

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

APPEAL No. C/1222/2009

(Arising out of Order-in-Original No. CAO/156/2009/SHH dated 27.10.2009 passed by Commissioner of Customs (Import), Mumbai)

Tata Motors Ltd.

Appellant

Vs.

Commissioner of Customs (Import), Mumbai

Respondent

Appearance:

Shri T. Viswanathan, Advocate, for appellant

Shri Roopam Kapoor, Commissioner (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 15.6.2018

Date of Decision: 26.10.2018

ORDER No. **A/87779/2018**

Per: Sanjiv Srivastava

This matter has arisen as result of the remand order passed by Hon'ble Bombay High Court, in the case of Appellant. By the said order Hon'ble High Court has held as follows:

***"4.** The issue of classification of the said imported material need not detain us for the simple reason that Mr. Sridharan, learned senior counsel appearing on behalf of the appellant in support of this appeal fairly conceded that the said issue of classification has been resolved finally by an order passed by the Bench of the Tribunal at Ahmedabad. That is resolved in*

favour of the Revenue. The only issue that is being agitated before us by Mr. Sridharan is that while the Revenue proceeded to issue the show cause notice and adjudicate the case, it invoked Section 28 of the Customs Act, 1962.

5. *Thus, the Revenue alleged in terms of that provision that the extended period of limitation can be invoked for there is a willful misstatement or suppression of facts by the assessee.*

6. *Mr. Sridharan would submit that the very fact that when the Revenue brought the issue before the Tribunal and agitated it so also when the Tribunal considered the case of the assessee, there was a difference of opinion between the members deciding that appeal. The appeal was referred to a third member on the limited issue of classification and namely the difference of opinion. In the meanwhile, the Ahmedabad Bench of the Tribunal rendered an order on the issue of classification and based on which the Mumbai Bench concluded the matter in favour of the Revenue. The assessee has paid up the amount of duty and is not seeking any relief in relation to the same. That there was a difference of opinion would denote as to how an arguable case was raised and, therefore, the extended period of limitation cannot be invoked.*

7. *In the impugned order, barring noting the rival contentions, the Tribunal, according to Mr. Sridharan, has passed a cryptic order without assigning any reasons and considering the materials placed on record. It is, therefore, for this limited issue that the appeal deserves to be allowed and the matter examined again by the Tribunal. Mr. Sridharan, on instructions, states that no other issue would be raised and argued, save and except the plea of time-bar.*

8. *Mr. Sonpal, on the other hand, would submit that the issue of limitation is a mixed question of fact and law. Whether it is willful misstatement or suppression of facts would necessitate an enquiry into factual matters and once the Tribunal has referred to the statement of officials of the assessee, then, there cannot be any reappreciation and reappraisal of the order passed by the Tribunal. It is not vitiated by any error of law apparent on the face of the record*

or perversity warranting interference in the appellate jurisdiction of this Court.

9. *Having heard the rival contentions, we find that in the initial order passed by the Tribunal where the Member (Judicial) and Member (Technical) differed, namely, that rendered on 17th June, 2013, the issue was squarely raised. In Paragraph 5.1.3 the Tribunal finds that the assessee failed to fulfill the obligation and requirement of declaring complete description and specification whether the goods were alloy steel or non-alloy steel. According to the Tribunal, the correct description of the goods was not declared. The statements of the four officials and recorded under Section 108 of the Customs Act, 1962, according to the Tribunal, contains an admission and that is how the Tribunal terms the act as mis-declaration and suppression on the part of the importer, resulting in a duty evasion. These facts, according to the Tribunal, conclusively establish mis-declaration.*

10. *From this discussion, we find that there appears to be a confusion in the mind of the Tribunal as to whether what the appellant-assessee declared was a correct description of the goods or whether it was a misdeclaration and suppression as alleged. The facts, according to the Tribunal, establish misdeclaration, but save and except the statements of the four officials, we do not feel that the Tribunal has adverted to any other material based on which the assessee declared the goods and as claimed throughout (CR coils) under the Tariff Head 72.09 of the Customs Tariff.*

11. *Thus, without expressing any opinion on the rival contentions but finding that the Tribunal having not examined the issue of time-bar or extended period of limitation completely that we have no alternative, but to set aside the impugned order of the Tribunal only to this limited extent. The appeal of the assessee before the Tribunal shall stand revived only for this limited purpose and the Tribunal shall now examine as to whether the recovery of duties are levied or not levied or erroneous and on account of the acts attributable to the assessee and within the meaning of sub-section (4) of*

Section 28 of the Customs Act, 1962. All incidental and ancillary matters to the same shall also be allowed to be raised and examined or scrutinized by the Tribunal. We clarify that we have kept all contentions open and merely because we have admitted this appeal and passed an order of remand or allowed it in the above terms, does not mean that any conclusive opinion is rendered or expressed by this Court.”

