

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO.III

Customs Appeal No.50425 of 2021

[Arising out of Order-in-Appeal No.IND-EXCUS-000-APP-070-2020-21 dated 29.10.2020 passed by the Commissioner (Appeals), Customs, CGST & Central Excise, Indore (M.P.)]

M/s. Sai Enterprises

Appellant

Plot No.104, Block-C,
Raj Enclave, Vaishno Dham,
Aditya Puram, Gwalior-474 005.

VERSUS

**Commissioner of Customs,
CGST and Central Excise Headquarters,
Manik Bagh Palace, Post Bag No.10,
Indore-452 001 (M.P.).**

Respondent

APPEARANCE:

None for the appellant.

Shri Rakesh Kumar, Authorised Representative for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 59887/2024

DATE OF HEARING:03.12.2024

DATE OF DECISION:16.12.2024

BINU TAMTA:

1. M/s. Sai Enterprises has challenged the order-in-appeal no.IND-EXCUS-000-APP-070-2020-21 dated 29.10.2020 confirming absolute confiscation under the provisions of Section 111(d), 111(f), 111(l) and 111(m) of the Customs Act, 1962¹

¹The Act, 1962

and penalty under Section 112(a)(i) and Section 114AA of the Act on the appellant.

2. The factual matrix of the case is that the appellant is engaged in import and trading on 'Stock Lot Tyres' of various makes and sizes including 'Off Road Tyres'. The appellant initially filed the two Bills of Entry² viz B/E No.2585131 dated 26.03.2019 and No.2624519 dated 29.03.2019 and later on, B/E No.3104162 dated 4.5.2019 declaring the goods as "Multi Brand and Multi Size Stock Lot Off the Road Tyres" for clearance under that "FIRST CHECK". On the basis of specific intelligence, the officers of DRI examined the goods under Panchnama dated 31.03.2019 and 04.05.2019. On examination, number of tyres found was 1642 instead of 1044 as declared in the B/E No.2585131 dated 26.03.2019. Similarly on examination of the goods covered under B/E No.2624519 dated 29.03.2019, as against the declared 650 tyres, the total number of 787 tyres were found. Thus, total 2429 (1642 + 787) tyres were imported as against the declared quantity of 1694 tyres (1044 + 650). The goods were also found to be mis-declared as they were not "Off the Road Tyres" as declared under the import documents and were without any BIS markings.

²B/Es

3. The statement of Shri Suryajeet Singh, Proprietor of the appellant company was recorded under Section 108 of the Act on 03.04.2019, wherein he, inter-alia, stated that he obtained IEC in the name of M/s.Sai Enterprises on behest of Shri Navin Kumar; that he opened a current bank account in Punjab National Bank, Milavali Branch, Gwalior for the said firm; that he provided the details of online login id and password to Shri Navin Kumar; that the said current account was operated by Shri Navin Kumar only; that Shri Navin Kumar promised him to give Rs.75,000/- to Rs.1,00,000/- per container; that he neither knew nor met nor made any correspondence to any overseas suppliers who supplied the goods imported by M/s. Sai Enterprises; that all the imports were being handled by Shri Navin Kumar; that whenever the imported goods were about to reach in India, Shri Navin Kumar used to inform him and handed over the import documents, who handed over the same to G Card holder, Shri Santosh Kumar Gupta; that after clearance of the goods, he used to send the goods at the address provided by Shri Navin Kumar; that all the payments to the supplier, Customs duty and shipping line charges etc. were made by M/s. Sai Enterprises only after receipt of the same from M/s. Auto Mart India that at some instances, M/s.Auto Mart India also made duty payments from their

accounts. He allegedly admitted that they intentionally did not declare the correct quantity and brand to save customs duty to gain more profits. The appellant submitted email transcript dated 01.04.2019 during the course of investigation stating that the supplier had by mistake sent documents mentioning 1042 tyres instead of 1644. The Proprietor, Shri Suryajeet Singh vide letter dated 06.04.2019 retracted his statement dated 03.04.2019 as the same were recorded under duress. In his subsequent statement dated 17.08.2019, he confirmed his earlier statement. The office premises of M/s.Sai Enterprises were searched on 08.04.2019, where some documents were seized.

