

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

**APPEAL No. C/190/2011
C/CO/44/2011**

(Arising out of Order-in-Original No. CC/MJ/27/2010 ADJ. ACC dated 30.12.2010 passed by Commissioner of Customs (Import), ACC, Sahar, Mumbai)

Commissioner of Customs (ACC & Imp), Mumbai Appellant

Vs.

R.G. Stone Urological Research Institute

Respondent

Appearance:

Ms. P. Vinita Sekhar, Additional Commissioner (AR), for appellant
Shri Jeevan Prakash, Advocate, for respondent

CORAM:

Hon'ble S.K. Mohanty, Member (Judicial)

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

Date of Hearing: 20.12.2018

Date of Decision: 08.02.2019

ORDER No. **A / 85263 / 2019**

Per: Sanjiv Srivastava

This appeal has been filed by the revenue against the Order in Original No CC/MJ/27/2010 Adj ACC dated 30.12.2010 passed by the Commissioner of Customs (Import) Air Cargo Complex, Sahar Mumbai.

2.1 Respondent a unit of R G Stone Urological Research Institute had imported 19 consignments of spares of medical equipments without payment of

customs duty amounting to Rs 1,40,64,277/- (Rupees One Crore Forty Lakhs Sixty Four Thousand Two Hundred and Seventy Seven only) availing the exemption under Notification No 64/88-Cus dated 01.03.1988. Respondents had claimed the exemption on the strength of Customs Duty Exemption Certificate (CDEC) No Z.37021/63/86-MG(P) dated 09.12.1988 issued by the Director General Of Health Services (DGHS).

2.2 DGHS vide its letter F No Z 37021/63/86-MG dated 08.01.2001 withdrew the CDEC issued by them under Notification No 64/88-Cus dated 01.03.1988, for the reason that institute was not fulfilling the conditions specified in the said Notification.

2.3 Since Respondents had willfully misstated and suppressed the facts, had wrongly availed the facility under Notification No 64/88-Cus and subsequent to imports failed to fulfill the post import conditions as specified, a Show Cause Notice was issued to them asking them to show cause as to why

- i. the goods imported valued at Rs 60,30,618/- should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962;
- ii. the legitimate duty amounting to Rs 1,40,64,277/- should not be demanded and recovered from the

importer u/s 12 and/ or 125(2) of the Customs Act, 1962;

- iii. the penalty should not be imposed u/s 112(a) of the Customs Act, 1962.

2.4 Adjudicating authority has by his order in original held that

- i. institute did not comply with the post import condition stipulated in the said notification as they did not have any facility to comply with condition (b) and (c) in Para 2 to the table appended to Notification No 64/88-Cus. Thus the benefit of exemption under the said Notification was not available to them;
- ii. the goods were liable for confiscation under Section 111(o) of the Customs Act, 1962 and the respondents were liable to penalty under section 112(a);
- iii. the equipment and its spares were covered under Notification No 65/88-Cus and hence the duty leviable on the said goods in terms of that notification @ 40% was Rs 24,12,000/- (Rupees Twenty Four Lakhs Twelve Thousand only.);
- iv. though the duty was payable, the same cannot be demanded under section 28, as it is time barred;
- v. in case of Jagdish Cancer and Research Centre, Hon'ble Apex Court has held that in cases

involving confiscation duty will be payable under Section 125(2). Since the goods are not available for confiscation nor they have been released to the respondents on the strength of a bond agreeing to pay redemption fine in lieu of confiscation thus the provisions of Section 125 cannot be invoked in the present case;

- vi. the obligations towards duty cannot continue beyond the life time of the equipments imported availing the exemption;
- vii. penalty of Rs 24,00,000/- (Rupees Twenty four Lakhs only) is imposed under Section 112(a).