2.0 Thus matter in terms of remand order needs to be heard on the limited extent in respect of invoking the extended period of limitation. The submission made by the appellant before the High Court, was effectively to the effect by referring to the order of Tribunal, learned Counsel submitted that, matter was complex one and appellant entertained genuine doubt in respect of the correct classification of goods under consideration. The fact that two members originally hearing the matter have deferred and the issue was resolved only by referring the matter to third member of tribunal, shows the complexity of issue and is enough to hold that the appellants entertained a bonafide and genuine doubt in respect of classification of goods.

3.0 Arguing on the behalf of Appellant Shri T Vishwanathan, learned Counsel, submitted that-

i. They had made a genuine and correct declaration in respect of the goods imported by them. It is for the revenue authorities to determine the correct classification and determine the duty liability in respect of the imported goods. The assessing authorities are not

bound by the classification claimed by the appellant on the Bill of Entry, and could have always amended the same by following the proper procedure and determine the correct amount of duty leviable in respect of the goods covered by the said Bill of Entries.

ii. If revenue has failed to determine the correct classification at the time of importation of the goods and have allowed clearance of the same, then they cannot invoke extended period of limitation to demand the duty in respect of past clearance. In support of their contention they rely upon a series of decisions listed below:

- i. G C Jain vs Commissioner Customs [2003 (162) ELT 733 (T-Kol)] affirmed in Commissioner Customs Vs G C Jain [2011 (269) ELT 307 (SC)];
- ii. Uniworth Textiles Ltd Vs CCE [2013 (288) ELT 161 (SC)];
- iii. Northern Plastics Ltd vs CCE [1998 (101) ELT 549 (SC)];
- iv. HPL Chemicals Ltd. Vs CCE [2006 (197) ELT 324 (SC)];
- v. Densons Pultretaknik vs CCE [2003 (155) ELT 211 (SC)];
- vi. Vodafone Essar South Ltd Vs UOI [2009 (237) ELT 35 (BOM)]

- vii. CC vs Jyoti Industries Ltd [2005 (188) ELT 88 (T-Del)];
- viii. CC vs Jyoti Industries [2007 (209) ELT 180 (P&H)];
- ix. Neotric Informatique Ltd Vs CC(I) Nhava Sheva [2015 (318) ELT 701 (T-Mum)]
- x. Devraj M Salian Vs CC (I) [2015 (316) ELT 139 9T-Mum)];
- xi. Commissioner of Customs vs Gaurav Enterprises [2006 (193) ELT 532 (BOM)]
- xii. PSL Limited Vs CC Kandla [2015 (328) ELT 177 (T-Ahd)] affirmed in [2016 (331) ELT A90 (SC)]; also affirmed in Commissioner vs Ratnamani Metals & Tubes Ltd [2016 (331) ELT A45 (SC)], review petition dismissed in [2016 (331) ELT A89 (SC)]

iii. Mill Test Certificate (MTC) was always submitted to the department at the time of assessment of imported goods. Department has wrongly stated that the MTC was not submitted at the time of importation. Department has itself laid down the requirement for submission of MTC at the time of assessment by way of various public notices and standing orders. (Refer Public Notice No 28/2005 dated 2/12/2005 issued by the Commissioner of Customs, air Cargo Complex Mumbai). The fact about submission of MTC is also

evident from the examination reports pertaining to imports in question. The said reports clearly state that the consignments have been verified in conjunction with the MTC's.

iv There is no intention to evade payment of duty. The total duty leviable in respect of the alloy steel falling under heading 7209 and non alloy steel falling under heading 7225, has been same for all the periods except during the period 18.04.2008 till November 2008.. Irrespective of the duty structure they had always classified the CR Coil under heading 7209 as Non Alloy Steel. It is not that just to avail the benefit of exemption Notification No 21/2002-Cus (SL No 190C) they had classified the said goods under heading 7209.