4. The Chartered Engineer inspected all the goods covered under three B/Es and submitted its report dated 28.06.2019 that they were high end tyres, which are actually "Passenger Car Radial", Commercial Tyres for delivery truck and were not "Off Road Tyres". He also arrived at the market value of the goods under 3 B/Es at Rs.1,92,20,387/-. The goods were put under seizure under Section 110 of the Act vide Seizure Memo dated 8.7.2019. The request made by the appellant for provisional release of the seized tyres was rejected vide Order dated 26.11.2019 holding that the law prohibits the import of

non-BIS tyres under Section 17 of the Bureau of Indian Standard Act, 2016³. Under a reasonable belief that the goods had been imported by mis-declaring the quantity and the value and were without mandatory BIS markings, show cause notice dated 13.02.2020 was issued to the proprietor of the appellant company along with 3 co-noticees, Shri Navin Kumar, Proprietor of M/s. Auto Mart India, Shri Santosh Kumar Gupta, G-Card Holder and Shri R.K. Sharma, owner of M/s.Sharma Enterprises. On adjudication, the order-in-original dated 16.06.2020 was passed as under:-

“(i) The 3066 new tyres of reputed brands found without BIS norms and markings having value of Rs.1,92,20,387/- imported vide Bills of Entry No.2585131 dated 26.03.2019, 2624519 dated 29.03.2019 and 3104162 dated 04.05.2019 are ordered to be confiscated absolutely under the provisions of Section 111(d),111(f), 111(l) and 111(m) of the Customs Act, 1962.

(ii) I impose a penalty of Rs.10,00,000/- (Rupees Ten Lakhs only) upon the Noticee No.1 under the provisions of Section 112(a)(i) of the Customs Act, 1962.

(iii) I impose a penalty of Rs.25,00,000/- (Rupees Twenty Five Lakhs only) upon the Noticee No.1 under the provisions of Section 114AA of the Customs Act, 1962.

(iv) I impose a penalty of Rs.10,00,000/- (Rupees Ten Lakhs only) upon the Noticee No.2 under the provisions of Section 112(b)(i) AA of the Customs Act, 1962.

³BIS Act

(v) I impose a penalty of Rs.25,00,000/- (Rupees Twenty Five lakhs only) upon the Noticee No.2 under the provisions of Section 114AA of the Customs Act, 1962.

(vi) I impose a penalty of Rs.2,00,000/- (Rupees Two Lakh only) upon the Noticee No.3 under the provisions of Section 112(b)(i) of the Customs Act, 1962."

(vii) I impose a penalty of Rs.50,000/- (Rupees Fifty Thousand only) upon the Noticee No.4 under the provisions of Section 117 of the Customs Act, 1962."

5. The order was challenged only by M/s. Sai Enterprises in appeal, which has been rejected by the impugned order by the Commissioner (Appeals). Hence the present appeal has been filed by the appellant herein before this Tribunal.

6. The appeal had been listed for hearing, however, despite several opportunities having been granted, as 'last opportunity', no representation was made on behalf of the appellant. On the last date of hearing i.e. 18.10.2024, since the counsel appearing in the appeal had withdrawn his vakalatnam, a fresh notice was directed to be served on the appellant and it was clarified in the order that the appeal shall be decided on merits even if the appellant fails to appear. The notice was served on the appellant on 11.11.2024, however, none appeared.

7. We have heard Shri Rakesh Kumar, learned Authorised Representative for the Revenue and have perused the appeal paper book as well as the synopsis and the compilation of judgements filed on behalf of the appellant.

Submissions of the Appellant

8. The submission made by the appellant in the grounds of appeal and the synopsis are to the effect that B/Es were filed under "FIRST CHECK" and, therefore, the proper officer was required to check all the declarations regarding the quality, quantity, brand, assessable value, Customs Tariff Heading and to assess B/Es accordingly, which implies that there was no question of intended mis-declaration. Secondly, the goods under import do not fall in the category of "Prohibited Goods" as defined under Section 2(33) of the Act. The tyres in question are freely imported without any licence and, therefore, they are under Open General Licence Category. However, the Central Government had brought in tyres under the BIS in order to regulate the quality of tyres of specified standard and hence, the requirement of BIS. Certain categories of pneumatic tyres which are not manufactured in India are exempted from the requirement of obtaining BIS. This exception was carved out because the manufacturers of reputed brands maintain

standards much higher than what are required under BIS and hence, they were granted an exemption in this regard. A bare reading of the Chartered Engineer Report indicate that the tyres in question are of very high standard quality being of either European, American or Japanese manufacturing standard which are much more stringent than the Indian BIS Standard and therefore, there is no question of any danger and life and safety of the passenger on road.

