

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

Appeal(s) Involved:

C/20467/2017-SM; C/21805/2018-SM

[Arising out of OIA No. 403-2016 dated 08/06/2016 passed
by Commissioner of CUSTOMS, BANGALORE-I(Appeal)]

Arising out of OIA No. 298/2018 dt. 09/08/2018 passed by
Commissioner of CUSTOMS, BANGALORE-I(Appeal)]

Composite Technologies Pvt Ltd

Plot No 4 Hirehalli Industrial Area
TUMKUR
KARNATAKA
572168

Appellant(s)

Versus

C.C-Bangalore-cus

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

Respondent(s)

Appearance:

Shri M.S. Nagaraja, Advocate
T. RAJESWARA SASTRY &
ASSOCIATES.

1010 2ND FLOOR ABOVE CORPORATION
BANK 26TH MAIN 4TH T BLOCK JAYANAGAR
BANGALORAE
KARNATAKA
560041

For the Appellant

Shri Gopakumar, Jt. Commissioner(AR)

For the Respondent

Date of Hearing: 18/06/2019

Date of Decision:24/06/2019

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 20493-20494/2019

Per : S.S GARG

Appellants have filed these two appeals against the
impugned orders dt. 08/06/2016 and 09/08/2018 passed by the

Commissioner(Appeals). both the appeals are based on same facts and issues and therefore both appeals are taken up together for discussion and disposal. The details of both the appeals are given herein below:-

Appeal No.	OIA No.	Duty	Redemption Fine	Penalty
C/20467/2017	403/2016 dt. 08/06/2016	Rs.22,14,833/-	Rs.5 lakhs u/s 125	Rs.2.5 lakhs u/s 112(a)(ii)
C/21805/2018	298/2018 dt. 09/08/2018	--	---	---

2.1. Briefly, the facts of the present case are that the appellant had imported capital goods claiming exemption under EPCG Scheme in terms of Customs Notification No.49/2000 dt. 27/04/2000 against EPCG Licence No.0730000275 dt. 22/02/2001 with the duty foregone amounting to Rs.22,14,833/-. The said goods were imported vide Bill of Entry no.02427/20-02-2001 through ICD, Bangalore as per the provisions of Para 6.11 of the Handbook of Procedure Volume 1 (1997-2002). As the appellant failed to submit the Installation Certificate in respect of the capital goods as per Customs Notification No.92/2004 dt. 17/09/2004 and also did not submit the Export Obligation Discharge Certificate (EOD certificate) issued by the JDGFT, the Department issued a show-cause notice dt. 22/11/2011 proposing to demand customs duty of Rs.22,14,833/- foregone on the imported goods along with applicable interest and penalty under Section 117 of the Customs Act, 1962 on the appellant. Subsequently, a corrigendum was issued on 20/02/2014. By following the due process, the Additional Commissioner of Customs vide Order-in-Original No.279/2014 dt. 28/03/2014 confirmed the following demands:-

- i. Confiscation of the goods valued at Rs.47,88,000/- under

Section 111(o) of the Act. Since the goods were already in the possession of the licensee, imposition of redemption fine of Rs.5 lakhs in lieu of confiscation under Section 125 of the Act.

- ii. Denial of the benefit of concessional rate of duty under EPCG Scheme read with Notification no.55/2003 Cus dt. 01/04/2003.
- iii. Demand of customs duty of Rs.22,14,833/- along with appropriate interest.
- iv. Appropriation of Rs.11,08,000/- realized by enforcing the Bank Guarantee no.20/2011-2002 dt. 20/05/2011 issued by Dhanalakshmi Bank, Bangalore towards the duty at (iii) above.
- v. Appropriation of Rs.6,00,000/- (Rupees six lakhs only) paid by the licensee on installments towards the duty at (iii) above.
- vi. Penalty of Rs.2,50,000/- under Section 112(a)(ii) of the Act.

