

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

REGIONAL BENCH- COURT NO. 3

Customs Appeal No. 10385 of 2015

(Arising out of OIA-JMN-CUSTOM-000-APP-291-14-15 dated- 19/11/2014 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

Essar Power Gujarat Ltd

44 Km Milestone, Jumnagar Okha Highway
Khambalia,
Jamnagar, Gujarat

.....Appellant

VERSUS

C.C.-Jamnagar(prev)

Sharda House...Bedi Bandar Road,
Opp. Panchavati,
Jamnagar, Gujarat

.....Respondent

WITH

Customs Appeal No. 11282 of 2015

(Arising out of OIO-RAJ-EXCUS-000-COM-02-15-16 dated- 29/04/2015 passed by Commissioner of Central Excise, Customs and Service Tax-RAJKOT)

Essar Power Gujarat Ltd

44 Km Milestone, Jumnagar Okha Highway
Khambalia,
Jamnagar, Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-Rajkot

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat – 360001

.....Respondent

AND

Customs Appeal No. 10513 of 2015

(Arising out of OIA-JMN-CUSTOM-000-APP-291-14-15 dated- 19/11/2014 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

C.C.-Jamnagar(prev)

Sharda House...Bedi Bandar Road,
Opp. Panchavati,
Jamnagar, Gujarat

.....Appellant

VERSUS

Essar Power Gujarat Ltd

44 Km Milestone, Jumnagar Okha Highway
Khambalia,
Jamnagar, Gujarat

.....Respondent

Appearance:

Shri Vishal Agarwal, Shri Akshit Malhotra & Ms. Dimple Gohil, Advocates appeared for the Appellant

Shri Deepak Kumar, Special Counsel (AR) for the Respondent

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

Final Order No. A /11870 - 11872/2022

DATE OF HEARING: 07.06.2022
DATE OF DECISION: 06.12.2022

RAMESH NAIR

The brief facts of the case are that the appellant has set up a 1200 Megawatt Thermal Power Plant at Salaya in the state of Gujarat, which was granted the status of Mega Power Project by the Ministry of Power, Government of India vide their letter F.No. C- 8/2007-IPC dated 08.02.2010. For setting up this project the appellant had entered into a contract dated 24.08.2007 with M/s Global Supplies FZE and also placed separate purchase orders dated 16.04.2008, 21.11.2009 and 26.05.2008 on M/s. Shinkawa, Japan, Arewa T & D & M/s. IDC & Technologies, Israel for import of capital goods. Since these capital goods were required for setting up the project were eligible for exemption from payment of custom duty, if the contracts/purchase orders for importing the same were registered under the Project Import Regulation, 1986,(PIR,1986- for short). The appellant had accordingly applied to the sponsoring ministry for necessary approval and based there on also applied to the customs for registering of contracts entered with the aforesaid 4 vendors under the PIR , 1986. In case of 61 bills of entry covered by Order-In-Original dated 29.04.2015 is concerned, the contracts were registered under PIR, 1986 prior to filing of bill of entry for home consumption, while in respect of 2 bills of entry dated 22.06.2010 and 22.12.2009 covered by Order-In-Appeal dated 19.11.2014 the contracts were registered prior to the assessment of bills of entry and orders for clearance for home consumption having been passed. The limited issue in dispute in the present appeals are as under :-

- (i) Whether benefit of project import is available when contract is registered with the customs authorities after filing an into bond Bill of Entry but before filing of an ex-bond bills of entry for home consumption.
- (ii) Whether change in classification is permissible at the time of ex-bonding from the warehouse for the home consumption (only in respect of appeal No. C/11282/2015)

2. Shri Vishal Agarwal, Learned Counsel along with Shri. Akshit Malhotra and Ms. Dimple Gohil , Learned Advocates appeared on behalf of the appellant. On the issue that whether project import is available when contract is registered with the customs authorities after filing an into bond

