CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

C/3-5/2009-DB

[Arising out of Order-in-Original No. 21-2008-CUS dated 31/10/2008 passed by Commissioner of CUSTOMS, BANGALORE]

1. **Ratnagiri Impex Pvt Ltd**
   No1/g,7th Cross Guddadahalli, Mysore Road
   BANGALORE-560026
   KARNATAKA

Appellant(s)

2. **Mr. S.A. Vasudevamurthy, MD**

3. **Mr. S.A. Gopalakrishna, Director**

Versus

C.C-Bangalore-cus
C.R. BUILDING,QUEENS ROAD,
P.B.NO. 5400,
BANGALORE
KARNATAKA
560001

Respondent(s)

Appearance:

Mr. B.V KUMAR LAW ASSOCIATES
#103,17TH "C" MAINROAD, 5TH BLOCK,
KORAMANGALA , BANGALORE
BANGALORE
KARANTAKA
560095

For the Appellant

Dr. J.Harish, AR

For the Respondent

Date of Hearing: 27/06/2018
Date of Decision:10/07/2018

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20934-20936/2018

Per : P. ANJANI KUMAR

The appellants have imported Sprayers, Cutters, Blowers of different varieties and models for use in the tea, coffee and rubber plantation sector availing the benefit of Notification No. 21/2002 Customs dated 01.03.2002 during the period from December 2003 to 31.03.2007. The department has issued a Show Cause Notice dated 04.12.2007 to the appellants alleging that majority of sales were affected to customers for use in non-plantations sector like agriculture, Sericulture, forestry, hospitals, Government organizations, hotels and resorts etc. and only small portion of the imports were sold for use in plantations sector. The SCN demanded a duty of Rs.1,30,22,441/- while seeking to levy penalties on the appellant and the Managing Director and Director of the company. The learned Commissioner of Customs, Bangalore passed Order-in-Original No. 21/2008 of Customs adjudication dated 31.10.2008 denying the benefit available at serial no. 252 (a) of the Notification No. 21/2002. The learned Commissioner has also confiscated the imported goods and levied a fine of 2.5 crores in lieu of confiscation. He imposed a penalty equivalent to duty on the appellants and a penalty of Rs.10, 00,000/- each on MD (Shri Vasudeva Murthy) and Director (Shri Gopal Krishna) hence these appeals.

2. The appellants contended that in terms of the

Notification No. 21/2002 Customs dated 01.03.2002 are required to be actually used in plantation sector to be eligible for concessional rate of duty. It is enough if they are capable of being used; the appellants contended that the imports were made during the period 16.12.2003 to 28.03.2007 vide 221 Bills of Entry and their assessments were final and the assessment cannot be reopened through Show Cause Notice without challenging the assessments in appeal. They have placed reliance on the following:

(i) CCE, Kanpur vs. Flock (India) Pvt Ltd; 2000 (40) RLT 131 (SC) wherein it was held that an assessment order cannot be reopened unless its correctness is questioned through an appeal. They have also relied upon the following cases.

(i) Priya Blue Industries Ltd. vs. CC; 2004 (64) RLT 321 (SC)
(ii) Voltas Ltd. Vs Commissioner of Central Excise and Custom; 2006 (202) ELT 355 (T).
(iii) Sree Digvijay Cement Co. Ltd. Vs CCE-1991 (52) ELT 631 (T).
(iv) Doothat Tea Estate Kanoi Plantation Pvt. Ltd. Vs CCE, shilling-2001 (135) ELT 386 (T).
(v) La Opala RG Ltd. Vs Commissioner of Central Excises JSR; 2002 (149) ELT (T).
(vi) Pushpam Pharmaceuticals Company Vs CCE; 1995 (78) ELT 401 (SC).
(vii) Tamil Nadu Housing Board Vs CCE, Madras-1994 (74) ELT 9 (SC).
(ix) CCE, Kanpur Vs U.P. Lamination 1997 (89) ELT (SC).
(x) Alocbex Metals Ltd- 2003 (153) ELT 241(SC).

