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

REGIONAL BENCH-COURT NO.3

CUSTOMS Appeal No. 10228 of 2024

(Arising out of OIO-AHM-CUSTM-000-PR-COMMR-11-2024-25 dated 18/04/2024 passed by the Principal Commissioner of Customs, Ahmedabad)

CHIRIPAL POLY FILMS LTD **........Appellant**
Chiripal House, Shivranjani Cross Road,
Satellite, Ahmedabad-380015

VERSUS

COMMISSIONER OF CUSTOMS-CUSTOMS AHMEDABAD **........Respondent**
Customs House, Nr. All India Radio,
Navrangpura, Ahmedabad-380009

WITH

CUSTOMS Appeal No. 10229 of 2024

(Arising out of OIO-AHM-CUSTM-000-PR-COMMR-12-2024-25 dated 18/04/2024 passed by the Principal Commissioner of Customs, Ahmedabad)

CHIRIPAL POLY FILMS LTD **........Appellant**
Chiripal House, Shivranjani Cross Road,
Satellite, Ahmedabad-380015

VERSUS

COMMISSIONER OF CUSTOMS-CUSTOMS AHMEDABAD **........Respondent**
Customs House, Nr. All India Radio,
Navrangpura, Ahmedabad-380009

AND

CUSTOMS Appeal No. 10230 of 2024

(Arising out of OIO-AHM-CUSTM-000-PR-COMMR-13-2024-25 dated 18/04/2024 passed by the Principal Commissioner of Customs, Ahmedabad)

CHIRIPAL POLY FILMS LTD **........Appellant**
Chiripal House, Shivranjani Cross Road,
Satellite, Ahmedabad-380015

VERSUS

COMMISSIONER OF CUSTOMS-CUSTOMS AHMEDABAD **........Respondent**
Customs House, Nr. All India Radio,
Navrangpura, Ahmedabad-380009

APPEARANCE:
Shri P M Dave, Advocate with Shri P P Jadeja, Consultant for the Appellant
Shri Tara Prakash, Deputy Commissioner (AR) for the Respondent

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

Final Order No.11628-11630/2024

DATE OF HEARING: 14.06.2024
DATE OF DECISION: 23.07.2024

RAMESH NAIR

These 3 appeals are filed by Appellant M/s. Chiripal Poly Films Ltd, Ahmedabad against 3 orders-in-original dated 18-04-2024, passed by the Principal Commissioner of Customs, Ahmedabad. The issue involved in these Appeals is whether Appellants is liable to pay duty, Interest, Redemption Fine and penalty for violation of "Pre-Import Condition" in connection with imports made under Advance Authorization scheme (referred to as the AA scheme) during the period from 13-10-2017 to 09-01-2019. Since these appeals involved common issues, all the appeals are taken up for disposal. The duty, Interest, fine and penalty involved are as under :-

SCN date	Port of Import and O-I-O. dtd 18-04-2024	Duty paid & Confirmed by OIO - Rs.	Interest paid by appellant-Rs.	Penalty imposed u/s 114A- Rs.	R/Fine imposed - Rs.
20-04-2021	Mundra-OIO-11	1,39,38,827	1,43,38,992	1,39,38,827	23,00,000
17-08-2021	JNCH - OIO-12	1,41,04,014	1,06,36,235	1,41,04,014	23,00,000
16.09.2022	A'bad-- OIO-13	11,10,26,373	10,42,86,757	11,10,26,373	1,85,00,000
Total		13,90,69,214	12,92,61,984	13,90,69,214	2,31,00,000

2 Appellant is a manufacturer importer and exporting their manufactured goods like, 1.Bi-Axially Oriented Polypropylene (Bopp) Film, 2. Aluminum Metalized Bopp Film, 3.Polyester Metalized Film, 4.Polyester Film, 5. Polyester (Pet) Chips (High Pressure Moulding Grade/Bottle Grade) Other Polyethylene Terepthalate, etc. (Export Products) since January, 2009. For manufacturing goods for export, Appellant have imported inputs viz. Plastic granules, Additives etc. under Advance Authorization, availed exemption of Notification No.18/2015-Cus dt. 1.4.2015 issued u/s 25(1) of Customs Act. The said Notification No. 18/2015-Cus was amended by Notification No.79/2017-Cus on 13.10.2017 allowing such exemption, subject to "pre-import condition" against producing a valid Advance Authorisation issued by Regional DGFT Authority in terms of paragraph 4.03 of Foreign Trade Policy, from the whole of duty of customs leviable, which is specified in the First Schedule to Customs Tariff Act 1975 and from the whole of additional duty,

safeguard duty, transitional product specific safeguard duty and anti-dumping duty leviable, respectively, under sections 3, 8B, 8C and 9A of Customs Tariff Act 1975. The Notification allowed exemption with pre-import condition from 13.10.2017 to the import duties in the nature of IGST leviable under sub section 3(7) of Customs Tariff Act 1975. The "pre-import condition" was inserted as a condition "(xii)" to the said Notification No. 18/2015-Cus for allowing exemption also from integrated tax leviable thereon under Section 3(7) of Customs Tariff Act 1975 and the exemption shall be subject to the Pre-Import Condition and physical exports of goods only.

2.1 Paragraph 4.14 of Foreign Trade Policy of 2015-20 (FTP) and Handbook of Procedures 2015-20 (HBP) incorporated "Pre-import condition" by Notification No. 33/2015-20. Thereafter, the amending Notification No. 1/2019-Cus., dated 10-1-2019 provided that the above mentioned condition "(xii)" i.e. 'pre-import condition' shall be omitted. Pre-import condition inserted by Notifications dated 13-10-2017 was to be complied with before its withdrawal with effect from 10-1-2019. The dispute remains for the period from 13-10-2017 to 09-01-2019.

2.2 Appellant have also imported various materials which were in the nature of their raw materials under Advance Authorizations during the period from 13-10-2017 to 09-01-2019. The proper Custom officers in Customs Stations at Mundra, JNCH and Ahmedabad, where such imports were made had allowed exemption of IGST under the Notification on final assessment. Appellant had not paid any amount towards IGST on imports during 13-10-2017 to 09-01-2019.

2.3 DRI, Kolkata had raised objection about non-compliance of pre-import condition. Appellant filed SCA No18097/2018 before Hon'ble Gujarat High Court, challenged validity of the said pre-import condition. The Hon'ble Gujarat High Court granted stay initially and allowed SCA along with SCA by Maxim Tubes Co. Pvt. Ltd. V/s. UOI 2019 (368) ELT 337 (Guj.). However, Union of India challenged judgment of the Hon'ble Gujarat High Court before the Hon'ble Apex Court, wherein orders dt. 04-02-2019 by Gujarat High Court are over ruled with directions in para 75 of decision dated 28-04-2023 by the Hon'ble Apex Court, as reported inUOI vsCosmo Films Ltd- 2023 (385) E.L.T. 66 (S.C.) / (2023) 5 Centax 286 (S.C.). Revenuewas also directed to permit all importers to claim refund or input credit, whichever is applicable. Appellant computed details and quantified their liabilities in imports made during the period from 13-10-2017 to 09-01-2019 i.e. amount of IGST payable for such imports made in that period.

2.4 CBIC issued Circular No.16/2023-Cus dated 07-06-2023 directing field officers to allow all such importers in India to make payments of duty (IGST), who had not satisfied the Pre-Import Condition during the such period from 13-10-2017 to 09-01-2019. Since Appellant had interim stay from the Hon'ble Gujarat High Court against payment of IGST till issue was finally decided by the Hon'ble Supreme Court on 28-04-2023, Appellant had not deposited the IGST during the period in question. Appellant approached concerned assessment group at the Port of Import (POI) with relevant details for payment of the duty(IGST) and to Re-assess such Bill of Entry and to generate the electronic challan in Customs EDI System for enabling to make due payment of duty[IGST]. This Circular dt. 07-06-2023 also provided that on completion of above payment, POI should make a notional out of charge (OOC) for B/E on Customs EDI System enabling transmission to GSTN Portal to avail Input Tax Credit as per GST provisions. The procedure under Circular No.16/2023-Cus dated 07-06-2023 was followed by the appellant for paying IGST tax in those cases only, where pre-import condition was not fully complied or partly complied in respect of the goods imported under Advance Authorisation Scheme for the period from 13.10.2017 to 09.01.2019. Since Customs EDI System did not allow payment of duty[IGST] without depositing applicable "interest", Appellant has paid differential duty along with interest amount as per EDI System.