Bill of Entry but before filing of an ex-bond bill of entry for home consumption, he submits that the impugned order have proceeded to deny of project import to the appellant on an erroneous premise that Regulation 5 required the application for registration of contracts to be made only before the goods entered into territorial borders of India which is completely untenable, baseless and premised on unharmonious reading of Regulation 4 and 5 of PIR, 1986. He submits that on perusal of Regulation 4 of PIR it is evident that it categorically stipulates that contract have to be registered in the manner specified in Regulation 5 before any order is made by the proper officer of customs permitting clearance of goods for home consumption. Regulation 4 having specifically provided that the contract has to be registered on or before an order for home consumption is made. The phrase "on or before" in regulation 5 ought to be read as "on or before clearance for home consumption". In the instant case it is not in dispute that all the contracts and purchase order in question were registered by the appellant before an order of clearance for home consumption was passed in all 63 bills of entry. Consequently there is no contravention of Regulation 4 or 5 of the PIR, 1986. He referred to CEEC customs manual of instruction para 3.1 and 3.2 of Chapter 5. According to which benefit of PIR, 1986 is available as long as the contract is registered prior to an order for clearance of goods for home consumption is made by the proper officer. He submits that the issue in dispute is no longer res- integra and stands settled in appellants favour by order of this Tribunal in the case of Essar Projects India Ltd vs. Commissioner of Customs port, Kolkata reported in 2015(329) ELT 130 (Tri. Kol). A similar finding was arrived at by the Hon'ble Tribunal in the case of National Aluminium Company vs. CC reported in 2019 (366) ELT 354 (Tri. Kol.).He also relied upon the following Judgments:-

- Bharat Earth Mover Limited vs.CC- 2006 (201) ELT 60
- Eveready Industries India Ltd Vs. CC – 2019 (369) ELT 730

2.1 He submits that as regard the reliance placed by the impugned order on the judgment of Apex court in the case of M/s Dunlop India Ltd vs. CC reported at 1997 (95) ELT 162 (SC), the respondent failed to appreciate that the said judgment was rendered in the context of PIR, 1965, the provision of which are not pari- materia with those of PIR, 1986. He further submits that the judgments of M/s Dunlop India Ltd vs. CC (Supra) follows the ratio of the Hon'ble Apex Court in Mihir Textiles relied upon by the respondents were considered in the case of Essar Projects India Ltd vs.

Commissioner of Customs Port, Kolkata (Supra) wherein a distinction was drawn between the provision PIR,1965 and PIR, 1986 while holding in the favour of assessee.

2.2 He further submits that the respondent have also relied upon the decision of the Hon'ble Apex Court in the case of Sneh Enterprise Vs. CC reported in 2006(202) ELT 7(SC). The facts of that case is not identical to the facts of the present case. He submits that the expression on or before importation appearing in Regulation 5 of PIR , 1986 would mean that contract can be registered at any time before the import is complete. The law on the point as to when import is completed is settled by the Hon'ble Apex Court in the case of Kiran Spinning Mills Vs. Collector of Customs reported at 1999 (113) ELT 753 (SC)

2.3 He also relied upon the decision of Hon'ble Apex Court in the case of Garden Silk Mills Vs. UOI reported in 1999 (113) ELT 358 (SC). In view of above submission he submits that since in the present case the project has been registered before an order for clearance of goods for home consumption is passed, the appellant is eligible for the exemption. Thus, the impugned order deserves to be quashed and set aside.

2.4 As regard the second issue Whether change in classification is permissible at the time of ex-bonding from the warehouse for the home consumption he submits that the impugned order wrongly relied upon this Tribunal decision in the case of M/s. Southern Iron Steel Company reported in 2007 (215) ELT 260 (T) and M/s Ispat Industries reported at 2004 (167) ELT 539 (T). He submits that the finding of the respondent on the decision of this judgment is beyond the scope of allegation labelled in the SCN. The SCN nowhere proposes to deny the classification under Chapter 98 on the ground that the goods were classified under respective tariff heading at the time of filing the warehousing bills of entry therefore, the finding being beyond the scope of SCN is completely unsustainable.