9. Referring to the various decisions, the submission was that there was fine line of difference between "Restricted Goods Make" and "Prohibited Goods". The alternate submission made is that even if it is assumed that the goods in question were prohibited within the meaning of Section 2(33) of the Act, still Section 125 is applicable to prohibited goods and redemption fine can be imposed for release of the imported goods. It is submitted that Section 125 of the Act gives discretion to the authorities to impose redemption fine and gives an option to the person to pay the same in lieu of confiscation.

10. Accordingly, the prayer made was to set aside the impugned order and permit release of the goods for home consumption on payment of applicable duty, redemption fine

and penalty, after fresh valuation as the goods are lying for the last 3 years.

Submissions of the Revenue

11. Shri Rakesh Kumar, learned Authorised Representative for the Department in the light of the findings of the authorities below submitted that it is a case of mis-declaration of the quantity and value of the goods under import without any BIS markings, which is a mandatory requirement. Since the goods found, on examination, were never declared in the BE, it was a clear case of mis-declaration. Referring to the provisions of Chapter 1(a) of the Customs Tariff Act, 1975 read with the provisions of Section 17 of BIS Act and the Pneumatic Tyres and Tubes of Automatic Vehicles (Quality Control) Order, 2009, he submitted that import of Pneumatic Tyres, which do not confirm to the BIS norms is prohibited and the goods, therefore, fall within the category of "Prohibited Goods" as defined under Section 2(33) of the Act. In support of his submission, he relied on the decision of the Apex Court in **Om Prakash Bhatiya⁴, Sheikh Mohd. Omer⁵ and Union of India Vs. Raj Grow Impex LLP⁶**. Since the goods imported

⁴ 2003 (155) ELT 423 (SC)

⁵ 1983 (13) ELT 1439 (SC)

⁶ 2021 (377) ELT 145 (SC)

are prohibited goods, they are liable for confiscation under the provisions of Section 111 on absolute basis. In the context of valuation, he submitted that the Chartered Engineer has submitted his report on the basis of market inquiry and the same was accepted in writing by the appellant. Referring to the conduct of the appellant, he tried to submit a fake email to cover-up the smuggling activities regarding mis-declaration and non-BIS markings, therefore, the penalty has been rightly imposed. Moreover, the appellant had sublet his IEC to Shri Naveen Kumar for a consideration.

11. Learned Authorised Representative also relied on the decision of the High Court of Allahabad in **Commissioner of Customs and Central Excise Vs. Aban Exim Pvt. Ltd.** ⁷, which has been affirmed by the **Apex Court** ⁸ wherein identical issue has been considered. In the above scenario, learned Authorised Representative prayed that the appeal may be dismissed.

BIS Certification is Mandatory

12. The undisputed position is that the goods imported by the appellant were not having the mandatory BIS certification.

⁷ 2014 (308) ELT 641 (All.)

⁸ 2016(336) ELT A-176 (SC)

Therefore, the first point for our consideration is whether any prohibition is imposed under any other law for the time being in force. Chapter 1(a) of CTA, 1975 provides that all goods imported shall also be subjected to domestic law, rules, orders, regulations, technical specifications, environmental and safety laws, as applicable to domestically produced goods. Section 17 of the BIS Act prohibits the manufacture, import, distribute, sell, hire, lease, store or exhibit for sale any goods or articles without standard mark. Section 17(1) of BIS Act reads as under:-

"17. Prohibition to manufacture, sell, etc., certain goods without Standard Mark

(1)No person shall manufacture, import, distribute, sell, hire, lease, store or exhibit for sale any such goods, article, process, system or service under sub-section (1) of section 16-

(a)without a Standard Mark, except under a valid licence; or

(b)notwithstanding that he has been granted a license, apply a Standard Mark, unless such goods, article, process, system or service conforms to the relevant standard or prescribed essential requirements."

