

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Customs Appeal No. 13346 of 2014

(Arising out of OIA-207-COMMR-A--JMN-2014 dated 26/05/2014 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

C.C.-Jamnagar(prev)

SHARDA HOUSE...BEDI BANDAR ROAD,
OPP. PANCHAVATI,
JAMNAGAR
GUJARAT

Appellants

Versus

J R Roadlines Pvt Ltd

Plot No. 06, Sector-10c,
Gidc, Area, Gandhidham,
KUTCH,
GUJARAT

Respondents

With

Customs Appeal No. 11972 of 2015

(Arising out of OIO- MCH/PRCOMMR/PVR/24/2015-16 dated 30/09/2015 passed by Commissioner of CUSTOMS-AHMEDABAD)

J R Roadlines Pvt Ltd

Plot No. 06, Sector-10c,
Gidc, Area, Gandhidham,
KUTCH,
GUJARAT

Appellants

Versus

C.C.-Ahmedabad

CUSTOM HOUSE,
NEAR ALL INDIA RADIO NAVRANGPURA,
AHMEDABAD,
GUJARAT

Respondents

With

Customs Appeal No. 11973 of 2015

(Arising out of OIO- MCH/PRCOMMR/PVR/24/2015-16 dated 30/09/2015 passed by Commissioner of CUSTOMS-AHMEDABAD)

Dhiren Rajde

C/o J R Roadlines P Ltd., Plot No. 6, Sector-10/c, Gidc Area,
Gandhidham,
KACHCHH
GUJARAT

Appellants

Versus

C.C.-Ahmedabad

CUSTOM HOUSE,
NEAR ALL INDIA RADIO NAVRANGPURA,
AHMEDABAD,
GUJARAT

Respondents

APPEARANCE:

Shri Shri J.C. Patel, Ms. Shamita Patel and Shri Rahul Gajera, Advocates for the Appellant

Shri Ghanshyam Soni, Joint Commissioner (Authorised Representative) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. A/11244-11246 / 2020

DATE OF HEARING: 16.09.2020
DATE OF DECISION: 22.09.2020

Ramesh Nair

The brief facts of the case are that the appellant M/s J.R.Roadlines imported Flexi Tank Containers and cleared the same under 16 bills of entries for the period from dated 03/01/2011 to 06/06/2012. The description of imported goods was declared as 'Flexi Tank Containers' and classified under Customs Tariff heading 39232990 of Customs Tariff Act, 1975. The said imported goods were cleared without payment of duty by availing the benefit under notification 104/94- Cus dated 16/03/1994. After almost one year of clearance of aforesaid goods, Customs House, Kandla, SIIB team searched the premises of M/s JR Roadlines, Plot no. 6 & 7, Sector 10 C, Gandhidham and some relevant records were withdrawn from the premises under Panchnama dated 31.07.2013. A total number of 660 flexi tank containers imported from Pipavav port valued at Rs. 79.20 lakhs lying at plot no. 2, sector 10A were detained and subsequently it was seized vide panchnama dated 16/08/2014. Consequently, a show cause notice dated 17/10/2014 was issued to the appellant whereby it was proposed to deny exemption notification no. 104/94-Cus, to confiscate the imported goods under section 125 of Customs Act, to demand customs duty and penalty on M/s JR Roadlines Pvt. Ltd. as well as Director of the M/s JR Roadlines Pvt. Ltd. and penalty was also proposed to be imposed on M/s Thirumalai Cargo Services Pvt. Ltd., Chennai. The Adjudicating Authority vide order in original No. MCH/PR.COMMR./PVT/24/2015-2016 Dated 30/09/2015 confirming the charges and proposals made in the Show cause Notice. Therefore, the appellant M/s JR Roadlines Pvt. Ltd. and its Director Shri Dhiren Rajde filed