v. The appellants being accorded an Accredited Client Programme Status ought to have classified the goods correctly, is an alibi to allege mis-declaration. In the instant case they have filed all the declarations as mandated and no facts have been suppressed by them. The claim of the department that since they are ACP clients, the goods have not been examined is only an alibi to fasten duty demand otherwise barred by limitation.

vi. Even if the declaration filed is found to be incorrect or erroneous then also the requirement for

filling the declaration has been fulfilled. In support they relied on the following decisions:

- a. Union of India Vs Rai Bahadur Shreeram Durga Parsad [1969 (1) SCC 91];
- b. Universal Cables [1977 (1) ELT J92 9MP]

vii. Since they have correctly described the goods on bill of entry they cannot be held guilty for mis-declaration and hence confiscation cannot be sustained in term of Section 111 (m) & (o).

viii. Since goods cannot be held liable to confiscation, no redemption fine can be imposed upon them under Section 125 of the Customs Act, 1962.

ix. Since extended period of limitation under Section 28 cannot be invoked, penalty under section 114A cannot be justified.

x. In view of the above extended period of limitation as provided under section 28 cannot be invoked in their case. The demand beyond the normal period of limitation as provided for by the section 28 i.e. 30.04.2008 to 14.06.2008 should be held to be time barred.

4.0 Arguing on the behalf of revenue, Shri Roopam Kapoor, Commissioner, Authorized Representative submitted that

i. From the facts as stated there is no dispute in respect of the correct classification of the goods under consideration, and also there is no dispute about non availability of exemption under Notification No 21/2002-Cus (SI No 190C) in respect of the consignments under importation.

ii. Appellant in the present case is accorded ACP status. The Importer who are accorded ACP status, definitely are facilitated more in terms of speedy clearance. He referred to para 5 of Circular No 42/2005 dated 24th November 2005, "Introduction of Accredited Client Programme (ACP) regarding-

*"5. Importers registered by the department as **"Accredited Clients"** under the Accredited Clients Programme will form a separate category to which assured facilitation would be provided. Except for a small percentage of consignments selected on a random basis by the RMS, or cases where specific intelligence is available or where a specifically observed pattern of non-compliance is required to be addressed, the Accredited Clients will be allowed clearance on the basis of self assessment i.e. as a matter of course, clearance would be allowed on the basis of their declarations, and without examination of goods. Further, this benefit would be available to the registered Accredited Clients at all the ports in the country where EDI and the RMS are operational. It is expected that this measure will bring about drastic reduction in the dwell time of cargo and transaction costs for such importers."*

i. In terms of the above circular, import consignments of ACP Status holders were allowed to clearance on the basis of self assessment.

Hence when the goods are allowed clearance on the basis of self assessment, then department cannot be faulted for the assessment made by the appellant.

ii. Various authorities which support the invocation of extended period of limitation in this case are as follows:-

a. Pleasantime Products Vs Commissioner of Central Excise Mumbai [2009 (243) ELT 641 (SC)]

b. Commissioner of Central Excise Goa Vs Pooja Ferro Alloys Ltd. [2011 (273) ELT 24 (BOM)].

iii. Further certain pleas which the appellants are now raising, were never raised before the adjudicating authority. On the contrary Appellants had at the stage of investigation itself admitted the duty liability and paid the same. It is settled law that such pleas which require further verification cannot be raised at the appellate stage. He relied upon following authorities in his favour-

a. Autolec Industries vs Collector of Customs [1991 (56) ELT 211 (T)]

b. Annanya Knitting Co vs Joint Secretary [2007 (211) ELT 378 (Mad)]

5.0 We have considered the issue and submissions made by both the sides in the remand proceedings. From the remand order, made by Hon'ble High Court, it is quite evident that the issue on merits admittedly stands decided against the appellants and the matter needs to be reconsidered, on the issue of demand by invoking extended period of limitation as provided by the Section 28 of the Customs Act, 1962. During the course of arguments appellant have through their counsel submitted a synopsis, and as per para 14 of the synopsis *"A chart showing the differential duty demanded by invoking extended period of limitation has been submitted vide letter dated 05.01.2017. as per the said chart, out of total demand of Rs 3,82,16,162/- the amount of duty barred by limitation is Rs 1,45,75,924/-."*

Thus in terms of own admission by the appellant's major portion of demand is not barred by limitation.

