

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

APPEAL No. C/14/2009

(Arising out of Order-in-Appeal No. PIII/185/08 dated 26.9.2008
passed by Commissioner of Central Excise (Appeals), Pune-III)

Tibco Software India Pvt. Ltd.

Appellant

Vs.

Commissioner of Central Excise, Pune-III

Respondent

Appearance:

Shri T. Viswanathan, Advocate, for appellant

Ms. Vinita Sekhar, Additional Commissioner (AR), for respondent

CORAM:

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

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

Date of Hearing: 10.12.2018

Date of Decision: 19.02.2019

ORDER No. **A/85308/2019**

Per: Sanjiv Srivastava

This appeal is directed against order in appeal No PIII/185/08 dated 26.09.2008 of the Commissioner Central Excise (Appeal) Pune-III. By the said order Commissioner (Appeal) upheld the Order in Original No P-VI/CUS/AMT/001/2008 dated 30.01.2008 of Deputy Commissioner Central Excise Pune VI. Deputy Commissioner has held as follows:

“In view of above I do not find any reason to consider claim of remission. The party may accordingly claim abetment under Section 222) for the damaged goods, either by giving additional Bank Guarantee or by paying the duty on depreciated value as per Section 22(2) of Customs Act, 1962. M/s Tibco may de-bond goods & premises.

This order is issued without prejudice to any other action that may be taken under Customs law or any other law for the time being in force in India.”

2.1 Appellant works under STPI scheme and holds a Private Customs Bonded Warehouse License issued under Section 58 of the Customs Act, 1962. They have also been permitted to warehouse duty free goods under Section 60 of Customs Act, 1962 and undertake manufacture and other operations in respect of warehouse goods under Section 65.

2.2 A fire broke out in the appellant premises, intimation in respect of which was given to the range verbally at 1100 Hrs on 08.05.2006 and by a letter dated 08.05.2006 filed on 09.05.2006. Fire occurred at around 0330 Hrs on 08.05.2006, on the sixth floor of their premises at Erandwane.

2.3 They filed a claim for remission of duty in respect of warehoused goods under Section 68 of Customs Act, 1962 on the goods destroyed in fire on 31.08.2006 along with copy of panchnama dtd 08.05.2006 drawn by Police, FIR Copy, Copy of Fire Certificate dated 24.05.2006 issued by Pune Fire Brigade, Photograph of

damaged goods, copy of insurance survey report dated 08.08.2006 issued by HDFC Chubb General Insurance Company along with list of damaged goods, Copy of Insurance Policy no FND000078000/00 dated 09.05.006 issued by HDFC General Insurance dated 01.05.2006, statement of goods lost due to damage.

2.5 Range Superintendent vide his letter dated 26.09.2006 submitted the report after verification that the goods were damaged and not usable after the fire incident. Appellants relinquished the title to goods as asked by the Assistant Commissioner vide their letter dated 13.10.2006.

2.6 Assistant Commissioner vide letter dated 15.05.2007 informed the Appellant that their claim for remission cannot be allowed for the reason that the goods have were cleared under Notfn No 52/2003-Cus dated 31.03.2005 by filling a bill of Entry and were in use for period of 3 years and insurance claim has been settled so claim of remission is not acceptable. They should pay the duty on depreciated value.

2.7 A show cause notice dated 18.12.2007 was issued to the appellants asking them to show cause as to why the claim for remission of duty under Section 23 should not be rejected on following grounds-

“(i) that they have procured imported/ indigenous duty free and warehoused the said goods; valued @

Rs.3,97,27,586.85 involving customs duties Rs.92,23,060 /-, and reported damage to the goods due to fire and claimed remission.

(ii) that the remission of duty sought by the assessee, under Section 23 of Customs Act,1962, was not correct and hence not admissible. Section 23 applies to the warehoused goods [imported], if lost/ destroyed, at any time before clearance for home consumption.

(iii) that the goods under reference were neither intended for "clearance for home consumption", nor "deposited" in the warehouse, but were 'Issued/put to use' for manufacture and other operations [under Section 65].

(iv) As the goods under reference, were neither warehoused goods nor intended for clearance-for home consumption; they were & are not eligible for remission of duty under Section 23 as claimed."

2.8 After considering the written submissions dated 27.12.2007 and those made during the personal hearing on the same day Deputy Commissioner adjudicated the matter as per the order referred in para 1, supra.

2.9 Aggrieved Appellants preferred an appeal before Commissioner (Appeal) which was dismissed by the Commissioner (Appeal)upholding the order in original.