2.2. Aggrieved by the said order, the appellant filed appeal before the Commissioner(Appeals) and the Commissioner(Appeals) vide Order-in-Appeal No.403/2016 dt. 08/06/2016 upheld the Order-in-Original with regard to confiscation, redemption fine, interest and penalty. As regards the Customs duty paid, the Commissioner(Appeals) remanded the matter back to the adjudicating authority for examining veracity of the appellant's claim that the entire duty had been paid in full. Aggrieved by the Order-in-Appeal No.403/2016, appellant filed appeal C/20467/2017 before this Tribunal. In the meantime, the Jt. Commissioner of Customs, ICD, Bangalore, as per the direction of the Commissioner(Appeals) passed Order-in-Original No.1/2017 dt. 04/01/2017 and confirmed that the appellants have to discharge the outstanding duty liability of Rs.2,41,794/-. But the adjudicating authority had confirmed the confiscation, redemption fine and penalty and the appellant challenged the said order before the Commissioner(Appeals) in appeal No.46/2017 and the Commissioner(Appeals) has passed the Order-in-

Appeal No.298/2018 confirming the order of the lower authority. against which, the appellant once again filed appeal No.C/21805/2018 before this Tribunal.

3. Heard both sides and perused the records.

3.1. Learned counsel for the appellant submitted that the impugned order passed in both the appeals are not sustainable in law as the same have been passed without appreciating the facts and the binding judicial precedent. He further submitted that despite the losses incurred and prolonged closure of the factory, the appellants have deposited the entire duty foregone amounting to Rs.22,14,833/- as on date. He further submitted that an amount of Rs.19,73,039/- had earlier been paid and the balance amount of Rs.2,41,794/- has also been paid vide Challan No.339309 dt. 25/09/2018 of SBI, Hoodi Branch, Bengaluru. Copy of the challan and letter dt. 25/09/2018 confirming the payment of duty is enclosed with the written submissions. therefore the entire customs duty foregone stands paid. He further submitted that the appellant had fulfilled the export obligation by earning foreign exchange to the extent of Rs.28,28,526/- as submitted before the Additional Commissioner vide letter dt. 20/03/2014 for which he received consideration in foreign exchange and if that is considered, then the export obligation will get reduced to Rs.2,30,01,474/- instead of 2,58,30,000/- and accordingly customs duty foregone also gets reduced to Rs.19,72,297/- from Rs.22,14,833/-. He further submitted that the appellant imported capital goods with intent to manufacture and export of high precision equipment to selected markets. However, the technical support assured for manufacture and marketing of the equipment was not extended resulting in complete breakdown of the project. The export obligation could not be fulfilled due to the circumstances beyond the control of the appellants and they have suffered huge financial losses and had to close the factory in 2007. The appellants have not derived

any pecuniary benefit by not exporting the goods as per the conditions of the EPCG notification rather they have suffered huge financial losses on account of import of capital goods and closure of the factory. It is his further submission that there was no seizure of the imported capital goods which are installed in the factory and the customs duty foregone has been paid. The non-fulfillment of export obligation and its subsequent closure of factory were due to reason beyond the control of the appellant. In these circumstances, the learned counsel pleaded that there is no justification for confiscation of goods and imposition of redemption fine in lieu thereof in terms of Section 125. Since the imported goods are not liable for confiscation and there was no mala fide intention in not fulfilling the export obligation, the penalty is also not imposable under Section 112(a) of the Act. For this submission, appellant relied upon the following decisions:-

- i. Taurus Novelties Ltd. Vs. CC, Bangalore [2004(173) ELT 100 (Tri. Bang.)]
- ii. FAL Industries Vs. Commissioner [2003(159) ELT 215 (Tri. Chennai)]
- iii. Age of Enlightenment Publications Vs. CC (Air Cargo), Delhi [2017(357) ELT 632 (T)]
- iv. Metropolis Overseas Ltd. Vs. Commissioner [2003(154) ELT (Tri. Ko.)]
- v. Philips (India) Ltd. Vs. Commissioner [2001(137) ELT 697 (Tri.)]
- vi. Meirs Pharma (India) Pvt. Ltd. Vs. CC, Chennai [2004(167) ELT 53 (Tri. Chennai)]

3.2. He also referred to the Public Notice No.22 (RE-2013)/2009-14 dt. 12/08/2013 which provides that in all pending cases of the default in meeting export obligation can be regularized by the authorization holder on payment of applicable customs duty and interest.

4. On the other hand, the learned AR defended the impugned orders and submitted that redemption fine and penalties have rightly been imposed because the appellant have not submitted the

installation certification and have also not complied with certain other conditions of the EPCG licence.

