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

Appeal(s) Involved:

**C/1818/2011-DB, C/1819/2011-DB, C/1933/2011**

[Arising out of Order-in-Original No. 11/2010-Cus. Adjn. dated 15.4.2011 passed by the Commissioner of Customs, Bangalore.]

**M/s. KALINGA COMMERCIAL CORPORATION**
*(Presently Kalinga Commercial Corp. Ltd.)*
C-112, H.I.C. HOUSING BOARD COLONY,
BARAMUNDA,
BHUBANESHWAR - 715 003.
ORISSA.

**P.K. BHATTACHARYA**
**ADD.GENERAL MANAGER (MINING)**
**M/S. ORISSA MINING CORPORATION LTD**
BHUBANESHWAR - 715 003.
ORISSA

Appellant(s)

**S.K. MALL,**
**M/S. BARELION INTERNATINAL**
PLOT NO.447/2167 SHREE VIHAR,
BHUBANESWAR - 751031

**Versus**

**The Commissioner of Customs**
C.R. BUILDING, QUEENS ROAD,
P.B.NO. 5400,
BANGALORE – 560 001.
KARNATAKA

Respondent(s)

**Appearance:**

**S/Shri Kishore K. Acharya &**
**M. L. Grover, Advocates**
**GROVER CONSULTANCY**
ROOM NO.25, SUCHETA NIWAS,
3RD FLOOR, 285,
SHADID BHAGAT SINGH ROAD,
MUMBAI – 400 001.
MH

For the Appellant

**Dr. J. Harish,**
**Dy. Commissioner (AR)**

**Mr. K. B. Nanaiah,**
**Asst. Commissioner (AR)**

For the Respondent

Date of Hearing: 09/08/2018
03/09/2018

Date of Decision: 06/12/2018

**CORAM:**

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

**Final Order No. 21851 - 21853 /2018**

**Per : P. ANJANI KUMAR**

This appeal is directed against the OIO 11/2010 passed by Commissioner of Customs, Bangalore.

2. Briefly stated the facts of the case are that during September, 2005 to May, 2008, the Appellants, i.e M/s Kalinga Commercial Corporation, were engaged in rendering 'Mining Services' exclusively to M/s. Orissa Mining Corporation Ltd. **(OMC**), a State Government owned corporation, on the strength of contracts entered into with OMC for raising Iron Ore at OMC's mines at Kurmitar Iron Ore Mines, Khandadhar, Dist. Sundargarh; Gandhamardan Iron Ore Mines, Dist. Keonjhar and Daitari Iron Ore Mines, Dist. Keonjhar in Odisha. Appellant required machines such as Cone Crushers, Screening Units, Excavators and Wheel Loaders etc., for raising/excavation/processing Iron ore.

**2.1.** Appellant obtained 12 nos. of Authorizations (9 from DGFT, Patna and 3 from DGFT, Cuttack), under the Export Promotion Capital Goods **(EPCG,** for short) scheme of the Foreign Trade Policy, 2004-09 and imported, 33 Nos. of capital goods by availing exemption under the corresponding Notification No.97/2004-Cus, as amended, by declaring the name of any one of the aforesaid mines of OMC as the place of installation of machines. Capital Goods were installed at the mines of OMC and Installation certificates obtained from the jurisdictional Assistant Commissioner of Central Excise/Chartered Engineers were submitted to the jurisdictional DDGFT.

**2.2.** The Kolkata Zonal Unit of the Directorate of Revenue Intelligence (DRI) investigated into the imports of the impugned capital goods made by the appellant under the aforesaid EPCG Licences. In the course of such investigation the DRI, inter alia seized the impugned capital Goods. However, at the request of the Appellant, the DRI allowed provisional release of the seized impugned Capital Goods, but the Appellant could never take provisional release of those having not been able to comply with the conditions attached to provisional release thereof.

**2.3.** Acting upon complaint received from the DRI, the DDGFT, Patna issued a Show Cause Notice dated 10.7.2008 to the Appellant proposing to cancel the EPCG Licences issued from his office and to put the Appellant's name in the Denied Entry List. Similarly, on the basis of such complaint the DDGFT, Cuttack also issued a Show Cause Notice dated 05.8.2008 to take action against the Appellant under FT (D&R) Act, 1992.

**2.4.** DRI alleged that the Appellant violated 'actual user condition' by having installed the impugned Capital Goods at the mines/premises of OMC and were not utilized for the Appellant's own use and some of the impugned Capital Goods were found to be used in the mines other than the declared ones of OMC. Subsequently, DRI issued to the Appellant a Show Cause Notice Dated 08.05.2009, *inter alia,* requiring the appellant seeking to

(i) Confiscate the impugned Capital Goods under Section 111 (o) of the Customs Act, 1962(CA’62).

(ii) Demanding differential duty of Rs.9,05,96,540 with interest as per Notification No.97/2004-Cus *supra,* read with proviso to Sec.28(1) and Sec.28AB of the CA,62.

(iii) Impose penalty under Sections 114A & 114AA of CA’62.

(iv) Encash Bank Guarantees and Bonds furnished by the Appellant at the time of importation towards the Appellant's liabilities.

**2.5.** The SCN was adjudicated by the Commissioner of Customs, Bangalore confiscating impugned goods worth Rs.33,47,03,410; allowing redemption on payment of Rs.15,00,000; confirming a duty of Rs.9,05,96,540 with interest; imposing equal penalty under Section 114A & 114AA and ordering encashment of BG towards liabilities. He imposed penalty of Rs. 20,000 on Shri S.K.Mall; Rs.10,000/- each on Shri R.N. Misra and Shri Subhas Chandra Das and Rs.20,000/- on Shri P.K. Bhattacharya. Among these the appellant and Shri S.K. Mall have filed appeals.

**2.6.** While adjudication of the SCN issued by DRI was pending adjudication by the Commissioner of Customs, Bangalore as the common adjudicating authority, the DDGFT, Patna and DDGFT, Cuttack adjudicated their respective SCNs dated 10.7.2008 and 05.8.2008 whereby the DDGFT, Patna passed a 'Blacklisting Order' dated 03.8.2009 and the DDGFT, Cuttack passed a 'Refusal of Licence Order' dated 28.8.2009.

**2.7.** Meanwhile, Additional Director General of Foreign Trade vide Orders-in-Appeals dated 03.01.2011 and 20.04.2011 respectively

set aside the 'Blacklisting Order' dated 03.8.2009 passed by the DDGFT, Patna and the 'Refusal of Licence Order' dated 28.8.2009 passed by the DDGFT, Cuttack.

**3.** Ld. Counsel for the appellants submitted that

**3.1.** By virtue of agreements entered into with OMC, the appellant was providing mining services in those mines; for providing such services, the Appellant was using its own labour and equipment; all the impugned capital goods are mobile **equipment and** were used by the appellant exclusively for providing mining services.

