

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 276 of 2011

(Arising out of Order-In-Original No. KOL/CUS/PORT/07/2011 dated 31.05.2011 passed by the Commissioner of Customs (Port), Kolkata.)

M/s. P. D. Associates

(91/1, Pilkhana Road (Vivekanand Road),
Rani Bagan (Opp. Durga Mandir), P. O. Berhampore, Dist. Murshidabad
W.B.-742101)

Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

(15/1, Strand Road, Kolkata-700001)

Respondent

APPEARANCE :

Mr. K. K. Sanyal, Consultant for the Appellant

Mr. Faiz Ahmed, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.76311/2023

Date of Hearing : 1 August 2023

Date of Decision : 1 August 2023

PER R. MURALIDHAR:

The Appellant was engaged for the Project work namely 'Raising & Strengthening to Brahamaputra dyke- Package No. ASW RO1'. For completing the said project, the Appellant imported various Sand & Water pump Machineries and Accessories on lease under 7 Bills of Entry during the period April 2009 to September 2009. They claimed the benefit of Notification No. 27/2008-Cus dated 01/03/2008. Under this Notification, if the goods are re-exported between 3 months to 6 months from the date of import, the Customs duty is required to be paid @ 15% of the Tariff rate. This Notification stipulates that the importer is required executive bond with a bank guarantee undertaking to re-export of the goods. The appellant approached the Customs officials to get the benefit of this Notification. The officials allowed the clearance of the goods provisionally against payment of 15% of the

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total duty along the re-exported bond executed by the Appellant and with security deposit of Rs.73,65,624/-. The Appellant could not re-export the goods since the project work was not completed within the prescribed time and most of the equipments were damaged/broken/lost in the river belt when the project was being undertaken. The Department issued Show Cause Notice to enforce the re-export demanding differential duty with interest and proposing confiscation of goods and imposition of penalty. After due process, the Adjudicating Authority confirmed the demand amounting to Rs.73,65,624/- along with interest. He imposed penalty of Rs. 6 lakhs in terms of Section 112 (a) read with Section 111(o) of the Customs Act, 1962. He also confiscated the imported goods with an Assessable Value of 3,91,65,562/-. He gave the option to redeem the same on payment of Redemption Fine of Rs.39,00,000/-. He appropriated the confirmed demand of Rs. 73,65,624/- which was given as Security Deposit by the Appellant at the time of imports. Being aggrieved by the interest, redemption fine and penalty, the Appellant is before the Tribunal.

2. The Learned Consultant appearing on behalf of the Appellant submits that the project work taken up by them in the river Brahmaputra could not be completed within the prescribed time because of the factors which were beyond the control of the Appellant. Most of the equipments were damaged and lost during the operation. Only because of these difficulties, the Appellants were not in a position to re-export the imported goods. Further, he submits that while the Notification No. 27/2008-Cus dated 01/03/2008 specifies that in respect of the initial Customs Duty saved, the importer is required to execute the bond with Bank Guarantee, the Department insisted that instead of the Bank Guarantee, the Appellant should make Security Deposit towards the duty saved. Therefore, having no other alternative, the Appellant has made the Security Deposit of Rs.73,65,624/- at the time of imports. He submits that this act of Customs Department has nullified the very concession proposed in the Notification No. 27/2008-Cus dated 01/03/2008. He submits that since the re-export could not

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take place due to the factors which were beyond their control, they are not disputing that the balance 85% duty is required to be paid by them. Therefore, they are not contesting appropriation of the Security Deposit of Rs.73,65,624/-. However, he submits that there is no case for the Department to charge interest on this differential duty since the security deposit was available right on the day when the import has taken place. He also contests the penalties imposed and order of confiscation with an option redeem. Further, he relies on the following case laws:-

- (i) Femco Filters (P) Ltd. Vs. Commissioner of Customs, Bangalore-2006 (203) E.L.T. 494 (Tri.-Bangalore)
- (ii) Sun Knitwear Pvt. Ltd. Vs. Commissioner of Customs, Bangalore-2007 (207) E. L. T. 85 (Tri.-Bang.)
- (iii) Commissioner of Customs, Bangalore Vs. Sun Knit Wear Pvt. Ltd.-2012 (278) E. L. T. 165 (Kar.)
- (iv) Fal Industries Ltd. Vs. Commissioner of Customs, Chennai-2008 (231) E.L.T. 524 (Tri.-Chennai)

3. He submits that in the above cases, it has been held that when there is no provision in the Notification to charge interest, the Department cannot charge interest on the differential duty. In these cases, it has been also held that when the differential duty stands paid, the goods in question are out of the purview of the exemption Notification. Accordingly, the Department cannot confiscate the goods and impose the penalty.

4. He also submits that in respect of the same Appellant, in respect of one Bill of Entry No. 465375 dated 16/4/2009 when they were not able to re-export, the Adjudicating Authority has only confirmed the differential duty along with interest. He has not imposed any penalty nor has he confiscated the goods. The Department has not filed any Appeal against this order dated 29/03/2011. Therefore, it is clear that the Department has subsequently taken the view that no confiscation, redemption fine and penalty is required in such cases. In view of the foregoing, the Learned Consultant prays that the present Appeal may be allowed.

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5. The Learned AR reiterates the findings of the Adjudicating Authority. He submits that it is an admitted fact that even after executing the Bond undertaking to re-export the goods within 6 months, the Appellants have failed to do so. Therefore, he justifies the findings and order of the Adjudicating Authority.