2.10 Aggrieved appellants have filed this appeal.

3.1 In their appeal appellants have assailed the order of lower authorities stating that-

- i. They are entitled to remission under Section 23 for the reason that the goods were damaged and had become unusable as a result of fire incident in their premises on 08.05.2006. The fact of fire and destruction has been certified by various agencies including, police, fire department, insurance surveyors and also the range superintendent.
- ii. They rely on following decisions in their claim for remission-
 - a. Voltas Ltd [2003 (156) ELT 295 9T-Mum]
 - b. Mounts Shivalie Breweries Ltd [2003 (157) ELT 9 (Del)]
 - c. Winsome Yarn Ltd. [2001 (134) ELT 686 (T-Del)]
 - d. Ganeshwar Ltd [2002 (141) ELT 654 (T-Del)]
 - e. Suryovonics Ltd [2003 (156) ELT 391 9T-Bang]
- iii. By allowing the order of abatement under section 22(2) Deputy Commissioner has gone beyond the scope of Show Cause Notice which was issued for denying the remission under Section 22(2)

4.1 We have heard Shri T Viswanathan, Advocate for the Appellant and Ms. Vinita Sekhar, Additional Commissioner (Authorized Representative) for the Revenue.

4.2 Arguing for the appellants learned counsel submitted that the facts of the case clearly bring out that they were operating under scheme of STPI, for which they had obtained the license for a private bonded warehouse under Section 58 of the Customs Act, 1962, and for undertaking manufacturing and other operations on the said warehoused goods under Section 65 of the Customs Act, 1962. As a result of the fire that happened in their premises the goods imported got damaged and they claimed remission of duty in respect of the said damaged goods. The said claim for remission under Section 23 of the Customs Act, 1962 should have been allowed in their favour as have been held in various decisions of as listed below:

- i. Paras Fab International [2010 (256) ELT 556 (T)]
- ii. Sami Labs [2007 (216) ELT 59 (T)]
- iii. Next Fashion Creators [2012 (280) ELT 374 (Kar)]
- iv. Symphony Services Corporation [2012 (275) ELT 369 (Kar)]
- v. Macmillan India [2008 (223) ELT 449 (T)]
- vi. Laxai Avanti Life Sciences [2017 (350) ELT 443 (T)]

4.3 Arguing for the revenue learned Authorized Representative submitted that in the present case though appellants had claimed remission in terms of Section 23 of the Custom Act, 1962, lower Authorities, Deputy Commissioner has allowed abatement from duty

under 22(2) of the Customs Act, 1962. By allowing abetment, the quantum of duty demand gets reduced to value of the damaged/ deteriorated goods, and hence there can be no demand in respect of the damaged goods to the extent of damage. Relying on the decision of Vishal Exports Overseas Ltd [2005 (182) ELT 137 (T-Mum)] and Sandoz Pvt Ltd [2014 (308) ELT 617 (T-Mum)] he submitted that this Bench of Tribunal has constantly not allowed the benefit of remission in similar cases. He also relied upon the decision of Calcutta High Court in case Antartica Limited [2010 (238) ELT 206 (Cal)] and Hon'ble Supreme Court in case of S K Patnaik [2000 (115) ELT 9 (SC)] to support his arguments. He distinguished the cases relied upon by the appellant stating that in those cases the goods were destroyed in fire even before they were put to use. Those cases were the case were the goods were not damaged but destroyed and hence not applicable in the present case.

5.1 We have considered the submission made by the appellants in their appeal and also during the course of hearing.

5.2 Section 23 of Customs Act, 1962 providing for remission of duty reads as follows:

“Remission of duty on lost, destroyed or abandoned goods. - (1) Without prejudice to the provisions of Section 13,

where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods have been lost (otherwise than as a result of pilferage) or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods.

(2) The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under Section 47 or an order for permitting the deposit of goods in a warehouse under Section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon.

Provided that the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force."

5.3 In the present case appellant is STPI unit and has been granted license under Section 58 & 65 of the Customs Act, 1962 for warehousing and for undertaking manufacture and other operations in respect of the warehoused goods. Said Section 58 and 65 reads as follows:

58. Licensing of private warehouses. - *(1) At any warehousing station, the Assistant Commissioner of Customs or Deputy Commissioner of Customs may license private warehouses wherein dutiable goods imported by or on behalf of the licensee, or any other imported goods in respect of which facilities for deposit in a public warehouse are not available, may be deposited. (2) The Assistant Commissioner of Customs or Deputy Commissioner of Customs may cancel a licence granted under sub-section (1) -*

(a) *by giving one month's notice in writing to the licensee; or*

(b) *if the licensee has contravened any provision of this Act or the rules or regulations or committed breach of any of the conditions of the licence :*

Provided that before any license is cancelled under clause (b), the licensee shall be given a reasonable opportunity of being heard.