**3.2.** The impugned Capital Goods were imported under EPCG Licenses at a concessional rate of 5% import duty under Notification No.97/2004, *supra,* which grants such exemption subject, *inter alia* to the condition that the Capital goods are installed in the importer's factory or premises and a certificate from the jurisdictional Central Excise Divisional Officers or a Chartered Engineer, as the case may be, is produced confirming installation and use of Capital goods in the importer's factory or premises within six months from the date of completion of imports or within such extended period as may be allowed by the said Divisional Officer. Provided that, if the importer is not

registered with Central Excise or if he is a service provider, he may produce such installation certificate issued by an independent Chartered Engineer.

**3.3.** All the impugned Capital Goods were used in the OMC's said mines only, though as on the date of search/seizure, some of those were found to be in use at the mines other than the ones specifically indicated as the place of installation, in the respective **EPCG Licenses. However, the appellant never used the impugned Capital Goods for any purpose other than for which those were imported.**

**3.4.** It is not in dispute that all the impugned Capital Goods imported by the appellant under EPCG scheme were used by the appellant itself for providing mining services. As would be evident from the EPCG licenses, the appellant had duly disclosed the nature of services rendered by them at the time of applying for the EPCG licenses; the addresses of the 'place of the installation' of the Capital goods are admittedly the premises (mines) of OMC where the appellant was engaged in rendering mining services and the appellant was granted permissive possession of such premises by the owner thereof (i.e. OMC) to carry out its mining activities.

**3.5.** It is also not in dispute that all the impugned Capital Goods imported by the appellant under EPCG scheme are **still owned by the appellant and there is no allegation whatsoever that the appellant ever parted ownership or possession thereof either by way of sale, hire or lease or any other manner to** any other person. Commissioner has recorded a finding at page 67 of the impugned Order.

**3.6.** FTP defines "actual use (industrial)" as "a person who utilizes the imported goods for manufacturing in his own industrial unit or manufacturing ***for his own use*** *in another unit including a jobbing unit".* In the instant case, the appellant undisputedly utilized the impugned Capital goods for its **own use** in the premises over which the appellant was granted permissive possession to carry out manufacturing (i.e. mining) activities. Therefore, for all practical purposes such Mines are to be considered as the appellant's ***"own industrial unit",*** lest the whole purpose of granting duty exemption to Capital Goods used in 'Mining' and/or including 'Mining' under the definition of 'Manufacture' would be rendered redundant. Construction of a statute leading to absurd results manifestly contrary to express legislative intent must necessarily be avoided. Hon'ble Tribunal

held in **the cases of Tamil Trading v. CCE, Tuticorin** [2006 (198) ELT 539 (T)J and **FCI OEN Connectors Ltd,** [2006-TIOL-1826-CESTAT-BANG], that in order to be manufacturer with reference to EPCG scheme the Appellant need not own the mines and the expression 'industrial unit' should be construed to mean as the mines where the Appellant utilised the impugned capital goods. The appellant satisfies the conditions attached to being an **"actual user (industrial)".**

**3.7.** Without prejudice to the submission heretofore, alternatively the Appellant begs to refer to the definition of **'Capital Goods'** and **'Manufacture',** wherein it is evident that in the definition of 'capital goods' 'manufacturing' and 'mining' have been stated separately and thereby making the legislative intent clear that though mining has been treated as 'manufacture' for the purpose of extending the benefit of concessional import duty under the EPCG scheme, it is not 'manufacturing' *per Se.* This legislative intent is further manifest in the definition of 'manufacture' wherein the specific part expressly covers 'manufacturing' and 'mining' has been placed in the inclusive part of the definition. Upon a conjoint reading of both above definitions, it will be evident that though 'mining' has been considered in the EXIM policy as 'manufacture' for the purpose of extending the benefit

of the EPCG scheme, 'mining' does not amount to 'manufacturing' and a mine cannot be treated as an 'industrial unit'. This submission is further vindicated from the fact that 'mining' is a taxable service under the Finance Act, 1994 and thus cannot be construed to be 'manufacturing in an industrial unit'. Therefore, the Appellant is not covered under the definition of 'Actual user (Industrial) and instead the appellant would be appropriately covered under the definition of ‘actual user (Non-Industrial)’, which permits utilization of the imported capital goods for the importers own use in any establishment carrying on any business, trade or profession, without any restriction whatsoever with regard to its place of installation. The word **'any'** used in the said definition enlarges the scope and ambit of usage of the imported capital goods without any restriction or rider.

**3.8**. In view of the above, usage of the impugned Capital Goods by the appellant for its own mining activities in the mines of OMC, over which the appellant was admittedly granted exclusive permissive possession for carrying on such activities, satisfies the 'actual user condition' attached to import of Capital Goods under EPCG Scheme.

**3.9.** There is nothing on record to even allege that the appellant ever utilized the imported Capital goods for any purpose other

than for which those were imported *or* that the appellant ever parted ownership or possession thereof either by way of sale, hire or lease or any other manner to any other person. Indeed, the impugned order, at page-67, categorically **confirms that "the Appellant has not diverted, sold or otherwise parted with the capital goods and that the Appellant has used** the goods for mining". This further fortifies the appellant's submission that it has satisfied the 'Actual User Condition' attached to the EPCG licenses in terms of the Policy.

**3.10.** In support of the above, the findings of the Additional Director of Foreign Trade, New Delhi in his Order-in-Appeal dated 03.01.2011 are relevant and are as under:

> *"**9(viii)**. But in any case, from their (The Deputy Director General of Foreign Trade, Cuttack) letters dated 06.09.2010 and 29.09.20 10 it is clear that the correctness of licenses, fulfillment of export obligation and utilization of licenses is not under dispute, there is no complaint by adjudicating authority in his correspondence regarding misutilisation of authorizations i.e. by way of transfer, sale or hiring to others. Dy. DGFJ, Cuttack has not in his Order showed any agreement with DRI or supported their stand with reference to appellant not being manufacturer exporter or appellant having obtained licenses fraudulently or by mis-declaration or licenses were issued incorrectly for mining activities. Mining activity is a manufacturing activity and it is common knowledge that mines are generally owned by the Government and therefore, authorizations are being issued with actual user condition to contractors."*

In another appeal against the Order-in-Original dated 03.08.2009 passed by Dy. DGPF, Patna, Additional Director of Foreign Trade, New Delhi in his Order-in-Appeal dated 20.04.2011 reiterated the same observation about the legitimacy of the EPCG licenses issued to the appellant as a manufacturer exporter.

