

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL Nos. C/152,153/2009

(Arising out of Order-in-Original No. 155/2008/CAC/CC(I)/SR/Gr.VA dated 26.11.2008 passed by Commissioner of Customs (Imports), Mumbai)

**Venkata Rao Infra Projects Pvt. Ltd.
M. Ramakrishna Rao**

Appellant

Vs.

Commissioner of Customs (Imp.), Mumbai

Respondent

Appearance:

Shri Prashant Patankar, Advocate, for appellant

Ms. P. Vinitha Sekhar, Joint Commissioner (AR), for respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)

Hon'ble Mr. Raju, Member (Technical)

Date of Hearing: 31.1.2018

Date of Decision: 17.5.2018

ORDER No. A/**86437-86438/2018**

Per: Ramesh Nair

Brief facts of the case are that the Appellant M/s. Venkata Rao Infra Projects Pvt. Ltd imported one 'Power Paver Finisher SF – 3000 – Slip Form" claiming exemption from Custom duty in terms of serial no. 230 of Notification No. 21/2002 – Cus dt. 01.03.2002. During investigation it was found that initially the machine was used for construction of 12 kms road connecting Vishakpatnam Port Road and later

was diverted for type of project not covered by the notification i.e laying of platform at Vishakaptanam Airport under contract with AAI, Vishakapatnam. Since the machine was not used for the purposes as notified under the conditions of the exemption the same was seized and provisionally released to the Appellant after payment of duty. They were issued show cause notice proposing denial of exemption supra, confiscation of machine in terms of proviso to Section 111 (o) of the Customs Act, 1962 on ground of violations of the conditions of the notification, demand of customs duty and appropriation of duty amount deposited by them against the demand, and to impose penalty in terms of Section 112 (a), 112 (b) and 114A of the Customs Act, 1962. It was also proposed to impose penalty upon the director Shri M. Ramakrishna Rao. The proposals as made in the show cause notice were confirmed by the adjudicating authority. Hence the present appeals.

2. Shri Prashant Patankar, Id. Counsel appearing for the Appellants submits that at the time of import, the Appellant were eligible for exemption as they were awarded contract by the National Highway Authority of India through its Special purpose vehicle to construct Road connecting Vishakapatnam Port and National Highway NH- 5. That in terms of contract the usage is exclusively for “construction of Roads” and the

condition does not envisages that the imported machine should be used only for the construction of Roads for which the contract was awarded by the agencies specified under Condition 40 (a) (ii). That the platform for which the machine was used in taxi – track connecting the runway. It is nothing but a road for taxing aero planes between the parking bay and runway and is in the nature of road only. That such contract was undertaken by them only after completion of project awarded by the NHAI as the machine could not be kept idle. He relied upon orders in case of Hemraj Gordhandas 1978 ELT (J350), Indian Tobacco Association 2005 (187) ELT 162 (SC). He also submits that the demand is not sustainable under section 28 of the Customs Act as there was no duty short levied or not levied at the time of assessment. It is only Post Import Violation of the condition. He relies upon the judgment of Hon'ble Supreme Court in case of Jagdish Cancer Care & Research Center 2001 (132) ELT 257 (SC).

3. Ms. Vinita Sekhar, Id. Joint Commissioner, AR appearing for the revenue submits that the impugned order has been rightly passed as the conditions of the Notifications were not followed. She has relied upon the Tribunal's order in case of Patel Engineering Ltd. 2013 (295) ELT 243 (TRI), Shreeji Construction 2014 (313) ELT 566 (TRI) and Hon'ble

Supreme Court judgment in case of Gammon India Ltd. 2011 (269) ELT 289 (SC).