2.5 During the time when above referred developments took place (i.e. inquiry by DRI/custom, judgments on 04-02-2019 reported in 2019 (368) ELT 337 (Guj.) bythe Hon'ble Gujarat High Court and by the Hon'ble Supreme Court on 28-04-2022.), Show Cause Notices were issued to appellant on 20-04-2021[signed on 22-04-2022] for Mundra, on 17-08-2021 for JNCH and on 16.09.2022 for Ahmedabad in respect of duty free imports made alleging wrong availment of exemption for imports made under Advance Authorisation Scheme at Ports of Mundra, JNCH and Ahmedabad. Show Cause Notices, alleged that "pre-import condition" was violated for the goods imported, and therefore duties foregone on such imports were recoverable with interest, Fine and Penalty for breach of the pre-import condition, invoking extended period under Section 28(4) of Customs Act, 1962 and section 28AB, 111(O), 112, 114A and 125 of Customs Act 1962 for demanding duties along with interest and proposing to confiscate imported goods at Ports of Mundra, JNCH and Ahmedabad and to impose Fine & penalties.

2.6 The Principal Commissioner took up the Show Cause Notices for adjudication. Appellant filed reply to 3 SCNs stating that the appellant has deposited the amounts towards IGST and interest thereon, and credit (i.e. ITC) of amount of IGST paid by appellant on reassessment of Bills of Entry has been availed by appellant as permitted/allowed. Accordingly, procedure provided by the Board under the above Circular is complied with by Appellant, and no further liability remained to be recovered/discharged. Appellant further submitted that amount deposited and recovered towards interest was without authority of the law, hence, unsustainable. There was no justification in facts of this case nor any authority in law for the assessment of interest during such Re-assessment and collection and recovery thereof from the Appellant.

2.7 The respondent Principal Commissioner has passed the adjudication orders in the Show Cause Notices, and while confirming the demand of duty (i.e. IGST) with interest, he has also held that the goods imported by the appellant were liable for confiscation and that the appellant is liable for paying redemption fine in lieu of confiscation under Section 125 of Customs Act 1962, Penalty under Section 114A of Customs Act 1962 and interest under Section 28AA of Customs Act 1962 and that the amount deposited towards duty [IGST] and interest are appropriated under the 3 impugned Orders-In-Original dated 18.04.2024 and quantification thereof are reflected in the Table in Para 1 above.

2.8 Therefore, the said Orders are challenged by Appellant in the Customs Appeal NosC/10228/2024 to C/10230/2024.

3. Shri Paresh M. Dave, Advocate and shri P. P. Jadeja, Authorised representative appearing on behalf of the appellant, while reiterating submissions in the grounds of Appeals, made the following submissions with relevant dates on the facts and the law which have also been taken on record. They submit that all the goods imported under the Advance Authorisation scheme were actually utilised by the appellant for manufacture of the final products which were exported upon following the normal procedure of filing Shipping Bill, export invoices etc. Therefore, there is no breach of the fundamental condition of the Advance Authorisation scheme about utilization of goods imported under Scheme for manufacture of finished goods exported, and physical incorporation of the goods imported under the scheme in such export of the goods. There is no breach or

violation of the core condition of the Advance Authorisation Scheme for any of the goods imported by appellant under any of the bills of entry. , because all goods imported tax free have been used by the appellant for production of the final/finished goods which were exported by appellant.Thus the prime condition of Advance Authorisation scheme is satisfied in respect of goods imported under Advance Authorization scheme in appellant's case. Consequently, the impugned order regarding interest, confiscation, imposition of redemption fine and penalty are liable to be set aside. They mainly submit that imposing additional financial liability by imposing undue interest, redemption fine and penalty are not sustainable in law, particularly when there is no statutory provision for imposing the same. They have mainly made following submissions to support their view points in respect of confirmation of duty, interest and imposing Redemption Fine and penalty :-

3.1 <u>Submissions on demand/payment of Duty[IGST] :-</u>

i. The appellant's submission is that duty[IGST] has been paid as a bonafide citizen, as per directions of the Hon'ble Supreme Court, in para 75 of the judgment dated 28-04-2023 and CBIC Circular No.16/2023-Cus dated 07-06-2023,

ii. In the present case, the entire situation was admittedly revenue neutral, at the time of import during period in question and while making payment of such duty[IGST] in 2023. The Hon'ble Supreme Court has also allowed all the importers including appellant to pay tax and claim its credit and/or refund as the case may be. The appellant has been actually allowed credit of the entire amount of tax paid on reassessment of Bills of Entry, and such credit also stands completely utilized by the appellant within a month or two from date of allowing such credit.

iii. The voluntary payment of duty[IGST] tax was made after 07-06-2023 as it was and it has been allowed as input credit of such tax if paid even at this stage.

iv. The said demand of duty, though, may not be sustainable on other grounds, like availability of exemption, revenue neutral situation, demand being time barred etc, but, since Appellant has already been allowed to take credit of the duty paid, Appellant is not seriously objecting the demands of the duty[IGST] deposited after 7-6- 2023 in this cases.

3.2 <u>Submissions against Interest, Redemption Fine & Penalty imposed :-</u>

a) In facts of this case, Appellant is contesting Interest, Redemption Fine and Penalty imposed by the impuged Order-In-Originals dt. 18-04-2024. The appellant's submission is that in this case interest cannot be levied, penalty cannot be imposed and redemption fine can not be charged as goods[not available for confiscation] cannot be confiscated andno provisions exist under Customs Tariff Act 1975 for interest, penalty, confiscation and redemption fine.

b) Integrated tax [IGST], is the duty involved in the present case, which is a levy imposed under Section 3(7) of the Customs Tariff Act 1975 like Additional Customs Duty (CVD) is imposed as a separate levy under Section 3(1) of the Customs Tariff Act 1975, and Additional CVD is a levy imposed under Section 3(3) of the Customs Tariff Act 1975.

c) Levies imposed under Section 3 of Customs Tariff Act 1975 are other duties imposed under other Acts on import are in addition to "Customs duty" levied under Section 12 of the Customs Act, 1962. For Integrated tax imposed and levied under Section 3(7) of the Customs Tariff Act 1975, there is no specific provision incorporated under Customs Tariff Act 1975 for levying interest, penalty and redemption fine. The provisions of the Customs Act are made applicable for the duties and taxes levied under Section 3 of the Customs Tariff Act 1975 to a limited extent, by virtue of sub-section (12) of Section 3 of the Tariff Act. There is no charging provision for interest, penalty and fine under sub section (7) of Section 3 or any other provision of the Customs Tariff Act 1975.

d) It is a settled legal position that interest, penalty and fine are separate levies, and such levies cannot be imposed without any specific and clear charging provision in the statute. Provision like sub section (12) of Section 3 of the Tariff Act 1975 cannot serve the purpose of a charging provision for such levies by relying upon provisions of the Customs Act 1962. A separate and specific charging section like sub section (7) of Section 3 of the said Tariff Act is required for other levies like interest, penalty etc. Hence, charging provisions for interest, penalty and fine must exist in a taxing statute, and such provisions for interest, penalty and fine must be specific and clear; and mere adoption of few provisions of other Act like Customs Act would not mean that charging provisions of such Act for levies like interest, penalty and fine were also adopted.

e) Like sub section (8) of Section 9A of the Customs Tariff Act, (for Anti-Dumping Duty) specific words like "interest, penalties and offences" must be inserted while adopting provisions of any other Act; as otherwise, consequences of absence of such expressions may be grave for the Revenue, but then Article 265 of the Constitution mandated that no tax shall be levied and collected except by authority of law. There is no authority of law to levy penalty, interest and fine under Section 3 of the Customs Tariff Act 1975 and there is no charging provision for such levies under the Customs Tariff Act 1975. Procedural provisions of the Customs Act and even the definitions given under the Customs Act may be applicable by virtue of Section 3(12) of Customs Tariff Act 1975, but the charging provisions for interest (Section 28AA), penalty (Section 114A) and fine (Section 125) are not applicable to Tax levied under sub section (7) of Section 3 of the Customs Tariff Act 1975.

f) The impugned Orders have applied provisions of the Customs Act for levying interest (Section 28AA), for Penalty (Section 114A) and for Confiscation and Redemption Fine (Section 111(o) and 125); but these provisions of the Customs Act 1962 are not made applicable for interest, penalty and fine in respect of Integrated tax, levied under Section 3(7) of the Customs Tariff Act 1975, which is a separate enactment and for separate levy. There is no charging provision for interest, penalty and fine in Section 3(7) or 3(12) of Customs Tariff Act 1975. In law, a specific provision for interest, penalty and fine has to be there in the taxing statute; and in absence of any specific charging provision, the levies of interest, penalty and fine cannot be imposed and levies cannot be recovered.

g) Accordingly it is the submission of Appellant that <u>Interest, Redemption Fine & Penalty imposed by the adjudicating authority can not be sustained in law.</u>

h) Appellant has relied upon the following judgments to support their view :-

- CCE Suratvskai Pradesh SahkariKhandUdyogMandli Ltd. 2011 (271) ELT 32 (Guj.)
- Mahindra & Mahindra Ltd – (2023) 3 Centax 261(BOM.) and 2022 (10) Tax Management India 212 – Bombay High Court
- Revenue’s SLP against the judgment of the Hon’ble Bombay High Court in case of Mahindra& Mahindra Ltd was dismissed by the Hon’ble Apex Court and even the review petition of Revenue was

rejected. Relied 2023 (386) E.L.T. 11 (S.C.) - UOI vs Mahindra & Mahindra Ltd.