(3) *Pending an enquiry whether a license granted under sub-section (1) should be cancelled under clause (b) of sub-section (2), the Assistant Commissioner of Customs or Deputy Commissioner of Customs may suspend the license."*

"65. Manufacture and other operations in relation to goods in a warehouse. - (1) *With the sanction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs and subject to such conditions and on payment of such fees as may be prescribed, the owner of any warehoused goods may carry on any manufacturing process or other operations in the warehouse in relation to such goods.*

(2) *Where in the course of any operations permissible in relation to any warehoused goods under sub-section (1), there is any waste or refuse, the following provisions shall apply : -*

(a) *if the whole or any part of the goods resulting from such operations are exported, import duty shall be remitted on the quantity of the warehoused goods contained in so much of the waste or refuse as has arisen from the operations carried on in relation to the goods exported :*

Provided *that such waste or refuse is either destroyed or duty is paid on such waste or refuse as if it had been imported into India in that form :*

(b) *if the whole or any part of the goods resulting from such operations are cleared from the warehouse for home consumption, import duty shall be charged on the quantity of the warehoused goods contained in so much of the waste or*

refuse as has arisen from the operations carried on in relation to the goods cleared for home consumption.”

5.4 Both sections 58 and 65 stipulate that person depositing the goods in terms of the above section in private bonded warehouse or undertaking operations as specified by the said section, is bound by the conditions specified in the said licenses and also by the Bond executed under Section 59. One of the conditions prescribed by the license is that the appellants shall insure the goods deposited in the warehouse against pilferage, theft, fire accident and other natural calamities. Even CBEC Circular No 99/95-Cus states-

“(v) It may be ensured that the goods deposited in the warehouses are fully insured by the ware housekeeper against theft, pilferage, fire accidents, other natural calamities, risks against rioting, etc. at least for a value equal to the customs duty by a comprehensive insurance policy and drawn in favour of the Commissioner of Customs.”

Thus by not executing the bond as required as condition for warehousing license, appellants have violated the conditions of license issued under Section 58.

5.5 Now coming to insurance policy that has been produced by the appellants covering the value of goods destroyed in fire. Appellants had been working with the imported goods much before when the fire incident happened. It is worth noting that though the fire incident happened in the premises of Appellant on

08.05.2006, the Insurance Policy has been issued to them on 09.05.2006 effective from 01.05.2006. The said insurance policy is reproduced below:

23

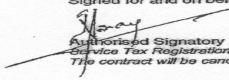



HDFC Chubb General Insurance Company Limited
5th Floor, Express Towers, Nariman Point, Mumbai 400 021.
Te.: 91 22 5638 3600. Fax: 91 22 5638 3699.

STANDARD FIRE AND SPECIAL PERILS INSURANCE (Material Damage)

	SCHEDULE
Policy No: FMD0000785000100	Issued at Mumbai
Item 1. Name of the Insured	: Tibco Software India Pvt. Ltd.
Item 2. Broker/Agent Name	: J.B. Boda Insurance Brokers Pvt. Ltd.
Item 3. Financial Interest	: Not Applicable
Item 4. Mailing address of the Insured	: Suna Center, Erandwane, Pune - 411 004
Item 5. Business	: Software Development
Item 6. Period of Insurance	: From 00:01 hours: May 01, 2006 To (Midnight) April 30, 2007
Item 7. Occupancy	: Software Development
Item 8. Premium	: Rs. 99,210.00
Item 9. Coverage & Premium Statement	: Refer to Page 2
9.1 Premium Computation 9.2 Details of Add On Covers 9.3 Details of Property Insured & Location of Risk Covered	
Item 10. Clauses & Conditions	:
10.1 Designation of Property Clause 10.2 Earthquake Cover 10.3 Terrorism Damage Coverage Endorsement 10.4 Reinstatement Value Clause	

Subject otherwise to terms and conditions of Standard Fire and Special Perils (Material Damage) Insurance Policy.
Signed for and on behalf of HDFC Chubb General Insurance Company Limited, on May 09, 2006



Authorized Signatory
Service Tax Registration No: AABCH0736EST001
The contract will be cancelled ab initio in case, the consideration under the policy is not received.