6.0 Facts necessary and relevant for deciding on the issue of limitation under Section 28 of the Customs Act, 1962 are as follows:

i. Information was received by SIIB (Import) of Mumbai Custom House that appellants had been claiming wrong benefit of Notification No 21/2002-Cus (SI No 190C) on their import of steel coils. It was gathered that they were importing alloy steel and mis-declaring the same as non alloy steel.

ii. On the basis of information received the live Bill of Entries were taken up for detailed scrutiny along with the mill test certificates in respect of the said Bill of Entries, and it was found that indeed the items imported were alloy steels as defined by Chapter Note to Chapter 72 of the Schedule 1 to Central Excise Tariff Act, 1985.

iii. Further enquiries were made in respect of past clearances and hence all the bill of entries filed by appellants, after 29/04/2018 were taken up for scrutiny.

iv. Thus it was found that appellants had since 29/04/2018 filed more than 150 Bill off Entries in respect of the same imported items for which they had wrongly claimed the benefit of exemption under Notification No 21/2002-Cus (SI No 190C). Admitting their mistake appellants deposited the differential duty due in respect of all the said bill of entries as detailed below:

Table 1: Details of Payment of Duty against past clearances	
Date of Deposit	Amount Deposited in Rupees
7 th November 2008	1,00,00,000
12 th November 2008	1,00,00,000
17 th November 2008	80,00,000
25 th November 2008	18,00,000
24 th December 2008	3,83,689
Total	3,01,83,689

vii In respect of eleven live Bill of Entries, appellant deposited the differential duty of Rs 80,32,473/-

viii. Goods totally valued at Rs 13,10,71,798/- (rupees Thirteen Crores ten Lakhs Seventy One Thousand Seven Hundred Ninety Eight Only) imported under all the Bills of Entry were seized under a Panchnama dated 19/11/2008, under the provisions of Section 110, under reasonable belief that same had been imported and attempted to be cleared in contravention of various provisions of the Custom Act, 1962, and were liable for confiscation under Section 111 (o) and (d) of the said Act. Appellant made a request for the provisional release of the seized goods and deposited differential duty of Rs 80,32,473/- in respect of the consignments imported under 11 live Bill of Entries. The provisional release of the seized goods was allowed on execution of bond of full value (Rs 16,14,00,000/-) of the seized goods and bank guarantee of 15% of the differential duty (Rs 58,81,707/-).

ix. During course of investigation statements of various person namely Shri V G Charry Senior Manager, Material, Shri R R Suvana, Assistant General Manager, Shri A M Khopkar, Assistant General Manager, Materials and Shri B R Ganguli Deputy General Manager (QA) of Appellants were recorded under Section 108 of Customs Act, 1962. In their statements all of

them admitted that they were professionally qualified Metallurgical Engineers and by looking at the Mill Test Certificate they can determine whether the product covered by the said mill test certificate is alloy steel or not. They admitted that goods covered by the said Bill of Entries and mill Test Certificates were in fact alloy steels and were not exempted under notification No 21/2002-Cus (SI No 190C). They also stated that the said mistake came to their knowledge in the last week of October 2008 and had accordingly instructed the CHA for re-assessment of all pending Bill of Entry under Alloy Steel by paying 5% Basic Custom Duty.

x. Statements of Shri Rajkamal Maroo, partner of Manglam (India) (CHA No 11/492), and Shri Dattatraya Gopinath Gohre, Docks Clerk of CHA were recorded under Section 108. In their statement, they also admitted that by looking into the Mill test Certificate they can determine whether the goods covered by the said mill test Certificate were alloy steel or otherwise. They admitted that due to urgency they did not scrutinize the Mill Test Certificate.

7.0 Section 28 of the Customs Act, 1962 defines the relevant date for computation of period of limitation as follows:

"Explanation 1- For the purposes of this section, "relevant date" means,-

- (a) *in a case where duty is not levied or not paid or short-levied or short-paid, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;*
- (b) *in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;*
- (c) *in a case where duty or interest has been erroneously refunded, the date of refund;*
- (d) *in any other case, the date of payment of duty or interest.”*

8.0 Appellants have vide letter of their counsel dated 5.01.2017, submitted a detailed chart of Bill of Entries in respect of which the demands have been made. From the said chart in respect of which the appellants have claimed the demand to be barred by limitation, following details are worth noting-