- DEVI DASS GOPAL KRISHAN LTD vs UOI - 2002 (140) E.L.T. 56 (P & H)
- Acer India (Pvt.) Ltd. vs CC(Audit) - Chennai CESTAT's FINAL ORDER No.40534/2024 dated 08-05-2024
- Khemka and Co. (Agencies) Pvt. Ltd. v. State of Maharashtra — 1975 (2) SCC 22
- Pioneer Silk Mills Pvt. Ltd. v. U.O.I. — 1995(80)ELT-507(Del) [approved by Apex Court in Union of India v. Pioneer Silk Mills Pvt. Ltd. – 2002(145)ELT-A74(SC)]
- CCE, Ahmedabad vs ORIENT FABRICS PVT. LTD-2003 (158) E.L.T. 545 (S.C.)
- Indo Swiss Embroidery Industries Ltd vs CCE, Vapi-2017 (356) E.L.T. 226 (Bom.)

3.3 Revenue Neutral Situation at the time of import & in the year 2023 :

1) The most important factor for considering whether the Appellant had malafide intention to evade duty in revenue neutrality; and this Hon'ble Tribunal has considered this factor in a long chain of decisions in favour of the assessees. In the present case, the entire situation was admittedly revenue neutral, and the Hon'ble Supreme Court has also therefore allowed the appellant to pay duty and claim its credit and/or refund as the case may be. The appellant has been actually allowed credit of the entire amount of duty paid on reassessment of bills of entry, and such credit stands completely utilized by the appellant within a month or two from date of allowing such credit.

2) If the proper Custom officers were aware about pre-import condition and its scope and exemption for imports under Authorization had not been allowed, then the appellant would have paid Integrated tax leviable under Section 3(7) of the Customs Tariff Act, and its credit under the GST law would have been taken at that time of import itself; and such credit would have been utilized for payment of GST on other goods or the appellant would have been allowed refund of such credit because GST law permits for refund of credit of tax paid on goods utilized for export transactions. Considering this legal position, the Hon'ble Supreme Court has also observed at para 75 of the judgment rendered on April 28, 2023 for permitting the importers to

claim refund or input credit upon paying integrated tax, and the Revenue was directed for the appropriate procedure to be followed in this regard.

3) The situation thus being revenue neutral, the intention to evade payment of tax can never be attributed to the appellant; and the Commissioner's order upholding invocation of extended period on the basis that the appellant had intention to evade tax is on face of it illegal and impermissible.

3.4 Undue reliance on Bond furnished at the time of Imports :-

a) There are error on the part of Principal Commissioner in justifying liability of "interest" on the basis that interest liability automatically arose upon confirmation of duty under Section 28 of Customs Act 1962. The Principal Commissioner has also committed error in justifying liability of "interest" with reference to the Bond furnished by appellant at the time of import of the goods. A bond furnished in terms of an exemption notification does not create a liability, per se, if no such liability is created under Statute. The bond is only agreement, or undertaking, for binding a person to discharge his liabilities in law; but no new liability other than those created under the statute could be fastened on an assessee by a bond. In this case, the bonds furnished by the appellant at the time of import were in the nature of an undertaking to fulfil all legal liabilities, including the liability of "interest" if such interest liability validly existed under the statute. However, if there was no levy of interest under the statute, then a bond referring to payment of tax with interest cannot create a new charge or a new levy like interest.

b) Appellant's undertaking in bond to pay IGST with interest could have resulted in the interest liability if such interest was chargeable under any provision made by the statute. In this case, there is no provision in Customs Tariff Act 1975, like Section 28AA of Customs Act 1962 for interest on customs duty, and therefore Principal Commissioner had no jurisdiction to fasten interest liability on appellant on the basis that a bond was furnished by the appellant binding themselves to pay tax with interest in certain eventualities. Section 28AA of the Customs Act 1962 is a charging section for interest on delayed payment of customs duty levied u/s 12 of the Customs Act 1962. However, IGST on the goods imported into India is not a “duty” leviable under Section 12 of the Customs Act 1962. Therefore, Principal Commissioner had no jurisdiction to hold that interest liability automatically arose any duty was confirmed/determined under Section 28 of the Customs Act 1962.

c) Appellant relied upon the cases of Sterlite Optical Technologies Ltd. V/s. CCE, Aurangabad 2011 (270) ELT 266 (Tri-Mum), Emcure Pharmaceuticals Ltd. 2014(307) ELT 180, and M/s. Madhu Silica Pvt. Ltd-2016 (344) E.L.T. 1072 (Tri. – Ahmd.)theHon’ble Tribunal has firmly settled the legal principle that the provisions for issuing Notice to Show Cause were applicable even when a bond was furnished by the assessee, and the time limitation provided under these provisions was also applicable for such demand notwithstanding the bond furnished by assessee. It is settled that for recovery, following the mandatory procedure of Section 11A of Central Excise Act 1944 and/or Section 28 of the Customs Act 1962, as the case may be though Bond was furnished by Appellant.

3.5 <u>Submissions against confiscation and Redemption Fine imposed:-</u>

- The impugned Orders has applied provisions of the Customs Act for Confiscation and Redemption Fine (Section 111(o) and 125); but it is the appellant’s submission that there is no charging provision for Confiscation and Redemption Fine in Section 3(7) or 3(12) of Customs Tariff Act 1975. In absence of any specific charging provision, charges of Confiscation and Redemption Fine cannot be imposed and levies cannot be recovered.

- The Principal Commissioner has committed a further grave error in ordering confiscation of goods and imposed Redemption Fine, when, the goods imported by the appellant were not physically available for confiscation/release, and all imported goods were allowed clearance for home consumption on Final Assessment orders made by the proper Custom officers in charge of the Port of Import. Notional confiscation of the goods is impermissible in law.

- The Larger Bench of the Hon’ble Tribunal in the case of Shiv KripaIspat Pvt. Ltd-2009 (235) ELT 623 has also upheld this principle. Confiscation of goods is without jurisdiction because section 111 of Customs Act,1962 is not applicable under Customs Tariff Act, 1975.

Consequently, liability of redemption fine imposed is equally unauthorised.

3.6 <u>Invocation of extended period of time limitation for issuance of SCN</u>

a) The invocation of extended period of time limitation for issuance of SCN is incorrect, as ingredients required invoking extended period are not existing in this case.

b) The case may be of section 28(2) hence, confirming demand of IGST underSection 28(4) of Customs Act 1962 is incorrect. The learned Principal Commissioner has committed a grave error in confirming demand of tax under Section 28(4) of the Customs Act, 1962 in the facts of the present case.

c) Appellant was legally allowed to avail ITC of IGST, if paid at the time of import of the goods in question, and even refund of such tax, was admissible under the scheme of GST laws; and it was a complete revenue neutral situation at the material time and now also. Thus, there was no intent to evade payment of IGST by the Appellant in this case.

d) Customs Authorities have conducted inquiry and investigation in this case before issuing Show Cause Notices, but, no evidence is found by Revenue officers for even remotely suggesting that appellant knew about scope and coverage of pre-import condition.

e) Appellant has deliberately not kept any facts or information hidden from the Revenue officers while importing and clearing goods under exemption; or exporting goods in fulfilment of export obligations under the said Advance Authorisation Scheme.

f) It is also settled that Revenue cannot invoke larger period of time limitation for duty demands in cases involving serious interpretation and resolution of the issues by higher courts and in a Revenue Neutral situation. Appellant never had any intent to evade payment of tax in such issues of interpretations or revenue neutral situation.

3.7 <u>Penalty imposed under Section 114A of the Customs Act 1962</u>

- The impugned Orders have applied of the Customs Act for Penalty (Section 114A); but it is the appellant’s submission that there is no charging provision for Penalty in Section 3(7) or 3(12) of Customs Tariff Act 1975. In absence of any specific charging provision, Penalty cannot be imposed and levies cannot be recovered.