2.5 The order of Commissioner has been challenged by the revenue on various ground as stated below:-

- i. Since the duty demand does not relate to short levy or non levy at the time of assessment on importation but has subsequently arisen on account of failure to fulfill the post importation conditions stipulated under the Notification, section 28 has no application in the present case.
- ii. The power to recover escaped duty collect is arising out of section 12 of the Act. Since no specific time limit has been provided under the said section 12, the notice of demand cannot be subjected to any limitation of time and cannot be termed as time barred.

- iii. The Notification did not mandated the clearance of said goods under a bond or bank guarantee for recovery of duty in case of failure to comply with the conditions stipulated. Merely because the Notification did not provide for the requirement of bond there can be no valid reason for not paying the escaped duty when post import conditions are violated.
- iv. In case of Bombay Hospital Trust [2005 (188) ELT 374 (T-LB)] it has been held when a post importation condition in an exemption notification is not fulfilled department has the power to recover the escaped duty under Section 12 of the Customs Act, 1962 without limitation of time for demanding duty so escaped.
- v. Mediwell Hospital and health Care Pvt Ltd [1997 (89) ELT 425 (SC)] also hold that custom duty can be realized whenever obligations imposed by the exemption notification are not fulfilled.
- vi. In case of Virgo Steel [2002 (1410 ELT 598 (SC))] Hon'ble Supreme Court held that *"..... While the absence of notice may invalidate the procedure adopted by the proper Officer under the Act, it will not take away the jurisdiction of the Officer to initiate action for the purpose of recovery of duty escaped. This is because of the fact that the proper*

Officer does not derive his power to initiate proceedings for recovery of escaped duty from Section 28 of the Act. Such power is conferred on him by other provisions of the Act which mandate the proper Officer to collect the duty leviable..... A cumulative reading of these provisions found in the Act clearly shows that the jurisdiction of a proper Officer to initiate proceedings for recovery of duty which has escaped collection, is not traceable to Section 28. The power to recover duty which has escaped collection is a concomitant power arising out of the levy of customs duty under Section 12 of the Act,”

- vii. Thus adjudicating authority has failed to appreciate that Section 12 gives the power to levy customs duty, section 25 gives the power to grant exemption of duty in the public interest either absolutely or subject to conditions. Since the conditions of exemption were not fulfilled post importation and clearance of goods, the public interest was not served and exemption became unavailable and full duty leviable under section 12 become payable.

2.6 Respondents have filed cross objections in the matter challenging the penalty imposed by the Commissioner in his order.

3.1 We have heard Ms P Vinita Sekhar, Additional Commissioner (Authorized representative) for the Appellant (Revenue) and Shri Jeevan Prakash Advocate for the Respondents.

3.2 Arguing for the revenue learned Authorized Representative submitted that adjudicating authority was not correct in confirming the duty demanded after having held that post import conditions stipulated by the Notification No 64/880-Cus were not fulfilled. She submitted the sole reason for not confirming the said demand was that Commissioner found that demand will be barred by limitation under Section 28 and Section 125 of the Customs Act, 1962 is not applicable in this case as the goods were not available for confiscation, nor where they released against a bond or bank guarantee agreeing to pay the redemption fine or the duty. She relied upon the decision of larger bench of Tribunal in case of Bombay Hospital Trust [2005 (188) ELT 374 (T-LB)] to argue that power to recover duty is vested in terms of Section 12 of the Customs Act, 1962 and in case of failure to comply with the post importation condition the duty needs to be recovered by invoking the said section. She further submitted that in case of Bombay Hospital Trust [2006 (201) ELT 555 (Bom)], Hon'ble High Court has held that the duty can be recovered in such situation in terms of Section

125(2) of the Customs Act, 1962, even if the assessee do not opt to redeem the goods on payment of redemption fine. She also relied upon the decisions in case of Virgo Steel [2002 (141) ELT 598 (SC)] and Shah diagnostic Institute Pvt Ltd [2008 (222) ELT 12 (Bom)] to buttress her arguments.