FMD0000785000100

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Registered Office: Ramesh House, R. T. D. Marg, 169, Backbay Reclamation, Mumbai 400 020, India.





HDFC Chubb General Insurance Company Limited

Coverage & Premium Statement
(Item. 9 of Schedule, Attached to and forming part of Policy No: FMD0000785000100)

9.1 Premium Computation

Perils Covered	Clause / Peril Code	Risk Code	Rate Code	Rate %	Sum Insured (Rs.)	Premium (Rs.)
Standard Fire & Special Perils		73	04	1.25	50,000,000.00	62,500.00
Add on Covers excl. Terrorism						10,000.00
Policy Premium						72,500.00
Terrorism Damage Cover				0.30	50,000,000.00	15,000.00
Net Policy Premium						87,500.00
Add: Service Tax (Inclusive of 2% Education Cess)						10,710.00
Total Premium						98,210.00

9.2 Details of Add On Covers

Sr. No.	Description of Add on Cover	Risk Code	Rate %	Sum Insured (Rs.)	Premium (Rs.)
1	Earthquake	1309	0.2	50,000,000.00	10,000.00
Total of Add on Covers					10,000.00

9.3 Details of Property Insured & Location of Risk Covered

Sr. No.	Risk Location Address	Details of Property Insured	Total Sum Insured (Rs.)
1	Suma Center, Erandwana, Pune - 411 004	Building and Contents	50,000,000.00
TOTAL			50,000,000.00

[Handwritten signature]

FMD0000785000100



[Handwritten signature]

(15)




HDFC Chubb General Insurance Company Limited
205, 2nd floor, Gera Legend, Next to German Bakery,
North Main Road, Koregaon Park, Pune - 411 001.

To whomsoever It May Concern

This is to certify that on 8th May 2006, there was a fire loss in the premises of M/s TIBCO Software India Pvt Ltd at 6th floor Suma Center, Erandwane, Pune 411004, which is covered under this Company's Fire policy No. FMD0000785000100. The list of equipments damaged in the said fire are attached and the same has been accepted by us Total Loss as per Policy conditions.

This certificate is being issued at the request of TIBCO for submitting the same to Customs and Central Excise Authorities to complete formalities relating to debonding of Damaged Equipments.


 (Veerendra.katti)
 Asst Claims Manager

Encl : List of Equipments.

08.08.2006




Registered Office: Ramon House, H. T. Parekh Marg, 169, Backbay Reclamation, Mumbai 400 020, India.

Even this insurance policy is in the name of Appellants and not in the name of Commissioner Customs as per the condition of license. If such an insurance policy as required in terms of conditions of license was executed by the Appellant, then there would have been no requirement of any remission. Section 23 of the Customs Act, 1962 is a general provision seeking to provide a generalized remedy of remission in case of loss of goods. However section 58 and 65 are specific provisions in relation to the private bonded warehouse etc. By prescribing the condition of insurance coverage to the extent of Custom Duty deferred in respect of the warehoused goods, the Appellants have been insulated

from the losses that may occur on this account. However by choosing not to do so Appellants have to be themselves held responsible for any loss that may occur on this account.

5.6 It is settled position in law, that when a some manner is prescribed in law for performing a function in then that needs to be done in that manner only or not all. Thus appellants should have insured the goods to the extent of duty deferred in respect of the imported goods destroyed in fire. In terms of B-17 bonds executed by the Appellants, they have bond themselves in respect of the imported / warehoused goods. In *Avis Electronics Pvt. Ltd.* case [2000 (117) E.L.T. 571 (Tri.-LB)], a Larger Bench of this Tribunal held that when a particular thing is directed to be performed in a manner, statutorily, it should be performed in that manner itself and not otherwise. Similarly, in *Commissioner of Central Excise v. Jellalpure Tea Estate* [2011 (268) E.L.T. 14 (Gau.)], the Hon'ble High Court of Gauhati held that "what is required to be done in a manner prescribed by law, ought to be done in that manner only or not at all." Therefore, the appellant having failed to insure the goods for the Customs duty involved on the goods deposited in the warehouse, cannot seek benefit under Section 23 of the Customs Act. Therefore, demand of Customs duty on the imported raw materials which

were destroyed in the fire as such or which were contained in the finished products destroyed is clearly sustainable in law and we hold accordingly. Similar view has been taken by the tribunal in case of Sandoz Pvt Ltd [2014 (308) ELT 617 (T-Mum)]

5.7 Further clear analysis of Section 23 will make it evident that the said section is applicable, only in case where order Section 47 for clearance of goods for home consumption or an order for deposit of the said goods in warehouse has not been made. Further remission is also not to be allowed in respect of the goods for which an offence under the customs Act, 1962 is committed. By not fulfilling the conditions of license issued under the Section 58 of the Customs Act, 1962 appellants have contravened the provisions to that extent and hence section 23 should not be applicable.