- Penalty imposed on the appellant is also an action illegal and without jurisdiction because Section 114A of the Customs Act is not applicable for alleged violation or non-payment of IGST, which is an independent levy and this levy is imposed under a separate statute. Even in the facts of the present case, no penal action could have been taken against the appellant; and therefore also penalty on the appellant is unauthorized and is unjustified. The impugned order imposing penalty on the appellant is unsustainable and unjustified in facts as well as in law. The situation in the present case was actually revenue neutral, and therefore there cannot be any penal liability only because the amount of IGST is paid now owing to the litigation about the legality and validity of the pre-import condition. Amount of IGST, if paid at the time of import, was fully admissible as ITC and as refund; and the amount of IGST now paid is also fully admissible as ITC and refund. Penalty could not be imposed or justified in this case of a totally revenue neutral situation.

3.8 The prayer:

A. It is therefore prayed that the appeals may kindly be allowed and interest recovered/collected from the appellant may be ordered to be refunded;

B. The other liabilities on confiscation of goods and imposition of Redemption Fine and Penalty, may kindly be set aside, in the interest of justice.

4. Shri Tara Prakash, learned Deputy Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned orders and submits to upheld the Orders.

5. We have carefully considered submissions made by both sides and perused the records. We find that the issue involved is whether Appellants is liable to pay the Duty[IGST], Interest, Redemption Fine and Penalty confirmed by the impugned Orders in connection with alleged violation of "Pre-Import Condition" in the imports made against Advance Authorisation scheme during the period from 13-10-2017 to 09-01-2019. The following questions need consideration.

i) Whether customs duty (in nature of Integrated Tax) was recoverable from the appellant, in view of time-bar demands under extended period (though Input Tax Credit i.e. ITC) of the entire duty amount is allowed to the appellant ?

ii) whether interest is chargeable, whether goods are liable to confiscation entailing imposition of redemption fine, and whether penalty is imposable, in facts of this case ?

iii) Whether in law the above liabilities of interest, confiscation/redemption fine and penalty imposed are without jurisdiction and untenable, because there is no provision under the law for imposing such liabilities which are in the nature of separate levies?

iv) Whether the amount deposited towards interest is liable to be refunded, and whether liabilities of penalty and confiscation/redemption fine are liable to be set aside?

5.1 We find that adjudicating authority has passed impugned Orders in the cases and (i) confirmed total Customs Duty Rs. 13,90,69,214/- under Section 28(4) of Customs Act, 1962 in the form of IGST saved in imports of goods under Advance Authorizations and has ordered appropriation of deposited duty of Rs. 13,90,69,214/-.
(ii) Ordered to recover "interest" in respect of demand confirmed in (i) and ordered to appropriate paid interest of Rs. 12,92,61,984/-towards interest liability.
(iii)hold that goods imported under Advance Authorizations are liable to confiscation under Section 111(o) of Customs Act, 1962 and imposed total Redemption Fine of Rs. 2,31,00,000/- in lieu of confiscation under the Section 125 of Customs Act, 1962.
(iv)imposed a total penalty of Rs. 13,90,69,214/- equal to the duty demanded and confirmed at (i) above under Section 114A of the Customs Act, 1962.

5.2 We find that an Advance Authorisation is issued in terms of Para 4.03 of the Foreign Trade Policy (2015-20) to allow duty free import of inputs, which are used in manufacture of goods which are physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, energy, catalysts which are consumed/ utilised to obtain export product, may also be allowed. Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Safeguard Duty etc, applicable. Imports under Advance Authorisation for physical exports are also exempt from whole of integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975.

5.3 Notification No.- 18/2015 - Customs, Dated: 01-04-2015 issued in exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962, exempted materials imported into India against Advance Authorisation issued by the Regional Authority in terms of paragraph 4.03 of the Foreign Trade Policy from the whole of the duty of Customs leviable, which is specified in the First Schedule to the Customs Tariff Act, 1975 and from the whole of the additional duty, safeguard duty, transitional product specific safeguard duty and anti-dumping duty leviable thereon, respectively, under sections 3, 8B, 8C and 9A of the said Customs Tariff Act 1975, subject to the conditions mentioned therein,

5.4 Thereafter, on introduction of Goods and Service Tax Act 2017 w.e.f 01-07-2017, Additional Customs Duties (CVD & SAD) subsumed into the newly introduced Integrated Goods and Service Tax (IGST). Thus, at the time of imports, in addition to Basic Customs Duty, IGST was made payable instead of such Additional Duties of Customs. Government decided to impose IGST at the time of import, however, at the same time, importers were allowed to either take credit of such IGST for payments of Duty during supply to DTA, or to take refund of IGST amount paid within a specified period on certain situation for not being able to utilise credit. However, as trade facilitation on representations, Notification No.18/2015-Cus dated 01-04-2015 was amended by the Notification 79/2017-Cus dated 13-10-2017 to extend exemption from the payment of IGST at the time of import of input materials, under Advance Authorizations, subject to the pre-import condition.

5.5 The Director General of Foreign Trade issued one Notification No. 33/2015-20 dated 13-10-2017, which amended Para 4.14 of Foreign Trade Policy (2015-20), to incorporate exemption from IGST, subject to compliance of the pre-import and physical export conditions. Thus, in post GST regime, amended Notification No. 18/2015-Cus., dated 01-04-2015, provided for levy of the following duties in addition to duty levy u/s of Customs Act 1962 :-

(1) levy of a duty (referred to as additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India [Section 3(1) CTA 1975];

(2) levy of such additional duty as would counter-balance the excise duty leviable on any raw materials, components, and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article [Section 3(3) CTA 1975];

(3) levy of additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India [SAD, under Section 3(5) CTA 1975];

(4) levy of integrated tax as leviable under Section 5 of the Integrated Goods and Services Tax Act, 2017; [under Section 3(7) CTA 1975] and;

(5) levy of GST compensation cess at such rate as is leviable under Section 8 of the Goods and Services Tax (Compensation to States) Cess Act, 2017 [under Section 3(9) CTA 1975].

5.6 Thus, in post GST regime, benefit of exemption were available from payment of IGST in terms of the Foreign Trade Policy (2015-20) and the corresponding Customs Notification No. 18/2015-Cus dated 01-04-2015 as amended by Notification No.79/2017-Cus dated 13-10-2017, subject to the pre-import condition as well as physical export condition. However, we also find that the Central Government has omitted pre-import condition on 10.01.2019 by issuing further Notification No. 01/2019-Cus dated 10-01-2019. Such pre-import condition from para 4.14 of the FTP 2015-20 has also been omitted/removed by Government. Thus, exemption from payment of integrated tax was effective subject to pre-import condition and physical export condition for the period from 13.10.2017 to 09.01.2019, which also is in question in these cases.

5.7 As regards payment of duty[IGST] as per the Hon'ble Supreme Court's judgment dated 28-04-2023, all the importers who did not satisfy the "Pre-import Condition" were made liable to pay duty[IGST]. The Hon'ble Apex Court in case of UOI vs COSMO FILMS LTD -2023 (385) E.L.T. 66 (S.C.)- in the Pare 75 has passed Orders to the effect that since the respondents i.e. Importers were enjoying interim orders, till judgment was delivered, Revenue is directed to permit them to claim refund or input credit (whichever applicable and/or wherever customs duty was paid). For doing so, importers shall approach jurisdictional Commissioners, and apply with documentary evidence. The claim for refund/credit, shall be examined on merits, on a case-by-case basis. The Hon'ble Supreme Court directed that for the sake of convenience, the revenue shall direct the appropriate procedure to be followed, conveniently, through a circular, in this regard. Accordingly, CBICissuedCircular No.16/2023-Cus dated 07-06-2023. Therefore, wherever, the "Pre-Import Condition" was not satisfied, the duty[IGST], foregoneat the time of Import for the period from 13.10.2017 to 09.01.2019, became payable by Importers. Accordingly, Appellant[importer] has also obeyed the directions of the Hon'ble Apex Court and CBIC Circular dated 07-06-2023. Appellant has paid such duty[IGST] and allowed Credit of such duty[IGST]. Therefore, Appellant has also not objected the duty [IGST] payment seriously. There is no requirement to pass any detailed order on such payment of duty[IGST], which is paid and its credit is allowed to Appellant. The Situation has become Revenue Neutral for Appellant, Hence, we also refrain from passing any order on such confirmation of duty, which is allowed as credit by Revenue, though duty may or may not be sustainable on other grounds in these cases.