2.5 Without prejudice to the above, he submits that the decisions relied upon by the respondent are distinguishable in the facts and circumstances of the present dispute. The respondent has failed to appreciate the facts that both the said cases pertain to one particular item whose classification as assessed on warehousing bill of entry was sought to be altered at the time of clearance of said item for home consumption. The same was not allowed on the logic that once the characteristics and nature of the goods have been examined and classification determined thereof at the time of warehousing, it was not open to dispute the characteristics and nature of the goods at the

time of clearance of the same for home consumption. However, in the present case the appellant is not disputing the nature and characteristics of the goods and the classification was determined in into bond bills of entry. He submits that in the present case while the appellant does not dispute that at the time of clearance for home consumption the goods sought to be imported by it were individually liable to be classified under the same heading as determined at the time of warehousing. By virtue of the fact that the same were sought to be imported under the PIR as a whole Chapter heading 9801 would apply to all such goods as evident from the mere perusal of Chapter note 2 of Chapter 98 therefore, the aforesaid cases relied upon by the respondent are not applicable to the facts and circumstances of the present case.

2.6 He submits that the aforesaid decisions relied upon by the respondent do not laid down the binding precedent and are in fact contrary to the judgment of Hon'ble Madras High Court in the case of Commissioner of Customs vs. Tungabhadra Fibres Limited reported at 1994 (71) ELT 655 (Mad.). He also placed reliance on the decision of:-

- Dinesh Mills Vs. CC 2007 (220) ELT 246 Tri. Ahmd)
- Ferro Alloys Corporation Ltd Vs. Collector of Customs – 1995 (77) ELT 310 (Tri.-LB)

2.7 He also referred to para 9.1 of Chapter 3 of the CBEC's Custom Manual of Instruction and submits that the entire purpose of an assessment made at the time of warehousing is to ascertain the amount for which a bond is required to be furnished by the importer so as to secure the duty payable of goods if they do not reach the warehouse properly or are improperly removed from the warehouse. He submits that in the context of project import it is a settled practice in all customs houses across India whereby bills of entry in respect of project imports are initially assessed at the time of warehousing under specific chapter headings applicable to imported equipments. If thereafter re-assessed under heading 9801 at the time of ex-bond clearance, in this regard learned counsel invited our attention to various bills of entry in respect of other importers obtained under RTI from Customs House Nhavaseva and Custom House Ballard (State- Mumbai). He also referred to some public notices of customs which clearly state in context of EDI assessments there is an express provision for change of classification of the goods in ex-bond bills of entry as compared to the Into-bond bills of entry if so required. Therefore, the change of classification is permissible at time of ex-bond clearance.

2.8 As regard the confiscation redemption fine and penalty, it is his submission that goods are not liable for confiscation under section 111 (o) in as much as there is no violation of post import condition. Even there is no allegation in the SCN regarding any violation of post import condition therefore, the goods are not liable for confiscation and imposition of penalty is unsustainable.

2.9 Without prejudice, he submits that the redemption fine is imposable only when the goods are available for confiscation. In the present case neither the goods were available nor the same was released provisionally on provisional release bond. Therefore, the redemption fine is not imposable. He placed reliance on the following judgment :

- Finesse Creations – 2009 (248) ELT 122 (Bom.) maintained in 2010 (255) ELT A120 (SC).

2.10 In light of the above submission, he prays that appeals may be allowed and the impugned orders be set aside.

3. Shri Deepak Kumar, Learned Special Counsel appearing on behalf of the Respondent reiterates the finding of the impugned order. As regard the Revenue's appeal he reiterates the grounds of the appeal. He also placed reliance on the following judgments:

- Dunlop India Ltd - 1997 (95) ELT 162 (SC)
- Mihir Textiles Ltd – 1997 (92) ELT 9 (SC)
- Pratibha Industries Ltd - 2005 (188) ELT 433 (Tri.-Mum)
- Industries Ltd – 2015 (320) ELT A273 (SC)
- Ajanta Offset & Packaging Ltd – 1997 (94) ELT 443 (SC)
- Radhe Exim Pvt Ltd – 202 (372) ELT 600 (Tri.- Ahmd)
- Prabhat Cotton and Silk Mills Ltd – 1982 (10) ELT 203 (Guj.)

