IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL SOUTH ZONAL BENCH, CHENNAI

C/40/2007 and C/42143/2013

(Arising out of Order-in-Appeal C. Cus. No.711/2006 dated 3.10.2006 and Order-in-Appeal C. Cus. No. 853/2013 dated 25.6.2013 passed by the Commissioner of Customs (Appeals), Chennai)

M/s. ORR JAY Process — Appellant

Vs.

Commissioner of Customs, Chennai — Respondent

Appearance

Ms. J. Ragini, Advocate for the Appellant
Shri K. Veerabhadra Reddy, JC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **06.07.2017**

Final Order Nos. 41190 - 41191/2017

Per Bench

The issues involved in both these appeals being interrelated and pertaining to the same imported goods, they are heard together and disposed by this common order.

2. Brief facts that lead to the filing of these two appeals are that 32 sets of used secondhand mini offset printing machines had been imported in the name of M/s. Goldline Offset Printers in May 1999. These goods were examined by the DRI. It

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appeared to the department that the market value of the goods would be Rs.32 lakhs and that the importer was not the actual user, hence the said secondhand printing machines could not be imported by them. During the investigation, M/s. Goldline Offset Printers, had disowned the said goods. The matter was adjudicated and the goods confiscated which were lying in Inddev CFS, Chennai absolutely without extending any option for redemption vide Order-in-Original dated 31.1.2001. In the meantime, however, M/s. Orr Jay Process, Chennai (appellants in both these cases) had filed IGM amendment and Bill of Entry dated 31.7.2000 and cleared the impugned goods in August 2000. Issue of clearance of the confiscated goods was taken up for investigation by the department. In such investigation, the appellant deposited a sum of Rs.32 lakhs on 21.3.2002 towards duty liability. Thereafter, appellant filed a refund claim on 20.9.2002 claiming that the amount of Rs.32 lakhs paid was required to be refunded to them. The original authority vide letter dated 21.3.2006, informed the appellant that the refund claim cannot be entertained / decided until finalization of the case by DRI and adjudication by the competent authority, that till then there is no cause of action in the refund section, therefore, their claim is not maintainable. Aggrieved, the appellant filed appeal before Commissioner (Appeals) who vide order dated 3.10.2006, rejected the appeal

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upholding the decision of the original authority. Hence Appeal No. C/40/2007.

3. Pursuant to aforementioned clearance of the imported goods by M/s. Orr Jay Process, in the resultant investigation, statements were recorded under section 108 of the Customs Act, 1962 from the partner of the appellant Sh. R. Janardhanan and other persons. Subsequently, a show cause notice dated 2.8.2005 was issued inter alia proposing confiscation of 32 numbers of imported printing machines valued at Rs.32 lakhs, confiscation of the amount of Rs.32 lakhs paid by appellants as sale proceeds of illegally removed smuggled goods and imposition of penalties on the importer and other persons under various provisions of the Customs Act, 1962. In adjudication, the original authority, inter alia, confirmed confiscation of the imported printing machines and the amount of Rs.32 lakhs paid by the appellant and also imposed penalties on the importer and other persons. In appeal, Commissioner (Appeals) vide impugned order dated 25.6.2013 partly allowed the appeal restricting the confiscation of sale proceeds to Rs.9,65,000/- only but retaining penalty of Rs.4 lakhs imposed on them. The appellate authority ordered adjustment of these amounts against the deposited amount of Rs.32 lakhs and ordered that the balance amount of Rs.18,35,000/- be refunded the appellant in accordance with law. Hence Appeal No. C/42143/2013.

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4. Today, when the matter came up for hearing, on behalf of the appellants learned counsel Ms. J. Ragini submitted that in respect of Appeal No. C/40/2007, the amount of Rs.32 lakhs has been collected arbitrarily by the department without any basis which has not been taken note of by the Commissioner (Appeals); that as per the order of assessment there was no short-collection of duty and therefore the amount of Rs.32 lakhs collected by the department has to be refunded to the appellant. Under these circumstances, the impugned order is not sustainable.