5.8 In the present cases, confirmation of interest demand, confiscation of goods, imposition of Redemption Fine and Penalty are objected claiming it to be illegal and unjustified. This Hon'ble Tribunal in case of Commissioner V/s. GNFC Ltd. 2010 (262) ELT 829 has held that even in case of voluntary payment of time-barred duty, it was open to contest liability of interest when department proposed to charge duty with interest which assessee paid voluntarily. This decision is upheld by a detailed judgment by the Hon'ble Gujarat High Court in Tax Appeal No. 56 of 2011 in case of GNFC Ltd. V/s. Commissioner, Vadodara 2012 (285) ELT 336 (Guj). Thus, it is open for Appellant to contest liability of Interest, confiscation, Redemption Fine and Penalty, even though the entire amount of Integrated tax is voluntarily paid by this Appellant.

5.9 We find that the Appellant has vehemently made submissions against the Orders for recovery of the amount of Interest, Redemption of Fine and Penalty on the main ground that there is no statutory provision made under section 3(7) or 3(12) of Customs Tariff Act, 1975 for such recoveries on delayed payment of duty[IGST] in Imports. Therefore, we also critically examine this contention. The amount of such duty[IGST] and "Interest" deposited by Appellant have also been ordered to be appropriated.

The demand/recovery in this case is of duty[IGST] leviable under Section 3(7) of Customs Tariff Act 1975 and charging section for levy/recovery of such duty[IGST] on goods imported into India and it is a separate and independent levy of duty. We find that Customs Tariff Act 1975 has made the following provisions for recovery of duty :-

> "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 5 of the Integrated Goods and Services Tax Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (8) [or sub-section (8A), as the case may be]."

Section 3(12) of Customs Tariff Act 1975 has provided as under

> "Section (12):- The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty or tax or cess, as the case may be, chargeable under this section as they apply in relation to the duties leviable under that Act.]"

SECTION 8B of Customs Tariff Act 1975 provides Power of Central Government to apply safeguard measures. SECTION 8B(9) ibid has provided as under :-

> "(9) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short-levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act."

SECTION 9Aof Customs Tariff Act 1975 provides for imposing "Anti-dumping duty". Section 9A(8) ibid has provide as under :-

> "[(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.]"

5.10 We find from above provisions that for recovery of IGST on import of goods, provisions are made under section 3(7) of Customs Tariff Act 1975. However, no specific provision is made for recovery or charging of Interest, Fine and Penalty u/s 3(7) or 3(12) of Customs Tariff Act 1975 as compared to such similar provisions made under the Section 8B(9) and Section 9A(8) of Customs Tariff Act 1975. Such provisions u/s 9A(8) were introduced in Statute by The Finance (No. 2) Act, 2009 way back on 19-08-2009. However, while introducing similar provisions post GST Regime under Section 3(7) or 3(12) of the Customs Tariff Act 1975, Government of India has not incorporated such provisions for recovery of the Interest, Fine and Penalty under Section 3(7) or Section 3(12) of Customs Tariff Act 1975. We are of the view that Interest, Fine & Penalty are separate/independent financial levies, and hence charging provision must be there in statute levying interest, fine, penalty is the mandate of settled law established by provisions for such separate and independent levy and decisions by the courts. Accordingly, we do not find and revenue has also not been able to show us such charging provision for levy and collection of "interest, Fine and Penalty" for late payment of IGST leviable under Section 3(7) or under Section 3(12) of Customs Tariff Act 1975. Therefore, the orders for recovery of interest, fine and Penalty on late payment of the IGST during Re-assessment process of Bill of Entry for the period from 13-10-2017 to 09-01-2019 are without authority of law and the same are unsustainable.

5.11 In case of J.K. Synthetics Ltd. v/s Commercial Taxes Officers - (1994) 4 Supreme Court Cases 276, theHon'ble Apex Court has held in Para 7 that "interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf." In case ofKhemka and Co. (Agencies) Pvt. Ltd. v/s State of Maharashtra — 1975 (2) SCC 22, theHon'ble Apex Court in para 25 & 26 of the decision has held 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."

5.12 In case of - Pioneer Silk Mills Pvt. Ltd vs UOI- 1995 (80) E.L.T. 507 (Del.), Section 3(3) of Additional Duties of Excise (Goods of Special Importance) Act, 1957 was for consideration before the Hon'ble Delhi High Court. Section 3(3) of Additional Duties Act 1957 was similar to Section 3(12) of Customs Tariff Act, 1975 which is involved in the present case. The provisions of the Central Excise Act and the Rules made thereunder were adopted by virtue of Section 3(3) of Additional Duties Act, whereas provisions of Customs Act and Rules made thereunder are adopted by virtue of Section 3(12) of Customs Tariff Act 1975 in present cases.Having recorded the core question in para 8 of judgment, the Hon'ble Delhi High Court conclusively held in para 37 that when penalty was additional tax, constitutional mandate required a clear authority of law for imposition thereof. In para 38, the Hon'ble High Court has held that a penal liability cannot be created by implication or intendment; and that the provision levying penalty must be explicit. Para 39 is important, where the Hon'ble High Court has recorded that interpretation put on Section 3(3) of Additional Duties Act had grave consequences for Revenue as similar terminology had been used in various other Acts and other enactments, but Article 265 of the Constitution has mandated that no tax shall be levied and collected except by authority of law. The Hon'ble Delhi High Court has also referred to a Larger Bench decision of the Hon'ble Supreme Court in case of Ujjagar Prints & others in paras 25 to 28 of this judgment and held that provisions of an Act may be adopted including definitions, but not penal provisions or provisions for imposing additional duties like interest and penalty without a specific provision for additional liabilities. Relevant Para are reproduced as under :-

"37. When penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. If long-drawn arguments are needed to explain if the Act by referential legislation or legislation by incorporation levies penalty or not, it is better for the court to lean in favour of the tax payer. There is no room for presumption in such a case. The mere fact that all these years the Additional Duty Act has not been challenged on this ground is of no consequence if authority of law as mandated by the Constitution is lacking. We may also note in the passing that it was submitted before us that penalty so realised earlier has never been

distributed among the States as part of net proceeds of the collection of the additional duties of excise under the Additional Duties Act. This statement made at the Bar was not challenged. Since, however, this point was not raised in the writ petition and the revenue had no opportunity to reply in its counter-affidavit, we leave the matter at that. Levy of penalty which is an additional tax has to be under the authority of law which should be clear, specific and explicit.

38. In Dr. Pratap Singh and Another v. Director of Enforcement, Foreign Exchange Regulation Act and Others, AIR 1985 Supreme Court 989, with reference to the expression "so far as may be", the Supreme Court said that the expression had always been construed to mean that those provisions may be generally followed to the extent possible and it is not that those provisions have been incorporated by pen and ink (like in Section 3(3) of the Additional Duties Act). This expression, therefore, negatives any plea that the whole of the provisions of the Central Excises Act have been incorporated by virtue of Section 3(3) of the Additional Duties Act. We have already held that the term "levy and collection" has restricted meaning and inclusive provisions have been made only in relation to the refunds and exemptions. It cannot be interpreted to cover penalty and offences as well. In Statutory Interpretation by F.A.R. Bennion (1984 Edition), it is said "where it is doubtful whether a stated term does or does not include a certain class, and words of extension are added which cover some only of the members of the class, it is implied that the remaining members of the class are excluded" (Expressiouniusprinciple : words of extension). Again we have also referred to certain enactments wherein provisions of another enactment have been specifically borrowed in their entirety, and also the enactments where though the terminology used is the same as used in Section 3(3) of the Additional Duties Act, yet separate provisions have been made for levy of penalties. The Supreme Court has construed the expression "levy" and "collection" in National Tobacco Company's case which would show that levy refers to imposition of tax as well as assessment and that the term "imposition" is generally used for levy of a tax or duty by the legislative provision, and further collection is equated to the recovery of the tax or duty imposed and assessed. Collection is stage subsequent to levy. In the absence of any provision for levy of tax or duty, the process of collection itself cannot create a levy and more so penalties. A statute must be regarded as penal for purposes of construction if it imposes a fine, penalty or forfeiture other than a penalty in the nature of liquidated damages, or other penalties which are in the nature of civil remedies (para 909, Halsbury Laws of England, Vol. 44, 4th Edition). As a general rule penalty enactments are to be construed strictly. That stage, however, does not arise in the present case. But a penal liability cannot be created by implication or intendment. We have already observed that provision levying penalty must be explicit.