3. The appellants also contended that there was no suppression of fact either in the description of the goods or in the valuation of goods. Therefore, extended period cannot be

invoked. The learned Commissioner has totally ignored the law as laid down by the Hon'ble Apex Court. They relied upon the following cases

(i). Pushpam Pharmaceuticals Company Vs CCE 1995(78)ELT 401(SC)
(ii). Tamil Nadu Housing Board Vs CCE Madras 1994(74) ELT9(SC)
(iii). Lubri Chem Industries Ltd Vs CCE Bombay 1997(73) ELT 257(SC)
(iv). CCE Kanpur Vs UP Lamination 1997(89) ELT 440(SC)

4. A careful reading of serial No. 252A of Notification No. 21/2002 would make it clear that there is 'no end use condition' attached either in serial no. 252A or in list 32A, in the said Notification. When there is no condition attached to an exemption Notification, the Department cannot import any condition into the said Notification and hold that the impugned machines have to be actually used or only used in coffee/tea/rubber plantation sector per se.

5. The appellants further contended that if the intention of the legislature was to restrict the benefit off the concessional rates duty, the Notification would have stated so. The words "Machinery for coffee plantation sector should not be taken in a narrow sense to mean Machinery for actual use in coffee plantation in that sector alone. It is not the case of the Department that these machines are not capable of being used in the coffee/tea/rubber plantation sector. It is an admitted fact that some of the machines have in fact been sold and used in these

sectors; when the said Notification does not stipulate a condition of proof of end use, the Department cannot claim that if the intention were to grant benefit without any condition, it would have been spelt out. If it was the intention of the legislature the words 'only' or 'exclusively' or 'entirely' would have been used in the Notification; a narrow interpretation of the Notification will defeat the very object and purpose of the Notification. The appellant referred to the Hon'ble Supreme Court observation in the case of Commissioner of Customs, Kolkata vs. Rupa & Co. Ltd.- 2004 (170) ELT 129 (SC) that the term 'required for' would also include materials which are not directly used in the manufacture of the resultant product but are still required for the purpose of manufacturing resultant products. They also relied upon the following case law:

(i). State of Haryana Vs Dalmia Dadri Cement Ltd 1998(14) ECR 292
(ii). UOI & Othrs Vs Tata Iron and Steel Co Ltd, Jamshepur 1977(1) ELT (J 61)
(iii). Asean Trading Agency Vs CC 1991(55) ELT 253(T). This case was upheld by Supreme Court in 1997(94) ELT A 129
(iv). Kudremukh Iron Ore Ltd Vs CC Bangalore 2000(41) RLT 138 (T-LB)
(v). Shri Harakchand Dharmaji Vs CC Madras 1996(88) ELT 764
(vi). Dunlop India Ltd & MRF LTD Vs UOI & Others 1983(13) ELT 1566(SC)
(vii). AK Reporters Vs CC Chennai 2003(157) ELT 153(T)
(viii). CCE Chennai Vs Q Max Test Equipment Pvt Ltd 2003(159) ELT 665(T)
(ix). Mentha & Allied Products Ltd Vs CCE Meerut-1999(112)ELT 600(T)
(x). Karl Storz Endoiscopy India (Pvt) ltd Vs CCE New Delhi 2000(123) ELT 1071(T)
(xi). Cougar International Pvt Ltd Vs CC Cochin 1984(16) ELT 310 (T)
(xii). Farida Classic Shoes Ltd Vs CCE 1999(83) ECR 869(T)
(xiii). Fertilizer Corporation of India Ltd Vs CCE Patna 1987(30) ELT 507(T)
(xiv). Camphor & Allied Products Ltd Vs CCE 1999(113) ELT 516(T)

6. The appellants contended that the Hon'ble Apex Court and other courts have held that the wording in an exemption Notification have to be construed keeping in view the object and purpose of the exemption and while interpreting an exemption Notification, the same should not be read in a narrow manner as to defeat the object of the Notification. They relied upon the following cases:

(i). UOI Vs Wood Papers Ltd 1990(47) ELT 500 SC
(ii). Collector Vs Parle Exports P Ltd Vs CC Bombay 1988(38) ELT 741 SC
(iii). Oblum Electrical Industries Ovt Ltd Vs CC Bombay 1997 (94) ELT 449 SC
(iv). CC Bombay Vs United Electrical Industries Ltd 1999(108) Elt 609
(v). CCE Vs Himalayan Co-op Milk Product Union Pvt Ltd 2000(122) ELT 278 SC
(vi). KR Stell Union Ltd Vs CC Kandla 2001(129)ELT 273(SC)
(vii). Shriram Vinyl & Chemical Industries Vs CC Mumbai 2001(129) ELT 278 SC
(ix). Sianet Pvt Ltd & another Vs UOI & another 1984(18) ELT 141 (Bom)
(x). Baxter(I) Pvt Ltd Vs CC Calcutta 2001(130) ELT 652 (T)
(xi). Asea Brown Boveri Ltd Vs CCE Bhuvaneshwar 2000(121) ELT 666 (T)
(xii). HMM Ltd Vs CCE New Delhi 1996(87) ELT 593(SC)
(xiii). The Tata Oil Mill Co Ltd Vs CCE 1989(43) ELT 183 (SC)