5. After considering the submissions of both the parties and perusal of the material on record, I find that in the present case, the appellant could not fulfill the export obligation on account of reasons beyond his control as he has suffered huge financial losses and his factory was closed in 2007. Further I find that the appellant have paid the entire customs duty foregone amounting to Rs.22,14,833/- as on date. Further I do not find any force in the contention of the appellant that they had fulfilled the export obligation by earning foreign exchange of Rs.28,28,526/- because both the authorities have not considered the same as export. Further I find that there is no deliberate default in fulfilling the export obligation and therefore there is no justification for confiscation of the goods and imposition of redemption fine in terms of Section 125 of the Act. The Tribunal in the case of Taurus Novelties Ltd. cited supra on identical facts has held in para 3 as under:-

3. On a careful consideration of the submissions, we notice that the appellants had imported capital goods under concessional rate of duty under EPCG Notification No. 110/95, dated 5-6-1995. But, they could not set up the industry to fulfil the export obligation due to total collapse of Korean economy and hence could not procure the order for manufacture and export of ceramic goods. The value of Korean company fell drastically and affected the appellants' project. As they could not get the support from the Korean collaboration for buy back of production and due to stiff competition from Chinese competitors, the factory could not be established for commercial production and export of goods. The appellants, due to these factors, approached the Commissioner and requested him to permit them to encash the Bank Guarantee and deposit these amounts due to the department. The same was granted and the amounts were deposited by TR-6 Challan on 30-11-2000. The same has been appropriated in the impugned order. The Show Cause Notice alleging violation of the Notification under Section 124 of Customs Act was issued on 15-1-2001. In terms of the adjudication order, the machineries were confiscated and granted redemption under fine of Rs. 20,00,000/- besides a penalty on the Company of Rs. 20,00,000/- and penalty of Rs. 5,00,000/- each on the Managing Director and the Executive Director. The question in this appeal is as to whether the goods can be confiscated and redemption fine imposed besides penalties and interest. In a like situation, the Tribunal, in the citations referred to by the Counsel, has held that confiscation cannot be ordered in a circumstance when the export obligation became an impossibility. Further it has been held that when the Bank Guarantee has been realized before the issue of Show Cause Notice, then in such a circumstance, the redemption fine, penalty and interest is not imposable. We have perused these judgments and find that the appellants' prayer for setting aside the redemption fine, penalty and interest, in terms of these judgments, is justified. The ratio of the judgments clearly applies to the facts and circumstances of this case. Respectfully following the same, the impugned order, confiscating the machinery and imposing redemption fine and penalty on the Company and the Directors including the levy of interest, is set aside

by allowing the appeal.

This judgment of the Tribunal has been followed in the case of Age of Enlightenment Publications cited supra. Further the Tribunal in the case of Metropolis Overseas Ltd. cited supra has observed in para 4(a) as under:

4. After hearing both sides and considering the matter, we find :

(a) The issue of confiscation and liability for penalty under Sections 111(o) and 112 of Customs Act, 1962 EPCG Scheme imports and non-fulfilment of Export obligation is no longer res integra, having been decided by the Tribunal in a catena of decisions including M/s. Philips India Ltd. v. CC, Mumbai [2001 (137) E.L.T. 1267 (Tri. - Mumbai)] which has been followed by the Tribunal in the case of M/s. Fal Industries Ltd. v. CC, Chennai - 2002 (53) RLT 86 (CEGAT). Though these decisions have been arrived at in the context of Notification 160/92 and not Notification No. 110/95, dated 5-6-95. The law laid down therein would be equally applicable to this case. Therefore, following these decisions, we find that in the case of Notification 110/95 also, the drastic measures of ordering confiscation under 111(o) of the Customs Act and penalty under 112A of Customs Act, 1962 is totally uncalled for.

6. Therefore by following the ratio of the decisions cited supra, I am of the considered view that in the facts and circumstances of this case, the confiscation, redemption fine of Rs.5 lakhs in lieu of confiscation and penalty of Rs.2.5 lakhs is liable to be set aside and I set aside the same. But as far as payment of interest is concerned, the appellants are liable to pay interest on the delayed payment of customs duty foregone. For that purpose, I remand the case back to the original authority for quantification of interest which the appellant would be liable to pay. With these observations, I set aside the confiscation, redemption fine and penalty and confirm the interest liability. Both appeals are disposed of accordingly.

(Order was pronounced
in Open Court on 24/06/2019)

S.S GARG
JUDICIAL MEMBER

Raja...