**3.11.** In a letter written by the Dy. Director General of Foreign Trade, Cuttack to the Additional Director General of Foreign Trade, New Delhi, it was observed that "*In similar cases, where any doubt was aroused, Installation Certificate has been regularised by the Appellate Authority so many times. There is no dispute over Installation Certificates issued by the Central Excise dept. Then without taking Appellate Authority in confidence, DRI declared the Violation of Condition sheet of the licenses, (in regard of Installation Certificate), which seems an encroaching activity by Custom Authority in DGFT (Policy). Meanwhile Custom authorities have consciously oversighted the Order-in-Appeal dated 03.01.2011 by Appellate Authority which has clearly* ***pointed out that there seems no Actual User Condition violation because the EPCG goods have not been transferred/sale out / disposed of to any other person by EPCG holder which has been physically verified***

***by license issuing authority, Cuttack. When EPCG holder possessed the imported goods then there is no question of violation*** *of Actual User Condition. Moreover, DRI did not mention any name of another user other than EPCG holder. There is no dispute over installation certificate issued by the Central Excise department.”*

**Ld. Counsel submitted that the above orders of Additional Director DGFT have not been appealed against.**

**3.12.** In another communication the Foreign Trade Development Officer in the Office of the Dy. DGFT, Cuttack wrote to the Zonal Director General of Foreign Trade, Kolkata, that” Since *these mines though owned by the Orissa Mining Corporation Ltd. Are allotted to appellant, therefore, there is no infringement of policy provisioning in shifting some of the machines between these working places for the purpose of optimum production and to prevent idling of the machines during lean period at work sites.* ***There is no infringement of licensing condition as these machines were and are in possession of appellant at all times have not been disposed off, loaned or otherwise transferred to any other person. This can be verified by any means. Verification has been done by the FTDOECA***

***on... and found the requisite machine has been installed there.***

**3.13.** It is evident from the above Orders-in-Appeals read with the above letters of the Regional Licensing Authority that the appellant has not violated the 'Actual User Condition' with regard to the impugned Capital Goods. Such findings/opinions of Authorities in the DGFT Organization are binding on the Customs Authorities and thus the findings in the impugned Order regarding violation of 'Actual User Condition' cannot be sustained. The appellant relies upon

(i). **Bharath Steel Corporation Vs. CC, Chennai** [2004-TIOL-1036-CESTAT-MAD], wherein it was held that adjudication Order of JDGFT is binding on the Customs Authorities.

(ii). **Jumbo Bags Ltd Vs. CCE, Chennai** [2005 (184) ELT 214 (Tn.-Chennai)], wherein it was held that *"in a three-legged race for export promotion by the Customs and Export Promotion authority, the two authorities cannot run in opposite direction. Lack of clarity, if any should be resolved in a manner facilitating the advancement of the policy and not in a manner that defeats public policy".*

**3.14.** All the Capital Goods impugned in the present proceedings are mobile equipment and do not need to be firmly installed at **a** particular place for being operational. Also, it is an admitted fact on record that all the impugned Capital Goods were shifted from one mine to the other, all belonging to OMC, over which the appellant was granted sole permissive possession for carrying out mining activities. Such utilisation of the Capital Goods in another premises for the same purpose declared in the EPCG Licenses and for the appellant's own use does not violate Actual User Condition'. To submit so, the appellant relies upon the following decisions of the Hon'ble Tribunal.

**(i). Indusind Media Communications Ltd. Vs CC, Mumbai** [2006-TIOL-1394-CESTAT-MUM], wherein it was held that installation of imported capital goods in another premises without any monetary gain would not amount to violation of 'Actual User Condition' since it cannot be equated to sale of the goods and would essentially amount to use of the same by the importer himself.

**(ii). Galaxy Surfactants Ltd. Vs CC(EP), Mumbai** [2006 (202) ELT 495 (Tri.-Mum.)], wherein it was held that *"The case of the department is that the Licence-holder has to use the*

*imported goods in the unit, whose address is mentioned in the DEEC book. This objection or interpretation is not sustainable in view of the clear language employed in the first portion of the definition of 'actual user - industrial'. The first portion of definition of actual user contemplates use of the inputs by the Licence holder in his own industrial unit. There is no stipulation that the Licence-holder has to use the imported goods in the unit whose address is specified in the DEEC Book".*

**(iii). Davangere Wire Rope Indus. P. Ltd. Vs. CC(Appeals), Bangalore [2006 (196) ELT 445 (Tn.)],** wherein it was held that installation of machines imported under EPCG scheme in neighboring unit due to certain exigencies does not violate the conditions of the Notification No.110/95-cus dated 05.06.1995.

**(iv). Policy Circular No.26/2009-14 dated 17.03.2010:** Movable capital assets cannot be installed at one particular location and therefore, the requirement of 'Installation Certificate' cannot be insisted upon, for such movable capital assets/goods.

**3.15.** In the instant case, OMC never supplied to the appellant any raw material or semi-finished goods to complete a part of

the processes resulting in the manufacture (i.e. mining). Instead the appellant was only granted permissive possession of the premises to carry out manufacturing (i.e. mining) activities by using their own men and machine and other resources. Thus, the appellant is bound to be treated as a Manufacturer and, not as a job worker as per the provisions of the Foreign Trade Policy.

**3.16.** Needless to reiterate that the EPCG Scheme under the Foreign Trade Policy is a beneficial scheme, intended to permit import of Capital Goods, under concessional rate of duty, with a view to augment export from the country for earning precious foreign exchange. Thus, denying the appellant the benefit by alleging frivolous procedural violation, tantamount to defeating the object and purpose of said scheme. Such an attempt in the impugned Order is contrary to the doctrine of substantial compliance reiterated by the Constitution Bench of the Hon'ble Supreme Court in the case of **CCE, New Delhi Vs. Han** Chand Shri Gopal [2010 (260) ELT 3 (S.C)]. Similar view was reiterated by the Hon'ble Supreme Court in the case of Mangalore Chemicals & Fertilizers Ltd. [1991 (55) ELT 437 (S.C)] in the following words: -

> *"11. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of*

*policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the nonobservance of all conditions irrespective of the purposes they were intended to serve."*

The aforesaid decision of the Hon'ble Supreme Court was also followed by the Government of India in the case of **Modern Process Printers** - 2006 (204) ELT 632 (GOI) and by the Tribunal in a most recent decision rendered in the case of **Metalink Vs. CC, KOL** - 2018 (6) TMI 1375-CESTAT-KOL.

**3.17.** Government of India in Revision Application in **Re: Allanasons Ltd,** [1999 (111) _E.L.T. 295 (GOI)], held that the procedural lapses are to be condoned in the interest of export promotion. Also, the Hon’ble Supreme Court in M/s. Suksha International case [1989 (39) ELT 503 (SC)] held that interpretations/ restrictions so as to defeat the very purpose of Govt. policy should be avoided. In that connection the Appellant also relies upon the decision of the Hon'ble Supreme Court in the **cases of Himalayan Co-op. Milk Product Union Ltd,** 2000 (122) ELT 327 (SC), **Maiwa Industries Ltd,** 2009 (235) ELT 214 (SC) and the Hon'ble Gujarat High Court in the case of **Cosmonaut** Chemicals, 2009 (233) ELT 46 (Guj) have held to the same effect.