7. The appellant further contended that they deal in a range of products required for agriculture, horticulture, plantations, forestry, sericulture and other segments. In order to promote business and also to create awareness among the agriculturists, plantation owners, growers etc. we participate in tenders organized by different State Government and thus, they have come in to the contracts with Government of Karnataka (Department of Agriculture). The A.P. State Agro Industries Development Corporation Ltd etc. 99 % of the sales are done

through their dealers' network and only a small percentage of cases they have supplied against tenders or through rate contract. The learned Commissioner ignored the letters received from Department of Agriculture, Government of Karnataka and the judicial precedent cited by the appellants. The bulk of their sales were for use in coffee and tea plantations and a small part of the equipment has been sold to non-plantation sector. However, as submitted the said equipment is capable of being used in the coffee/tea plantations; the Department contended that the appellants have not maintained any record indicating the customers who have purchased the aforesaid goods for use in tea, coffee and rubber plantation sector despite having prepared formats indicating the purpose or usage of machines. The appellants would like to submit that the Notification No. 21/2002 has not prescribed any statutory record to be maintained by the importers. In the absence of such a condition, the allegation is not tenable in law.

8. The appellants contended that when the issues relate the interpretation of Notification, penalties cannot be imposed and they relied upon following case laws:

(i). *commissioner of Customs Mumbai Vs A. Shankar Rao 2002(149) ELT 387(T)*
(ii). Goenka Woollen mills Ltd Vs CCE Shillong 2001(135) ELT 873(T)
(iii). Vadhera Luminaries Vs Commissioner of C.Ex Delhi-1 2004(166) ELT 211(T)

9. The appellants contended that the Department has not placed on record any evidence to show that the impugned goods have not properly imported or there was a misdeclaration in terms of value and description of goods. Further, no evidence has been placed on record to the fact that the appellants have done or omitted to do some act, which act has rendered the said goods liable for confiscation. In the absence of any such evidence, the imposition of penalties on the Directors and the appellant is bad in law. They relied upon the following cases:

(i). Lalson Vs CC Bombay 1999(109) ELT 709(T)
(ii). KK Manufacturing Co Vs CC Bombay 1997(91) ELT 635(T)
(iii). Dass Photo Electronics Vs CC New Delhi 1987(30) ELT 988 (T)
(iv). Sear Cargo services Vs CC New Delhi 2001(130) ELT 960(T)
(v). Parda Auto Parts Vs CC(P) Mumbai 2000(119) ELT 548(T)
(vi). Pranalal Timbedia CC (prev) Mumbai 2000(122) ELT 162 (T)
(vii). Sij Electronics Comp. Tech.Pvt Ltd Vs CC Kochi 2001(129) ELT 528(T)
(viii). Alex C Joseph & Soman Sunil Kumar Vs CC Cochin 2001(132) ELT 612(T)
(ix). J. Mahabeer & Co Vs CC Mumbai-II 1998 (103) ELT 442(T)
(x). Nippon Audiotronix Ltd Vs CC New Delhi 2000(120) ELT 76(T)

10. The appellants submitted that concessions or deliberate withholding of information by the assesse when he knew otherwise is required to be proved to invoke the penal provision and that mere inaction, failure or negligence on his part is not sufficient. They placed reliance on the following case laws;

(i). CC Vs Chemphar Drugs and Liniments 1989(40) ELT 276(SC)
(ii). Padmini Products Vs Collector 1989(43) ELT 195 (SC)
(iii). Tamil Nadu Housing Board Vs CCE Madras 1994(74) ELT9 (SC)
(iv). Pushpam Pharmaceuticals Company Vs CCE 1995(78) ELT 401(SC)

11. The appellants contended that as they have not violated

any condition, the imposition of mandatory penalty under Section 114 (A) is not correct and also confiscation and imposition of R.F is not tenable when goods were not available for confiscation. They placed reliance on the following case laws.