4. We have carefully considered the submission made by both sides and perused the records. As regard the assessee appeal the issue for our consideration in this case are as under:-

- (i) Whether benefit of project import is available when contract is registered with the customs authorities after filing an into bond Bill of Entry but before filing of an ex-bond bills of entry for home consumption.
- (ii) Whether change in classification is permissible at the time of ex-bonding from the warehouse for the home consumption (only in respect of appeal No. C/11282/2015)

4.1 As regard the first issue we find that the Adjudicating Authority/Commissioner (Appeals) denied the exemption available for the project import applying the regulation 5 whereby it was interpreted that as per the said regulation of Project Import Regulation, 1986 (PIR, 1986) the assessee's is required to register the project before the commencement of importation in other word the project should be registered before the goods entered the territorial border of India. In the present case the facts are not under dispute that the goods under the project import have been warehoused under into bond bill of entry thereafter before clearance of the goods from the warehouse under ex-bond bills of entry the project has been registered. For ease of reference regulation 4 and 5 of PIR, 1986 are reproduced below:

" REGULATION 4. Eligibility. - *The assessment under the said heading N. 98.01 shall be available only to those goods which are imported (whether in one or more than on consignment) against one or more specific contracts, which have been registered with the appropriate Custom House in the manner specified in regulation 5 and such contract or contracts has or have been so registered,*

(i)Before any order is made by the proper officer of customs permitting the clearance of the goods for home consumption;

(ii)In the case of goods cleared for home consumption without payment of duty subject to re-export in respect of fairs, exhibitions, demonstrations, seminars, congresses and conferences duly sponsored or approved by the Government of India or Trade Fair Authority of India, as the case may be, before the date of payment of duty."

REGULATION 5. Registration of Contracts.- *(1) Every importer claiming assessment of the goods falling under the said heading No. 98.01, on or before their importation shall apply in writing to the proper officer at the port where the goods are to be imported or where the duty is to be paid for registration of the contract or contracts, as the case may be:*

Provided that in the case of consignments sought to be cleared through a Custom House other than the Custom House at which the contract is registered, the importer shall produce from the Customs House of registration such information as the proper officer may require.

(2) The importer shall apply , as soon as may be, after he has obtained the Import trade control licence wherever required for the import of articles covered by the contract and in case of imports

covered by the Open General Licence or imports made by Central Government, any State Government, statutory corporation, public body or Government undertaking run as a joint stock company (hereinafter referred to as "Government Agency") as soon as clearance from the [concerned sponsoring authority], as the case may be, has been obtained

(3) The application shall specify –

(a) the location of the plant or project;

(b) the description of the articles to be manufactured, produced, mined or explored;

(c) the installed or designed capacity of the plant or project and in the case of substantial expansion of an existing plant or project the installed capacity and the proposed addition thereto;

(d) such other particulars as may be considered necessary by the proper officer for purposes of assessment under the said heading.

[(4) The application shall be accompanied by the original deed of contract together with a true copy thereof, the import trade control licence, wherever required, and an approved list of items from the [concerned sponsoring authority]

(5) The importer shall also furnish such other documents or other particulars as may be required by the proper officer in connection with the registration of contract.

(6) The proper officer shall, on being satisfied that the application is in order register the contract by entering the particulars thereof in a book kept for the purpose, assign a number in token of the registration and communicate that number to the importer and shall also return to the importer all the original documents which are no longer required by him."

From the perusal of the Regulation 4 of PIR, 1986 it is evident that contract have to be registered in the manner specified in regulation 5 before any order is made by the proper officer of customs permitting clearance of goods for home consumption. Regulation 4 having specifically provided that the contract has to be registered "on or before" an order for home consumption is made. The phrase "on or before" in regulation 5 ought to be read as "on or before clearance for home consumption". In the instant case it is not in dispute that all the contracts and purchase orders in question were registered by the appellant before an order of clearance of home consumption was passed in all 63 bills of entry. Therefore, we do not find

any contravention of Regulation 4 and/or 5 of the PIR, 1986. We further observed that para 3.1 and 3.2 of Chapter 5 of CBEC's Custom Manual of Instruction is very relevant which are reproduced below:-

3.1 In terms of Regulation 4 of the Project Import Regulations, 1986 (PIR) the basic requirement for availing the benefit of assessment under Tariff Heading 98.01 is that the importer should have entered into one or more contracts with the suppliers of the goods for setting up a project. Such contracts should be registered prior to clearance in the Customs House through which the goods are expected to be imported. The importer shall apply for such registration in writing to the proper officer of Customs.