3.3 Arguing for the respondents learned advocate submitted that-

- i. Adjudicating authority has by his order made out a case against them which never there in the show cause notice, by stating the respondents were not a hospital but a diagnostic centre. {Reckitt and Coleman of India Ltd [1997 (10) SCC 379]}
- ii. Adjudicating authority has proceeded on irrational and ambiguous basis, therefore order is to be strike down; {B Lakshmidhand [1983 (12) ELT 322 (MAD)]}
- iii. Post import conditions cannot be continue when the notification No 64/88_Cus was rescinded by the Notification No 98/94-Cus on 1.03.1994.
- iv. The ruling of Hon'ble Supreme Court in case of Mediwell Hospitals have considered by larger bench of Supreme Court in case of Faridabad CT Scan Centre [1997 (7) SCC 752] and it was held that Mediwell Hospital case did not lay down the correct law. In case of Sri Sai Sathya Institute

High Medical Science [2003(158) ELT 675 (SC), larger bench held against the decision of Mediwell Hospital. Similarly Mediwell Hospital has been discussed in case of RG Stone Urological Research Institute & other {Order dated 24.08.2010 of Delhi High Court in CWP No 2485/2001}, Apollo Hospital Enterprises Limited [2001 (133) ELT 58 (Mad)], Bharat Diagnostic Centre [2007 (2070 ELT 13 (T-Bang)]

- v. Show Cause Notice is clearly time barred and hence the proceedings initiated by the said time barred notice cannot be sustained.
- vi. Section 12 cannot be pushed into operation for recovery of duty escaped without any limitation. Rulings relied upon by the revenue do not advance their case. {Corporation Bank vs Navin J Shah [2000 (2) SCC 628], Haryana State Coop Land Development Bank vs Neelam [2005 (5) SCC 91]}
- vii. No duty can be demanded by invoking section 124 and 125 (2) of the Customs Act, 1962. {Fortis Hospital Ltd
- viii. Since no duty can be demanded penalty cannot be imposed.
- ix. They had complied with the post import obligations and also filed the proof of same for about 13 years.

4.1 We have considered the submissions made in the appeal, cross objections and during the course of argument.

4.2 Para 14 of the Show cause Notice reads as follows:

“14 Therefore M/s Bombay Urological Institute & Research Centre are called upon to show cause to the Commissioner of Customs (Import) Air Cargo Complex, Sahar International Airport, Sahar, Andheri (E), Mumbai as to why

- (a) The said goods as described in Annexure A to this Show Cause Notice and valued at Rs 60,30,618/- should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962.*
- (b) The legitimate customs duties amounting to Rs 1,40,64,277/- should not be demanded and recovered from M/s Bombay Urological Institute & Research Centre under the provisions of Section 12 and/or 125 (2) of Customs Act, 1962.*
- (c) Penalty should not be imposed under Section 112(a) of the Customs Act, 1962 for the above described wilful act of defrauding customs duty to the tune of Rs 1,40,64,277/- (duty calculation shown in Annexure A to this Show Cause Notice) by M/s Bombay Urological Institute & Research Centre”*

4.3 On the merits of the issue Commissioner has relied on the decision of the Bombay High Court in case of-

- i. **Wockhardt Hospital & Heart Institute [2006 (200) ELT 15 (Bom)]** holding that

“Although some issues decided in the case of Mediwell Hospital have been overruled by the Apex Court in case of Faridabad CT Scan (supra) and Sathya Sai Institute (supra), the above observations regarding the liability to pay duty under Section 125 (2) have not been overruled by the Apex Court. Moreover, the above observations made in the case of Mediwell Hospital case has been reiterated by the Apex Court in case of Jagdish Cancer Research Institute (supra). Thus our interpretation of Section 125(2) is supported by the aforesaid observation of the Apex Court.”

ii. Shah Diagnostic Institute Pvt Ltd [2008 (222) ELT 12 (Bom)], holding that-

“31 Now, we may deal with the last contention of the Petitioners that the Notification No 64/88-Cus dated 1st March 1988 came to an end on 1st March 1994 and, therefore, the conditions imposed in the said notifications came to an end and ceased to be effective. The learned Counsel submitted that Section 6 of the General Clauses Act cannot be made applicable to such notification.