Table 2: Bill of Entries for which demand claimed to be time barred				
S No	Bill Of Entry No.	Bill of Entry date	Date of examination	Differential Duty in Rs
1	837376	30.04.2008	12.05.2008	4,24,637
2	840908	20.05.2008	28.05.2008	28,51,030
3	840918	20.05.2008	28.05.2008	5,54,987
4	840920	20.05.2008	28.05.2008	2,92,710
5	840925	20.05.2008	28.05.2008	2,47,546
6	840926	20.05.2008	28.05.2008	5,21,963
7	840932	20.05.2008	30.05.2008	58,069
8	843022	30.05.2008	03.06.2008	21,41,752
9	837377	30.04.2008	12.05.2008	15,93,898
10	837362	30.04.2008	22.05.2008	15,13,040
11	839172	09.05.2008	22.05.2008	2,56,960
12	839184	09.05.2008	22.05.2008	59,533
13	840923	20.05.2008	28.05.2008	3,46,405

14	845928	14.06.2008	03.07.2008	8,77,823
15	845930	14.06.2008	03.07.2008	47,018
16	845944	14.06.2008	03.07.2008	6,76,071
17	845948	14.06.2008	03.07.2008	3,02,614
18	845950	14.06.2008	03.07.2008	7,08,731
19	839505	12.05.2008	19.05.2008	8,78,345
20	845929	14.06.2008	03.07.2008	91,641
21	845949	14.06.2008	Not Available	1,31,151
	Total			1,45,74,924

9.0 From the table 2, it is quite evident that the earliest date of examination in respect of the Bill of Entries, for which appellants have claimed that the demand is beyond normal period of limitation as prescribed by Section 28, is 12.05.2008. Thus in terms of Section 28, the period of limitation which has to be within six months from the date on which the proper officer makes the order for clearance of goods would be some date after 12.05.2008. Since examination precedes the order for clearance of goods. In respect of these Bill of Entries, Appellant have themselves admitted the error and have proceeded to pay the duty as detailed in table 1. Since the duty has been paid in respect of these clearances on 7th November 2008, 12th November 2008, 17th November 2008, 25th November 2008 and 24th December 2008 by the appellants the demand was not time barred on the date of payment. Thus the proceedings initiated by the Show Cause Notice dated 01.01.2009, cannot be said to be

proceedings for fresh demand of duty but are only in nature of proceedings to confirm the amount paid and appropriate the said payment against the confirmed duty liability. Para 'f' of the Show Cause Notice makes this aspect very clear when it states that "Duty deposit of Rs 3,01,83,689/- (rupees Three Crore One Lakh Eighty Three Thousand Six Hundred Eighty Nine only) deposited with Customs for CR Coils earlier cleared as per Annexure B to the Show Cause Notice should not be adjusted/ appropriated towards differential duty on the goods as per Annexure B. Further when the Appellants have themselves admitted the differential duty liability and have paid the same within the prescribed period of limitation under section 28, they should be estopped from taking the ground of limitation in subsequent proceedings. In case appellants intended to disagree with the duty demanded, instead of paying the same they should have asked the department to issue a show cause notice on 7th November 2008, and then it was for the department to issue the show cause notice within the prescribed period of limitation which ended after the said date. Thus even if the appellants argument that extended period of limitation cannot be invoked in the present case is admitted, even then the demand cannot be held to be time barred as the all the amounts had been paid by the appellants, prior to expiry of normal period of limitation.

10.1 Now examining the issue in respect of mis-declaration etc for the purpose of invoking extended period of limitation under section 28, and for imposition of penalties under section 114A of the Customs Act, 1962. Issue in consideration is in respect of Notification No 21/2002-Cus (SI No 190C). For ease of reference the said entry as in notification is reproduced below:

S. No.	Chapter or heading or sub-heading or tariff item	Description of goods	Standard rate	Additional duty rate	Condition No.
190A	7201	All goods other than pig iron	5%	-	-
190B	7204	All goods other than seconds and defectives	5%	-	-
190C	7203, 7205, 7206, 7207, 7208, 7209, 7210, 7211, 7212, 7213, 7214, 7215, 7216 or 7217	All goods other than seconds and defectives	Nil	-	-;

10.2 In case of **Commissioner of Customs (Import), Mumbai Vs. M/s. Dilip Kumar and Company & Ors.** [Civil Appeal No. 3327 of 2007], Five Member

Constitutional Bench of Supreme Court has by its order dated 30th July 2018, [2018 (7) TMI 1826 (SC)] held as follows:

“52. To sum up, we answer the reference holding as under

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export Case (supra) stands overruled.”