3.2 Regulation 5 provides in the manner of registering the contracts, as follows:-

(i) Before any Order is made by the proper officer of Customs permitting the clearance of the goods for home consumption;

(ii) In the case of goods cleared for home consumption without payment of duty subject to re-export in respect of fares, exhibitions, demonstrations, seminars, congresses and conferences, duly sponsored or approved by the Government of India or Trade fair Authority of India, as the case may be, before the date of payment of duty."

From the plain reading of the above para of CBEC's Custom Manual of Instruction also makes it very clear that the contract should be registered before any order is made by proper officer of customs permitting goods for clearance for home consumption. Therefore, in the present case since all the project and purchase orders were registered before filing of ex-bond bills of entry i.e. before clearance of goods for home consumption the appellant have scrupulously complied with the provision of Project Import Regulation, 1986. This issue is no longer res-integra as this Tribunal dealing with the absolutely identical issue in the case of Essar Projects India Ltd vs. Commissioner of Customs port, Kolkata (Supra) held as under:

"5.6 *A plain reading of Regulation 4 and the instruction of CBEC mentioned above leaves no room for doubt that the timing stipulated for registration of the contract is on or before clearance of the goods for home consumption i.e. when it leaves the customs barrier. Needless to mention, clearance of goods for home consumption as mentioned in Regulation 4 of PIR, 1986 cannot be construed as crossing of the Indian territorial waters and depositing it in the warehouse. Unhesitatingly, it could be said that the clearance of the goods is for home consumption i.e. when the goods move out of the Customs control so as to mix with the mass of goods for consumption."*

In the above judgment the Tribunal has clearly given finding that clearance of goods for home consumption as mentioned in Regulation 4 of PRI, 1986 cannot be construed as crossing of the Indian territorial waters and depositing it in the warehouse. With this observation on the identical fact that the project was registered not before the importation of the goods but before the ex- bond clearance for home consumption, the benefit of PIR, 1986 was extended. Similarly Tribunal has arrived at the finding in the case of National Aluminium Company (Supra) wherein it was held as under :-

"7. From the combined reading of Rules 4 and 5 it is evident that the registration of the contract for availing the benefit of Project Import has to be done on or before their importation so, the Commissioner (Appeals) finding that the registration should be done prior to import is not correct. In this case, the appellant has not effect the clearance of goods till their project at the strength of Sponsoring Authority Certificate was permitted by the Customs. Therefore, we are of the view that no violation of project import benefit has been committed by the appellant. Also the appellant was registered for benefit under project import benefit initially, after the lapse of seven and a half years, the Department can't take the stand contrary to that at the time of finalization, denying the concessional rate of duty under project import. Therefore, we set aside the impugned order and allow the appeal."

In the aforesaid judgment the goods were imported but even after import the appellant did not have the certificate from the project sponsoring authority and only after obtaining the said certificate the customs has permitted the clearance of the goods under PIR, 1986.

- A similar view was taken by this Tribunal in the case of Eveready Industries India Ltd (Supra).

"5. We find that the issue in this appeal is regarding demand of customs duty on the ground that the appellant had irregularly taken duty concession under Project Import Regulations, 1986 (PIR) inasmuch as they have not complied with sub-clause (i) of Regulation 5 of the PIR as the contracts have been registered by the proper officer at the port after importation of the goods and warehouse.

6. We also find that as per Rule 5(2) of the PIR, any importer desiring to claim the benefit of Project Imports, shall get a clearance from the Sponsoring Authority. In the present case the sponsoring authority i.e. the Ministry of Commerce and Industries, Department of Industrial Policy and Promotion (light engineering section), had cleared/approved the project imports of the appellant for import of capital goods for essential setting up of project at Uttaranchal in terms of Customs Notification No. 230/86-Cus., dated 3-4-1986. This has been addressed to the Assistant Commissioner of Customs, Customs House, Kolkata and is part of the appeal paper book of pages 41, 42, 43 and 44.