13. Section 16 of BIS Act empowers the Central Government to notify by an order published in the Official Gazette, the goods or articles etc. to conform a standard by use of the Standard Marks in public interest or for protection of human,

animal or plant, health, safety of the environment or prevention of unfair trade practices or national security. In exercise of the power under Section 14, the Central Government issued the order dated 19.11.2009 in respect of the Pneumatic Tyres and Tubes of Automatic Vehicles (Quality Control) Order, 2009, which came into force on 13.05.2011.

The relevant provisions of the order is quoted below:-

“3. Prohibition regarding manufacture, sale, distribution etc:- (1) No person shall by himself or through any person on his behalf, manufacture, import, store for sale, sell or distribute Pneumatic Tyres which do not conform to the Specified Standard and which do not bear the Standard Mark of the Bureau on obtaining Certification marks licence;

Provided that nothing in this Order shall apply in relation to Pneumatic Tyres for the following:

- (a) Pneumatic tyres manufactured in India for exports;
- (b) Pneumatic tyres imported by Original Equipment Manufacturers (OEM) and/ or their authorized companies for fitment on vehicles or after sales, meant for exports;”

In terms of the aforesaid provisions, it is absolutely clear that no person can manufacture, import, store for sale, sell or distribute the pneumatic tyres, which do not bear the standard mark of the Bureau. The proviso enumerates the exception in respect of the pneumatic tyres manufactured in India for export or the pneumatic tyres imported by OEM for fitment on vehicles

or aftersales, which are meant for exports. The appellant do not fall in either of the two exceptions carved out in the proviso and, therefore, it was mandatory that the pneumatic tyres imported by them should bear the BIS markings.

14. Learned Authorised Representative has taken us to the communication dated 11.02.2010 issued by the Ministry of Commerce and Industry emphasizing to give wide publicity to the said order. The Ministry of Finance also issued similar communication dated 29.11.2011 directing the field formation to verify the BIS Standard Mark before clearance of the imported pneumatic tyres. The relevant portion of the communication is quoted as under:-

“The said Order prescribes quality standards for pneumatic tyres (which include pneumatic tubes) with the objective of ensuring safety of human lives and vehicles and also availability of quality products, whether domestic or imported, to the consumers. Adherence to the quality standards is indicated by a BIS Standard Mark. However, specified pneumatic tyres that are not domestically manufactured and are therefore imported by Original Equipment Manufacturers (OEMs) are exempt from this stipulation. Accordingly, the Department of Industrial Policy and Promotion, has vide OM dated 13.05.2011 and 08.09.2011 identified total 316 pneumatic tyres that are exempt. This list is available at <http://www.dipp.nic.in>. Hence, other than these exempted pneumatic tyres no person shall by himself or through any person on his behalf, manufacture, import, store for sale, sell or distribute pneumatic tyres (which include

pneumatic tubes) that do not conform to the specified standards and that do not bear the BIS Standard Mark.”

15. The above legal provisions and the departmental communication in that regard makes it emphatically clear that pneumatic tyres imported by the appellant were required to bear the BIS markings and in absence thereof, there is a clear violation of the statutory provisions. The tyres under import do not fall in any of the exception. The non-compliance of the conditions of having the BIS markings affixed on the tyres renders the goods liable for confiscation.

16. On the issue of affixing the BIS markings in **Aban Exim Pvt. Ltd. (Supra)**, the issue before the learned Division Bench of the Allahabad High Court was as under:-

“3. Whether the Tribunal has committed an error of law in accepting and upholding the clearance for home consumption allowed by the Commissioner (Appeals) of goods otherwise prohibited for clearance for home consumption in absence of valid BIS certificate with reference to the Pneumatic Tyres and Tubes for Automotive Vehicles (Quality Control) Order, 2009, read with 2.2 of the Foreign Trade Policy and General Note 2A of the import policy regarding mandatory compliance with regard to BIS certification as per Schedule III to the import policy.”