appeals. In a separate proceedings, against assessment of two bills of entries, wherein Assistant Commissioner, the assessing officer denied the exemption under notification 104/94-Cus, M/s JR Roadlines Pvt. Ltd. challenged the assessment of Bills of Entry nos. 3483259 and 3850604 by way of filing appeal before the Commissioner (Appeals). The learned Commissioner (Appeals) vide Order in Appeal no. 53-54/Commr(A)/JMN/2014 dated 17/02/2014 remanded the matter to the assessing officer for passing a speaking order. The assessing officer vide order in assessment order no. 40/AC/GPPL/Assessment/13-14 dated 12.03.2014 passed the reasoned order wherein it was held that the assessee M/s JR Roadlines Pvt. Ltd. is not entitled for exemption under notification no 104/94-Cus. The appellant again approached the Commissioner (Appeal) by filing the appeal. The Learned Commissioner (Appeal) vide order in appeal No. 207/COMMR(A)/JMN/2014 dated 26/05/2014 allowed the appeal of M/s JR Roadlines Pvt. Ltd. Being aggrieved by this Order in Appeal, Revenue has filed an appeal which bears Appeal no. C/13346/2014. In both the cases, the issue remains same i.e. whether the appellant is eligible for exemption under notification no. 104/94-Cus. In the Adjudication Order as well as in the appeal filed by the Revenue, the contention for denial of exemption is that the notification provides exemption to the durable containers whereas the present goods i.e. Flexi Tank Containers, are not durable for the reason that it is only used once and not for repeated uses. Therefore, the same cannot be treated as durable containers.

2. Shri J.C. Patel, Ld. Counsel along with Shri Rahul Gajera and Ms. Shamita Patel, Advocates appeared through video conference on behalf of appellants M/s JR Roadlines Pvt. Ltd. and its Director Shri Dhiren Rajde. As regards the fact that whether imported Flexi Tank Container is durable and therefore, eligible for benefit under exemption notification 104/94-Cus, he submits that Flexi Tank Container is a bulk container constructed by multiple layers of polyethylene with an outer covering of woven polypropylene which is used for transportation of liquid. The Flexi Tank Container is placed/fitted in a standard 20 feet ocean container and, thereafter, liquid to be transported is filled into the flexi container. In this manner it becomes possible to transport liquid cargo in a 20 feet container which is otherwise used for transporting dry cargo and in this way the flexi container provides cost effective alternative to the usual ISO containers for transport of bulk

liquid cargo. That Flexi Tank Container have to be durable to withstand the rigours of transport by road/rail and sea and accordingly, tanks material for the tanks undergo the following tests as per the Code of Practice prescribes by the Containers Owners Association:

- a) Rail Impact Test
- b) Puncture resistance or impact strength
- c) Seal (weld) strength
- d) Tensile strength and elongation
- e) Tear Resistance
- f) Temperature tolerance
- g) Valve Leakage Testing

He referred to the relevant code of practices prescribing the aforesaid testing which is annexed to the appeal papers. He further submits that during the sea voyage on account of movement of the ship and wave- induced dynamic forces, the liquid cargo in the Flexi Tank undergo sloshing and surging and the Flexi Tank is durable and strong enough to withstand the impact of such movement of the liquid within the Flexi Tank. The consignments of Flexi Tank Containers were imported by the Appellant for exporting of bulk liquid cargo by exporters from India. He submits that since the Flexi Tank Containers are imported after fitting of liquid cargo, the same is re-exported, the said containers are durable. Therefore, the appellant have claimed the benefit of duty exemption under notification 104/94-Cus dated 16/03/1994. The only condition in the said notification is that the containers should be durable in nature subject to condition that should be re-exported within 6 months from the date of exports. The appellants in respect of the 16 consignments were granted benefit of duty exemption against execution of bond for re-export. The goods were duly examined by the customs. He referred to the examination report placed in appeal papers. Subsequent to the clearances from Customs, the said Flexi Tank Containers have been re-exported and proof of export has been submitted to the Customs and the bonds have been cancelled. He submits that in the Show Cause Notice, the department has heavily relied on CBEC circular no. 69/2002-Cus dated 25/10/2002 and circular no. 73/2002-Cus dated 07/11/2002 whereby it was contended that only those containers which are reusable are entitled for benefit of said exemption. It was contended that since Flexi Tank Containers are used only for one voyage, thereafter disposed of and since the same are