7. We further observe that the Regulation 5 is not a condition determining eligibility of the imported goods for the benefit of concessional rate of assessment under Project Import Regulation. It is only a procedural requirement. The importer shall apply as soon as he has obtained the clearance from the sponsoring authority under Regulation 5(2) of the PIR.

8. We also observe that there is no prescribed time limit for obtaining clearance from the sponsoring authority. This aspect has further been made clear vide Para 8 of Chapter 5 of C.B.E. & C.'s Customs Manual. On a careful perusal of the provisions of Chapter 98 of the Customs Tariff Act, read with Regulations 4 and 5 of the Project Import Regulation, it is our considered view that the project can be registered before the goods are cleared for home consumption. In the case of *Mihir Textiles Ltd. v. Collector of Customs, Bombay* [[1997 \(92\) E.L.T. 9 \(S.C.\)](#)], the Hon'ble Apex Court had examined the provisions under Chapter Heading 84.66, which laid down that the registration of contract has to be done before any order is made by proper officer of Customs permitting clearance for home consumption or deposit in warehouse. This restriction is absent in Regulations 4 and 5 of the present Regulation under Chapter Heading 98.01. Regulation 4 specifically omit what refers to the condition regarding registration being done before depositing in a warehouse and only states before clearance for home consumption. We find that both the lower authorities have not gone through the provisions carefully and had denied the benefits on incorrect interpretation of the statutory provisions. In the present case the appellants had registered the contract before clearance of the warehoused goods and hence they are eligible for the benefit of the project import."

- In the case of *Bharat Earth Movers Ltd (Supra)* identical issue has been decided:-

"4. On a careful consideration and perusal of the provisions of Chapter 98 of Customs Tariff Act read with Regulation 4 & 5 of the Project Import Regulations, it is cleared that the project can be registered before the goods are cleared for the home consumption. In the case of *Mihir Textile Ltd.*, the Apex Court had examined the provisions as under chapter heading 84.66 which clearly laid down that the registration of contract has to be done before clearance of goods for home consumption or before the deposit in the warehouse. This restriction is absent in Regulation 4 & 5 of the present Regulations and in Chapter Heading 98.01. The Regulation 4 specifically omits a reference to the condition regarding registration being done before depositing in a warehouse and only states that it has to be done before clearance for home consumption. Therefore, both the authorities have not carefully gone through the provisions and had denied the benefit on incorrect reading of the provisions. The appellants had registered the contract before the clearance of the warehoused goods and hence they are eligible for the benefit of the Project Import in terms of the Tribunal ruling rendered in the case of *McNally Bharat Engineering Company Limited* vide final order No. 1607/05, dated 8-9-2005. The refund is not hit by provisions of unjust enrichment. The appellants succeed in this appeal and the same is allowed by consequential relief, if any."

In the above judgments since consistent view was taken by the Tribunal, in our view the issue is no longer res-integra. Therefore, merely because the project was registered prior to clearance of goods for home consumption

from warehouse there is no contravention on the part of the appellant and they are legally entitled for the exemption available to the project import. As regard the judgment relied upon by the lower authorities, all those judgments being on the different facts, the ratio of same will not be applicable in the present case. On the contrary all the above judgments which are in the favour of the appellant are directly on the issue in hand. For this reason also the judgments relied upon by the lower authorities for confirmation of demand are not relevant in the dispute in hand.

4.2 As regard the issue no. (ii) regarding the change of classification to chapter 98.01 we find that there was no charge in the SCN regarding change of classification. Therefore, entire proceeding on the issue which is not flowing from the SCN is vitiated. It is settled law that an adjudicating authority cannot go beyond the scope of SCN. In view there of this finding of lower authority and the consequent conclusion drawn thereof are totally untenable and needs to be discarded at the threshold.