17. The learned Division Bench with reference to the 2009 Order observed that the import of prohibited goods, which are to be utilized in motor vehicles has an important bearing on the safety of the public at large and the conditions, which have been imposed in the 2009 Order and the circulars of the Board are intended to fulfil a specific purpose of protecting the public interest. As in the said case, the BIS certification was available only in respect of a part of a consignment and the goods in the remaining consignment did not have the requisite BIS markings and the Commissioner (Appeals) having missed the discretionary element in exercise of the jurisdiction under Section 125 of the Act, the matter was remanded back to the Commissioner (Appeals). The appeal preferred by the party before the Apex Court was dismissed by a Three Judge Bench vide Order dated 02.12.2014.

18. The learned counsel for the appellant in the compilation of judgements has annexed the **Final Order of the Tribunal dated 07.04.2017** passed against the remand order by the High Court of Allahabad in **Aban Exim Pvt. Ltd.** In view of the peculiar facts in that case where the BIS certification was initially valid upto 31.12.2012 but was extended till 31.01.2019 in respect of some of the goods, they were permitted for home

consumption. So far the tyres of other brands were concerned, learned Single Member remanded the matter and directed the Adjudicating Authority to obtain a test report from the Central Institute of Road Transport or some other laboratories whether the tyres are of acceptable quality so as to allow them for home consumption or else to be directed to re-export. The final order by the learned Single Member has been basically passed on the facts of that case, however, the principles of law has been enumerated by the learned Division Bench of the High Court of Allahabad, where the Court emphasized on the BIS markings in terms of the 2009 Order and the circular issued in that regard. The same are binding on us and in light thereof, we hold that the goods (tyres) imported by the appellant without any BIS markings being in violation of the statutory provisions are not permissible to be imported and hence they are liable for confiscation under Section 111 of the Act.

Prohibited Goods

19. We now come to the issue whether the tyres imported by the appellant fall under the category of “prohibited goods as defined under Section 2(33) of the Act, which reads as under:-

“Section 2(33) of the Customs Act, 1962—
 “prohibited goods” means any goods the import or export of which is subject to any prohibition under

this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.”

20. The term “prohibited goods” has been the subject matter of interpretation in several decisions. In the case of **Aban Exim Pvt. Ltd.**, the import of identical goods was treated as import of prohibited goods. Reference is also invited to the decisions of the Apex Court in **Sheikh Mohd. Omer (supra)** and **Om Prakash Bhatiya (supra)** and the principles laid down have been followed by the Delhi High Court in **Commissioner of Customs and Central Excise, Delhi-IV Vs. Achiever International**⁹. The principle of law as has been settled in the catena of decisions is that if there is any prohibition on the import or export of any goods under the Act, or any other law, for the time being in force, it would be considered as “prohibited goods” but excluding the goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. Since the learned counsel for the appellant has tried to distinguish between the term “prohibition” and “restriction”, reference is invited to the decision of the Apex Court in **Sheikh Mohd.**

⁹ 2012(286) ELT 180 (Del.)

Omer, where also a contention was raised that the expression "prohibition" used in Section 111(d) must be considered as a total prohibition and it does not bring within its fold the restriction imposed by clause (3) of the Import Control Order, 1955. The Court negatived the said contention and held as under:-

"....What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. **"Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in section 111 (d) of the Customs Act, 1962 includes restrictions.** Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. **"Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition.** From item (I) of Schedule 1, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues." **(Emphasis laid)**

Similarly, in **Rajgrow Impex (supra)**, the Delhi High Court rejected the contention that the goods fall in restricted category and observed that, "if the conditions prescribed for

import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject' to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description."

21. We do not wish to deal further into the concept of the "prohibited goods", which stands settled over the period. In the facts of the present case, it is an admitted position that the goods imported were not having the BIS markings, whereas the legal position, as discussed above, has categorically imposed such a condition and, therefore, the goods imported in violation of the said condition had rendered the goods in the category of "prohibited goods", which are liable for confiscation under the Act.