not used for repeated voyages, the same cannot be considered to be of durable nature and hence, not eligible for the benefit of the said exemption Notification. He submits that it is not necessary that the containers should be repeatedly used in order to qualify as containers of durable nature. The contention of the department that since Flexi Tank Containers are used for single sea voyage and are not reusable or put to repeated uses, the same cannot be said to be durable in nature, is untenable in view of the consistent view taken by the Tribunal in the following decisions wherein the term "Durable" used in the notification is not restricted to only such containers as are re-used and the term "Durable" is wide enough to cover Containers which are strong enough to withstand and endure a sea voyage:

- a) Dimasuki Tea Co. Ltd. vs CC-1995 (75) ELT 158
- b) CC vs Assam Company (India) Ltd. 1995 (78) ELT 168
- c) CC vs Indofil Chemicals Company-2006 (199) ELT 871
- d) Sam Agri Tech Ltd. vs CC 2017 (353) ELT 358

He submits that in the above judgments, the Tribunal has taken a consistent view that for containers to be considered as durable, it is not necessary that it must be re-usable or put to repeated uses. He submits that the Show cause notice and Order in Original, do not dispute that Flexi Tank Containers are strong enough to withstand and endure the rigours of sea voyage. He further submits that the Principal Commissioner while adjudicating the case denied the exemption also on the ground that the re-export of the Flexi Tank Container was made by the exporters of the liquid cargo and not by the appellant. This is not tenable in law for the reason that, firstly, this was not the ground on which the Show cause notice proposed to deny the benefit. Therefore, any finding in the order which is beyond the scope of show cause notice, the order will not sustain. In this regard, he placed reliance on the following judgments:

- a) Prince Khadi Woollen Handloom Prod Co-op Indl. Soc. Vs CCE-1996 (88) ELT 637 (SC)
- b) CCE vs Ballarpur Industries Ltd. 2007 (215) ELT 489 (SC)

2.1 He further submits that even in case of steel containers, the container may be imported by one person or company and given to exporters who export their goods in the containers. This is a regular practice and Customs

do not deny exemption merely because the importer of the container is different from the exporter of the goods which are exported in the containers. The purpose and object of the notification in granting the benefit to the containers is that the same must go out of the country and so long as they are re-exported, it is immaterial that the re-export takes place at the hands of the exporter of the goods which are exported in the containers. He submits that if the department's interpretation is accepted in this regard it would defeat the notification and render it redundant, because in almost all the cases, the importer/supplier of container is different from the exporter of the goods. As regard the reliance of the Revenue on the Tribunal's decision in the case of Paul Abrao Agencies P. Ltd. vs CC-2017 (349) ELT 676, the said decision apart from being an ex-parte Order, is per incuriam of the terms of Notification were not fulfilled because the importer did not carry out any processing of the Flexi Tanks not exported the same on processing. A bare perusal of the said notification, there is no term or condition in the Notification that the imported goods must undergo any processing at the hands of the importer. Therefore, the said decision is per incuriam as per the terms of the said notification. He submits that while denying the exemption notification, the Principal Commissioner in the impugned order also made up wrong contention that the appellant had sold the Flexi Container on the ground that the exporters to whom the Appellant had sold the Flexi Tank Containers had claimed the drawback by factoring in the price of the Flexi Tank Containers in the export product. He submits that, again this was not the ground of Show cause notice to deny the exemption. Without prejudice to the aforesaid submission, he further submits that in any event, the issue whether the exporter availed the drawback or not is entirely irrelevant to the Appellant's claim to the exemption since there is no condition in the notification of non availing of drawback. It is not open to read into the Notification, conditions which are not stipulated in the Notification. The Adjudicating Authority has heavily relied upon CBEC circular no. 69/2002-Cus dated 25/10/2002 and circular no. 73/2002-Cus dated 07/11/2002. It is misconceived and not tenable. He submits that the said circular were issued in the context of whether the open containers such as plastic trays and steel cases can be said to be covered by the notification. The said circulars nowhere states that only re-usable containers can be called durable containers. As held by the Tribunal in the aforesaid decisions, capability of re-use is only one criterion of durability but not the only criterion and if the