**3.18.** Regarding the validity of EPCG licenses, the Ld. Commissioner referred to show cause notice dated 10.07.2008 and 07.08.2009 issued by DGFT, Patna, which were pending adjudication. Though the said show cause notice dated 10.07.2008 has been referred to in the Black Listing Order dated 03.08.2009 (incorrectly stated as 07.08.2009 in para D.2.2 of the OIO), the licenses were never cancelled and instead the appellant was only put under Denied Entities List (DEL). As would be evident from Order-in-Appeal dated 20.04.2011 passed by the Addl. DGFT, New Delhi, the said Black Listing Order dated 07.08.2009 has since been set aside. Thereafter, the other show cause notice dated 07.08.2009 has never been adjudicated by the DGFT, Patna. Therefore, none of the EPCG licenses issued by the DGFT, Patna and/or Cuttack has been cancelled as on date.

**3.19.** In any view of the matter, in the present case the SCN was issued by the Additional Director General, DRI, Kolkata, on 08.05.2009 without authority and in terms of the decision of the Hon'ble Supreme Court in the case of **CC Vs. Sayed All** [2011 (265) ELT 17 (S.C), it is not legal and valid. In view of the above, the impugned Order is wholly unsustainable and liable to be set aside with consequential relief to the appellant.

**3.20.** During the course of hearing on 7-9-2018 the counsel reiterated the above submissions and further stated that the Ld Commissioner has erred in coming to conclusion on the basis of pending SCN by DGFT. Commissioner erred in finding that they are Actual user (industrial). Mining is deemed to be manufacture only for the sake of Policy and not for Central Excise purposes. Commissioner based his finding on policy provisions rather than the conditions of Customs Notification, which were never violated. Commissioner found fault with the installation certificates holding that Central Excise authorities have not seen the equipment. It is submitted that there was no fixed Procedure for issuing such certificates. Commissioner failed to appreciate that the goods exported are iron ore only. The only condition for import of capital goods is that the goods exported should be capable of being used for manufacture or processing of export goods. Ld Commissioner looked at only minor infractions and has not appreciated that as per certificate given by Customs, they have fulfilled export obligation albeit they have exported through third party as per the procedure allowed in Pradeep Port.

**3.21.** Regarding the Role of Shri S.K. Mall, who was only a consultant for arranging Licences Commissioner has proceeded to levy penalty on him even when there were no violations by him

under Customs, Act, 1962 and has never dealt with impugned goods. In view of the above, the impugned Order is wholly unsustainable and liable to be set aside with consequential relief to the appellant.

**4.** Ld. DR for the department reiterated the findings of OIO. He submitted that in terms of Para 5.3 of the FTP import of capital goods shall be subject to actual user condition. The appellants themselves declared to be 'Manufacturer-Exporter'. Therefore, the Commissioner has rightly held them to be Actual User (Industrial). In terms of agreement with the OMC, they are job workers getting only a fixed amount per tonnage of ore excavated. At no pint of time the ownership of the mines or ore was with the appellants. Moreover, the ore after mining belonged to OMC. It is not disputed by the appellants that OMC has sold the ore to other parties. They have fulfilled the export obligation through export of other parties. No nexus between the goods mined by using the machinery and goods exported was established. The mines at 'Diatari' were never named in the applications and Licences. One machine was found to be engaged in road repair work. He submitted that Tribunal has considered identical issue in the case of Sushant Minerals (P) Ltd Vs CC Mumbai 2015(327) ELT 260 (Tri-Mumbai) and decided the issue

in favour of Revenue. Therefore, the submissions of appellants on substantial compliance of law are incorrect and they are not eligible for the benefit claimed.

**4.1.** However, the appellants vide miscellaneous application filed in 2014 have submitted that the case of Sushant Minerals (P) Ltd (supra) can be distinguished on the following grounds.

(i). the ingredients necessary for deciding whether the appellant is a manufacturer or not for EPCG purposes was not before the Tribunal. The distinction between a job worker manufacturer and service provider was not discussed.

(ii). Concept of nexus under EPCG has changed over the years, 1992-2004, from requirement of physical use of machinery in the manufacture of export of goods to export of goods being capable of being manufactured by imported machines.

(iii). Third party exports are permitted in terms of Notification 97/2004.

(iv). Along with M/s Sushant Minerals (P) Ltd, one more contractor i.e. M/s Thriveni Earth movers were also working as contractors of M/s KJS Ahluwalia. But they were not proceeded against even after the decision of Tribunal in M/s Sushant

Minerals (P) Ltd. In fact, largest contractors like M/s Thriveni Earth movers (41 Licenses) and M/s. Taurian Resources Ltd( 37 Licenses) were not proceeded against as per information received by them under RTI.

**5.** Heard both sides and perused the records of the case.

**6.** The Ld. Commissioner has decided the case against the appellants on the grounds that:

(i). The Appellant did not use the imported Capital goods for manufacturing in their own unit or for manufacturing for their own use in another unit including a jobbing unit. Instead, the Capital goods were found in the mines of OMC who engaged the Appellant for rising **of Iron Ore.** Thus, the appellant violated actual user condition.

(ii). Since the installation certificates were issued by the Chartered Engineer without physically inspecting the machines in its site of installation and that some of the certificates were undated, the said installation certificates are invalid and the condition in that regard in Notification No.97/2004, *supra,* stands violated.

(iii). The appellant being neither the owner nor lease-holder of the mines and not being the owner of the resultant produce, cannot be considered as manufacturer engaged in manufacturing activity using the imported Capital goods in their own premises for their own use, in terms of Notification No.97/2004 *supra.* Instead the appellant is mere job worker for OMC**.**

**6.1.** Therefore, the brief issues for determination in this case is to see whether the appellants were actual users in terms of Notification No 97/2004-CUS dated 17.09.2004 and as to whether they have violated any of the conditions of the Notification so as to be ineligible for the exemption claimed on the impugned goods.

**6.2.** For a proper appreciation of the issue it is relevant to see the notification and the provisions of the FTP as it existed at the relevant point of time. As the Notification is issued for the benefit of those who hold the licences issued under Para 5 of the policy, the conditions of the policy get merged with that of the Notification and they cannot be read in isolation.

**6.2.1.** Relevant Notification No. 97/2004-Cus dated 17-9-2004 is as under.

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in the Table annexed hereto, from, -

(i) so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as is in excess of the amount calculated at the rate of five per cent *ad valorem*, and

(ii) the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act, when specifically claimed by the importer.

