

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH AT HYDERABAD**

Division Bench  
Court – I

**Appeal No. E/146/2010**

(Arising out of Order-in-Appeal No.16/2009-CE-Hyd-III-Adjn-Commr dt.30.09.2009 passed by CCCE, Hyderabad - III)

**S. Balasubramanian, Director (Operations)**

**M/s Surana Telecom & Power Ltd,  
Plot No.214/215/A & 215/D, Phase – II,  
IDA, Cherlapally, Hyderabad – 500 051**

**.....Appellant**

*VERSUS*

**Commissioner of Central Excise, Customs**

**& Service Tax, Hyderabad – III,  
Kendriya Shulk Bhavan, L.B. Stadium Road,  
Basheerbagh, Hyderabad,  
Telangana – 500 004**

**.....Respondent**

**With**

**Appeal No. E/147/2010**

(Arising out of Order-in-Appeal No.16/2009-CE-Hyd-III-Adjn-Commr dt.30.09.2009 passed by CCCE, Hyderabad - III)

**B. Shekarnath, Manager (Excise),**

**M/s Surana Telecom & Power Ltd,  
Plot No.214/215/A & 215/D, Phase – II,  
IDA, Cherlapally, Hyderabad – 500 051**

**.....Appellant**

*VERSUS*

**Commissioner of Central Excise, Customs**

**& Service Tax, Hyderabad – III,  
Kendriya Shulk Bhavan, L.B. Stadium Road,  
Basheerbagh, Hyderabad,  
Telangana – 500 004**

**.....Respondent**

**With**

**Appeal No. E/148/2010**

(Arising out of Order-in-Appeal No.16/2009-CE-Hyd-III-Adjn-Commr dt.30.09.2009 passed by CCCE, Hyderabad - III)

**Narender Surana, Managing Director,**

**M/s Surana Telecom & Power Ltd,  
Plot No.214/215/A & 215/D, Phase – II,  
IDA, Cherlapally, Hyderabad – 500 051**

**.....Appellant**

*VERSUS*

**Commissioner of Central Excise, Customs**

**& Service Tax, Hyderabad – III,  
Kendriya Shulk Bhavan, L.B. Stadium Road,  
Basheerbagh, Hyderabad,  
Telangana – 500 004**

**.....Respondent**

**and****Appeal No. E/149/2010**

(Arising out of Order-in-Appeal No.16/2009-CE-Hyd-III-Adjn-Commr dt.30.09.2009 passed by CCCE, Hyderabad - III)

**M/s Surana Telecom & Power Ltd,  
Plot No.214/215/A & 215/D, Phase – II,  
IDA, Cherlapally, Hyderabad – 500 051**

**.....Appellant***VERSUS*

**Commissioner of Central Excise, Customs  
& Service Tax, Hyderabad – III,  
Kendriya Shulk Bhavan, L.B. Stadium Road,  
Basheerbagh, Hyderabad,  
Telangana – 500 004**

**.....Respondent****Appearance**

Present for the Appellants: Shri P.V.B. Chary, Advocate

Present for the Respondent: Shri A.V.L.N. Chary, Authorized Representative.

**Coram:**

**HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)  
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)**

**FINAL ORDER No. A/30544-30547/2019****Date of Hearing: 12.04.2019****Date of Decision: 04.06.2019****[Order per: P. VENKATA SUBBA RAO.]**

1. These appeals are filed against Order-in-Appeal No. 16/2009-CE-Hyd-III-Adjn-Commr dated 30.06.2009.
2. All these appeals are filed by the assessee/appellant M/s Surana Telecom & Power Ltd and the officers of the assessee against whom personal penalties have been imposed.
3. After hearing both sides and perusing the records, it emerges that the appellants are manufacturers of optical fibre cables. They imported raw

material under Customs Notification No.24/2005-CUS dated 01.03.2005 which exempts various goods including goods used for manufacture of optical fibre cables classifiable under Chapter heading 8544 70.