Misdeclaration

22. The next issue is in the context of mis-declaration of the quality, quantity and the valuation of the goods. As per records of the case, the goods declared in the B/E were "Multi Brand and Multi Size Stock Lot Off the Road Tyres" though on examination and further investigation from the various

manufacturers of tyres, it was confirmed that the imported tyres were "Passenger Car Radial Tyres". Similarly, the quantity of the goods as mentioned in the B/E No.2585131 was 1044 tyres, however, 1642 tyres were recovered and in respect of the B/E No.2624519 as against the declared quantity of 650, a total number of 787 tyres were found. Thus, there was a clear mis-declaration as to the quantum of the goods. The appellant sought justification by referring to a fake email stating that the foreign supplier had dispatched excess quantity of tyres by mistake, which is difficult for us to accept as no prudent businessman would supply excess amount of goods without charging for the same. Thus the allegation of mis-declaration stands proved.

23. The appellant has challenged the valuation of the imported goods arrived at by the Chartered Engineer. We find from the contents of the show cause notice that the value of the imported tyres could not be determined under Rule 4 to Rule 8 of the Customs Valuation Rules, 2007 and consequently, resort was taken under Rule 9 and the value ascertained by the Chartered Engineer on the basis of the Circular and the investigation was taken to be the market value at the time of import. We also find from the order of the Adjudicating

Authority, where it has been categorically noted that the appellant had accepted the violation in his statement dated 17.08.2019. In the circumstances, nothing further survives to be challenged so far as the valuation arrived at by the Chartered Engineer.

Penalty under Section 112(a)(i) & 114AA of the Act

24. The Adjudicating Authority have imposed the penalty of Rs.10 lakhs under the proviso of Section 112(a)(i) and Rs.25 lakhs under Section 114AA of the Act on the appellant, considering the conduct of the appellant in obtaining IEC and opening an account in the name of his firm though the actual importer was Shri Navin Kumar (Noticee No.2). Though the appellant was aware of mis-declaration made in the B/Es and the prohibited nature of the goods, yet he signed false declaration and filed B/Es for the purposes of making the profit of Rs.75,000/- to Rs.1,00,000/- per container from the Noticee No.2. He has further tried to divert the issue of mis-declared quantity of tyres by producing a forged email. Relying on the principle that question of *mens-rea* is not relevant for liability to confiscation and penalty, the learned Authorised Representative has referred to the decision of the Apex Court

in **Pine Chemical Suppliers Vs. Collector of Customs** ¹⁰.

The Tribunal also in **Commissioner of Customs, New Delhi Vs. Art Alive** ¹¹ has held that in case of mis-declaration, 'mens rea' is not a pre-requisite for confiscation and imposition of penalty under the Customs Act. We have no hesitation in accepting this settled principle. Considering the conduct of the appellant, we do not find any error in the orders of the Authorities below in confirming the penalty on the appellant under the provisions of Section 112(a)(i) and 114AA of the Act. Before concluding, we would like to refer the decision of the Delhi High Court in **Achiever International (supra)**, where penalty of equal amount was upheld both under the provisions of Section 112(a) and Section 114AA of the Act, *inter alia*, observing as under:-

"29. A reading of the two provisions show that they refer to different violations. In a given case, it is possible that only one provision may be attracted and in another case both provisions may be violated. **When both provisions are violated, penalty under the two Sections can be imposed. There is no provision/section in the Act, which states that should penalty under one Section be imposed, penalty under the second provision should be waived.** Of course, if the violations have taken place in the course of the same transaction or are a part of the same transaction and are interconnected, the quantum of penalty imposed can be appropriately modulated and rationalised. This is different from stating that penalty cannot be imposed under the two provisions."

¹⁰ 1993 (67) ELT 25 (SC)

¹¹ 2014(314) ELT 632 (Tri.-Delhi)

Absolute Confiscation/Redemption of Goods

25. The Adjudicating Authority had ordered absolute confiscation of the goods under the various provisions of Section 111 of the Act. In the appeal filed, the appellant had made an alternate prayer that the goods be released for home consumption or for re-export, however, the same was rejected. Similar prayer has been made by the appellant before us. In considering the said prayer, however, we find that in the case of **Aban Exim Pvt. Ltd. (supra)**, where the Adjudicating Authority imposed redemption fine with a condition of re-export but the said condition of re-export was deleted by the Commissioner (Appeals). The High Court observed that the Commissioner (Appeals) proceeded on mis-conceived notion that the assessee is entitled to redemption on the payment of an appropriate redemption fine, which was held to be not a proper interpretation of Section 125 of the Act. Relying on these observations of the High Court, the Commissioner (Appeals) in the present case held that releasing the goods on payment of redemption fine to the appellant may lead to risk of public life and promote smuggling. The main objective of the import policy regarding tyres was to maintain quality control