(i). Shiv Kripa Pvt Ltd Vs CCE Nashik 2009(235) ELT 623 (Tri-LB)
(ii). Associate Marketing Vs CC Airport 2006(195) ELT 287 (Tri-Chennai)
(iii). Shiwalaya Spinning & Weaving Mills P Ltd Vs CC Amritsar 2002(146) ELT 610 (T)
(iv). Chinku Exports Vs CC Calcutta 1999(112) ELT 400(T)
(v). Prudential Pharmaceuticals Ltd Vs CC 2001(136) ELT 1057(T)
(vi). Shilpa Trading Co Vs CC Bangalore 2008(224) ELT 453 (Tri. Ban)

12. The Departmental Representative drawing the attention to Para 1.2 of the SCN has stated that the appellants have filed a declaration to the customs at the time of clearance of the said goods that the goods were imported for use in coffee/tea/rubber plantations. He also drawn the attention to Para 65.6 of the SCN wherein the Commissioner has observed that the incentive of concessional rate of duty being provided was sector specific as seen from the Ministry of Commerce and Industries, Press release dated 23.08.2003. The exemption was granted by the Government with an intention to benefit the said sector. Therefore, the argument by the importer, that in the absence of specific condition in the Notification; the impugned equipment could be used in gardens, landscaping; cleaning of bikes or even control of Chickegunya, once it is proved that the same can be used in coffee/tea/rubber plantations; cannot be accepted. This

appears to be a blatant mis-conception on the part of the importer which would make a wrong interpretation in the light of the fact that majority of the imports are used in totally unrelated sectors. The contention of the appellants that they have supplied a major part of the imports to the specified sectors is incorrect and is not supported by documentary evidence.

13. The Departmental Representative further stated that the appellants are incorrect in interpreting the decision of the ***Hon'ble Supreme Court in Commissioner of Customs (Preventive), in M/s Priya Blue Industries 2004(172), ELT, 145 (SC)*** to their case. It is very clear that the Hon'ble Supreme Court has stated that once an Order of Assessment is passed, duty would be payable as per that order unless that Order of Assessment has been reviewed under Section 28 and/or modified in an appeal. In the instant case, the notice for demand of duty has been issued in terms of Section 28 of the Customs Act and therefore, there is no infirmity in issuance of the SCN. Having declared that the goods are imported for use in coffee/tea/rubber plantations and having sold a majority of them to other sectors; the appellants have rendered themselves squarely liable for invocation of extended period for issue of SCN.

14. Countering the contention of the appellants that it is

enough if the goods are fit to be used in a particular sector for which exemption is given and that they need not be actually used, the Departmental Representative has opposed the contention of the appellants that in terms of the Notification, it is sufficient if the goods are capable of being used in the coffee/tea/rubber plantations and there is no condition that they should be, in fact, used in the same. He placed reliance on the judgment of the Tribunal in the case of ***Formic India Division Vs. C.C. Bombay, 1999 (109) ELT 787 (Tribunal)*** wherein the Tribunal drawing reference to Hon'ble Supreme Court of India in the case of ***Rajasthan Spinning and Weaving Mills Ltd. Vs. Collector of Central Excises, Jaipur, 1995 (77) ELT, 474,*** held that for exemption of duty, there is no question of any liberal construction of terms and scope of the exemption Notification. Such exemption Notification must be strictly construed and the assesse must bring himself squarely within the ambit of the Notification. No extended meaning can be given to the exempted item to enlarge the scope of the exemption granted by the Notification. The Departmental Representative submitted that Hon'ble Supreme Court has upheld the Order of the Tribunal's Order ***2002 (142), ELT, A71 (SC)***. The Departmental Representative has also referred to the judgment of Tribunal in the case of ***Suresh Productions Pvt.***

Ltd, 2002 (139), ELT 733 (Tri. Chennai) wherein it was held that the terms of the Notification cannot be enlarged to grant the unit which is not a printing industry; relying on the judgment of the Bombay High Court in respect of ***R.K. Chemicals 1993 (67), ELT, 79 (BOM);*** the Departmental Representative submitted that it is not for the custom authorities to examine as to how the goods will be used at the time of clearance of the goods; in case, subsequently, the customs authority felt that the goods are not used in the leather industry, they are free to take appropriate proceedings to recover duty which was not paid because of the exemption Notification. The Departmental Representative submitted that the proceedings initiated against the appellants in issuing a SCN which culminated in the adjudication order are not vitiated by law.