4. Optical fibre cables (OFC) are classifiable under two different headings; those which are individually sheathed are classifiable under Tariff heading 8544, while those which are not individually sheathed are classifiable under Chapter heading 9001. The assessee procured various items claiming the aforesaid exemption notification available to goods used in manufacture of OFC falling under heading 8544 70. It is the case of the revenue that they have actually used the imported goods for manufacture of products falling under heading 9001 for which the exemption notification is not available. The dispute therefore is regarding the differential Customs duty on inputs. The show cause notice also alleged that penalty is imposable under section 112 on the assessee as well as on Shri Narender Surana (Managing Director), Shri S. Balasubramanian [Director (operations)], Shri B. Shekarnath (Manager-Excise) and authorized representative of the assessee. After following due process the original authority has confirmed the demand of Rs.22,75,654/- upon the assessee along with interest and imposed penalty of Rs.5 lakhs under section 112(a)(ii) of the Customs Act. He also imposed penalty of Rs.2 lakhs on Shri Narender Surana, Rs.1 lakh on Shri S. Balasubramanian and Rs.50,000/- on Shri B. Shekarnath.

5. All the goods were imported under the Customs (Import of goods at concessional rate of duty) Rules, 1996. Rule 4 of this rules prescribed that before importing the inputs the manufacturer should make an application to the Jurisdictional Asst. Commissioner of Central Excise specifying the requirements of inputs and has to execute bond. The jurisdictional Asst.

Commissioner of Central Excise, after fulfilment of this requirement, will send a copy of the same to the Customs who, at the time of clearance of the goods, would grant Customs Duty exemption. Rule 8 of the aforesaid rules reads as follows:

**"8. Recovery of duty in certain case** – *The Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise shall ensure that the goods imported are used by the manufacturer for the intended purpose and in case they are not so used take action to recover the amount equal to the difference between the duty leviable on such goods but for the exemption and that already paid at the time of importation."*

6. Learned counsel for the appellants would argue that the above Rule 8 only requires the Asst. Commissioner of Central Excise or Dy. Commissioner of Central Excise to take action to recover the amount equal to the difference between duty leviable on such goods for the exemption and that which has already been paid. He would submit that this rule by itself is not a provision for recovery of customs duty. The provision for recovery of customs duty is only section 28 of the Customs Act under which action can be initiated only by the customs officers who have assessed the customs duty at the time of import. He relies on the case law of Molex India Ltd [2015 (317) ELT 250 (Kar.)] and Havells India Ltd [2018 (364) ELT 488 (Tri-Delhi)].

7. He further argued that the goods which they have manufactured fall under Chapter heading 8544 70 although they have wrongly mentioned Tariff heading 9001 in their ER-1 returns. Therefore, they are entitled to the benefit of exemption notification on merits as well.

8. Learned departmental representative, on the other hand, would assert that the assessee, at the time of importation, has declared that they would use the material for manufacture of products falling under Chapter heading

8544 based on which the bond was accepted by the Central Excise officers and goods were cleared at concessional rate of duty by the customs officers. This exemption notification is a conditional exemption and will not be available to the assessee unless the conditions are fulfilled. An exemption notification being an exception to the general rule must be construed strictly and its benefit cannot be extended to the products imported and used for manufacture of optical fibre cables falling under Chapter heading 9001. Since the conditions required in the exemption notification cannot be verified at the time of import, (as these are post import requirements) the procedure prescribed under Customs (Import of goods at concessional rate of duty) Rules, 1996 has to be followed. Having executed the bond to use the material as per the notification, the appellants have used the imported material clearly in violation of the post importation condition and therefore, duty needs to be recovered and Rule 8 provides for a mechanism for the same. Accordingly, the original authority was correct in confirming the demand and imposing penalties in the impugned order.

9. Having considered both sides, we find that the customs duty is payable as per the Tariff read with any notifications at the time of import before such goods are cleared. Wherever any notification is available, subject to conditions, such conditions must be fulfilled. In case of any doubt regarding eligibility of exemption notification, the same must be construed strictly and any benefit of doubt must be given to the revenue and against the assessee as has been held by the Hon'ble Apex Court in the case of Dilip Kumar & Co. and others (Civil Appeal No. 3327/2007). In this case, the exemption notification is available to optical fibre cables falling under chapter heading 8544 and not to optical fibre cables falling under 9001. As

was evident from the excise returns filed by the assessee themselves, the optical fibre cables which they had manufactured fall under Chapter heading 9001 which were not individually sheathed. Therefore, the exemption notification was not available to the products used in manufacture of OFC falling under Chapter heading 9001.