10.3 In terms of the above referred decision of the Constitutional Bench of Apex Court, it was responsibility of the Appellant to ensure that he was eligible for exemption benefits claimed by him. He was thus required to make a fair declaration claiming the benefit of exemption Notification.

10.4 The issue as projected by the appellants to be a complex one is not as complex and reliance placed by the Appellant, on the difference of opinion between the two Members of CESTAT while deciding their appeal is totally misplaced. Both the Members had unanimously

agreed that the product imported by the Appellants is an alloy steel and benefit under the said notification was not admissible to them. For ease of reference, the differing order (minority but concurring view) of Member (Judicial) is reproduced below:

"I do agree with the conclusion drawn by the Id. Member (Technical) Shri S.K. Gaule that the impugned goods would rightly fall under the category of other alloy steel and not eligible for the benefit of Notification. Before arriving at the conclusion, I want to mention that during the course of arguments, the Id. advocate for the appellants, has taken a stand that the impugned goods are not "other alloy steels" as defined in Chapter Note 1(f) of Chapter 72. Chapter Note 1(f) of Chapter 72 defines "other alloy steel" which states that steels not complying with the definition of stainless steel and containing by weight one or more of the following elements in the proportion shown. From the above, the expression "one or more" means that if one of the listed elements is present in the imported coil and if that element is equal to or exceeds the limit mentioned in Note 1(f) above, then Note 1(f) above is satisfied and the imported coil will be treated as "other alloy steels". If the coil contains more than one element listed in the Note 1(f) above, then all the elements present in the imported coil should be equal or more than what is prescribed in the Chapter Note 1(f) above. If not, such coil will not be treated as "other alloy steel". For example, if the goods contain only manganese apart from steel and if manganese is 1.675% or more, then it will qualify as other alloy steel. But if out of 16 elements mentioned in Chapter Note 1(f) of Chapter 72 and all the elements are to be in the proportion shown in Chapter Note 1(f) of Chapter 72 or more, then it will qualify as other alloy steel. For example, if the imported coils are having 2 elements viz. manganese and titanium and if both are more than the prescribed proportion as mentioned in Chapter Note 1(f) of Chapter 72 i.e. 1.65% or more of manganese and 0.05% or

more of titanium then it will be called as other alloy steel. If element of manganese is 1.65% or more but titanium is less than 0.05% then it will not qualify as other alloy steel and vis-à-vis i.e. if titanium is more than 0.05% and manganese is less than 1.65% then also it will not qualify as other alloy steel. Therefore, the expression “or more” is relevant to define other alloy steel otherwise the expression “or more” shall become meaningless and redundant.

7. In the case in hand before us as recorded in para 3 of the impugned order the percentage of manganese is more than 1.65% and titanium is more than 0.05% thus the imported coil qualifies the definition of other alloy steel as per Chapter Note 1(f) of Chapter 72. Therefore, the Id. Member (Technical) has rightly held that the impugned goods are other alloy steels and not eligible for the benefit of the Notification.”

10.5 From the above referred differing view, it is quite evident that both the Members had concluded that goods imported are other alloy steels and not eligible for benefit of exemption. The order of differing member dispel any further doubt that might be there in mind of any person and he has concluded on the facts that even if the argument of the appellant is accepted then on facts these goods still are other alloy steels only and shall not be eligible for benefit under the notification.

10.6 Further it is an admitted fact by the employees of appellant who are professionally qualified metallurgical engineers that just by looking at the mill test certificate they can tell whether the consignment to which said mill test certificate pertains is of alloy steel or else. The professional experience of the said persons cannot be

disregarded. If the appellants were aware that the goods imported by them were other alloy steels, definitely by declaring them and classifying them as non alloy steels to avail the benefit of exemption is nothing but a mis-declaration.

10.7 Appellant have also argued vis a vis the intention to evade payment of duty. They have in their submissions stated that irrespective of the duty structure, appellants had always classified their product under heading 7209 as non alloy steel, and hence there cannot be any intention to evade payment of duty. The argument advanced cannot be accepted, because issue itself is not limited to classification of goods, but is in respect of the exemption claimed. When the duty structure on both alloy steels and non alloy steels was identical, there could have been no short payment of duty. However when said categorization lead to claiming and availment of exemption that was not admissible, then definitely there was intent to evade payment of duty. This controversy has been set at rest by the Constitutional Bench of the Apex Court referred above.