container is strong enough to withstand a sea voyage for export, it is considered to be of durable nature notwithstanding that it may not be re-used for repeated voyages. The word 'durable nature' has been defined as 'capable of lasting' remaining useful, for a period, and if the container is capable for a sea voyage, it satisfies the condition of being durable nature. Without prejudice to the above submissions on merit, on the point of limitations, he submits that the goods were imported and cleared during the period January 2011 to June 2012 whereas the show cause notice dated 17/10/2014 was issued beyond the normal period of limitation of one year as specified in Section 28(1) of the Customs Act 1962. Therefore the Show Cause Notice is entirely time barred. He submits that on claim of exemption notification, larger period of limitation can have no application. The appellant had duly filed the Bills of entry with Customs in which the goods were correctly described as Flexi Tank Container and the goods have been duly examined by the Adjudicating Authority and the proper officers of customs have duly assessed the Bills of entry granting the exemption claimed by the appellant. The bonds executed by the appellant were cancelled after satisfying that the imported Flexi Tank Containers have been re-exported. Therefore, there is no suppression of facts or mis-statement on the part of the appellant. Accordingly, the larger period of limitation cannot be invoked. On this point, he placed reliance on the following decisions:

- a) Northern Plastic Ltd. vs Collector-1998 (101) ELT 549
- b) Commissioner vs Gaurav Enterprises- 2006(193) ELT 532
- c) Baccarose Perfumes & Beauty Products vs CC-2014 (301) ELT 691
Upheld by Hon'ble Gujarat High Court in 2014 (314) ELT 27 (Guj.) and
maintained by Hon'ble Supreme Court in 2015 (316) ELT A 114 (SC)
- d) CC vs Orbit Fabrics Ltd.- 2011 (264) ELT 53 (Guj.)

2.2 As regard the imposition of redemption fine, he submits that, firstly, goods were not liable for confiscation under section 111(m) and (o) of the Customs Act, 1962 since there was no mis-declaration. Secondly, in any event, no redemption fine could have been imposed since the goods were not available for confiscation. He placed reliance on Commissioner vs Finesse Corporation Inc- 2009 (248) ELT 122 (maintained in 2010 (255) ELT A120).

2.3 As regard the department's appeal, he submits that the learned Commissioner has allowed the appeal on the basis of considering the fact and the above submission made by the appellant before the Commissioner (Appeal). He submits that Revenue filed appeal on the ground that Flexi Tank Containers are used for single sea voyage and are not re-usable. Therefore, the same cannot be considered as durable, hence, not eligible for exemption under notification 104/94-Cus. There is also contention in the Revenue's appeal that the Flexi Tank Containers imported by M/s JR Roadlines have not been re-exported by themselves but have been re-exported by the exporters of liquid cargo for which the Flexi Tank Containers were used. He adopted his above detailed submission which was made in respect of appeals filed by the assessee.

3. On the other hand, Shri Ghanshyam Soni, learned Joint Commissioner (Authorised Representative) appearing on behalf of the Revenue reiterates the finding of the impugned order passed by the Principal Commissioner where against M/s JR Roadlines have filed the appeal. He also reiterated the grounds of appeal made in the Revenue's appeal. He also filed a detailed written submission dated 14/09/2020. He also placed reliance on the following:

1. Circular no. 73/2002-Cus dated 07.11.2002
2. Circular no. 69/2002-Cus dated 25/10/2002
3. Paul Abrao Agencies Pvt. Ltd. vs CC, Chennai 2017 (349_ ELT 676 (tri-Chennai)
4. CC (Import), Mumbai vs Dilip Kumar and Company 2018 (361) ELT 577 (SC)
5. Union of India vs VVF Ltd. 2020 (372) ELT 495 (SC).
6. Hindustan Petroleum Corporation Ltd. vs CCE, Pune-I- 2020-TIOOL-1357-CESTAT-MUM
7. Venus Petrochemicals (Bombay) P Ltd. vs CCE, Kandla 2019(366) ELT 176 (Tri Ahmd)
8. Union of India vs Jain Shudh Vanaspati Ltd.1996 (86) ELT 460 (SC)
9. Titanide Coating P Ltd. vs Assistant Collector 1997 (96) ELT A161 (SC)-
10. Asia Motors Works vs CC, Kandla 2020 (371) ELT 729 (Tri-Ahmd)

4. We have heard both sides and perused the records. The limited issue to be decided in the present appeal is whether the Flexi Tank Containers imported by M/s JR Roadlines is durable in nature and are eligible for exemption under notification 104/94-Cus dated 16/03/1994. The contention of the Revenue is that since Flexi Tank Container is admittedly used for one time sea voyage and not repeatedly used, it cannot be considered as durable and consequently, the same will not be eligible for exemption under the above notification. The entire emphasis of the Revenue is that the subject Flexi Tank Containers are not repeatedly used. We find that whether the goods Flexi Tank Containers used one time or has repeated use, the only criteria to be satisfied is that whether Flexi Tank Containers on which exemption notification no. 109/94-Cus was claimed is durable or otherwise. We find that as per code of practice for Flexi Tanks relied upon by the assessee, the general criteria of the test of Flexi Tank Containers are as under:

"Section A

1. General

- 1.1. This test method is intended to prove the ability of Flexitanks and their installations in ISO shipping containers to withstand the effects of a longitudinal impact.*
- 1.2. Testing shall be conducted by facilities that meet the test provisions required for the COA impact test and are approved for this purpose by the COA.*
- 1.3. The test container shall be built according to ISO standards to meet ISO criteria and shall be a used container, with normal wear and tear and be rated at 30 tonnes gross for 20ft units and 32 tonnes gross for 40ft units, which represents containers in general service.*
- 1.4. Any scheduled test shall be announced to the COA with at least 3 weeks lead-time."*

From the above test criteria, it can be seen that it is necessary that Flexi Tanks should have an ability to withstand the effects of the longitudinal impact. The test provision also requires following impact test to be conducted:

- a) Rail Impact Test
- b) Puncture resistance or impact strength
- c) Seal (weld) strength
- d) Tensile strength and elongation

- e) Tear Resistance
- f) Temperature tolerance
- g) Valve Leakage Testing

The Tank Containers shall be according to ISO standard and shall be a used container of normal wear and tear and be rated at 30 tonnes gross for 20 ft units and 32 tonnes gross for 40ft units, which represents containers in general service. With the above specification of test and various impact tests, it is clear that Flexi Tank Containers are indeed durable. Moreover, these containers are imported, thereafter, the same is fitted in the steel containers and in the Flexi Tank Containers the liquid cargo is filled. The duly filled cargo is loaded on the ship/vessel and the same is exported. In our view, the containers once imported and then re- exported after fitting in steel containers and duly filled with liquid cargo itself shows that this entire process is possible only if the container is durable. The Flexi Tank Container can endure an ocean voyage for liquid cargo and the same was imported for exporting bulk liquid cargo. During sea voyage on account of movement of ship and wave induced dynamic forces, the liquid cargo in the Flexi Tank Containers undergoes sloshing and surging. Therefore, the Flexi Tank Containers must be durable and strong enough to withstand the impact of such movement of the liquid in the Flexi Tanks. Accordingly, as per the use and nature of the containers as discussed above it has to be durable containers. The above facts are not in dispute even by the Revenue. The Revenue's contention is only that the same is not reused and has no repeated use. We find that this Tribunal in a number of judgments held that merely because the container has no repeated use but if the contained is durable, the durability of the container cannot be negated only for the reason that the same has no repeated use and the benefit of exemption notification has been extended, some of the judgments are cited below:

a) Dimasuki Tea Co. Ltd. vs CC-1995 (75) ELT 158

"39. First and foremost the words 'durable containers' have to be considered. In view of the definitions which have been indicated as well as the common understanding, it is evident that these have to be interpreted and understood in the context in which they are used and with reference to the type of article or articles of which the container is made and for which they are used or intended to be used.