4.3 Without prejudice we also find that since at the time of inbonding of goods in warehouse project was not registered obviously classification could not have been made under chapter 9801. In case of project import a specific tariff entry has been created under chapter heading 9801 even though the goods are otherwise classifiable in the respective head of individual item. When the project was registered and ex-bond bills of entry were filed the correct classification was 9801 only. Therefore, we do not find any error on the part of the appellant or there has been no mis-classification of goods. In this regard we reproduced the chapter note 2 of the Chapter 98 :-

"2. Heading 9801 is to be taken to apply to all goods which are imported in accordance with the Regulation made under Section 157 of the Customs Act, 1962 (52 of 1962) and expressions used in this heading shall have the meaning assigned to them in the said Regulations."

As per the above chapter note it is clear that all the goods which otherwise may be classifiable in its actual tariff heading but once the goods is cleared under PIR , 1986 all the goods shall be classified under 9801. There is a force in the submission of he learned counsel, as regard the information gathered under RTI that at various customs ports even though the into bond bills f entry were filed under tariff item of individual goods but in ex-bond bill of entry the project import has been classified under CTH 9801 and benefit was allowed without raising any objection. We are of the view that at the time of clearance of the goods either from the port for home

consumption or either from the warehouse under ex-bond bills of entry the correct custom tariff head has to be applied. For example, if by mistake wrong classification was made in the into bond bill of entry, the same cannot be allowed to be continued while filing the ex-bond bills of entry and in the ex-bond bills of entry the error has to be rectified and clearance shall be effected under the correct classification. Therefore, the revenue's contention that the appellant are not allowed to change the classification in the ex-bond bills of entry is absolutely incorrect and illegal. In this regard, we take support of the Judgment of Hon'ble Madras High Court in the case of Commissioner of Customs vs. Tungabhadra Fibres Limited (Supra) wherein the Hon'ble court has found as under:-

“6. The main question that arises for consideration in Writ Appeal No. 1470 of 1991 is as regards the levy and collection of enhanced auxiliary duty, as there is no dispute regarding the basic duty. Even in paragraph 3 of the affidavit filed in support of the writ petition, the company had accepted that on 15-6-1981, its clearing agents filed two Bills of Entry for warehousing and for deposit in the bonded warehouse and that the goods were entered for warehousing for, the period upto 13-9-1992. Again, in paragraph 12, the company had accepted that the endorsement in the original had accepted that the endorsement in the original Bills of Entry was for warehousing. Obviously, therefore, at the time when the Bills of Entry for warehousing were filed for purposes of execution of Bonds, an assessment had been done on the basis of 40% basic duty and 5% auxiliary duty, as it then stood, under the Finance Act, 1981. This assessment had been done only for the purpose of determining the amount of duty for execution of warehousing bonds, as per Sec. 59 of the Act for entering the goods into the warehouse. It is also not in dispute that warehousing bonds had been executed by the company on this footing and only thereafter, the company had been permitted to deposit the goods in the bonded warehouse. When the purpose of the assessment on the filing of a Bill of Entry for warehouse is only to secure the duty payable by the importer, on the clearance of the goods later, it cannot be accepted that such a valuation made for the purpose of execution of a warehousing bond is conclusive. That at best can be regarded only as a tentative estimate of the liability to pay the duty, which is secured under the terms of the warehousing bond. Therefore, the stand of the company that the assessment to duty had already been made, cannot be accepted. It is also not in dispute that the company had not paid any duty as the goods were warehoused. The very idea of warehousing the consignment is to defer payment of the duty till actual clearance for home consumption. Admittedly, the company had not paid the duty and it had resorted to warehousing of the consignments and for the purpose of ascertaining the amount of duty and also to secure the same by the execution of bonds, the assessment had been made and not for any other purpose. In view of this, the claim of the company that even at the time when the Bills of Entry for warehousing had been filed, an assessment had been made and that cannot be gone back upon, cannot be accepted. When, even according to the company, the goods had been entered for warehousing, the proper provision applicable would only be Sec. 15(1)(b) of the Act read with S. 68 thereof and not Sec. 15(1)(a). The learned judge, while accepting that Bills of Entry for deposit in the bonded warehouse were filed on 15-6-1981, fell into an error in holding that the goods had been entered for home consumption on arrival by presenting the Bills of Entry and therefore, the duty as leviable on that date alone, was payable. When it is not disputed by the company that

the Bills of Entry filed on 15-6-1981 was for deposit of the goods in the bonded warehouse and not for clearance for home consumption, it is difficult to bring the case under Sec. 15(1)(a) of the Act."