6. Heard both sides and perused the documents.

7. On going through the Notification No. 27/2008-Cus dated 01/03/2008, it is seen that the condition under (5) of Limitations and Condition's (Col.2) states that the importer is required to execute Bond with Bank Guarantee. This Notification does not specify that at the discretion of the Customs officials, instead of Bank Guarantee, they can insist on Security Deposit. Clearly violating this provision, the officials have insisted on Security Deposit in the present case. This means that the importer had to make arrangement for the full duty amount at the time of imports which completely nullifies the benefit sought to be extended under this Notification.

8. While the assessee can get the Bank Guarantee from the Bank on payment of a nominal fee of 1 to 1.5% of BG value, in case of Security Deposit he has to pay the full Bank interest of 15 to 18% to obtain the same. It is not the case of the Department that the imported goods were not used for the purpose for which they were imported. The Appellant has given a reasonable explanation towards non-fulfillment of re-export obligation which was not considered by the Adjudicating Authority nor has he rebutted the claims made by the Appellant. The Adjudicating Authority in the OIO in respect of the differential duty demand has held as under:-

(iv) I confirm the demand of duty to the tune of Rs.73,65,624/- (Rs. seventy three lakhs sixty five thousand six hundred twenty four only) under section 28 of the Customs Act, 1962 and order levy of interest @ 15% under section 28AB of Customs Act, 1962. The interest shall be calculated from the date of import of the said goods till the date of payment of duty. Security deposit of Rs.73,75,624/- (Rs. seventy three lakhs sixty five thousand six hundred twenty four only) is appropriated towards payment of duty amounting to Rs. 73,65,624/-(Rs. seventy

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three lakhs sixty five thousand six hundred twenty four only).
[Emphasis supplied]

9. From this Order, it is clear that this is not a case where the Bank Guarantee has been encashed by the Department when the OIO was passed. The Security Deposit was available right on the day when the import has taken place. Therefore, when the entire amount was available in the form of Security Deposit of Rs.73,65,624/- on the day of import, the question of the Appellant paying any interest till the payment of duty will not arise. In this case, it is seen that entire amount has been paid on the date of import itself, partly by way of 15% payment through Bill of Entry and balance 85% by way of Security Deposit.

10. The Bangalore Tribunal in the case of Femco Filters Pvt Ltd. Vs. Commr. of Customs, Bangalore-2006 (203) E. L. T. 494 (Tri.-Bangalore) has held as under:-

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Further, we find that during the relevant period, there was no provision under Notification No. 160/92 for demand of interest. Therefore, the demand of interest is not sustainable. As regards the confiscation, we find there was no deliberate violation of the conditions of the Notification. The appellant could not fulfil the export obligations due to circumstances, which were beyond his control. In such a case, imposing penalty and confiscating the impugned goods cannot be sustained. Therefore, we set aside the confiscation of the impugned goods. When the confiscation is set aside, no penalty can be levied. In view of the above observations, we set aside the impugned order and allow the appeals with consequential relief. [Emphasis Supplied]

11. In the present case also in the Notification No. 27/2008-Cus dated 01/03/2008, it is seen that there is no provision to impose any interest when the differential duty is paid.

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12. In view of the above observations, we hold that the OIO demanding interest is required to be set aside. Accordingly, we set aside the interest confirmed under the impugned OIO. We hold that the Appellant is not required to pay the interest of Rs.20,71,220/- which they have paid on 26/08/2011.

13. Coming to the issue of confiscation, Redemption Fine and penalty, in the case of Sun Knitwear Pvt. Ltd. Vs. Commr. of Customs, Bangalore-2007 (207) E. L. T. 85 (Tri.-Bang.), the Tribunal has held as under:-

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Once the appellants pay the duty and interest, the goods will be out of the ambit of the said notification and they cannot be held liable for confiscation under Section 111(o) of the Customs Act as held by this Tribunal in Steel Authority of India v. CCE [2005 (184) E.L.T. 308 (Tri. - Bang.)]. When the goods are not liable for confiscation, there is no question of redemption fine and penalty. In these circumstances, we do not find it necessary to go into the allegation of installing the machinery in different premises. Hence the penalties imposed cannot be sustained. In fine, we uphold the Order-in-Original to the extent of confirmation of duty foregone along with interest. The appellants should pay forthwith the interest liability on them failing which the Revenue is free to initiate any further proceedings in the matter. The appeal is disposed of in the above terms. [Emphasis Supplied]

14. On Appeal, the Hon'ble High Court of Karnataka, in the case of Commr. of Customs, Bangalore Vs. Sun Knit Wear Pvt. Ltd.-2012 (278) E. L. T. 165 (Kar.) has affirmed the decision of the Tribunal by holding as under:-

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It is under these circumstances the Tribunal was justified in holding that when once the assessee pay the duty and interest, goods will be out of the ambit of the said notification and they cannot be held liable for confiscation under Section 111(o) of the Act. The said finding is legal and valid and we do not see any infirmity in the said order which calls for interference. Thus,

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substantial questions of law framed in this appeal are answered in favour of the assessee and against the revenue.[Emphasis Supplied]

15. In the present case, as the Appellant has brought in proper explanation for non-export of the goods, following the ratio of the cited case law, we hold that the goods are not liable for confiscation and no penalty is to be imposed. Accordingly, we set aside the confiscation, redemption fine and the penalty imposed by the Adjudicating Authority.

16. Since we are holding that the appellant is not required to pay interest and penalty, the amounts paid by the Appellant under the heading of interest (Rs. 20,71,220) and penalty (Rs.6,00,000) would be eligible for consequential refund to him along with interest as per the statutory provisions.

17. The Appeal is disposed of thus.

(Operative part of the order was pronounced in the open court.)

Sd/-

(R. Muralidhar)
Member (Judicial)

Sd/-

(Rajeev Tandon)
Member (Technical)

Pooja