10.8 Appellant have placed reliance on series of decisions referred in para 3(ii) supra, to argue that it was for revenue to determine the correct classification and admissibility of exemption. Having failed to do so, they cannot fasten liability for short payment by

invoking extended period of limitation. In our view the entire controversy has been set to rest by the decision of Apex Court now, when it has held that appellant was required to satisfy the requirements of the exemption notification before he could have claimed the benefit of same.

10.9 Commissioner has in par 23.2 of his order recorded *"The other submission from importer is that claiming of exemption notification or claiming a particular heading for purposes of classification does not amount to misdeclaration. They have cited various case laws in this respect. However, I find that the importer had submitted incomplete description at the time of assessment. Further, the wordings of the notification are very specific and clear and only non alloys steel is eligible for the benefit of exemption of basic custom duty. This proves that the importer knowingly claimed the said benefit against the alloy steel coil also. Further, there is no scope of any ambiguity/ confusion as it is very clearly defined what is alloy steel and what is non alloy steel. Thus the importer's act of claiming the steel as non alloy steel under Sr No 190C amounts to suppression of facts for evading duty applicable on alloy steel. The case laws cited by the importer about claiming a particular classification or exemption under a particular notification not amounting to misdeclaration would have been*

applicable, had he provided full and correct description of goods.”

10.10 Further issue has been raised in respect of the Appellant being an ACP status holder. It has been pointed out by the AR, relying on the circular of CBEC, that assessment and clearance of the goods by such status holder is facilitated by the departments automated risk management system. The imported goods are assessed by the system on the basis of the declaration made on the bill of entry and allowed clearance without or minimal human intervention. In such cases only a minimum number of bill of entries will be sent to group for assessment. The goods are thus cleared on the basis of self assessment done by the ACP status holder. When the Government confers ACP status, it is based on trust which government imposes on such importer. Appellants have claimed that they have filed the declarations as were required to be filed by them and it was for department to act on the basis of declaration. The argument of appellant is based on wrong appreciation of the scheme. The appellant were not required to file the declarations as were mandated to be filed under the said scheme but on the basis of the trust imposed by according the ACP status, they were required to ensure filling of correct declarations at the time of importation. The status conferred provides for

speedy clearance of the imported goods without much or minimum scrutiny. It imposes additional responsibility on the status holder to make correct and complete declaration. Even otherwise if the declaration made at any time is found to be incorrect the charge of misdeclaration is natural consequence. In our view appellants have misdeclared about the goods imported, to the extent of claiming benefit of exemption not admissible in their case. The reliance placed by the appellants on the two authorities referred in para 3(vi) supra is totally misplaced because in those cases the persons concerned were not operating under any scheme such as ACP scheme, which were based on the trust that person making the declaration will make correct and true declaration.

10.11 Hence in view of the discussions as above we are of the opinion that appellants have misdeclared and have thereby availed the benefit of exemption which was not due to them. Thus we find the ingredients required for invoking extended period of limitation as provided by the Section 28 are satisfied in the present case. Thus on this account also demand cannot be held to be time barred for any part.

10.12 Since the ingredients for invoking extended period of limitation under section 28 and for imposition of mandatory penalty under section 114A of the

Customs Act, 1962 are identical, in our view penalty imposed on the appellants under the said section is justified.

11. During the course of arguments appellants have also challenged the order in respect of confiscation of goods. However we find that tribunal has in its earlier order only upheld the confiscation of goods which were seized and were available for confiscation. This part of order was not before the High Court and matter has not been remanded for reconsideration of the same. However since we have upheld that appellants had misdeclared with the intention to evade payment of duty, we do not find any reason to differ with the earlier order of the tribunal upholding the confiscation of goods, which were seized and allowed to be provisionally released against the bond and bank guarantee.

12.0 In result the order of the adjudicating authority in case of Appellants is modified to the extent of setting aside the redemption fine of Rs 2,46,00,000/- imposed in respect of the goods not available and which were not even seized. Except the above modification the impugned order is upheld and the appeal filed by the appellants is partly allowed to the said extent.

(Pronounced in court on 26.10.2018)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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