2. The exemption under this notification shall be subject to the fallowing conditions, namely :-

(1) that the goods imported are covered by a valid licence issued under the Export Promotion Capital Goods Scheme in terms of Chapter 5 of the Foreign Trade Policy permitting import of goods at the rate of five percent duty and the said licence is produced for debit by the proper officer of customs at the time of clearance :

**Provided** that for import of spare parts specified at S. No. 4 of the said Table, the validity period of the licence shall be deemed to be the period permitted for fulfilment of the export obligation in full;

(2) that the importer executes a bond in such form and for such sum and with such surety or security as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs binding himself to fulfil export obligation on FOB basis equivalent to eight times the duty saved on the goods imported as may be specified on the licence, or for such higher sum as may be fixed by the Licensing Authority, within a period of eight years from the date of issue of licence, in the following proportions, namely :-

| S. No. | Period from the date of issue of licence | Proportion of total export obligation |
|---|---|---|
| (1) | (2) | (3) |
| 1. | Block of 1st to 6th year | 50% |
| 2. | Block of 7th to 8th year | 50%; |

**Provided** that where the duty saved is not less than Rs. 100 crores, or where the licence is issued to units in the agri export zone as may be notified by the licensing authority, the export obligation shall be fulfilled within a period of twelve years from the date of issue of licence in the following proportions, namely :-

| S. No. | Period from the date of licence | Proportion of total export obligation |
|---|---|---|
| (1) | (2) | (3) |
| 1. | Block of 1st to 10th year | 50% |
| 2. | Block of 11th to 12th year | 50% |

**Provided** further that where a sick unit is notified by the Board for Industrial and Financial Reconstruction or where a rehabilitation scheme is announced by the concerned State Government in respect of sick unit for its revival, the export obligation may be fulfilled in terms of Paragraph 5.5.1 of the Foreign Trade Policy:

**Provided** also that where the capital goods are imported for technological upgradation, the export obligation shall be fixed equivalent to six times the duty saved on the goods imported as may be specified on the licence, or for such higher sum as may be fixed by the Licensing Authority, within a period of eight years from the date of issue of licence;

**Provided** also that export obligation of a particular block may be set off against the excess exports made in the said preceding block;

(3) that if the importer does not claim exemption from the additional duty leviable under section 3 of the Customs Tariff Act, 1975 (51 of 1975), he shall be deemed not to have availed of the exemption from the duty specified in the First Schedule to the said Customs Tariff Act for the purpose of calculation of the duty saved amount for calculation of export obligation;

(4) that the importer produces within 30 days from the expiry of each block from the date of issue of licence or within such extended period as the Deputy Commissioner of Customs or Assistant Commissioner of Customs may allow, evidence to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs showing the extent of export obligation fulfilled, and where the export obligation of any particular block is not fulfilled in terms of the preceding condition, the importer shall within three months from the expiry of the said block pay duties of customs of on equal amount equal to that portion of duties leviable on the goods, but for the exemption contained herein which bears the same proportion as the unfulfilled portion of the export obligation bears to the total export obligation together with interest at the rate of 15 per cent per annum from the date of clearance of the goods;

(5) that the capital goods imported, assembled or manufactured are installed in the importer's factory or premises and a certificate from the jurisdictional Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, is produced confirming installation and use of capital goods in the importer's factory or premises, within six months from the date of completion of imports or within such extended period as the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may allow :

**Provided** that if the importer is a service provider, he may produce said certificate of installation and usage issued by an independent chartered engineer:

**Provided** further that in the case of, -

(i) manufacturer-exporter and merchant-exporter having supporting manufacturer(s) or vendor(s);
(ii) import of irrigation equipment for use in contract farming for export of agricultural products; and
(iii) importer rendering services,

the capital goods may be installed at the factory or premises of such other person whose name and address are endorsed on the licence referred to in condition (1) and where the bond for full difference of duty, if necessary, in terms of condition (2), with or without a bank guarantee, as the case may be, is executed by the importer and such other person binding themselves jointly and severally to fulfil the export obligation and all other conditions of this notification and to pay duty with interest at the rate of 15 per cent per annum in case of default;

**Provided** also that agro units located in Agri Export Zones or service providers in Agri export Zones may move the capital goods within the Agri Export Zones under intimation to the jurisdictional Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, subject to the condition that the importer shall maintain accurate record of such movement.

(6) that the imports and exports undertaken through seaports at Mumbai, Kolkata, Cochin, Magdalla, Kakinada, Kandla, Mangalore, Marmagoa, Chennai, Nhava Sheva, Paradeep, Pipavav, Sikka, Tuticorin, Visakhapatnam, Dahej, Mundhra, Nagapattinam, Okha, Jamnagar and Muldwarka or through any of the airports at Ahmedabad, Bangalore, Bhubaneswar, Mumbai, Kolkata, Coimbatore, Delhi, Hyderabad, Jaipur, Chennai, Srinagar, Trivandrum, Varanasi, Nagpur and Cochin or through any of the Inland Container Depots at Agra, Bangalore, Coimbatore, Delhi, Faridabad, Gauhati, Guntur, Hyderabad, Jaipur, Jallandhar, Kanpur, Ludhiana, Moradabad, Nagpur, Pimpri (Pune), Pitampur (Indore), Surat, Tirupur, Varanasi, Nasik, Rudrapur (Nainital), Dighi (Pune), Vadodara, Daulatabad (Wanjarwadi and Mailiwada), Waluj (Aurangabad), Anaparthy (Andhra Pradesh), Salem, Malanpur, Singanalur, Jodhpur, Kota, Udaipur, Ahmedabad, Bhiwadi, Madurai, Bhilwara, Pondicherry, Garhi Harsaru, Bhatinda, Dappar (Dera Bassi), Chheharata (Amritsar), Karur, Miraj, Rewari, Bhusawal, Jamshedpur, Surajpur and Dadri or through the Land Customs Station at Ranaghat, Singhabad, Raxaul, Jogbani, Nautanva (Sonauli), Petrapole and Mahadipur.

(7) notwithstanding anything contained in condition (4), where the Licensing Authority grants extension of block-wise period for any block(s) or overall period of fulfilment of export obligation upto a period of two years or regularization of shortfall in export obligation, not exceeding five per cent of such export obligation, the said block-wise period or overall period of export obligation shall be extended or condoned by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be :

**Provided** that in respect of sick unit referred to in the second proviso to condition (2), extension of overall period of export obligation shall not be allowed.

3. Where the goods specified in the said Table are found defective or unfit for use, the said goods may be re-exported back to the foreign supplier within 3 years from the date of payment of duty on the importation thereof;

**Provided** that at the time of re-export, the goods are identified to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, as the goods which were imported.