39. We have given our considerable thought to various arguments raised by the parties. We find there is no mandate in the Additional Duties Act for levy of penalty and the Central Excises Act and the Rules made thereunder cannot be imported in the Additional Duties Act for the purpose of levy of penalty. We have spent anxious moments as the interpretation we have put has grave

> *consequences for the revenue as similar terminology as used in Section 3(3) of the Additional Duties Act has been used in various Acts and other enactments, but then Article 265 of the Constitution mandates that no tax shall be levied and collected except by authority of law. There being no such authority of law to levy penalty, we have to hold so."*

The above decision in Pioneer Silk Mills Pvt. Ltd. vs. Union Of India 1995 (80) ELT 507 (Del.)was Maintained by the Hon'ble Supreme Court in 2002 (145) ELT A74 (Supreme Court)and Approved in 2003 (158) ELT 545 (Supreme Court).

5.13 In the case reported in CCE, Ahmedabad vs ORIENT FABRICS PVT. LTD-2003 (158) E.L.T. 545 (S.C.), in para 20 of this judgment, the Hon'ble Supreme Court has also referred to an amendment made in year 1994 by inserting the expression "offences and penalties" in Section 3 (3) of the Additional Duties Act and held that such amendment was required to remedy the defect contained in the unamended provisions.

In absence of specific insertion of words like offences, penalties and interest, such levies could not be assumed and such additional tax cannot be charged.

The Hon'ble Apex Court has held as under :-

> *"1 The short question that arises for our consideration in these appeals, which arises from the judgments and orders dated 10-2-1997 and 26-3-1996, as regards jurisdiction of the authorities under the Central Excise Act, whether it is permissible to resort to penalty proceedings or forfeiture of goods for non-payment of additional duty in terms of the Additional Duties of Excise (Goods of Special Importance) Act , 1957 (for short 'the Act') by taking recourse to the provisions of the Central Excise Act and Rules framed thereunder.*
> *…*
>
> *8. A comparison of the amended provisions with the unamended ones would clearly demonstrate that the words 'offences and penalties' have consciously been inserted therein. The cause of action for imposing the penalty and directions of confiscation arose in the present case in the year 1987. The amended Act, therefore, has no application to the facts of this case.*
> *…..*
> *20. The matter may be considered from another angle. The Parliament by reason of the Amending Act 32 of 1994 consciously brought in the expression offences and penalties' in sub-section (3) of Section 3 of the Act. The mischief rule, if applied, would clearly show that such amendment was brought with a view to remedy the defect contained in the unamended provisions of sub-section (3) of Section 3 of the Act. Offences having regard to the provisions contained in Article 20 of the Constitution of India cannot be given a retrospective effect. In that view of the matter too sub-section (3) of Section 3 of the Act as amended cannot be said to have any application at all.*

21. In view of the aforesaid decisions, it must be held that the confiscation proceedings taken against the respondents and the penalty imposed upon them were totally without the authority of law and were rightly set aside by the Tribunal.

22. For the aforesaid reasons, we do not find any merit in the appeals. They fail and are, accordingly, dismissed. No costs."

5.14 In Civil Appeal Nos. 1354 of 1980 reported in -1999 (108) E.L.T. 321 (S.C.) - HYDERABAD INDUSTRIES LTD vs UOI, the Constitution Bench of the Hon'ble Supreme Court has observed that on a correct interpretation of the relevant provisions of the two Acts there can be no manner of doubt that additional duty which is levied under Section 3(1) of the Tariff Act is independent of the customs duty which is levied under Section 12 of Customs Act, and held that Section 3 of Customs Tariff Act was the charging provision for levying additional duty, and such duties were not Customs duty levied under Section 12 of the Customs Act. (Paras 10, 12, 13, 14 of the judgment are reproduced as under :-

"10. Section 3(1) of the Customs Tariff Act, 1975 provides for levy of an additional duty. The duty is, in other words, in addition to the customs duty leviable under Section 12 of the Customs Act read with Section 2 of the Customs Tariff Act. Secondly this duty is leviable at a rate equal to the excise duty for the time being leviable on a like article to the one which is imported if produced or manufactured in India. The explanation to this sub-section expands the meaning of the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India". The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable under sub-section (1) would be the excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation is that the article is produced or manufactured in India. The second limb to the explanation deals with a situation where "a like article is not so produced or manufactured" The use of the word "so" implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced of manufactured in India.

….

12. Section 12 of the Customs Act levies duty on goods imported into India at such rates as may be specified in the Customs Tariff Act, 1975. When we turn to Customs Tariff Act, 1975, it is Section 2 which states that the rates at which duties of customs are to be levied under Customs Act, 1962 are those which are specified in the First and Second Schedules of the Customs Tariff Act, 1975. In Section 12 of the Customs Act there is no reference to any specific provision of the Customs Tariff Act, 1975. In other words for the purpose of determining the levy of customs duty on goods imported into India what is relevant is Section 12 of the Customs Act read with Section 2.

13. On the other hand levy of additional duty under Section 3 is equal to the excise duty for the time being leviable on the like article which is imported into India if produced or manufactured in India. The rate of additional duty under Section 3(1) on an article imported into India is

> *not relatable to the First and the Second Schedule of the Customs Act but the additional duty if leviable has to be equal to the excise duty which is leviable under the Excise Act. This itself shows that the charging section for the levy of additional duty is not Section 12 of the Customs Act but is Section 3 of the Customs Tariff Act, 1975. This apart sub-sections (3), (5) and (6) of Section 3 refer to additional duty as being leviable under sub-section (1). In sub-section (5), for instance, it is clearly stated that the duty chargeable under Section 3 shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.*
>
> *14. There are different types of customs duty levied under different acts or rules. Some of them are; (a) a duty of customs chargeable under Section 12 of the Customs Act, 1962 : (b) the duty in question, namely, under Section 3(1) of the Customs Tariff Act; (c) additional duty levied on raw-materials, components and ingredients under Section 3(3) of the Customs Tariff Act; and (d) duty chargeable under Section 9A of the Customs Tariff Act, 1975. Customs Act, 1962 and the Customs Tariff Act, 1975 are two separate independent statutes. Merely because the incidence of tax under Section 3 of the Customs Tariff Act, 1975 arises on the import of the articles into India it does not necessarily mean that the Customs Tariff Act cannot provide for the charging of a duty which is independent of the customs duty leviable under the Customs Act."*

5.15 The case of CCE, Surat-I V/s. Ukai Pradesh SahkariKhandUdyogMandli Ltd - 2011 (271) ELT 32 (Guj.) shows thatthe Hon'ble Gujarat High Court while considering demand of "Cess" under Sugar Export Promotion Act, 1958 has held that interest can be levied and charged on delayed payment of "Cess", if statute that levies and charges the tax makes a substantive provision in that behalf. Section 7(4) Sugar Export Promotion Act, 1958 were similar to Section 3(12) of the Customs Tariff Act, 1975; and provisions of Central Excise Act, 1944 and rules made were made applicable for levy of sugar Cess by Section 7(4) of Sugar Export Promotion Act, whereas provisions of Customs Act, 1962 are made applicable by Section 3(12) of Customs Tariff Act 1975. Revenue demanded interest on late payment of Sugar Cess under Section 11AA of Central Excise Act on ground that provisions of Central Excise Act and the Rules made, including those relating to refund and exemptions from duty were adopted for levy of Sugar Cess, and interest for late payment of Sugar Cess.

The Hon'ble Gujarat High Court has conclusively held that interest was a separate levy and interest could be charged on delayed payment of tax only if the statute levying and charging the tax made a substantive provision in this behalf. The demand for interest under provisions of Central Excise Act has been set aside on the legal proposition that charging provision for interest cannot be adopted from the Central Excise Act. The appeal filed by

Revenue was dismissed. This decision on "Cess" of Gujarat High Court is squarely applicable in this case.