ensuring safety of human lives and vehicles and hence, it would not be proper to release the goods on payment of redemption fine. The Commissioner (Appeals) also noted that the goods imported without BIS Standard Markings are prohibited goods and it would not be prudent to release the goods on payment of redemption fine as the appellant is a trader and the goods once released can end-up in the hands of the un-authorised person, which may lead to the risk of safety of passengers travelling by such vehicles. We do not find any error in the observations and the conclusions arrived at by the Commissioner (Appeals). Further, in support, we would like to refer to the decision of the Principal Bench in **Commissioner of Customs, New Delhi Vs. Ashwini Kumar Alias Amanullah** ¹² on the issue of redemption fine under Section 125 of the Act, where observations were made as to whether redemption fine could be allowed or not. The relevant para is quoted below:-

"26. A plain reading of the above section shows that the Adjudicating Authority has no discretion in respect of goods which are not prohibited goods and he is bound to give an option of redemption. In case of prohibited goods, such as, the gold in this case, the Adjudicating Authority may allow redemption or may not allow redemption. There is no bar on the Adjudicating Authority allowing redemption

¹² 2021(376) ELT 321 (Tri.-Delhi)

of prohibited goods. The reason for such discretion left to the adjudicating authority is evident. **In case of prohibited goods, the nature of the goods and the nature of the prohibition vary and cases have to be dealt with exercising discretion. For instance, spurious drugs, arms, ammunition, food which does not meet the food safety standards, etc. are harmful to the society if released to the owner and they find their way into the market. On the other hand, there could be goods which, though prohibited, may not be harmful and releasing them to the owner on payment of fine may be an option.** There is absolutely no bar in Section 125 on the adjudicating authority releasing any goods whatsoever, which are prohibited or restricted on payment of redemption fine. The adjudicating authority can allow redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine but he is not bound to so release the goods."

26. The appellant along with the synopsis has relied on several decisions, however, considering the same, we find they are distinguishable and do not support the case of the appellant. In the case of **Union of India Vs. Asian Food Industries**¹³, the issue was whether the terms 'restrictions' and 'regulations' used in Clause 1.5 of the Foreign Trade Policy includes 'prohibition' also. Though the Court observed that the terms undisputedly would be construed having regard to the text and context, in which they have been used, however, observed that the expression "regulate" and "prohibit" inhere in

¹³ 2006 (204)ELT 8 (SC)

them, the elements of restrictions but it varies in degrees and element of restrictions inherits both in regulative measures as well as in prohibitive or preventive measures. In a way, the said decision supports the case of Revenue. In **Commissioner of Customs Vs. Atul Automations Pvt. Ltd.** ¹⁴, the Three Judge Bench of the Supreme Court in the context of Foreign Trade Policy observed that there exists a fundamental distinction between what is prohibited and what is restricted and held that in the statutory scheme of the Foreign Trade Act, there is no error in the direction to the respondent for deposit of bond, leaving it to the DGFT to decide whether the confiscation needs to be ordered or release be granted on redemption at the market value. In the list of cases, reliance has been placed on the decision of this Tribunal in **Ashwini Kumar case**, where the issue related was whether the gold imported without fulfilling import conditions is 'prohibited goods' under Section 2(33) of the Act and liable for confiscation. In the penultimate findings, it was held that as per Section 2(33) of the Act, 'prohibited goods' includes 'restricted goods' in respect of which the conditions have not been fulfilled. Secondly, the owner or the person from whom

¹⁴ 2019 (365) ELT 465 (SC)

the goods have been seized, cannot claim as a matter of right, that the 'prohibited goods' must be allowed to be redeemed.

27. We do not find any reason to interfere with the impugned order and hence, the same is affirmed. The appeal, is accordingly dismissed.

[Order pronounced on 16th December, 2024]

(Binu Tamta)
Member (Judicial)

(P.V. Subba Rao)
Member (Technical)

Ckp.