32. This argument of the learned Counsel overlooks and ignored Section 159A of the Customs Act which was introduced by the Finance Act, 2001. Section 159A reads thus:

“159A. Effect of amendments, etc., of rules, regulations, notifications or orders. Where any rule, regulation, notification or order made or issued under this Act or any notification or order issued under such rule or Page 0883 regulation, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not

(a) receive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or

(b) affect the previous operation of any rule, regulation, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, regulation, notification or order so amended, repealed, superseded or rescinded; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, regulation, notification or order so amended, repealed, superseded or rescinded; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, regulation, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.”

33. *That Section 159A is deemed to have been inserted on and from 1st February, 1963 cannot be questioned. It, therefore, has to be held that Section 159A was operating on 1st April, 1994 when the Notification No 64/88-Cus was rescinded. In other words, rescission of the Notification No 64/88, does not effect the liability acquired, accrued or incurred by the petitioners with regard to fulfillment of clause 2(b) of the said notification.*

34. *We find no merit in both.”*

4.4 Accordingly he had held that non compliance with the post importation conditions stipulated by the notification No 64/88-Cus, would negate the admissibility of exemption. Para 33.1 and 33.2 of the order of Commissioner are reproduced below:

“33.1 From the discussions above it can be seen that the importer did not comply with the post import conditions prescribed at any point of time after import of goods because they did not have facility required to comply with conditions (b) and (c) in para 2 to Table appended to Notification No 64/88-Cus. Thus the goods were rendered liable to confiscation under section 111(o) of the Customs Act. So the importer is liable to penalty under section 112 (a) of the Customs Act.

33.2 I find the main equipment for which spares were imported was Lithotome. This equipment and its spares were covered under Notification 65/88-Cus with concessional rate of duty of 40%. Considering the total value of Rs 60,36,618/- for the imports of the impugned spare parts the duty liability worked out approximately to Rs 24,12,000/- only. I take this fact into account for the purpose of deciding the quantum of penalty.”

4.5 Respondents have challenged the findings of Commissioner referred above by relying on various decisions specifically of Delhi High Court in their own case [Order dated 24.09.2008 in CWP 2485/2001]

“Analysis of Mediwell Hospital and the later Supreme Court decisions

31. *This brings us to the decisions of the Supreme Court, beginning with the Mediwell Hospital case, on whether the obligation under Notification No. 64/88 continues indefinitely and, in any event, even after the repeal of the said notification.*

32.

33. *What is relevant, as far as the present case is concerned, is the answer to Question No. 3. The Supreme Court observed that while Mediwell was entitled to get the CDEC from the DGHS, "the very notification granting exemption must be construed to cast continuing obligation on the part of all those who have obtained the certificate from the appropriate authority and on the basis of that have imported equipments without payment of customs duty to give free treatment at least to 40 per cent of the outdoor patients as well as give free treatment to all the indoor patients belonging to the families with an income of less than Rs. 500 per month." The Supreme Court required the competent authority to "continue to be vigilant and check whether the undertakings given by the applicants are being duly complied with after getting the benefit of the exemption notification and importing the equipment without payment of customs duty." It was consequently held that if upon enquiry the authority was satisfied that the said obligation was not being carried out "then it would be fully open to the authority to ask the persons who have availed of the benefit of exemption to pay the duty payable in respect of the equipments which have been imported without payment of customs duty." All the above observations were made in para 13 of the judgment (SCC@ p.766). In para 14, a direction was given that all the persons, including Mediwell, who had the benefit of the CDECs "should notify in the local newspaper every month the total number of patients they*

have treated and whether 40% of them are the indigent persons below stipulated income of ` 500/- per month full particulars and address thereof which would ensure that the condition to treat 40% of the patients free of cost would continuously be fulfilled." In the event of default, it was directed that coercive official action should be undertaken, and that the above condition should become part of the CDEC itself. Subject to the fulfillment of the above conditions, as set out in paras 13 and 14 of the judgment (SCC@ p.766-767), the judgment of the High Court was set aside and the DGHS was directed to reconsider the case of Mediwell and issue the necessary CDECs within a period of three months.