10. The next question is about the mechanism for recovery of duty. The normal mechanism for recovery of duty not paid, short paid or erroneously refunded is section 28 of the Customs Act, 1962 which provides to recover within the normal period of one year or extended period of 5 years in case there are elements of fraud, collusion, wilful misstatement, suppression of facts, etc. There is no mechanism under section 28 to demand customs duty beyond the period of 5 years even if there is fraud, collusion, etc. In cases where a condition of import has to be fulfilled post importation, the period of one year or 5 years may not be relevant. For instance, one may import goods declaring his intention to use in a particular manner to avail benefit of exemption notification and take almost 6 years to use them so. After the period of 6 years, if he fails to use the goods in the prescribed manner or uses them in some other way, the duty cannot be recovered under section 28. Further, if the importer uses the imported goods in other than the prescribed manner, after a period of one year, one cannot allege that there was fraud, collusion, etc., unless there is evidence to the effect and it is only a failure. The importer may, out of real constraints or practical considerations use the material in some other manner. In such case, the demand under section 28 will not sustain. Further, there are imports in schemes such as EPCG where there is a time limit of 8 years under the Foreign Trade Policies for fulfilment of the conditions. This is clearly beyond

the normal period as well as extended period of limitation under section 28. Therefore, Section 28 is the normal section for recovery of duties. Alternative methods have been prescribed under the Act itself. Section 143 of the Customs Act reads as follows:

*"143. Power to allow import or export on execution of bonds in certain cases.—*

*(1) Where this Act or any other law requires anything to be done before a person can import or export any goods or clear any goods from the control of officers of customs and the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied that having regard to the circumstances of the case, such thing cannot be done before such import, export or clearance without detriment to that person, the Assistant Commissioner of Customs or Deputy Commissioner of Customs, may, notwithstanding anything contained in this Act or such other law, grant leave for such import, export or clearance on the person executing a bond in such amount, with such surety or security and subject to such conditions as the Assistant Commissioner of Customs or Deputy Commissioner of Customs approves, for the doing of that thing within such time after the import, export or clearance as may be specified in the bond.*

*(2) If the thing is done within the time specified in the bond, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall cancel the bond as discharged in full and shall, on demand, deliver it, so cancelled, to the person who has executed or who is entitled to receive it; and in such a case that person shall not be liable to any penalty provided in this Act or, as the case may be, in such other law for the contravention of the provisions thereof relating to the doing of that thing.*

