CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 11005 OF 2021
[Arising out of OIA-AHD-CUSTM-000-APP-924-927-21-22 dated 27/09/2021 passed by Commissioner of CUSTOMS-AHMEDABAD]

JVS INDUSTRIES PVT LTD **.....Appellant**
DTA Unit A-1/35, GIDC Makarpura,
Vadodara,, Gujarat

VERSUS

COMMISSIONER OF CUSTOMS, AHMEDABAD **.....Respondent**
Custom House, Near All India Radio,
Navrangpura, Ahmedabad,
Gujarat

WITH
CUSTOMS APPEAL NO. 11006 OF 2021
[Arising out of OIA-AHD-CUSTM-000-APP-924-927-21-22 dated 27/09/2021 passed by Commissioner of CUSTOMS-AHMEDABAD]

JVS ENGINEERS **.....Appellant**
100 Eou A-1 / 33 Gidc Makarpura
Vadodara, Gujarat

VERSUS

COMMISSIONER OF CUSTOMS, AHMEDABAD **.....Respondent**
Custom House, Near All India Radio,
Navrangpura, Ahmedabad,
Gujarat

AND
CUSTOMS APPEAL NO. 11007 OF 2021
[Arising out of OIA-AHD-CUSTM-000-APP-924-927-21-22 dated 27/09/2021 passed by Commissioner of CUSTOMS-AHMEDABAD]

NARENDRA SAUBHAGYA CHAND SHAH **.....Appellant**
Partner And Director Of Ms Jvs Engineers,
100 Eou A-1 / 33, Gidc Makarpura,
Vadodara, Gujarat

VERSUS

COMMISSIONER OF CUSTOMS, AHMEDABAD **.....Respondent**
Custom House, Near All India Radio,
Navrangpura, Ahmedabad, Gujarat

APPEARANCE:
Shri Manish Jain, Advocate for the Appellant
Shri A. R. Kanani, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (TECHNICAL), MR. RAJU
HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

FINAL ORDER NO .A / 10453-10455 /2024

DATE OF HEARING: 12.02.2024
DATE OF DECISION: 22.02.2024

SOMESH ARORA

The details of three appeals before us are as follows:

Appeal No.	**Period of Dispute**	**Impugned Order and Order-in-Original**	**Amount Involved**
C/11075/2021 M/s. JVS ENGINEERS LIMITED **(100%EOU)** **A-1/33, GIDC,** Makarpura, Vadodara	2008-12	Order-in-Appeal No. AHD-CUSTM-000-APP-924to927-21-22 dated 27.09.2021 Order-in-Original No. 16/JC/SM/O&A/2020-21 dated 29.07.2020	Rs. 55,00,000/- as redemption fine imposed under Section 125 of the Customs Act, 1962 Rs. 36,00,000/- as penalty imposed under Section 112(a) of Customs Act One lakh penalty under section 117 of customs Act
C/11076/2021 M/s. JVS INDUSTRIES PVT LIMITED **(DTA Unit)** **A-1/35, GIDC,** Makarpura, Vadodara			Rs. 36,00,000/- as penalty imposed under Section 112(a) of Customs Act One lakh penalty under section 117 of customs Act
C/11077/2021 SHRI NARENDRA SHAH (Partner/Director of JVS Engineers-100% EOU)			Rs. 5,00,000/- as penalty imposed under Section

2. Issue pertains to imposition of penalty and confiscation/redemption fine on risers and pipes *(hereinafter referred to as "impugned goods/said goods").* According to department, said goods were transported by ONGC to

EOU for the purpose of repair activity. However, appellants have done repair activity on said goods at DTA location i.e., *M/s. JVS Industries Limited* instead of *EOU Unit, i.e., M/s. JVS Engineers Limited).* Thus according to department this fact (repair activity done at DTA location) has led to violation of TSA bond furnished by ONGC and therefore, appellants are liable for penalty and fine.

3. Appellants had entered into a contract (as appointed by M/s. Vetco Gray Pvt. Ltd., on behalf of ONGC) for carrying out repairing works for risers and pipes belonging to *"MODU SAGARBHUSHAN VESSELS"* of M/s. ONGC for damage incurred due to operational reasons.

3.1. In terms of above contract, the impugned goods were to be repaired at Shed 35 of the Appellants (DTA location i.e. shed 35), the same was intimated to the concerned parties as well as to the customs department.

In fact at the time of reaching the said goods at appellant premises (DTA location) landing certificates were also stated to be issued by jurisdictional central excise officer.