It is settled law that in case of warehousing goods at the time of ex-bond clearance for home consumption, the goods have to be re-assessed under section 2(2) of Customs Act, 1962. This issue has been considered by this Tribunal In the case of Dinesh Mills Vs. CC (Supra) wherein the following observation has been made:-

"5. *In respect of the goods imported and warehoused, it is to be noted that the goods are assessed and admitted to warehouse after taking necessary bond. Section 15 of the Customs Act prescribing the date for determination of rate of duty in the case of goods cleared from a warehouse under Section 68 to be the date on which a bill of entry for home consumption in respect of such goods was presented. At the time of clearance from the warehouse, reassessment is therefore a must. It may so happen that the rate of duty at the time of into-bill of entry and the rate of duty at the time of ex-bond bill of entry could be the same and the reassessed duty may not be different from the originally assessed duty. But reassessment is a must to give effect to the provisions of Section 15. It is also to be appreciated that Section 2(2) of the Customs Act defines the term assessment as follows "assessment includes provisional assessment, reassessment and any order of assessment in which the duty assessed is nil". Therefore, it will be reasonable to conclude that there is a need for reassessment in respect of warehoused goods when the same is cleared from the warehouse and such reassessment is also assessment in terms of Section 2(2) of the Customs Act. As in the present case, no challenge of the assessment has been made by the importer, his claim for refund is not admissible in the light of the ratio laid down by Hon'ble Supreme Court in the case of Priya Blue Industries cited supra."*

4.3 We further find that as regard the in-bond and ex-bond bill of entry for warehouse goods relevant para 9.1 of Chapter 3 of CBEC's Customs Manual of Instruction is relevant which is reproduced below:-

"Bill of Entry for bond/warehousing:

9.1 A separate form of Bill of Entry is used for clearance of goods for warehousing. All documents, as are required to be attached with a Bill of Entry for home consumption are also required with the Bill of Entry for warehousing which is assessed in the same manner and duty payable is determined. However, since duty is not required to be paid at the time of warehousing, the purpose of assessing the duty at this stage is only to secure the duty in case the goods do not reach the warehouse. The duty is paid at the time of ex-bond clearance of goods for which an Ex-Bond Bill of Entry is filed. The rate of duty applicable to imported goods cleared from a warehouse is the rate in force on the date of filing of Ex-Bond Bill of Entry."

From the above para it is clear that the assessment in real sense takes place at the time of ex-bonding of the warehouse goods. Therefore, the effect of rate of duty, any exemption notification prevailing at the time of filing the ex-bond bill of entry shall be applicable and not the one which is

applicable at the of in-bonding of the good even though the different rate of duty was applied in the in-bond bill of entry.

4.4 In view of above settled position the Revenue has no authority to question the change of classification at the time of filing ex-bond bills of entry in the present case which is the correct one as compared to the classification declared in the into-bond bill of entry. Therefore, the revenue has wrongly restricted the benefit of PIR to the appellant.

4.5 As regard confiscation of the goods, we find that since we hold that the appellant have availed the PIR benefit correctly and legally the confiscation being a consequential to the charge of the revenue shall also not be maintainable. Without prejudice, we find that it is an admitted fact that the goods were cleared from the warehouse and same were never seized and nor released provisionally on execution of any provisional release bond. In this position neither confiscation can be made nor the redemption fine can be made. Consequently, the penalty is also not sustainable. The revenue's appeal was filed challenging the order of Commissioner (Appeal) to the extent that the Commissioner (Appeals) has not quantified the redemption fine and penalty. Since on the merit itself we have decided that the appellant is entitled for the benefit of PIR and their appeal against the common order of Commissioner (Appeals) succeeds there is no substance in the Revenue's appeal and the same is not maintainable.

5. As per our above discussion and finding, the impugned orders are not sustainable and hence the same are set aside. Appeals by the assessee's are allowed and Revenue appeal is dismissed.

(Pronounced in the open court on 06.12.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)