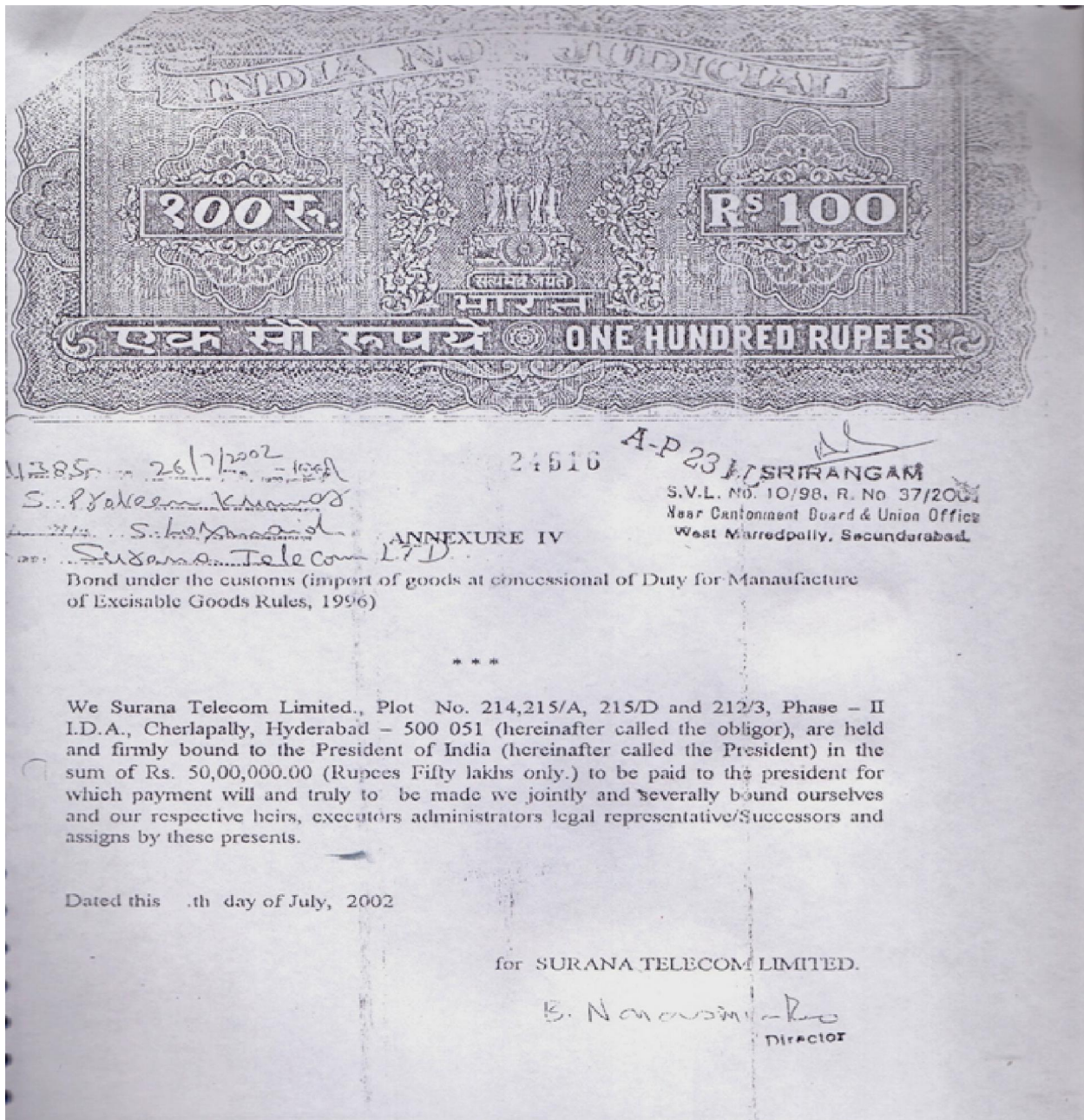
*(3) If the thing is not done within the time specified in the bond, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall, without prejudice to any other action that may be taken under this Act or any other law for the time being in force, be entitled to proceed upon the bond in accordance with law."*

11. As is evident from the above, section 143 of the Customs Act provides for recovery of duty, etc., by way of bond which is as much a part of the Customs Act as section 28. However, in order to recover duty under section 143 the bond has to be enforced and demand cannot be raised under section 28 for enforcement of a bond. The usual method of enforcing any bond is by filing of civil suit and the time limit prescribed under section 28 does not apply to any such civil suits. A further alternative method of recovery of amounts due under the bonds executed under section 143 is provided under sub-section (2) of section 142 which reads as follows:

*"(2) Where the terms of any bond or other instrument executed under this Act or any rules or regulations made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in sub-section (1) the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section."*

12. Section 142 provides for recovery of sums due to the Government. Therefore, whenever any bond executed under the Customs Act, Rules or Regulations also mentions that amounts may be recovered under section 142 without prejudice to any other mode of recovery, the amount may be recovered by following the procedure under section 142. If the bond does not mention so, the normal provisions to proceed upon the bond apply.

13. As is evident the bonds are signed not only under Customs Act but also under different rules and regulations of Customs Act. The rules in question in this case are the Customs (Import of goods at concessional rate of duty) Rules, 1996. Rule 8 of these rules, therefore, does not refer to raising the demand under section 28 but only indicates that the action can be taken for recovery of the amount. One such action can be asking the customs officers to raise a demand under section 28 of the Customs Act, 1962. The other possible action is enforcement of bond. In fact, section 28 does not apply beyond the period of limitation of one year or 5 years indicated therein. However, the bond will be in full force unless it is discharged. In this case, the bond in question reads as follows:



Whereas the above obligor having been permitted by the Asst. Commissioner of Central Excise at Hyderabad Division X, Hyderabad (hereinafter called "The Asst. Commissioner") to obtain various items vide our registration Sl.no 1 of 1997, file no IV/16/413/96 dt.10.05.1997, for use in their factory at Plot No. 214, 215/A, 215/D and 212/3 Phase-II, I.D.A., Cherlapally, Hyderabad-500 051 for use in the manufacture of Optical Fibre cables/ and optical fibre (Telecommunication Grade) and in the manner specified in their application dated 29.07.2002, in terms of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.21/2002 CUS dt. 01.03.2002 (hereinafter referred to as the notification).