TABLE

| S. No. | Description of goods |
|---|---|
| (1) | (2) |
| 1. | Capital goods far pre-production, production and post production including second hand capital goods. |
| 2. | Capital goods in SKD/CKD conditions to be assembled into capital goods by the importer. |
| 3. | Components of capital goods required for assembly or manufacture of capital goods by the importer. |
| 4. | Spare parts of goods specified at Serial Nos. 1, 2 and 3 as actually imported and required for maintenance of capital goods so imported, assembled, or manufactured. |
| 5. | Spare parts including consumables for the existing plant and machinery of the licence holder. |

*Explanation.* - For the purposes of this notification, -

(1) "Capital goods" has the same meaning as assigned to it in Paragraph of 9.12 of the Foreign Trade Policy;

(2) "Foreign Trade Policy" means the Foreign Trade Policy 2004-2009 published vide notification of the Government of India in the Ministry of Commerce and Industry, No. 1/2004 dated the 31st August, 2004 as amended from time to time;

(3) "Licensing Authority" means the Director General of Foreign Trade appointed under section 6 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) or an officer authorized by him to grant a licence under the said Act;

(4) "export obligation", -

(i) in relation to importers other than those rendering services, means exports to a place outside India, of products manufactured with the use of capital goods imported, assembled or manufactured in terms of this notification :

**Provided** that export obligation may also be fulfilled by, -

(a) export of same products capable of being manufactured with the use of said capital goods; or
(b) export of same products manufactured in different units of the licence holder; or
(c) through third party exports made by an exporter or manufacturer on behalf of the licence holder by exporting the same product and in such cases, *inter alia* the shipping bills shall indicate name of both the third party and the licence holder; or
(d) making supplies of manufactured product in terms of paragraph 5.4 of the Foreign Trade Policy; or
(e) export of other goods manufactured by the importer;
(ii) in relation to importers rendering services, means, receiving payments in freely convertible foreign currency for services rendered through the use of capital goods:

**Provided** that in respect of units holding licence both as manufacturer-exporter and service provider, the export obligation may be fulfilled either by export of products specified in sub-clause (i) or by receiving payments in freely convertible foreign currency for services rendered through the use of such capital goods.

**Provided** further that in respect of Group Company as defined in paragraph 9.28 of the Foreign Trade policy where licence has been issued to any one of such Group Company, the export obligation may also be fulfilled by export of manufactured goods by any other company(s) belonging to such Group Company:

**Provided** also that in respect of service providers in the Port Handling sector, the export obligation may be fulfilled by earning service charges in Indian rupees which are otherwise considered as free foreign exchange by the Reserve Bank of India:

**Provided** also that in respect for hotels the export obligation may also be fulfilled by Managed Hotels as defined in paragraph 9.36 of the Foreign Trade Policy.

**6.2.2.** A plain reading of the above notification reveals that the primary conditions for the claiming the exemption benefit under the notification are as under.

- Goods should be imported under a valid license issued under Chapter *5* of the Foreign Trade Policy.

- The export obligation has to be fulfilled as per the condition 2 of the Notification.
- Capital goods imported should be installed in the importer's factory or premises and an installation certificate to that effect is produced within 6 months from the date of completion of imports.
- In case of a manufacturer exporter and merchant exporter having supporting manufacturer(s) or vendor(s); the capital goods may be installed at the factory or premises of such other person whose name and address are endorsed on the license referred to in condition (1). The only exception for the installation of capital goods in the premises of any other person other than the importer/license holder is provided in the proviso to condition 5. The condition is that if the capital goods are installed and used in premises of other person than the importer, such other person should be the supporting manufacturer or vendor of the licence holder and the name and address of such other person should be endorsed in the license. Further, licence holder and such other person should execute a bond to ether binding them jointly and severally to pay duty and other obligations.

- All the conditions that form part of the said licence will become the conditions of this Notification. Also, the notification has to be read with the terms and conditions of the licence.

**6.3.** Some of the Relevant Conditions which are mentioned in the licenses are :

**Condition 2:** “The export obligation shall be fulfilled by the use of the Imported Capital Goods"

**Condition No.6:** "Import of Capital Goods under this authorisation shall be subject to actual user condition".

**Condition No.9:** (for EPCG licences, covering the 29 machines and *4* machines) the site of installations for 29 capital goods is MIs Kalinga Commercial Corporation at Gandhamardan Iron Ore Mines, Suakati, Dist Keonjhar, Orissa— 758018 and the site of installation for *4* capital goods is MIs Kalinga Commercial Corporation, Kurmitar Iron ore Mines, Kolda, Barsuan, Dist-Sundargarh, Orissa - 770041.

**Condition No. 13:** This authorization shall only be utilized in accordance with the permission of Foreign Trade Policy (2004-

2009) and the concerned Customs Notification No. *(971* 2004) as amended from time to time".

**Condition No. 14:** The licensee should submit Installation certificate to the Licensing Authority within 6 months from the date of import.

**6.4.** It is pertinent to note here that as per the agreement the scope of the work undertaken by M/s KCC is Excavation / raising of iron ore and associated rejects/spoils/spurious/sub-grade materials, segregation, sizing of iron ore into calibrated ore (10-30/10-40/5-18 mm) and 10mm fines size) by crusher, stacking thereof, cleaning of quarry faces, loading to tippers/dumpers, transporting of the above materials to the specified yards. The proposed work shall have a preparatory period of six months during which the agency shall revive total haulage road from quarry to proposed crusher site and stockyard. The agency during such period shall excavate and transport subgrade ore to the designated point at hill top within a distance of 2.5 km. The agency has to install adequate capacity of crushing and screening plant within the period of 1st six months during the year 2006-07 as per the specifications and subject to the terms and conditions enumerated in this agreement.

**6.4.1. At Para 4.1, the** agreement specifies that 4.1 The agency (M/s KCC) shall not assign the work or any part thereof, any share of interest therein, or money due thereunder, or sublet the work or any part thereof or allow any person to become interest in the work or a portion thereof, in any manner whatsoever except with the written permission and approval of the OMC management.

It is also provided in the agreement that:

(i) In relation to the physical/chemical specification as indicated in Clause No 17(a)(B), the penalty imposed or any amount deducted by the buyers shall be recovered from the agencies bill in full.

(ii) In case of complete rejection by the buyers relating to physical/chemical specification specified in Clause No 17(a) & (b), twice the sales price for the quantity so rejected shall be recovered from agency's bill.

**6.4.2.** As per the agreement between M/s OMC and M/s KCC, it is seen that M/s KCC were engaged by OMC for excavation and raising of the iron ore in the mines belonging to OMC: the machinery and the plant required for such work will be set up by KCC in the mines of OMC; OMC will make available the mine free

of cost for such excavation and raising work; the labour required for the excavation work will be hired and managed by KCC; the work shall be carried out as per specifications and the supervision of OMC; KCC shall be paid a fixed amount i.e. Rs.265 per MT for the excavation and raising work. Commissioner has thus found that KCC were neither owners nor the lease holders of the mines; they were not even the owners of the resultant produce that emerged after excavation and raising of the ore; They are not the buyers of the produce; they only rendered an activity using the machinery imported under concessional rate of duty under Notification No. 97/2004, for which they were paid job charges; they did not clear or sell the resultant product after processing as the product did not belong to them but to their principals i.e. M/s OMC. These facts are not disputed by the appellants**.** They had no ownership of the premises or the product thereof. Therefore, we find that they are at best job workers or service providers to M/s OMC.

**6.5.** We find that the licenses were obtained disclosing to the DGFT authorities that they were manufacturer exporter. For being a manufacturer, the appellants should be owners/lessee of the mines or get the ore mined with the help of job workers. The appellant's case doesn't fall under either of these categories.