5. In respect of Appeal No. C/42143/2013, learned counsel submits that there cannot be second confiscation of the same goods which have been confiscated earlier by the Chief Commissioner. She further submitted that the goods were not illegally removed, they had effected amendment of manifest, filed Bill of Entry, the goods had been examined by the officers and were removed only after examination and out of charge order. The order of confiscation of the goods was passed merely after six months of the cargo being released by Custom House. When the clearance of goods on the Bill of Entry filed by them was permitted, the department ought to have verified whether any detention or seizure of the goods was in force. The appellants have come into picture only as a buyer of the goods. They were not aware of seizure of the goods etc. nor were they privy or party to the proceedings of the seizure.

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Further, the amount of Rs. 32 lakhs was not sale proceeds. The same had not been seized by the authorities on any reasonable belief that it represented sale proceeds. The said deposit was made under compulsion. It was further submitted that the penalty of Rs.4 lakhs imposed under section 112(a) ibid was not imposable since the goods are not liable for confiscation at all under section 111 of the Act. Hence, penalty is also not sustainable.

6. On the other hand, with regard to Appeal No. C/40/2007, the learned AR Shri K. Veerabhadra Reddy submits that there was no cause for filing the refund claim since there was no order of assessment giving rise to the refund claim. He further draws attention to page 11 of the impugned order whereby Commissioner (Appeals) has noted the appellant's plea that they had filed refund claim only to avoid being hit by limitation and rather than asking for refund, they have requested that the proceedings be simply kept in abeyance until the adjudication proceedings are completed after which the refund claim may be initiated. Learned AR further submits that no cause for refund claim had arisen because the sum of Rs.32 lakhs has been voluntarily paid and as such the claim did not satisfy the requirements of section 27 of the Customs Act, 1962.

7. With regard to appeal No. C/42143/2013, learned AR submits at the time of clearance of the goods, the appellant

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was aware of the violations of licensing conditions, seizure of the goods by DRI and has imported from the importer and also further that the CHA was contracted without informing him of the seizure by the DRI. From the above, it is clear that the culpable mind of the importer is quite evident and accordingly for dealing the goods which are liable for confiscation, the appellant has rendered itself liable for penalty.

8. We have heard the submissions made by both sides.

9. The issues that come up decision are as follows:-

(i) In respect of Appeal No. C/40/2007, whether the rejection of the refund claim preferred by the appellant is not maintainable is in order or otherwise.

(ii) In respect of Appeal No.C/42143/2013, whether the impugned order upholding confiscation of sale proceeds of the imported used mini offset printing machines to the extent of Rs.9,65,000/- and penalty amount of Rs.4,00,000/- is in order or otherwise.

(iii) We intend to take up both the issues one by one.

10. In respect of Appeal No. C/40/2007, we note that the appellant had filed refund claim proximate to payment of Rs.32 lakhs against Bill of Entry No. 022484 dated 31.7.2000. Refund section of Custom House issued deficiency memo-cum-show cause notice dated 16.10.2003 to the appellant stating that the claim was deficient since there were no enclosed copies of Order-in-Original / Order-in-Appeal etc. based on which the

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refund could be considered. In response, the appellants replied vide letter dated 24.11.2003 that refund had been filed to ensure that it did not became time-barred in respect of time-limit. The appellant also requested that the claim be kept pending and that they would inform the department as and when the results of adjudication are known. After exchange of correspondences vide communication dated 21.3.2006, the Deputy Commissioner of Customs (Refunds) informed the appellant that the refund claim could not be maintained / decided until finalization of the case and adjudication by competent authority, hence there is no cause of action, therefore, the claim of refund was not maintainable and therefore rejected. All these facts have been brought out in the impugned order. It is seen from para 9 of the impugned order that even in the personal hearing, the learned counsel for the appellants had submitted that as department had not issued show cause notice to them for a long time, to protect their revenue, they had filed the refund claim to keep the matter alive. The affirmation of the learned counsel that they "were not pressing of the refund of the money at this stage but wanted the matter to be kept alive and the refund claim restored" has also been taken note of by the lower appellate authority.