34. Thereafter, the writ petition filed by the PUCL in this Court was heard and a detailed order was passed on 2nd May 2003 by a Division Bench of this Court. After examining the report of the Member (Customs), Central Board of Excise and Customs („CBEC“) it was noted that so far as the DGHS was concerned, "396 cases were examined. In respect of 386 institutions/hospitals CDEC has either been withdrawn or cancelled."

35.

36. It is clear from the decision in Faridabad CT. Scan Centre that only insofar as the two-Judge Bench in the Mediwell Hospital case held that even a diagnostic centre not attached to any hospital could be granted the CDEC, such decision was held to be no longer good law. By no means can this be construed as an overruling by the larger bench in Faridabad CT. Scan Centre of the entire decision of the smaller bench in the Mediwell Hospital case.

37.

38. *The resultant position is that after the judgment in Sri Sathya Sai Institute High. Medical Sciences v. Union of India, the directions in para 14 of the decision in the Mediwell Hospital case, which imposed a condition of the holder of a CDEC having to issue advertisement in newspapers regarding the provision of free treatment, were held to be no longer good law.*

39. *Consequently, only the directions contained in para 13 of the Mediwell Hospital case that declared that the obligation under Notification No. 64/88 was a continuing one, which was required to be monitored by the authorities, survived.*

Effect of repeal of Notification No. 64/88

40.

41. *The learned Single Judge of the Madras High Court in Apollo Hospitals held that the requirement of complying with the condition under Clause 2 of the table to the Notification No. 64/88 would continue till such time the said notification was operational. It was further held that such liability cannot be enforced after the repeal of the notification. It was held in para 43 (ELT @ p. 75):*

"43. Having derived such exemption whether it is open to the petitioners to contend that after the rescinding of Notification No. 64/88, it is not open to the authorities to enforce the liability. The answer is simple, in view of the judgments of the Supreme Court referred to above. The petitioners those who benefited the tax exemption are bound to discharge the liability during the period when the said Notification 64/88 was in force. Hence it is always open to the authorities to enforce such obligation only during that period when the Notification No. 64/88 was in force and not for the subsequent period. So it is for the authorities to establish that the petitioners had

violated the conditions imposed under Notification No. 64/88 subsequent to their availing the benefit of the exemption of Duty and before the end of February, 1994, since Notification 99/94, rescinding the Notification 64/88 came into force on 1-3-94."

42.

43. *The resultant position from the above discussion would be that as far as the Customs Notification No. 64/88 is concerned, the requirement under Para 2 of the Table to provide free treatment to at least 40% of all their outdoor patients and provide free treatment to all indoor patients belonging to families with an income of less than ` 500/- per month, would be a continuing obligation but that such obligation would continue till the time the Notification No. 64/88 continued to exist. Such obligation could not be enforced even after the repeal of the said notification, i.e., even after 1 st March 1994.*

44.

45. *The Bombay High Court negated the challenge to the reasonableness of the conditions imposed by Notification No. 64/88. It was held that one of the essential conditions in Para 2(b) of the said notification was that the beneficiary of the CDEC must be a hospital, which can provide both free medical and diagnostic treatment to all indoor patients belonging to the families with an income of less than ` 500/- per month and at least 10 per cent of the hospital beds should be reserved for such patients. Since the first Petitioner did not have the facility of inpatients, it could not have complied with the said conditions and, therefore, was ineligible for the benefit of exemption. It was then held that the attempt by the Petitioners therein to have the machines installed in the premises of the Breach Candy Hospital and Research*