Even if one accepts the argument of the appellants that mining is an activity that amounts to manufacture for the purposes of FTP, the essential condition should be that they are owners of the product even if they get the same manufactured with the help of a job worker. As observed rightly by the commissioner, they have not even got the name of M/s OMC endorsed in any of the licences obtained from DGFT or in documents submitted to Customs. M/s KCC and their job workers if any have not given any joint Bond obligating them individually or severally. We find that in the case of Commissioner of **Customs** vs. **CESTAT in 2009(240) ELT 166 (Mad)** renders such contention invalid as the Hon'ble High Court held that

*33. It is to be noted that the Division Bench of this Court in a case of South India Exports as referred above held that even the discharge of the export obligation per se cannot put an end to the whole matter. The facts in the present case is worse, in the sense that the importer made a false statement for the purpose of securing an advance Licence with Actual User Condition The fact that the time within which he had to discharge his obligation has not come to an end, does not advance the case of the importer. The basis for his discharge of the export obligation is existence of a factory. The basis does not exist; the address given is a false address, so the whole edifice falls. The fact that the importer could affect his export obligation through job workers and the existence of a factory is not a sine qua non, does not advance his case either. The importer claimed he had a factory when he had none. So, whether he could have completed the manufacture otherwise hardly matters. For the purpose of obtaining such Licence with Actual User Condition, it is mandatory that the importer should be a Manufacturer-Exporter. The importer made a false declaration of being one. Having made such a false declaration and obtained a Licence, the importer cannot be permitted to now say that the imported material is freely importable under OGL and therefore should be allowed to be clear on merit rate. The Tribunal fell in error in permitting the clearance of the goods on merit rate. By doing so the Tribunal has virtually set at naught the purpose behind issuance of an exemption Notification. If the Respondent is not an actual user, he would not be entitled to utilise the Licence. The Licence having been secured by*

*adopting fraudulent method would not confer any right on the importer and as such he cannot be allowed to plead any equity. Therefore, we find that the order passed by the Tribunal is not sustainable and liable to be set aside.*

From the ratio of this judgment wherein the facts of the case are similar it is clear that submission of false declaration will result in the goods being liable to action under the Act for recovery of duty and imposition of penalty.

**6.6.** As observed by Ld. Commissioner, we find that Constitutional Bench of Apex Court, held in the case of CCE New **Delhi vs. Harichand Shri Gopal 2010-TIOL-**95-SC-CX-CB held as under:

> *"22. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the noncompliance of which would not affect the essence or substance of the notification granting exemption. In Novopan Indian Ltd. (supra), this Court held that a person, invoking an exception or exemption provisions, to relieve him of tax liability must establish clearly that he is covered* hi *the said provisions and, in case of doubt or ambiguity, the benefit of it must go to the State. A Constitution Bench of this Court in Hansraj Gordhandas v. H.H. Dave (1996) 2 SCR 253 (2002-TJQL-351-SC-CX), held that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should*

> *be governed wholly by the language of the notification, i.e., in plain terms of the exemption.*
>
> *23. Of course, some of the provisions of an exemption notification may be directory in nature and some are of mandatory in nature. A distinction between provisions of statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept clearly distinguished. In Tata Iron and Steel Co. Ltd. (supra), this Court held that the principles as regard construction of an exemption notification are no longer res Integra; whereas the eligibility clause in relation to an exemption notification is given strict meaning where upon the notification has to be interpreted in terms of its language, once an assessee satisfies" the eligibility clause, the exemption clause therein may be construed literally. An eligibility criterion, therefore, deserves a strict construction, although construction of a condition thereof may be given a liberal meaning if the same is directory in nature."*

In the instant case the onus for establishing their claimed status of being a manufacturer exporter and fulfilling the conditions of the licence obtained is squarely on the appellants. The status of the appellant decides the eligibility to the Licences. It is not the appellant's case that their status as a manufacturer exporter was fixed by the authorities. It was accorded as per their own declarations. Therefore, it is to be observed that the appellants have not passed the eligibility criteria to lay claim for the benefit of the exemption claimed.

**6.7.** Coming to the installation certificates, from the records of the case it is seen that most of the machines were installed at the premises of M/s OMC, which were not owned by the

appellants. Some machines were found to have been installed in the mines situated at 'Daiatari', whose name is not even figuring in the Licences. One machine was found to be used for road repair purposes and one was found to be in broke down condition somewhere away from the place of installation. Some machines which were supposed to be installed in one mine were found installed in other mines. 'actual user condition' as per the condition laid down in the condition sheet issued with the EPCG authorization by DGFT was not fulfilled since the imported capital goods were installed at a place which does not belong KCC and the said capital goods were not utilized for the own use of KCC. Instead, the capital goods were found in the mines of OMC who engaged the services of KCC for rising of the iron ore. The person who has issued the certificates has stated that he has not physically verified the installation. Some of the certificates are not even dated. The certificates proceeded on a wrong premise that the machines were installed in the premises of M/s KCC. Therefore, such certificates cannot be treated as valid for the purposes of satisfying the conditions of the Notification. The appellants argued that the machinery being mobile in nature, the installation was not required. Installation per say, may not be of any significance in respect of machinery that is mobile. However,

installation in that case has to be understood as use. As use of the machinery was not used in the premises of appellants who procured them as merchant exporter, the same is to be treated as not installed. There was nothing to stop the appellants in truly disclosing their status vis a vis the OMC mines and to endorse their name as supporting manufacturer. However, from the agreement it is seen that they had no such relationship with M/s OMC. In fact, it was other way round. They were on site job workers for OMC.

**6.8.** The appellants contended that the licences in question were not cancelled so they are to be treated as valid at the time of import. Though the Licences are issued by DGFT, the customs authorities are very much in their right to see if the conditions of the notification wherein exemption availed are complied, as high revenue stakes are involved. The bond submitted by the appellants casts a continuous obligation on the importer till the Bonds are discharged. Checks and balances are created purposefully to ensure that the benefit is not misused and there is no revenue leakage. Therefore, the argument of the appellant that as the licences were existing on at the time of import and they have not been cancelled, imports were proper is not correct. Moreover, we find that the DGFT authorities have issued Show

Cause Notices and the same are pending. The appellants themselves submitted that the DGFT are waiting for the outcome of these appeals before us.

**6.9.** The appellants have further contended that they have fulfilled the export obligation by making exports through third party. The appellants are within their rights to undertake such exports. But they are required to inform the authorities of the same. Understandably the Policy as well as Customs Notification provide for such exports subject to the endorsement of such third-party exporter's name in the Licence. Business of Import export is not a suspense thriller story that the concerned authorities come to know of the same only towards the end of the story. It is a situation where the theme, plot and characters are to be pre-approved. Every situation for a manufacturer exporter, merchant exporter, third party exporter etc., has been duly given a thought and has been duly provided for in the law. This being the situation, undertaking every activity at the back of the authorities and claiming substantial compliance of law in the end and crying foul in the event of their request is being turned down cannot be equated with fair business practice. It is not the case of appellants that they have informed the authorities and have got due endorsements. Therefore, the exports claim to have been

made through third party, as such their sister concern, M/s. Maa Taruni Ispat, cannot be reckoned towards the export obligation as these third parties are not declared. It is to be held that necessary conditions as per Notification No. 97/2004 are not fulfilled. In view of the facts of the case, we find that case law cited by the appellants in their defence are not appropriate.