15. The learned Counsel for the appellants replying to the contentions submitted that extension of exemption by any Notification involves two levels of interpretation. At the time of allowing the exemption at the time of clearance of goods, it is to be seen whether the goods are capable of being used in that particular sector or not. Once this threshold is passed, a liberal interpretation requires to be given in the second stage as to whether the same are really used in that sector or otherwise.

16. Heard both the side and perused the records of the case.

17. The appellants are traders engaged in the import and trading of high tech implements/ appliances meant for use in agriculture, horticulture, forestry, gardening plantations etc. The appellants have imported said machinery like Sprayers, Power Weeders, Tea Pruners & Mist Blowers etc. declaring the same to be used in coffee/tea/rubber plantations and availed exemption contained in the Notification No. 21/2002 Customs, dated 01.03.2002. The crux of the argument on the part of the appellants was that (i) The SCN issued without appealing against the Assessment Order was bad in law (ii) As there is no specific condition in the Notification that the said machinery should actually be used in coffee/tea/rubber plantations, it is enough if they are capable of being used in the said sector. The appellants relied upon the case of ***Dalmia Dadri Cement Ltd. 2004 (178), ELT, 13 (SC).*** However, we find that what was discussed in that case was that the certificate of use not shown to be false is a sufficient proof of use. We are afraid that the case may not of much help to the appellants whereas in the instant case, no issue of certificate is being discussed and sale/use of the imported equipment in other sectors for which the exemption has been

availed is not disputed. What is disputed in the instant case is that the imports are items only capable of being used and not actually used. We find that serial no. 252 (A) of the Notification No. 21/2002 Customs, dated 01.03.2002 prescribes concessional rate of duty for the machinery or equipment specified in list (A) in List 32 (A), the said list 32 (A) parts of machinery for use in coffee/tea/rubber plantation sector. It is seen that the exemption Notification is applicable to purely a particular sector i.e. coffee/tea/rubber plantations. It would be said that it is applicable to any sector; the movement of goods are capable of being used in the said sector. Admittedly, some of the machines may be capable of being used other sectors also, however, for the same reason it cannot be held that the exemption will be applicable if the machines are used in other sectors. Such an interpretation would lead to mis-construction of the intent of the Notification. As observed by the learned Commissioner in the Order-in-Original, the clarification regarding the exemption Notification has been given by the Commerce Ministry to the fact that Notification intended for the machinery for use in coffee/tea/rubber plantation sector only/ The Notifications have been issued for exempting goods imported for use in a particular sector as there is no ambiguity. In the wording of the Notification, no interpretation needs to be taken recourse too. Going by the decision of Tribunal in the case of ***Formica India Division, 1999 (109), ELT, 787 (Tri.).*** We conclude that the Notification being sector specific the contentions of the appellants are not acceptable. We hold that the Notification is to be strictly interpreted in the absence of any ambiguity in the wording of the same. Coming to the other contentions of the appellants that the SCN and the adjudication order are bad in law in view of the fact that the assessments were not final and have not been appealed against. We find force in the contention of the Departmental Representative that the SCN has been issued by invoking Section 28 and therefore, it does not stand any legal infirmity in view of ***R.K.Chemicals, 1993 (67), ELT 79 (BOM)***. On the same reason, we are not inclined to accept the claim of the appellants that the SCN is time-barred as the machinery were sold or used to other sectors contrary to the declaration given at the time of import. The fact of sale or use in other sectors was never disclosed to the Department. It is only after the department conducted an enquiry the facts come to the light. There is a clear suppression of the material fact. Therefore, we find that extended period is correctly invoked.

18. The appellants have contended that the learned

Commissioner has imposed redemption fine on the impugned goods even though, they are not available for confiscation. We accept this contention and in view the ratio of judgment in cases cited by the appellants, we set aside the redemption fine imposed. We also reduce the penalty on Shri Vasudeva Murthy, MD, RIPL and Sh. Gopal Krishna, Director, RIPL to Rs.1,00,000/- each from Rs.10,00,000/- each, the other portion of the Order-in-Original are not interfered with.

19. The appeal is disposed of in the above lines.

(Order was pronounced
in Open Court on **10/07/2018**)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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