Centre and not in their own units was dishonest and constituted the practice of a fraud on the revenue authorities. Consequently, it was held that the CDEC was rightly withdrawn. It was further held that the judgment in Apollo Hospitals Enterprises Ltd. did not help the case of the Petitioners at all. The contention that the Notification No. 64/88 was repealed on 1st March 1994 and, therefore, the conditions imposed thereunder ceased to be effective, was rejected by the Bombay High Court by referring to Section 159A of the Customs Act, 1962. It was held that the rescission of the Notification No. 64/88 did not affect the liability acquired, accrued or incurred by the Petitioners with regard to the fulfillment of Para 2(b) of the said Notification.

46. The above view of the Division Bench of the Bombay High Court in Shah Diagnostic appears to have been relied upon by a three-member Bench of the CESTAT in Bharath Diagnostic Centre v. Commissioner of Customs, Air Cargo (I&G), New Delhi where while discussing the very same notification, it was held that even if the notification was rescinded, action could be taken for violation of the conditions under which the benefit of the said notification had been obtained during the period the said notification was in force. Referring to paras 42 and 43 of the Madras High Court ruling in Apollo Hospitals, the CESTAT also held that a careful reading of the said paras would reveal that the authorities can enforce the obligations only during the period when the Notification No. 64/88 was in force and not for the subsequent period.

47. The resultant position on a collective reading of the judgment of the Bombay High Court in Shah Diagnostic and the order of the CESTAT in Bharath Diagnostics Centre is that with the repeal of the Customs Notification

No. 64/88 with effect from 1st March 1994, the Petitioner in the instant case would have to satisfy the Respondents that it duly complied with the conditionalities in Para 2 of the Table to the Notification during the time the said Notification was in force. While all the judgments referred hereinbefore talk of the validity of action taken by the Respondents after the repeal of the Notification for the non-compliance during the period the said notification was in force, none of the judgments state that the obligation to comply with the conditions under Notification No. 64/88 continued after the said notification was repealed.”

4.6 We are not in agreement with the said submissions of the respondents, because the issue is in relation to imports made through the port situated in the jurisdiction of Bombay High Court. Also the decision of Delhi High Court do not departs with the decision of Bombay High Court and hold that the conditions stipulated in the Notification No 64/88-Cus, cast a continuing post importation obligations on the importers. Only difference was on the issue as to the period for such continuing post import obligations. While Delhi High Court stated that it continued till the Notification was rescinded, Bombay High Court has held that it continued thereafter in view of Section 159A of the Customs Act, 1962. Thus finding arrived by the Commissioner relying on the decisions of the jurisdictional High Court cannot be faulted with.

4.7 Commissioner after holding the issue on merits in favour of revenue did not demand the duty and observed as follows:

“32 Issue V Since the SCN was issued after the time limit specified in section 28 of the Customs Act and since the goods are not available for confiscation is the demand for duty sustainable?”

In this case a demand under Section 28 will not be maintainable because it is time barred. It is decided by the Supreme Court in the case of Jagdish Cancer & Research Centre that in cases involving confiscation of goods duty will be payable under section 125(2) of the Customs Act and not under Section 28 of the Customs Act, 1962. However in this case there has been no seizure of the goods. It is decided by the Courts that for confiscation of goods either the goods should be physically available or the goods should have been released to the party on the strength of a bond agreeing to pay redemption fine in lieu of confiscation. In this case the goods were never seized and the goods were not released to the institute on the strength of any bond or undertaking. So section 125 can not be invoked in this case.”