**6.10.** We find that Mumbai Bench of the Tribunal has decided a case with identical situation wherein the appellant was a job worker, like M/s KCC, of the mine owners. In the case of ***Sushant Minerals vs. CC 2015 (327) E.L.T. 260 (Tri. - Mumbai).*** Tribunal held that:

***Para 5.3*** *In the instant case, the appellant has not used the machinery as a manufacturer-exporter but he has used the same in the mines of M/s. KJS Ahluwalia. The appellant is not a lessee of the said mines. What he has done is, he has rented out the machinery to M/s. KJS Ahluwalia for a consideration of ` 180/- per MT. In other words, the appellant has not utilised the machinery for his own purposes but merely rented out the machinery to somebody else. Secondly, the appellant could not be to be the 'actual user (non-industrial)' as defined under the EXIM Policy.*

***5.7*** *From the above it is clear that condition relating to manufacture-exporter cannot be applied to a service provider who has to fulfill the export obligation by providing services with the use of capital goods under EPCG scheme. In the present case, in view of deemed definition of manufacturer, the appellant is a 'manufacturer- exporter' and an actual user (industrial). If that be so, the appellant has to utilise the goods for the manufacture of goods on his own account and not on account of somebody else whose name does not figure in the EPCG licence. It is also an admitted position that the name of the mine owner, M/s. KJS Ahluwalia does not figure in the EPCG licence issued to the appellant. If that be so, violation of condition No. 5 of Notification No. 97/2004-Cus. stands clearly established and accordingly, the appellant would not be eligible for the benefit of the aforesaid exemption. In view of the foregoing, we do not find any infirmity in the order of the adjudicating authority in confiscating the goods under Section 111(o) of the*

*Customs Act, 1962 and in confirming the differential duty demand of ` 1,52,39,903/- under Section 28(1) of the Customs Act, 1962.*

**6.11.** The actual user (Industrial) definition as per Para 9.4 of the FTP during the relevant period "means a person who utilses the imported goods for manufacturing in his own industrial unit or manufacturing for his own use in another unit including a jobbing unit". Thus, the appellant having obtained the Licenses under the said category as Manufacturer exporter had to fall within this stipulated definition of actual user and as noticed from his activities has failed to comply with this requirement as he has neither used it in his own premises or in a job worker premises for his own use. They are in fact Job worker for M/s OMC who have at no point of time parted with the ownership of either the premises or the product to the appellants. Therefore, by no stretch of imagination the appellants can be treated as manufacturer exporter. As discussed above, they have suppressed the facts in the course of obtaining the licences. Therefore, they have violated the eligibility criterion of the Licences and thus violated the provisions of Notification 97/2004 and there is no ambiguity in the language of Notification or the policy.

**6.12.** We also find that Hon'ble Supreme Court in the case of ***Dilip Kumar & Co vs. Commissioner of Customs (I) Mumbai 2018 (361) E.L.T. 577 (S.C.)*** held that

> **43.** *There is abundant jurisprudential justification for this. In the Governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the Courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualizing different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view.*

**6.13.** In view of the above, we find that the as there is no ambiguity in the Customs Notification, FTP and Licences issued thereunder, the terms have to be strictly interpreted as per the plain wordings thereof. This being the case, by obtaining Licences

by way of misrepresentation of the status being that of a manufacturer and not complying with the conditions of Licences or Customs Notification do not confer any benefit to the appellants for concessional rate of duty. The submissions claiming that Customs acted more on the violations of FTP than Customs notification and that they have substantially complied with the provisions is not tenable. Therefore, we hold that having violated the conditions of the Notification, the appellants have rendered themselves liable to pay the duty along with appropriate interest and the capital goods imported by them at different ports. As the conditions of the Notification have been violated, the appellants have rendered the imported goods liable for confiscation under Section 111(o) of Customs Act, 1962.

**6.14.** We find that Commissioner had imposed penalty equal to the duty demanded. However, Commissioner has imposed a composite penalty in terms of Section 114A and Section 114AA of Customs Act, 1962. The Commissioner has not specified as to what is the amount of penalty liable to be paid under each of the Sections. We find that such an imposition is not tenable. Moreover, we find that the Notification provides for recovery of duty along with interest in case the appellants default, on any of the conditions contained in the Notification, in

terms of the bond submitted by them at the time of import. Notification does not provide for levy of penalty. When confiscation and demand of duty is on account of violations of conditions of the Notification, one need not traverse beyond the Notification for the purpose of demand of duty and imposition of penalty. Therefore, we find that the penalty imposed on the main appellants i.e., M/s. KCC is not maintainable on the above counts.

**6.15.** Two other appellants i.e., Shri P. K. Bhattacharya and Shri S. K. Mall have also filed appeals No. C/1818/2011 and C/1933/2011 seeking to set aside the penalties levied on them. We find that Commissioner has given a finding that Shri P. K.Bhattacharya connived with Soumya Ranjan Samal and issued a false certificate without any authority, has disclosed the secret documents to M/s. KCC and acted against the interest of investigation. Regarding the role of Shri S. K. Mall, learned Commissioner has given a finding that Shri S. K. Mall represented M/s. KCC before DGFT, advised M/s. KCC to submit false information in obtaining licenses as well as installation certificates. Commissioner also observed that Shri S. K. Mall had abetted similar offences in case of a number of parties. Commissioner has imposed penalty on both of them under Section 112(a) of Customs Act, 1962. However, the findings are

not clear bringing out their role in any offence committed under Customs Act. But has imposed penalty for abetting the offence of the main appellant i.e., M/s. KCC. However, we find that these two persons have not filed any documents before the Customs authorities and have not dealt with the impugned goods in any manner. It is also not brought on record to show that they have been benefitted in a pecuniary manner for their acts. The acts of commission and omission could constitute any offence under any other statute or any other proceedings but as discussed above their offences do not appear to come under the purview of Customs Act, 1962. Therefore, we are not inclined to uphold the penalties imposed on them.

**7.** In view of the above, the appeal (C/1819/2011) filed by M/s. KCC is partially allowed i.e., the demand of duty and interest on the appellants is confirmed and penalty is set aside. The appeals filed by M/s. P. K. Bhattacharya (Appeal No. C/1818/2011) and M/s. S. K. Mall (Appeal No.C/1933/2011) are allowed.

(Order was pronounced in Open Court on **06/12/2018.)**

**P. ANJANI KUMAR**
**TECHNICAL MEMBER**

**S.S GARG**
**JUDICIAL MEMBER**

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