	Qty Cat	Total Quantity	Ex-Mill (Rs.)	Amount
PET/HPA 2.63 R-CGS/215NPK009	50%PET 50%HPA NON WOVEN FABRIC	0.00		4,471.00	314.65	1,406,80

PAL wise 84" GSM

08/07/2016

175,850 = 00

GATE OUTWARD G.K. No. 642 Time 19.50 Date 07 JUL 2016 Arvind OG Nonwovens Pvt. Ltd. Dhotiya Vill. Kharawa, Po. Illow, Dist. Ahmedabad

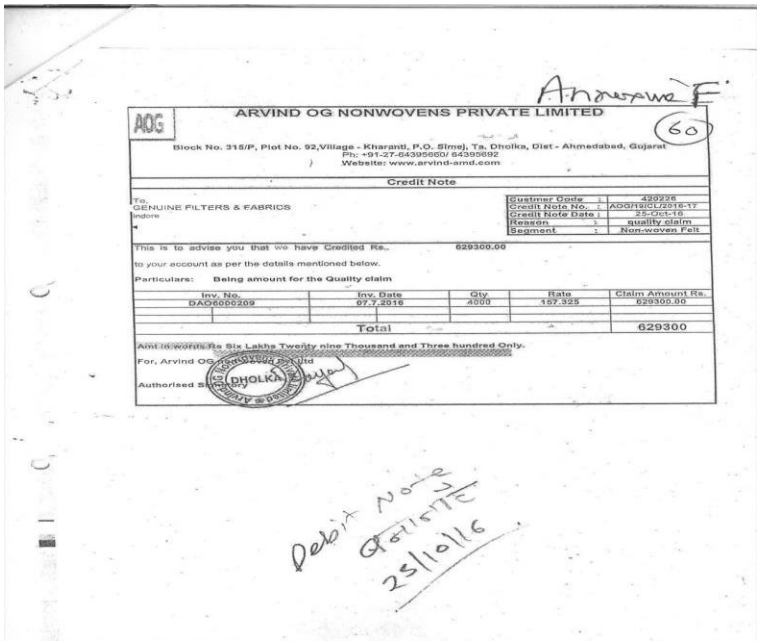
8/7/16

Total Quantity 4,471.00

Taxable Value 1,582,650 Total No of Cartons 44

Add. Value	BED (Rs.)	ED Cess Amt. (Rs.)	SHE Cess (Rs.)	Total Excise Amt.(Rs.)	Insurance	Forwarding	VAT/CST 2%	Add Tax	
	12.5								1,406,80
	175,850			175,850			31,653		

Cash Disc. Allowed @



ARVIND OG NONWOVENS PRIVATE LIMITED

Block No. 315/P, Plot No. 92,Village - Kharanti, P.O. Sime), Ta. Dholka, Dist - Ahmedabad, Gujarat
Ph: +91-27-64395660/ 64395692
Website: www.arvind-amd.com

Credit Note

To,
GENUINE FILTERS & FABRICS
Indore

Custmer Code	:	420226
Credit Note No.	:	AOG/19/CL/2516-17
Credit Note Date	:	25-Oct-16
Reason	:	quality claim
Segment	:	Non-woven Felt

This is to advise you that we have Credited Rs.. 629300.00
to your account as per the details mentioned below.
Particulars: Being amount for the Quality claim

Inv. No.	Inv. Date	Qty.	Rate	Claim Amount Rs.
DAO6000209	07.7.2016	4000	157.325	629300.00
	Total			629300

Amt in words Rs Six Lakhs Twenty nine Thousand and Three hundred Only.
For, Arvind OG Nonwovens Pvt. Ltd
Authorised Signatory

Debit Note
Credit Note
25/10/16

7. On going through the credit note, this amount is shown as claim raised by the appellant on account of poor quality of the material supplied which is in nature of compensation received by the appellant for receiving poor quality of goods.

8. In that circumstances, I find that the said act is covered under declared service under sub-section (e) of section 66 (E) of the Finance Act, 1994 as it is an act of tolerance by the appellant for which appellant received compensation for receiving poorquality of goods.

9. In that circumstances, I do not find any merit in appealfiled by the appellant. Accordingly, the same is dismissed by upholding the impugned order.

(Dictated and pronounced in open court.)

(ASHOK JINDAL)MEMBER (JUDICIAL)

PK

OFFICE OF THE PR. CHIEF COMMISSIONER (AR)
CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO. 2, WING NO. 2, 1ST FLOOR, R.K. PURAM
NEW DELHI – 110 066
Email: ecompendium3@gmail.com