4. We have perused the facts of the case and the conditions of the notification. We find that the Appellant has used the machine only for 12 kms of road contract awarded by the NHAI and thereafter it was not used any of the projects as enumerated in the condition of the notification. The condition of the notification envisages as under :

If,-

(a) the goods are imported by –

- (i) the Ministry of Surface Transport, or*
- (ii) a person who has been awarded a contract for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Government or by a road construction corporation under the control of the Government of a State or Union Territory; or*
- (iii) a person who has been named as a sub-contractor in the contract referred to in (ii) above for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by Public Works Department of a State Government or by a road construction corporation under the control of the Government of a State or Union Territory;*

(b) the importer, at the time of importation, furnishes an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, to the effect that he shall use the imported goods exclusively for the construction of roads and that he shall not sell or otherwise dispose of the said goods, in any manner, for a period of five years from the date of their importation; and

(c) in case of goods of serial no. 12 and 13 of List 18, the importer, at the time of importation of such goods, also produces to the Deputy Commissioner of Customs or the

Assistant Commissioner of Customs, as the case may be, a certificate from an officer not below the rank of a Deputy Secretary to the Government of India in the Ministry of Surface Transport (Roads Wing), or an officer not below the rank of Chief Engineer of the National Highways Authority of India, to the effect that the imported goods are required for construction of roads in India.

5. We find that the imported machine was used for intended purpose of road only once for a small contract and after that period for construction of platform at Airport on contract awarded by AAI. Such contract of platform was neither awarded by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Government or by a road construction corporation under the control of the Government of a State or Union Territory or the machine was used for 5 years for the above contracts. We find that the issue is squarely covered by the Tribunal judgments in case of Patel Engineering Ltd. 2013 (295) ELT 243 (TRI) as upheld by the Hon'ble Supreme Court as reported in 2016 (338) ELT A35, Shreeji Construction 2014 (313) ELT 566 (TRI) and Hon'ble Supreme Court judgment in case of Gammon India Ltd. 2011 (269) ELT 289 (SC). The Tribunal in case of M/s Patel Engineering Ltd. supra held as under :

8. We find that the paver finisher has been imported by the appellant by claiming the exemption from duty under as per Sr. No. 230 of Notification 21/2002. For better

appreciation, the relevant portion of the said condition is reproduced as under :-

“(a) the goods are imported by -

(i)

(ii) a person who has been awarded a Contract for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of State Govt. or by a road construction corporation under the control of the Govt. of a State or Union Territory; or

(iii) a person who has been named as sub-contractor in the contract referred to (ii) above for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Govt. or by a road construction corporation under the control of the Govt. of a State or Union Territory.

(b) the importer, at the time of importation furnishes an undertaking to the Deputy Commissioner of Customs or the Asstt. Commissioner of Customs as the case may be, to the effect that he shall use the imported goods exclusively for the construction of roads and that he shall not sell or otherwise dispose of the said goods, in any manner, for the period of five years from the date of the importation; and

(c) in case of goods at Sr. No. 12 & 13 of the list 18, the importer, at the time of importation of such goods, also produces to the Dy. Commissioner of Customs or Asstt. Commissioner of Customs, as the case may be, a certificate from an officer not below the rank of a Dy. Secretary to the Govt. of India in the Ministry of Surface Transport (Roads wing), or as officer not below the rank of Chief engineer of the National Highways Authority of India, to

the effect that the imported goods are required for construction of roads in India.”

9. It is contended that by the Id. Sr. advocate that the condition No. 40A is fully satisfied and there is no dispute. We do agree with the same. It is also contended on behalf of the appellant that condition 40B is also fully satisfied at the time of import by execution of bond by the appellant to the effect that he shall use the imported goods exclusively for construction of roads and he shall not sell or otherwise dispose of the said goods in any manner for a period of 5 years for the date of importation. Therefore they have not violated the condition 40B and have rightly claimed the exemption under the above Notification as the undertaking is a pre-import condition and condition No. 40B is not a post-import condition. Therefore the appellant has not violated any condition of the said Notification and for the same he is strongly relied on the decision of Sameer Gehlot (supra).