The condition of this bond is that of the obligor and his representative shall observe all provisions of the notification and the customs (import of goods at concessional rate of duty for manufacture of Excisable Goods) Rules 1996 and relevant provisions of the customs act 1962 (52 of 1962) the Central Excises and Salt Act 1944 (of 1944) and Central Excise Rules, 2002 in respect of the aforesaid permission granted by the Asst. Commissioner of Central Excise.

And if all dues (lawful charges) which shall be demandable on the import goods obtained by the obligor be duly paid in to the treasury to the account of The Asst. Commissioner within 10 days of the date of demand thereof being made in writing.

This obligation shall be void other wise and on breach or failure in the performance of any part of this condition the same shall be in full force and virtue.

And the President shall at his option be competent to make good all the loss and Damages by endorsing his rights under the above written bond.

for SURANA TELECOM LIMITED

B. N. Narasimha Rao  
Director

We further declare that this bond is given under the order of the Central Government in the performance of an act in which the public are interested.

In these presents the words imposing singular only shall also include the plural and vice versa if the context so requires.

In witness thereof these present have been signed the day herein before written by the obligor.

Place : Hyderabad

for SURANA TELECOM LIMITED.

Date : 29.07.2002.

AUTHORISED SIGNATORY  
SIGNATURE AND NAME OF THE OBLIGOR

1. Witness

B. Narasimha Rao

Address

1-8-204/1  
Cherlapally

Occupation

Director

2. Witness

A. S. Narasimha Rao

Address

A. S. Narasimha Rao

Occupation

P.O. - Hyderabad before me  
29/07/2002

Accepted for and on behalf of the President of India

Superintendent (Tech)  
Customs & Central Excise  
Division - X, Hyderabad

Signature and Date :

Name:

Designation and Seal:

Asst. Commissioner  
Customs & Central Excise  
Division - X, Hyderabad.

14. A plain reading of the bond says that the assessee would either fulfil all the conditions of the notification or pay the duty within 10 days of demand; in case of failure, he will pay Rs.50 lakhs to the President of India. This bond is not dependent on section 28 but is independent and executed under section 143 of the Customs Act. On behalf of the President of India, the bond was accepted by the Superintendent (Tech) of jurisdictional Central Excise Division who can enforce the bond through appropriate legal means. Had the bond provided for recovery under section 142(2), recourse can be taken to methods prescribed under section 142 as well. However, there is no such provision in the present Bond.

15. To summarise, in all cases, where a bond is executed under the Customs Act, Rules or Regulations and the person executing the bond violates the conditions of the bond, the following options are available to the department:

- a) A demand under Section 28 by the officer who can raise a demand.
- b) Enforcement of the Bond executed under Section 143 through appropriate legal action such as a civil suit;
- c) Recovering the amount under Section 142(2) if the Bond that is signed has such a clause incorporated in it.

16. However, the impugned order sought to recover the amount under Rule 8 of the Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996 which is not a mechanism for demand of duty. Therefore, the impugned order needs to be set aside on that ground alone. As far as the demand under section 28 is concerned, as rightly pointed out by the learned counsel for the appellant, the same can be demanded only by the Customs officers and not the Central Excise officers.

Consequently, penalties imposed under section 112 of the Customs Act also need to fail due to lack of jurisdiction itself without going into the merits of the imposition of such penalties.

17. We, therefore, find it is a fit case to set aside the impugned order. The department is free to take legal action to enforce the bond executed by the assessee.

18. The appeal is disposed of as herein above.

(Order pronounced in the open court on 04.06.2019)

**(ANIL CHOUDHARY)**  
**MEMBER (JUDICIAL)**

**(P.VENKATA SUBBA RAO)**  
**MEMBER (TECHNICAL)**