5.16 The above mentioned decision in the case of CCE, Surat-I V/s. Ukai Pradesh SahkariKhandUdyogMandli Ltd. 2011 (271) ELT 32 (Guj.) is also based upon judgments of Punjab & Haryana High Court in the case of *Devi DassGopalKrishan Ltd*. v. *Union of India*, 2002(140)ELT-56 (P&H), dealing with case wherein demand of "interest" had been challenged on the ground that there was no provision under Produce Cess Act 1966 as well as under Vegetable Oils Cess Act 1983 for charging "interest" on delayed payment of cess. Before the Hon'ble Punjab & Haryana High Court, Section 15 (2) of Produce Cess Act, 1966 and Section 3(4) of Vegetable Oils Cess Act, 1983 were for consideration. By virtue of both these provisions of 1966 Act and 1983 Act, provisions of the Central Excise Act and Rules made thereunder, including those relating to refunds and exemptions from duty, were made applicable to levy and collection of duties under the 1966 Act and the 1983 Act. But the Hon'ble High Court had conclusively held that provisions of the Central Excise Act for levying interest cannot be adopted and made applicable for interest in respect of late payment of Cess and Taxes under the 1966 Act and the 1983 Act as interest was a separate levy, and interest cannot be charged without specific charging provision in statute that levied tax and cess. The Punjab & Haryana High Court, following the decisions of the Supreme Court in Para 7 in the cases of J.K. Synthetics Ltd. v/s Commercial Taxes Officer - (1994) 4 SCC 276. Thus, the decision in CCE, Surat-I V/s. Ukai Pradesh SahkariKhandUdyogMandli Ltd. 2011 (271) ELT 32 (Guj.) is the binding decision to be followed in Gujarat, but, adjudicating authority has not followed the same and passed Orders, which are not sustainable and deserves to be set aside in this case. Adjudicating authority who passed Orders has not followed judicial discipline laid down by the Hon'ble Supreme Court in 1991 (55) E.L.T. 433 (S.C.)- UOI vs KAMLAKSHI FINANCE CORPORATION LTD, wherein it is held that decisions of higher authorities should be followed by all authorities in department. In case of 2016 (340) ELT- 193(Tri.–LB) -J.K. Tyre& Industries Ltd v/s CCE, on binding Precedent of the decision, it has been held that Precedent where Conflicting judgments of the various High Courts are available on the issue, Judgment of jurisdictional High Court shall prevail following the Judicial discipline, as held by Tribunal Larger Bench of five Member in 1997 (96) E.L.T.257 (Tribunal) resolving the issue of binding precedent in case of conflicting judgments of High Courts. It has been ordered to follow judgment of jurisdictional High Court in such cases. Accordingly, in the facts of this case, decisions of the Hon'ble Gujarat High Court in case of CCE, Surat-I V/s. Ukai Pradesh SahkariKhandUdyogMandli Ltd reported in 2011 (271) ELT 32 (Guj.) needs to be followed.

5.17 The case of Mahindra & Mahindra Ltd. V/s. Union of India reported in 2022 (10) Tax Amendment India 212–Bombay High Court = (2023) 3 Centax 261 (Bom.) - is a case relating to Section 3 of the Customs Tariff Act, 1975, which is the provision involved in present case also. In this case before the Hon'ble Bombay High Court, the provisions of the Customs Act and the Rules and Regulations made thereunder were adopted and made applicable for duty, tax and cess levied under Section 3 of the Customs Tariff Act 1975 by sub section (8), (which has now been renumbered as sub section (12) with effect from 1.7.2017 in view of the new levy of Integrated tax and Cess. In this case also, the Hon'ble High Court has held that imposing interest and penalty on the demand pertaining to surcharge or additional duty of customs or special additional duty of customs was without jurisdiction.

The Hon'ble High Court has considered the relevant provisions of a few other statutes where the Statute had consciously inserted words like "offences, penalties and interest" while applying provisions of other Acts like the Customs Act and the Central Excise Act, for independent levies imposed under some other enactments. In para 23 of this judgment, the case law of Orient Fabrics Pvt. Ltd. is referred to, and it is recorded that an amendment was made by the Finance Act, 1994 in the Act considered by the Hon'ble Supreme Court, in that case wherein the words "offences and penalties" were consciously inserted. Similarly, in para 26 of judgment by Hon'ble Mumbai High Court, provision of Section 9(8) of the Customs Tariff Act, 1975 is also considered because, for levy of Anti-Dumping Duty imposed under Section 9A of the Customs Tariff Act, provisions of Customs Act for "interest and penalties" are specifically made applicable by Section 9A(8) of Tariff Act. It is held by the Hon'ble Mumbai High Court that there being no specific provision for imposing interest and penalty on CVD levied under Section 3(3) of the Tariff Act 1975, imposing interest and penalty on the demand on surcharge or additional duty of customs or special additional duty of customs was incorrect and also without jurisdiction. The Revenue's Special Leave Petition against the judgment in case of Mahindra & Mahindra Ltd. is dismissed by the Hon'ble Supreme Court on 28.7.2023, and Review Petition of the Revenue has also been dismissed on 09-01-2024. The Hon'ble High Bombay Court in relevant para has held as under :-

"13. Therefore, the issue that requires to be decided by this Court in this petition is limited to leviability of interest and penalty in relation to amounts payable as duty other than basic customs duty.

….

19. When a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. As held by the Apex Court in the matter of J.K. Synthetics Ltd. v. Commercial Tax Officer [1994] 1 SCC 276 relied upon by Mr. Sridharan, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law.

20. Section 28AB of the Customs Act, 1962 is a taxing provision which creates and fastens the liability on a party. The provision has to be strictly construed and will be governed by the language employed in the section. The Apex Court in the matter of Indian Carbon Ltd. v. State of Assam 1994 SCC (4) 276/1988 taxmann.com 1764 (SC), relied upon by Mr. Sridharan, after quoting paragraph 16 of J.K. Synthetics Ltd. (supra), held that the proposition that may be derived from J.K. Synthetics Ltd. (supra) is interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. The Court held that where there is no substantive provision requiring the payment of interest, the authorities cannot, for the purpose of collecting and enforcing payment of tax, charge interest thereon.

21. It is petitioner's case, as noted earlier, that provision relating to interest and penalty are not borrowed under Finance Act, 2000 and under section 3 and 3A of the Customs Tariff Act, 1975, and hence no interest and penalty can be levied on the portion of demand pertaining to surcharge, additional duty being countervailing duty (CVD) and special additional duty (SAD) being levied under section 3 and Section 3A of the Customs Tariff Act, respectively. The total duty demand raised in the show cause notices consist of the demand of basic customs duty under section 12 of the Customs Act, 1962, surcharge of customs duty under section 90 of the Finance Act, 2000, additional duty of customs equal to excise duty under section 3 of the Customs Tariff Act, 1975 (CVD) and special additional duty of customs under section 3A of the Customs Tariff Act, 1975 (SAD).

It is also petitioner's case that Section 28AB of the Customs Act, 1962, interest on delayed payment of duty is applicable only for customs duty leviable under section 12 of the Customs Act, 1962. Section 90 of the Finance Act, 2000 relating to surcharge, Section 3 of the Customs Tariff Act, 1975 relating to additional duty of customs and Section 3A of the Customs Tariff Act, 1975 relating to special additional duty of customs do not borrow the provisions of Customs Act, 1962 relating to interest.

…

26. Sub-section (6) of Section 3 and sub-section (4) of Section 3A of the Customs Tariff Act, 1975 does not provide for any interest or penalty. Neither Section 90 of the Finance Act, 2000 provides for the same. Therefore, no interest and penalty can be levied on the portion of payment pertaining to surcharge, CVD and SAD.

…

30. As stated earlier, sub-section (6) of Section 3 and sub-section (8) of Section 3A of the Customs Tariff Act, 1975 referred to the procedural aspect and machinery provisions under the Customs Act, 1975 and not the charging provisions. So also Section 90 of the Finance Act, 2000. As held by the Apex Court in Jain Brothers v. Union of India AIR 1970 SC 778, which was also cited by Mr. Sridharan, penalty was not a continuation of assessment proceedings and penalty partook all the character of the additional tax. There is no provision under section 3 for additional duty or Section 3A for special additional duty under the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 that creates a charge in the nature of penalty or interest.

…

36. We find support for our view in Hyderabad Industries Ltd. v. Union of India 1999 (108) E.L.T. 321 (SC) relied upon by Mr. Sridharan. The Apex Court considered Section 12 of the Customs Act, 1962 and went on to hold that the charging section to impose CVD is Section 3 of the Customs Tariff Act, 1975. Paragraphs 12, 13 and 14 of Hyderabad Industries Ltd. (supra) read as under:

37. In view of the above, imposing interest and penalty on the portion of demand pertaining to surcharge or additional duty of customs or special additional duty of customs is incorrect and without jurisdiction.

39. The finding of respondent no. 2 that it has the inherent authority or power to determine the terms of settlement covering not only the amount of duty but also interest and penalty as well is ex-facie untenable. Reliance by respondent no. 2 upon Section 127C of the Customs Act, 1962 to direct payment of interest is totally misplaced in the case at hand. Section 127C of the Customs Act, 1962 itself provides that the order of the Settlement Commission has to be in accordance with the provisions of the Customs Act, 1962. Respondent no. 2 certainly cannot pass an order beyond the provisions of the Customs Act, 1962. The provisions relating to interest contained in Section 28AB of the Customs Act, 1962 are not borrowed in the legislation imposing levy of surcharge or CVD or SAD. Respondent no. 2 cannot include interest in the settlement arrived at by it on the ground that petitioner has derived financial benefits by not paying the correct rate of duty when it was due. Deriving financial benefits itself cannot be a ground to order payment of interest in the absence of any statutory provisions for payment of interest."