With the advance of technology many materials have been discovered which are capable of providing strength, persistency, permanency and

resistance to wear and tear etc. and they are available for making containers in addition to conventional materials. Not only that durability is a relative term and containers of different materials may be durable to a varying extent. [Repeated use or capacity thereof is an inferring criterion and not the only one which could be resorted to in the above context. (Further repeated use is generally related or relatable to a product and purpose and may not be always advisable even if the article was otherwise durable)]. Therefore, in the case of the type of containers imported by the appellants, a test was required to be conducted before deciding whether such containers could be considered as durable or not. But no test report/technical literature or market report has been produced before us by either side. In the circumstances, we find that the material produced before us is insufficient to record a specific finding in this regard."

b) CC vs Assam Company (India) Ltd. 1995 (78) ELT 168

"4. According to the Concise Oxford Dictionary (New Seventh Edition), container means 'vessel, box etc. designed to contain some particular things.' The word 'durable' has been defined as 'capable of lasting', remaining useful, for a period...'. We agree with the learned Counsel for the respondents that the expression durable has been used in Notification No. 97/79 in the context of the utility of the container for packing tea for export and since the tea sack made of four ply printed paper with aluminium inner foil was strong enough to withstand sea voyage from India, it is undoubtedly durable in nature."

c) CC vs Indofil Chemicals Company-2006 (199) ELT 871

"The Revenue is aggrieved by the order of the Commissioner of Customs (Appeals), extending benefit in terms of Notification No. 104/94-Cus., dated 16-3-94 to 6650 pieces of laminated paper bags imported by the respondents herein for packing chemicals for export purpose.

2. We have heard both sides. We find that the only issue for determination viz. as to whether the goods in question are capable of repeated use, has been decided by the Tribunal in the case of CC v. Assam Company (India) Ltd. [[1995 \(78\) E.L.T. 168](#)], wherein tea sacks made of four ply printed paper with aluminium inner foil were held to be strong enough to withstand sea voyage from India and held to be durable containers entitled to the benefit of exemption under Notification 97/79-Cus., dtd. 2-5-79 which is *pari materia* with Notification No. 104/94 which is under consideration in the present appeal. Following the ratio of the above order, we see no reason to interfere with the impugned order of the Commissioner (Appeals). We accordingly uphold the same and reject the appeal."

d) Sam Agri Tech Ltd. vs CC 2017 (353) ELT 358

4. I have heard the submissions made before me. The word used in the Notification No. 104/94 is "containers of durable nature". The authorities below relied upon the Board Circular (mentioned *supra*) to interpret the word 'durable' as 'capable of being reused'. It is thus observed by the department that since the containers used for packing the perishable products are of disposable nature, they cannot be

considered as durable containers. The said view of the department is highly imaginary. The appellants are using containers for exporting perishable products. As submitted by Id. Consultant for the appellant, the packing is done as per the specifications of the overseas purchaser of the product. Further, the department cannot insist that the containers should be capable of reuse when the products are being exported. When the products are being exported after packing in containers, the appellants cannot be expected to reuse such containers for further packing. The appellant cannot be compelled to do something which is practically not possible for them. The meaning of 'durable containers' has been examined in the judgment relied upon by the Id. Consultant for appellant [Dimakusi Tea Co. Ltd. v. CC, Calcutta (supra)]. The Tribunal has analysed the meaning as under :