4. It is the case of the department that the Appellants had transferred the goods out of the EOU Unit to the DTA Unit without any proper permission which was in violation of Manufacture and other Operations in Warehouse Regulations, 1966 read with Section 54, 62, and 71 of the Customs Act, 1962. According to department the repair work has to be done by EOU unit only and not DTA unit.

4.1 It is also the case of the department that the delivery certificates under which the goods were returned were forged and appellants used fake stamp of superintendent.

4.2 There is no dispute that said goods were repaired and returned to ONGC after repair, however on the basis of certain testimonial statements of employees and partner Shri. Narendra Shah admitting forgery of documents in transit to divert goods, department made out a case of breach of bond and diversion of goods in a bid to benefit from service tax against the appellant. Aggrieved by the order impugned by which redemption fine and personal penalties were imposed, present appeals have been preferred.

5. It is submitted by the Appellants that they intended to clear the impugned goods not from the EOU Unit since the repair work was to be carried at the DTA Unit. The discrepancy with respect to the exact location of repair activity was a bonafide error on part of ONGC and its intermediary. The Appellants cannot be held responsible for the same. The understanding between parities was very clear that said goods need to be repaired at DTA location of the appellants (i.e. JVS Shed 35). Further the goods after repair were sent back to ONGC rigs. There was merely movement of the goods. The goods were cleared under bond and no import transaction took place, so as to attract provisions of Customs Act, 1962.

5.1 It is submitted that the goods were returned to ONGC after repair and on said repair activity service tax was also paid, therefore allegation of tax evasion and malafide intention should be set aside. The same has also been observed by the Deputy Commissioner of Central Excise and Customs vide letter dated 08.02.2012.

5.2 That the goods are not liable for confiscation under Section 111(b), (j) and (n) since the goods were neither imported goods nor dutiable or prohibited goods. Since the goods are not liable for confiscation, redemption fine under Section 125 or Penalty under Section 112(a) and 117 of the Customs Act is liable to be set aside, as far as they are concerned.

5.3 Further, the appellant submitted that to rebut testimonial evidence, they had also produced certain forensic evidence by way of expert opinion, as a part of their reply to indicate that no forgery was committed and the testimonial evidence to that effect was in fact under duress but the learned adjudicating authority did not consider the same. As it was stated that proceeding is pending in Court of law and therefore no finding was given to that effect but still the forgery was taken as part of the finding by the adjudicating authority and same was sustained by the Commissioner (Appeals) through the impugned order.

6. Learned AR relies upon the order of the lower authority to emphasize that Section 111(J) of the Customs Act having been violated penalties were properly imposed and sustained.

7. Considered, we find that in various documents as placed on record the name of the receiver of goods has been described at variance with JVS Engineer as a recipient of the goods in some documents and JVS Industries Pvt Ltd in others. As per the appellant the repair activity was to be done and mean to be done at DTA location of M/s JVS Industries Ltd and never on EOU unit i.e M/s JVS Engineer Ltd. And wherever the discrepancy happened, it is clearly on account of same misunderstanding or clerical error on the part of the suppliers i.e M/s ONGC. Further, we find that in the present case no investigation was done from M/s ONGC (Public Sector undertaking) which executed the transshipment bond for dispatch of goods i.e. risers and pipes from project area. The appellant in the instant case through intermedeatory i.e. M/s. Veto Grey Pte. Ltd on behalf of the ONGC and therefore the scope of same clerical error cannot ruled out. Even M/s. Veto Gray Pte. Ltd has not even been examined during investigations. The department has alleged that whole gamut of activities was carried out to save service tax duty which would have come into play only if the goods were repaired through DTA unit. It is alleged by the department, the service tax eventually got paid as exhibited in invoice produced before us which as per Bearing No. 008/RNM/11-12 dated 19.09.2011 but same has been issued by E.O.U. Basis of the department’s allegation, are statements recorded of officials of the company whereby it is stated that certain stamps were forged and delivery documents tampered to divert goods from E.O.U to DTA to escape such tax. In the absence of any investigation having been done from ONGC and its intermediatory, we are constrained at this stage to rely upon circumstantial evidence as is available on record. On the factual aspect, we

find that the bond of transshipment was executed by ONGC who had undertaken to pay duty.