4.8 Against this finding of the Commissioner revenue is in appeal. We find that show cause notice has been issued to the respondent, demanding the duty in terms of Section 12/ Section 125 of the Customs Act, 1962. Commissioner has in his order not recorded any findings in respect of the demand made in terms of Section 12. The order of Commissioner not considering

the demand under Section 12 cannot be sustained in view of the decision of larger Bench (Five Member) of CESTAT in case of Bombay Hospital Trust [2005 (188) ELT 374 (T-LB)] wherein larger bench held-

“22. Accordingly, we answer the reference as follows :-

(i) When a post-importation condition in an exemption notification is not fulfilled, the Department has the power to recover the escaped duty in terms of Section 12 of the Customs Act, 1962. Paragraph 12 of the Apex Court decision in Mediwell (supra) also provides an authority for such recovery.

(ii) Such demand notices will not be subject to any limitation of time.”

4.9 In case of Fortis Hospital Apex Court held-

“It is not that the Department is without any remedy. We have gone through the provisions of notification No. 64/88 dated 01.03.1988. As pointed out above, importer would be exempted from payment of import duty on hospital equipment only when the conditions contained in the said notification are satisfied. Some of the conditions, as pointed out above, are to be fulfilled in future. If that is not done and the importer is found to have violated those conditions, Show Cause Notice could always be given under the said notification on payment of duty, independent of the action which is permissible under Section 124 and Section 125 of the Act. It is also important to mention that under certain circumstances mentioned in the notification, the importer can be asked to execute a bond as well. In those cases, action can be taken

under the said bond when the conditions contained therein are violated. Therefore, if the Department wanted the Institute to pay the duty, which may have become payable, it could have taken independent action; de hors Section 124 of the Act, for payment of duty, simultaneously with the notice under Section 124 of the Act or by issuing composite notice for such an action. No doubt, it could have waited for option to be exercised by the Institute under Section 125(1) of the Act as well and in that eventuality, duty would have automatically become payable under Section 125(2) of the Act. But when such an option was not exercised, it could have taken separate and independent action by issuing Show Cause Notice to the effect that the Institute had violated the terms of exemption notification and therefore, was liable to pay duty.”

5.10 thus in view of the above decisions when it is concluded that the post import conditions stipulated in a exemption notification are not satisfied the duty becomes payable in terms of the Section 12 of the Customs Act, 1962 and it is for the respondents to come forward and pay the duty. Subsection 3 to Section 28, at the time of issuance of Show Cause Notice reads as follows:

“3) For the purposes of sub-section (1), the expression 'relevant date' means,

- (a) in case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;

- (b) *in a case where duty is provisionally assessed under Section 18, the date of adjustment of duty after the final assessment thereof;*
- (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."*

Clearly the case of violation of post import condition will not fall in the categories (a), (b) or (c), because,

- i. the exemption has been rightly allowed at the time of clearance of the goods;
- ii. it is not the case of provisional assessment
- iii. it is not case of recovery of amount erroneously refunded.

Thus in terms of (d) the relevant date can be the date of payment of duty or interest. The basic purpose of clause (d), is only to take care of situation where duty becomes payable, subsequent to clearance of the goods from the port, and only seeks to align the provisions of Section 28, so as to provide a machinery provision for recovery of duty legitimately payable under Section 12.

5.11 In our view order of Commissioner not considering demand of the duty legitimately payable under Section 12 of Customs Act, 1962 cannot be sustained.

5.12 Since we are not in position to sustain the order of Commissioner, the matter needs to be remitted back to

the Commissioner for determination of the issue in respect of the various contraventions alleged in the show cause notice and for recording a specific finding in respect of the duty legitimately payable under Section 12. Since the matter is being remitted back to Commissioner, he should also determine the issue of penalty under Section 112(a) afresh taking into account the consideration of the submissions made by the respondents herein.

6.1 Thus the appeal of revenue is allowed and the matter remanded back to Commissioner for reconsideration of the issue in light of provisions of Section 12 of the Custom Act, 1962. Since the matter is quite old, Commissioner should conclude the adjudication in remand proceedings within four month of the receipt of this order. Needless to say the respondents will extend all cooperation in re-adjudication of the matter. The appeal filed by revenue and cross objections filed by the respondents are disposed accordingly.

(Pronounced in court on 08.02.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)