10. We have examined the case of Sameer Gehlot (supra) and in that case it is clear cut relying by the adjudicating authority that there was no post-import contravention and that the impugned exemption has been correctly availed. Therefore, the said decision is not relevant to the facts of this case as in this case the show-cause notice has alleged that the appellant has not fulfilled the obligation undertaken by the appellant by executing the bond to that effect. This fact has clarified in the show-cause notice itself in para 32.3 as under -

“32.3 This act of the importer is in contravention to its undertaking filed by themselves at the time of import clearance before the customs authority in this regard, violating condition No. 40(b) of the Notification.”

Further, in para 35(b)(ii) the appellant were issued show cause why “an amount of customs duty of Rs.

1,30,46,188/- leviable on the paver finisher and evaded by the importer M/s. Patel Engg. Ltd. should not be demanded and recovered under the proviso to Section 28(1) of the Customs Act, 1962 and also by enforcing the Bonds/undertakings executed by them at the time of import.”

11. Another argument advanced by the Id. advocate is that the Notification did not contemplate actual use of the imported goods. Without going into this issue, it is a fact that the said paver finisher was found at the site of Nicco Corporation Ltd. and to ascertain the use of paver finisher, the statement of Shri Rajiv Nath, Sr. Manager Project Division was recorded and in his statement has submitted that M/s. Nicco Corporation Ltd. undertook engineering project or erection and commissioning of plant like gas plant, oil plant etc. M/s. ONGC has given a contract to M/s. Nicco Corporation Ltd. for construction of Pipe storage system with gantry crane and pipe stretching system including road culverts, site levelling works for model like Ligiri, Pukhari site, Assam. The aforesaid contract was for the period 27-3-2007 to 26-1-2008 and the contract work involves concretisation of the ground area of the entire depot and also erection of gantry crane bundle, electric panel and compressor in the said depot. He further stated that the depot which is of the size of 340 Mtr X 140 Mtr i.e. 40,600 sq.mtr and this depot is for purpose of storage of drilling pipe by ONGC. The above mentioned total work in the contract, the later part i.e. engineering erection of rail, gantry crane bundle strip system, electric panel and compressor is being carried out by project division. The paver finisher was used for dry lean concrete for an area of 1200 sq.mtr. initially and thereafter another area of 8000 sq.mtr was also undertaken by said paver finisher.

12. From the statement of Rajiv Nath, we find that the paver finisher was used not for construction of road but for the construction of depot and platform for storage of pipes.

13. As per the condition of the Notification, the undertaking was given by the appellant at the time of import that the impugned paver finisher shall be used only and only for construction of roads for a period of 5 years. From the facts ascertained hereinabove, we find that the paver finisher was not used for the intended purpose as undertaken by the appellant. In view of this finding, the department has rightly issued show-cause notice to the appellant for violation of condition of their undertaking and thereby for denying the exemption under Notification 21/2002. As show-cause notice has been rightly issued and in the adjudication order it is also found that the impugned paver finisher was not used for construction of road, therefore they have not fulfilled the condition terms of undertaking/bond at the time of import. As they have violated the terms of condition of their bond/undertaking, therefore they are liable to pay duty as demanded in the impugned order. On limitation, we find that the show-cause notice has been issued for violation of undertaking given at the time of importation for intended use and the fact that the imported paver finisher was not found to be used for intended purpose during investigation which amounts to suppression, therefore, the show-cause notice issued is within limitation.

14. Accordingly, demands confirmed in the impugned order are upheld and we do not find any infirmity in the impugned order. Therefore, impugned order is upheld, appeals filed by the appellants stand dismissed. Appeals filed by Revenue are dismissed as the penalties imposed on the appellants are appropriate in the facts and circumstances of the case.

6. We find that all the contentions raised by the Appellants stands negated in the light of above Tribunal order and the same has been upheld by the Apex Court. We therefore do not find any merit in the Appeals filed by both the Appellants. We thus uphold the impugned order and reject both the appeals.

(Pronounced in court on 17.5.2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

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