7.1 It is clear that the service tax has been charged and price paid for the work not on cum duty price but as separate element of service tax on total assessable value. It is clear that if goods were meant for EOU, the same should not have been subjected to the service tax as per the allegation of the department. However, we find that in the invoice issued by the JVS Engineer not only service tax has been separately shown to the consignee but also the same has been duly paid. Further vide letter dated 16 July, 2007 Vetco had clearly written to Cochin Shipyard Limited that the JVS shed 35 was their approved vendor. We find that not only critical parties like M/s ONGC, Cochin Shipyard Limited as well as Intermediary M/s Vetco have not been investigated in the matter but also show cause notice was issued severally and jointly to M/s JVS Engineer as well as M/s JVS Industries liable for confiscation jointly and severally. Both were neither the importers nor had executed the bond. The rebuttal of testimonial evidence produced by the appellants by way of forensic evidence was not entertained by the adjudicating authority simply on the ground, the same was to be evaluated in pending matter under criminal jurisprudence. This is highly improper way of evaluating evidence based on the presumption that the forensic evidence produced by the defendant can only be allowed to be evaluated in criminal court and not the adjudicating proceeding. Further, the department is alleging that the repair work was carried out in JVS Industries. However, we find that invoice at page 41 has been issued by M/s JVS Engineer to M/s Vecto Grey Pte. Ltd for the repair work for service tax component. It is improbable that M/S ONGC (Public Sector undertaking) would have agreed to paying any service tax, if the goods were not given to 100% EOU if it was actually wanting the repair work to be done through 100% EOU i.e JVS Engineer. A negotiated price is not easy to change in case of P.S.U’s if the amount involved is so big. It was submitted by the appellant’s counsel that as pointed out by them in response to the allegation made in show cause notice, Section 111(J) was not invokable and therefore the same has been invoked and penalty imposed without quoting of the relevant provision. As the Manufacture and Other Operations in Warehouse Regulation, 1966 have been wrongly quoted, wherein appropriate procedure for violations of the same was not available.

7.2 We find substance in this submission made by the appellant which should have been considered by the lower authorities. As the show cause notice was not maintainable as per the provisions quoted and same has been confirmed by both lower authorities under wrong provisions. Firstly, we find that Section 54 of the Customs Act is applicable where any goods imported in a Customs station are intended for transshipment. It is by no way forthcoming that the goods were coming from any Customs station and meant for transshipment as envisaged in Section 54. Further, we find that the show cause notice has extensively quoted in para 3 to 19, the provisions of Manufacture and Other Operations in Warehouse Regulation, 1966 as follows:-

> ***"REGULATION 3. Owner to make applications****. - (a) The owner of any goods warehoused under the Act intending to undertake any manufacturing process or other operations in the warehouse in relation to such goods shall make an application to the 2[Assistant Commissioner of Customs or Deputy Commissioner of Customs] in the proper form and furnish inter alia -*
>
> *(i) information regarding the nature of the manufacturing process or other operations;*
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> *(ii) particulars of imported and other goods proposed to be used in the manufacturing process or other op- erations;*
>
> *(iii) the detailed plan and description of the warehouse; and*
>
> *(iv) data regarding the volume of trade anticipated of the manufacturing process or other operations; and*
>
> *(v) the applicant shall, on being called upon to do so, furnish such other information as may be required.*

REGULATION 4. Execution of Bond. *The [Assistant Commissioner of Customs or Deputy Commissioner of Customs] may, if he is satisfied that the applicant has carried out such alterations to the warehouse premises as may be required for this purpose and that the volume of trade and other considerations justify grand of sanction direct the applicant to file a bond, undertaking inter alia to-*

(i) observe all the provisions of these regulations;

(ii) maintain detailed accounts of all imported and other goods used in the manufacturing process or other operations in the proper form and to produce such accounts for inspection by the proper officer;

(iii) submit detailed statements of all imported and other goods used in the manufacturing process or other operations and those remaining in stock, at any time the proper officer directs;

[(iv) provide to the officers of customs office space, wherever required, and access to warehouse, for control and supervision of the manufacturing process or other operations or imported and other goods as may be specified by [Assistant Commissioner of Customs or Deputy Commissioner of Customs);

(v) pay all the charges including pay, allowances, leave and of such officers pensionary charges or Deputy Commissioner from time to time be posted by the [Assistant Commissioner as may of Customs) in the warehouse for supervision and control of the manufacturing process or other op erations, or imported and other goods.]

(vi) comply with such conditions as may be imposed by the [Assistant Commissioner of Customs or Dep- uty Commissioner of Customs] from time to time for carrying out the purposes of these regulations and the Act.