"First and foremost the words 'durable containers' have to be considered. In view of the definitions which have been indicated as well as the common understanding, it is evident that these have to be interpreted and understood in the context in which they are used and with reference to the type of article or articles of which the container is made and for which they are used or intended to be used. With the advance of technology many materials have been discovered which are capable of providing strength, persistency, permanency and resistance to wear and tear etc. and they are available for making containers in addition to conventional materials. Not only that durability is a relative term and containers of different materials may be durable to a varying extent. [Repeated use or capacity thereof is an inferring criterion and not the only one which could be resorted to in the above context. Further repeated use is generally related or relatable to a product and purpose and may not be always advisable even if the article was otherwise durable]. Therefore, in the case of the type of containers imported by the appellants, a test was required to be conducted before deciding whether such containers could be considered as durable or not. But no test report/technical literature or market report has been produced before us by either side. In the circumstances, we find that the material produced before us is insufficient to record a specific finding in this regard.

According to the Concise Oxford Dictionary (New Seventh Edition), container means 'vessel, box etc. designed to contain some particular things.' The word 'durable' has been defined as 'capable of lasting', remaining useful for a period'. We agree with the learned Counsel for the respondents that the expression durable has been used in Notification No. 97/79 in the context of the utility of the container for packing tea for export and since the tea sack made of four ply printed paper with aluminium inner foil was strong enough to withstand sea voyage from India, it is undoubtedly durable in nature.

In the case of Dimakusi Tea Co. Ltd. v. Collector of Customs, Calcutta reported in [[1995 \(75\) E.L.T. 158](#) (Tribunal)] the Tribunal held that durability is a relevant term -and containers of different materials may be durable to a varying extent (the Tribunal was seized of the interpretation of Notification Nos. 97/79 and 150/80 in the context of sacks made by using three ply high strength craft paper and one ply high strength craft paper with aluminium inside ply used for packing tea. The Tribunal held that repeated use or capacity is a inferring criterion and not the only one which could be resorted to in the above context. The Tribunal extended the benefit of Notification No. 150/80; however the benefit of Notification No. 97/79 was not extended as there was no material to decide whether the containers could be considered as durable or not. However, in the case before us, the Collector has satisfied himself that the tea sacks were durable in nature and it is the department that has not been able to substantiate its contention that the sacks were not durable in nature. Therefore, the appeal remains

unsubstantiated. Accordingly, we see no reason to interfere with the impugned order, confirm the same and reject the appeal."

The Tribunal has analysed that the containers need not be capable of being reused to be durable containers. From the facts of the case as well as decisions cited supra, I hold that the rejection of benefit of exemption by the authorities below is unjustified. The impugned order denying the exemption under Notification No. 104/94 is set aside. The appeal is allowed with consequential reliefs, if any.

We find that from all the above judgments the Tribunal has categorically held that merely because the container does not have repeated use, the nature of durability cannot be rejected. The only criterion to be seen is that whether the container in itself is durable in nature. As per the nature of container and use thereof as discussed above it is clear that the container imported by the assessee is durable. Moreover, even taking reference from the above judgments, we find that on comparison basis also, all the packing containers which were subject matter in the above cases, the Flexi Tank Container is much durable. Therefore, applying the ratio of the judgments in the above cases, in our view, it is clear that the Flexi Tank Containers imported by the assessee is durable container. Consequently notification no. 104/94-Cus is available to such containers. We also observe that neither the Show Cause notice nor Order in original, raise any dispute that Flexi Tank Containers are strong enough to withstand and endure the rigours of sea waves. Therefore, durability of the containers in isolation is not in dispute. Revenue is also harping on the point that subject containers do not have repeated use, therefore, it is not durable. This very issue has been considered time and again in the above cited judgments. Therefore, only because the containers do not have repeated use, the containers which are otherwise durable benefit of notification cannot be denied. Learned Counsel also pointed out that apart from the issue of durability, the Adjudicating Authority has also taken a ground for denying the exemption that re-export of the Flexi Tank Containers was not done by the present assessee but by the exporters of liquid cargo and also on the ground that exporters to whom the appellant has sold the Flexi Tank Containers have claimed drawback by factoring in the process of Flexi Tank Containers in the exports. We find that this allegation was not raised in the show cause notice. Therefore, this particular finding is beyond the scope of show cause notice. The Adjudicating Authority cannot raise any new grounds in the Adjudication Order which was

not raised in the Show Cause Notice. This is a settled law in the following judgments:

- a) Prince Khadi Woollen Handloom Prod Co-op Indl. Soc. Vs CCE-1996 (88) ELT 637 (SC)

3. *If it is the case of the Revenue that the appellants are not entitled to the benefit of the exemption under the said Notification by reason of the fact that the appellants do not own the factories in which the woollen fabrics are produced, the Revenue must give to the appellants a notice to show cause in this regard and the matter must be processed from that stage.*

- b) CCE vs Ballarpur Industries Ltd. 2007 (215) ELT 489 (SC)

21. *Before concluding, we may mention that, in the present case, the second and the third show cause notices are alone remitted. The first show cause notice dated 21-5-1999 is set aside as time-barred. However, it is made clear that Rule 7 of the Valuation Rules, 1975 will not be invoked and applied to the facts of this case as it has not been mentioned in the second and the third show cause notices. It is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. If there is no invocation of Rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule*

In view of the above settled law, any finding given by the Adjudicating Authority on the issue which was not raised in the show cause notice has no meaning and the same will stand nullified. Having discussed above, we also find that in the notification there is no condition that the imported durable container should be re-exported by the importer themselves and also there is no condition regarding the availment of drawback or otherwise. Therefore, otherwise also, on both the counts, the finding of the Adjudicating Authority is firstly not relevant, consequently, will not adversely affect the eligibility of the notification no. 104/94-Cus. The appellant M/s JR Roadlines vehemently submitted that the demand relates to appeal no. C/11972-11973/2015 is entirely time barred. We find that there is no dispute on the fact that the appellant have made a correct and true declaration of description of the goods in their Bills of entry. The goods have been physically examined by the Custom department and examination report has been submitted. As per the condition of notification, the appellant had executed the bond which after fulfilment of condition that re-export of the container duly filled with liquid cargo bond has been cancelled. The appellant with a bonafide belief claimed the exemption notification 104/94-Cus without making any mis-declaration. The Custom department has very consciously after satisfying themselves

allowed the exemption notification and not only that they have cancelled the bond after satisfying that export obligation is fulfilled. In this undisputed fact, there is no suppression of fact on the part of the assessee and custom department was free to interpret in their own manner whether the exemption to be allowed or not. Therefore, it cannot be said that there is any suppression of fact, mis-statement or misdeclaration on the part of the assessee. Therefore, the entire demand relates to appeal no. C/11972-11973/2015 is unsustainable also on time bar apart from merit of the case. As regard the Revenue's submission relying on board circulars, we find that the same board circular has been considered in the judgments cited. Therefore, the Tribunal's judgments will prevail over the board circular. As regard the judgment of this Tribunal in the case of Paul Abrao Agencies P Ltd. *supra* relied upon by the Learned Authorised Representative, we find that firstly, the judgment was ex-parte, no material of the appellant was considered. Secondly, the said judgment was given on the premise that importer did not carry out any processing, nor exported the same on processing. However, in the present case, there is no issue of processing of the imported container. Moreover, there is no condition of processing of imported container in the notification no 104/94-Cus. Therefore, decision in the case of Paul Abrao Agencies P Ltd. is clearly per incuriam of the terms of notification no. 104/94-Cus. Accordingly, the said decision cannot have force of binding. As regard the Revenue's appeal since identical issue is involved, we have considered submission of both sides as the same were adopted in case of Revenue's appeal by both the sides, we need not to give a separate finding on the said appeal. As per the discussion and finding given as above, we are of the view that the appellant M/s JR Roadlines is entitled for notification 104/94-cus. Accordingly the appeal nos. C/11972-11973/2015 are allowed. Revenue's appeal bearing no. C/11346/2014 is dismissed.

(Pronounced in the open court on 22.09.2020)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Diksha

(RAJU)
MEMBER (TECHNICAL)