5.18 In the Customs Appeal No. 41786 of 2019 filed by Acer India (Pvt.) Ltd reported in 2024(5) TMI 478-CESTAT Chennai, the Tribunal Chennai vide Final Order No.40534/2024 dated 08-05-2024 has passed decision recently and held that interest demand, penalty and redemption fine cannot be imposed in relation to CVD leviable under Section 3(1) of the Customs Tariff Act, because there was no charging provision for such levies in the Tariff Act and provisions of the Customs Act for such levies like interest, penalty and fine were not applicable for duty levied under Section 3(1) of the Tariff Act. The judgment of the Hon'ble Mumbai High Court in case of Mahindra & Mahindra Ltd.(supra) is referred to in para 30 by the Tribunal at Chennai which has passed the Order as under :-

> *"The appellant has argued that confiscation of goods, interest demand, penalty and redemption fine imposed cannot be sustained in relation to CVD leviable under Section 3 (1) of Customs Tariff Act, 1975. The Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd. v. Union of India (supra) had considered the said issue and held that interest and penalty in relation to CVD cannot be demanded in the absence of specific provisions for levy of interest, penalty in the Customs Tariff Act, 1975. The said decision was upheld by Hon'ble Apex Court as reported in 2023 (8) TMI 135-SC. Following the same, we hold that the confiscation of goods, interest on CVD, redemption fine and penalties cannot sustain on this ground also."*

5.19 In Final Order No.40846/2023 dated 25.09.2023 passed by the Tribunal, Chennai in case of M/s. Acer India Pvt.Ltd the Chennai Bench of this Hon'ble Tribunal also, the same legal issues arose whether demand of interest on additional duty of customs (CVD) and SAD was sustainable by applying provisions of Customs Act, 1962 ? The Tribunal has held in paras 21, 24, 25, 26 and 28 that penalty, interest etc. cannot be levied in regard to collection of CVD and SAD. The Tribunal has also observed in para 26 of decision that the entire situation was revenue neutral; and therefore the demand for interest, Confiscation of goods, imposition of redemption Fine and penalty was unsustainable. In Para 29, the Tribunal Chennai has concluded and has held as under :-

> *"In the result, the impugned order is modified to the extent of setting aside, the demand of interest, the order of confiscation of goods, the imposition of Redemption fine, penalties imposed and the appropriation of interest paid by the appellant without disturbing the confirmation of duty."*

In the present Appeal cases herein also, the appellant has challenged the demand of interest, order of confiscation of goods, imposition of Redemption fine and penalty imposed and the appropriation of interest paid by the appellant.In the present case also the entire situation is revenue neutral, as Revenue has also allowed credit of entire amount of Integrated tax with interest paid by the appellant, pursuant to Re-assessment of Bill of Entry in question after following the procedure laid down under Circular No.16/2023-Cus. dated 7.6.2023.

5.20 We find that interest is recovered as per Para 5.2(c) of Circular No. 16/2023-Cus dated 07-06-2023, Appellant had no option, but, to pay "Interest" along with IGST, if they wish to avail option to pay IGST in compliance to para 75 of decision dt. 28-04-2023 by Apex Court. We find that in this case, issue is IGST leviable under Section 3(7) of Customs Tariff Act 1975. Section 3(7) is charging section for IGST on goods imported into India, and it is a separate levy independent of Customs Duty leviable under Section 12 of Customs Act. Thus, the Circular No. 16/2023-Cus dated 07-06-2023 directing to charge applicable interest is ex-facie, contrary to provision for charging "interest" u/s 3(7) of Customs Tariff Act 1975 and decisions of the Hon'ble Supreme Court, Punjab & Haryana High Court, Gujarat High Court, Bombay High Court and other decisions, as mentioned above. We observe that any Circular issued by CBIC would reflect only the views of Officers on any issue, but, law is also settled that decision by Court will always prevail over the views expressed in a CBIC Circular. The decisions of Hon'ble Supreme Court in the cases of 2002 (139) ELT-3(SC) - CCE, Vadodara vsDhiren Chemical Industries and 2008 (12) STR-416(SC) - CCE, BolpurvsRatan Melting & Wire Industries shows that circular contrary to the statutory provisions has really no existence in the law.

5.21 This is a case of revenue neutrality and interpretation of provisions. There is no substantive provision for confiscation or imposing Redemption fine in Customs Tariff Act 1975. There is no evidence showing intention for evasion of duty. There is no justification for confiscation of goods or imposing redemption fine, where the goods in question were released on Final Assessment and not available for release. The Larger Bench decision by the Hon'ble Tribunal in Shiv Kripa Ispat Pvt. Ltd-2009 (235) ELT 623 supports Appellant's contention. Thus, the orders for confiscation of goods and imposing redemption fine are not sustainable, in terms of the applicable provisions of law and the decisions relied upon by the Appellant.

5.22 This is a case also of interpretation of provisions. There is no statutory provision for imposing Penalty under section 3(7) or 3(12) of the Customs Tariff Act 1975. There is no evidence showing intention for evasion of duty. Imposition of penalty requires malafide intention to evade duty, which is not found in these cases. The ingredients required for imposing penalty are not found in these cases. Thus, the orders for imposing Penalty are not sustainable, in terms of the applicable provisions of law and the decisions relied upon by the Appellant.

5.23 As regard the submission made on demand being time barred, we find that the entire case is based upon assessments of the relevant Bills of Entry, cleared on final assessment by proper customs officers, where all the relevant documents and Information were provided by Appellant on facts and Re-assessment of same Bills of Entry are after Hon'ble Supreme Court's decision dt. 28-04-2023 and CBIC Circular dt. 07-06-2023. Thereis no suppression by appellant. Since the case was made out on the basis of alleged violation of "Pre-Import Condition" in imports under Advance Authorisation scheme, customs authorities were also aware of the said Pre-Import Condition inserted by the Notification on 13-07-2017, hence the department could have taken action within the normal period. Further, the situation was complete revenue neutral for Appellant on availability of credit of duty paid. In these facts, since no suppression of fact is there and show cause notices were issued beyond two years, from import, the entire demand is time barred. We also find force in the Appellant's submission that Revenue cannot invoke larger period of time limitation for duty demands in cases involving interpretation and resolution of the issues by higher courts upto the level of Hon'ble Apex Court and in a Revenue Neutral Situation. There is no evidence or justification to invoke extended period u/s 28(4) of Customs Act 1962. Since the demand made against the appellant was barred by time limitation, the duty liability is illegal and liable to be set aside. Such duty liability, would be permissible only when the assessee was guilty of deliberate omissions and/or commissions with malafide intention, to evade duty. Thus, we are of the view that in these cases, allegation of suppression of facts etc and invocation of extended period of limitation is not correct. Accordingly, entire demands of duty are beyond the normal period, the orders of confirmation of demands of duty with interest, fine and penalty are not sustainable on the ground of time bar also, though Appellant has not objected confirmation of duty seriously, which has been paid and allowed as credit by the revenue as per the Circular dated 07-06-2023..

5.24 In view of the above mentioned provisions of law and judicial pronouncements, it is settled that in the absence of specific provision relating to levy of Interest, Redemption Fine and Penalty in respective legislation for levy duty, the same cannot be demanded or imposed or recovered by taking recourse to machinery provisions relating to recovery of the duty. Therefore, the orders for recovery of "Interest, Redemption Fine and Penalty" in these cases are not sustainable considering charging provisions of the Customs Act 1962 and relevant provisions under the Customs Tariff Act, 1975 and the decisions rendered thereon as mentioned above. The issue on imposing Interest, Redemption Fine and Penalty is no longer ResIntegra.

5.25 We also note that adjudicating authority has relied upon a few decisions in the impugned orders, which are on different facts and applicable in such facts. The facts and issue in the present cases are not identical to those cases. Therefore, the ratio of the decision is not directly applicable in the present case.

6 Since we decide these Appeals on the multiple counts, on merits and limitation, the other issues raised by the appellant are not taken up or discussed and the same are left open.

7. In view of our above discussion and findings, the impugned orders on confirmation of demands for interest and appropriation thereof, order of confiscation of goods, imposition of Redemption fine and penalty are not sustainable and the same are set aside. The appeals are allowed with consequential reliefs in the above terms.

(Pronounced in the open court on 23.07.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Bharvi