REGULATION 5. Grant of sanction*. On execution of the bond, in the manner hereinbefore provided, the Assistant Commissioner of Customs or Deputy Commissioner of Customs] shall accord sanction to the ap plicant to carry on such manufacturing process or other operations specifying:*

(a) the manufacturing process or other operations permitted to be carried on in the warehouse;

(b) the types and nature of imported and other goods permitted to be used;

(c) the period for which the sanction is valid; and

(d) the conditions, if any, subject to which the manufacturing process or other operations may be carried on in the warehouse.

[(e) the input-output norms, wherever considered necessary, for the raw-materials and the finished goods.]

REGULATION 6. Conditions that may be imposed by the [Assistant Commissioner of Customs or Deputy Commissioner of Customs). *The [Assistant Commissioner of Customs or Deputy Commissioner of Customs] may from time to time:*

(i) Omitted
(ii) determine the number of customs officers that may be attached to the warehouse for purposes of su- pervising the manufacturing process or other operations;
(iii) fix the payable by sum the manufacturer towards the cost of such establishment and the extra charges payable towards the overtime services, if any, performed by such establishment at the request of the manufacturer; and
(iv)omitted

REGULATION 9. Maintenance of accounts. *The manufacturer shall maintain accounts relating to stocks, raw materials, goods in process, finished goods, waste and refuse in proper form:*
Provided that where the manufacturer maintains for his own purpose such detailed accounts and has carried such alteration in the form of accounts as may be required in this behalf, the Assistant Commissioner of Customs or Deputy Commissioner of customs may in his discretion direct such forms of accounts to be adopted as the proper form.

REGULATION 10. Accounts to be accessible to Customs Officer*. - The proper officer may, at any time, inspect or call for the accounts and connected records for scrutiny.*

REGULATION 12. Issue and return of imported goods to/from the manufacturing process or other operations.-

(a) The Assistant Commissioner of Customs or Deputy Commissioner of Customs shall, having regard to the manufacturing process or other operations to be carried on in the warehouse, direct the manner in which the imported goods shall be issued from and the unused items received back into stock.

(b) The application for issue of imported goods and the vouchers against which the unused items may be returned shall be in the proper form.

16. Whereas it further appears that Section 54 of the Customs Act, 1962 read as under

SECTION-54. ***Transhipment of certain goods without payment of duty.***

(i)Where any goods imported into a customs station are intended for transhipment, a bill of transhipment shall be presented to the proper officer in [such form and manner as may be prescribed] [Substituted 'the prescribed form' by Finance Act, 2018 (Act No. 13 of 2018), dated 29.3.2018.]:

*[**Provided** that where the goods are being transhipped under an international treaty or bilateral agreement between the Government of India and Government of a foreign country, a declaration for transhipment instead of a bill of transhipment shall be presented to the proper officer in the form.*

(ii)Subject to the provisions of section 11, where any goods imported into a customs station are mentioned in the import manifest or the import report, as the case may be, as for transhipment to any place outside India, such goods may be allowed to be so transhipped without payment of duty.

(iii)Where any goods imported into a customs station are mentioned in the import manifest or the import report, as the case may be, as for transhipment-

(a)to any major port as defined in the Indian Ports Act, 1908 (15 of 1908), or the customs airport at Mumbai, Calcutta, Delhi or Chennai or any other customs port or customs airport which the Board may, by notification in the Official Gazette, specify in this behalf, or

(b)to any other customs station and the proper officer is satisfied that the goods are bona fide intended for transhipment of such customs station, the proper officer may allow the goods to be transhipped, without payment of duty, subject to such conditions as may be prescribed for the due arrival of such goods at the customs station to which transhipment is allowed.

17. whereas, it appears that the Section 62 of the Customs Act, 1962 enjoins the control over warhoused goods which read as under:

SECTION 62. ***Control over warehoused goods. –***

> *(1) All warehoused goods shall be subject to the control of the proper officer.*
> *(2) No person shall enter a warehouse or remove any goods therefrom without the permission of the proper officer.*
>
> *(3) The proper officer may cause any warehouse to be locked with the lock of the Customs Department and no person shall remove or break such lock.*
>
> *(4) The proper officer shall have access to every part of a warehouse and power to examine the goods therein.*

18. Whereas, it further appears that Section 71 of the act ibid enjoins that the goods not be taken out of warehouse except as provided by this Act which reads as under:

SECTION-71"*No warehoused goods shall be taken out of a warehouse except on clearance for home consumption or re-exportation, or for removal to another warehouse, or as otherwise provided by this Act.*"

19. Whereas it further appears that Section 111 of the Customs Act, 1962 read as under

111. Confiscation of improperly imported goods, etc. - The following goods brought from a place outside India shall be liable to confiscation:-

> *(j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;"*

All above Regulations are seemingly quoted out of context e.g.