11. Based only on these facts and averments of the appellants themselves, the lower appellate authority has

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observed that the refund claim under the Customs Act, 1962 would arise only if the claim satisfies the provisions of section 27 ibid, that in this case, the sum of Rs. 32 lakhs had been voluntarily paid well in advance of any notice being issued to the appellants, for payment of duty, therefore question of assessment to duty mentioned in section 27 would certainly would not arise until the order of assessment has been made, consequently, there would be no cause of action of refund ad any claim thereof would not be maintainable. We do not find any infirmity with these findings of the lower appellate authority. As correctly observed by him, the clock of limitation would start taking only on receipt/communication of an order in adjudication proceedings issued to the appellants. Accordingly, we do not find any merit in the appeal (C/40/2007), for which the same is dismissed.

12. In respect of Appeal No. C/42143/2013, the proceedings thereat are consequence of appellants having cleared consignment of 32 used mini offset printing machines which had been confiscated by the department and was lying in INDEV CFS after filing application for amendment of manifest and Bill of Entry thereafter. Pursuant to investigations conducted in respect of this allegedly irregular clearance of confiscated goods, during the investigation an amount of Rs.32 lakhs was deposited by the appellants towards duty liability. The investigation resulted in issue of show cause notice dated

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2.8.2005 and resultant adjudication proceedings had resulted in original authority ordering confiscation of 32 numbers of imported used mini offset printing machines which had been sold in the open market, confiscation of an amount of Rs.32 lakhs paid by appellants as sale proceeds of illegally removed smuggled goods under section 121 ibid and imposition of penalties, inter alia, on the appellants. The lower appellate authority vide the impugned order dated 25.6.2013 has restricted the confiscation of sale proceeds to Rs.9,65,000/-, which as per his findings was the actual sale proceeds of the imported goods when sold by the appellant after clearance from the customs. We find that the appellants have preferred a number of grounds of appeal. However, the main thrust of these grounds is that the basis for working out of an amount of Rs.32 lakhs made to be deposited by them and confiscation of the same is without jurisdiction and authority. We are unable to fathom how the appellant is challenging confiscation of an amount of Rs.32 lakhs when the impugned order appealed against has in fact restricted the amount for confiscation to Rs.9,65,000/-. There are also no grounds preferred by the appellant to disprove the findings of the lower appellate authority that the said amount of Rs.9,65,000/-, worked out from sales invoices produced by the appellants themselves, do not represent the total sale proceeds of the imported goods.

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13. The appellants have made protestations of ignorance that they had no knowledge about the confiscated nature of the goods when they sought clearance. In fact, an attempt has been made to put the blame on the department officers as to why clearance was allowed for such goods when those were confiscated. However, we do not find any merit in these arguments, since from the facts they are definitely not white as the driven show. Shri R. Janardhanan, partner of the appellant-firm in his statement has clearly admitted that the supplier Shri Ramanababu of M/s. Babu Marketing Systems Inc. had informed him at the time of making request that the original consignee had disowned the goods and the said goods had been subsequently seized by DRI. We find from the order of the original authority that while obtaining amendment and filing Bill of Entry to clear the impugned goods, the CHA was not informed by the appellant about the detention / confiscation. It thus emerges that the entire exercise was a meticulously planned one by the appellants who utilized loopholes in the system to obtain clearances of imported goods with their definite knowledge under confiscation. Their conduct cannot be but otherwise considered as one of deceit and contumacious. The order of the lower appellate authority in respect of confiscation of sale proceeds of the illegally removed imported goods and confirmation of penalty of Rs.4,00,000/- under section 112(a) ibid is therefore just, fair and legal and

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does not call for any interference. We further observe that the lower appellate authority has passed a very reasoned order and has been considerate to order that the confiscated sale proceeds of Rs.9,65,000/- and the penalty amount of Rs.4,00,000/- be adjusted from already deposited amount of Rs.32 lakhs and that the balance amount of Rs.18,35,000/- to be refunded to the appellant in accordance with law. Accordingly, we do not find any merit in the appeal (C/42143/2013) for which the same is dismissed. We therefore refrain from making any interference with the order of the lower appellate authority including the order therein for refund of balance amount of Rs.18,35,000/- in accordance with law.

15. In the result, both the appeals are dismissed on the above terms.

(Operative portion of the order was pronounced in open court)

(**Madhu Mohan Damodhar**)
Member (Technical)

Sulekha Beevi

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

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