- Regulation 3 requires owner to make application for seeking permission for manufacture in bond.
- Regulation 4 require to execution of bond for grant of such permission.
- Regulation 6 pertains to condition relating to number of Customs officers to be attached and cost towards overtime charges.
- Regulation 9 relates of maintenance of accounts by person doing manufacture in bond.

- Regulation 10 pertains to account remaining assessable to Customs officers.
- Regulation 12 deals with issuance of materials from store to works area and back.
- In para 16 Section 54 has been quoted which pertains to transshipment of certain goods grom one customs station to another and not bond to bond transfer.
- In para 17 Section 62 has been quoted which pertains to warehouse being assessable to customs officers.
- Section 71 quoted pertains to removal and clearance for homes consumption or re exportation to other warehouse and are applicable to person who causes such removal.

7.3 We find that, the relevant regulations for the purposes are Warehoused Goods (Remove) Regulations, 1963 issued vide CBR Notification No. 59-Cus dated 1st February, 1963 read as follows:

"WAREHOUSED GOODS (REMOVAL) REGULATIONS, 1963

IC.B.R. Notification No. 59-Cus., dated 1st February, 1963/

In exercise of the powers conferred by section 157 of the Customs Act, 1962 (52 of 1962), the Central Board

of Revenue hereby makes the following regulations, namely:-
REGULATION 1. *Short title. These regulations may be called the Warehoused Goods (Removal), Regulations, 1963.*

REGULATION 2. *Conditions for transport of warehoused goods in the same town. Where the goods are to be removed from one warehouse to another in the same town, the proper officer may require that the transport of the goods between the two warehouses be under the supervision of an officer of Customs, the owner meeting the cost of such supervision.*

REGULATION 3. *Conditions for transport of warehoused goods to another town. Where the goods are to be removed from one warehouse to another in a different town the proper officer may require the person requesting removal to execute a bond in a sum equal to the amount of import duty leviable on such goods and in such form and manner as the proper officer deems fit.*

> ***REGULATION 4.*** *Terms of the bond to be executed. The terms of the bond shall be that if the person executing the bond produces to the proper officer, within three months or within such extended period as such officer may allow, a certificate issued by the proper officer at the place of destination that the goods have arrived at that place, the bond shall stand discharged, but otherwise an amount equal to the import duty leviable on the goods in respect of which the said certificate is not produced shall stand forfeited.*
>
> ***REGULATION 5****. Surety or security to be furnished. = The proper officer may require that the bond shall be with such surety or security or both as is acceptable to him."*

7.4 It is clear from the foregoing that the regulations require that the persons removing the goods from warehouse has obligation to pay duty in case goods are not received within three months or such extended period as a proper officer may extend and in case the proof of receipt is not received then the permission is required to be cancelled and duty bond enforced. Coming to the Clause 111(J), it is clear that the same can be thus enforced against the person who attempts to remove or actually removes goods from Customs area or warehouse without the permission of the proper officer or contrary to the terms of such conditions. The Clause comes into operation only when goods are removed from the customs area or warehouse without permission or contrary to the permission already granted. It does not deal with the warehouse goods in transit with which the above regulations i.e. Warehoused Goods (Removable) Regulations, 1963 have been provided and which make the goods dutiable in the hands of persons executing bond for any violation of conditions of bond. Thus, the liability under the bond is of the person executing it. As far as appellants are concerned, if intention was to evade service-tax, then show cause notice should have been issued under relevant provisions including penal provisions of Finance Act, 1994.

8. In view of totally irrelevant provisions having been quoted while, giving show cause to the party and same having been sustained without proper legal construction by the authorities below, we are inclined to set aside the proceeding of imposition of penalty etc. for violation of Section 111(J) against alleged recipients of the goods at this belated stage and

particularly when duty of Service Tax has also been discharged and accepted by the department reckoning in the invoice that work has been done by E.O.U, even though E.O.U may not have normally paid service tax. Also the party executing the bond and its intermediary responsible for executed bond have neither been investigated, nor show caused in the matter. The forensic evidence regarding rebuttal of two statements not having been considered by lower authorities, we are not commenting either way on the same, nor are inclined to rely on testimonial evidence in the absence of proper defense examination including forensic having been afforded in such old matter and service tax penal provisions not having been invoked.

9. Appeals are allowed with consequential relief.

(Pronounced in the open Court on 22.02.2024)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Prachi