5.8 Appellants in their appeal have relied upon certain decisions which are clearly distinguishable as they relate to destruction of goods prior to clearance from the port or prior to them being put to use.

5.9 Further appellants in their submission have relied upon following decisions in their support:

- i. Paras Fab International [2010 (256) ELT 556 (T)]
- ii. Sami Labs [2007 (216) ELT 59 (T)]
- iii. Next Fashion Creators [2012 (280) ELT 374 (Kar)]

- iv. Symphony Services Corporation [2012 (275) ELT 369 (Kar)]
- v. Macmillan India [2008 (223) ELT 449 (T0)]
- vi. Laxai Avanti Life Sciences [2017 (350) ELT 443 (T)]

Since all the decisions relied upon are on the same reasoning and issue and have been considered under the case of Laxai, we examine these judgments, together referring to facts of this case. In case of Laxai, the basic issue that distinguishes that case from the facts of the present case is that the goods destroyed were never put to use. Para 8 of the said judgment records as follows:

“8. The main ground for rejecting remission is that the appellant did not put the goods into the intended use for which they were imported and also that they did not fulfill the export obligation in terms of the notification. The Id. Counsel has submitted that after import, the capital goods were put to use by appellant till they were destroyed in fire. The appellant had fulfilled export obligation of 16 crores prior to the occurrence of fire accident. After which the appellant was not able to use the capital goods or fulfill the export obligation. When goods have been destroyed by fire, the appellant cannot be expected to fulfill the conditions in the notification. The performance of this impossible obligations must be excused with the maxim, ‘Lex non cogit ad impossibilia’ - The law does not compel the doing of impossibilities. The other similarly recognized maxim is ‘Imponentia Excusat Legem’. Where the law creates a duty or charge and the party is disabled to perform it, without any default on his part, and has no remedy over it, then the law in general will excuse him. Therefore, where the performance of the formalities prescribed by the notification has been rendered impossible by circumstances over which, the assessee had no control, like

the case of an unavoidable fire accident, the circumstances will be taken as a valid excuse. This is exactly the intention of the law contained in Section 23 as well as Rule 21 which deals with remission of duty.”

5.8 Admitted facts as is evident from the order of Assistant Commissioner is that goods were put to use by the appellants. After fire took place again the goods were not completely destroyed but damaged in the fire that took place in the fire incident. When the appellants have made use of the goods the goods would have definitely been used for fulfilling the export obligation that is dependent on the value of imported goods and duty saved. Assistant Commissioner has in the present case taken into account the damage caused by the fire to the imported bonded goods. Hence he has not even proposed to demand the entire duty on the value of goods as imported but has allowed appellants the option to claim abatement under section 22(2) of the Customs Act, 1962. He has also allowed the appellants to debond the said damaged goods by paying duty on the abetted/ depreciated value of the goods under Section 22(2). The provisions of Section 22 of the Customs Act, 1962 are reproduced below:

“SECTION 22. Abatement of duty on damaged or deteriorated goods.

(1) Where it is shown to the satisfaction of the 34 Assistant Commissioner of Customs or Deputy Commissioner of Customs –

(a) *that any imported goods had been damaged or had deteriorated at any time before or during the unloading of the goods in India; or*

(b) *that any imported goods, other than warehoused goods, had been damaged at any time after the unloading thereof in India but before their examination under section 17, on account of any accident not due to any wilful act, negligence or default of the importer, his employee or agent; or*

(c) *that any warehoused goods had been damaged at any time before clearance for home consumption on account of any accident not due to any wilful act, negligence or default of the owner, his employee or agent,*

such goods shall be chargeable to duty in accordance with the provisions of sub-section (2).

(2) *The duty to be charged on the goods referred to in sub-section (1) shall bear the same proportion to the duty chargeable on the goods before the damage or deterioration which the value of the damaged or deteriorated goods bears to the value of the goods before the damage or deterioration."*

5.9 In fact by allowing the benefit of Section 22(2) Deputy Commissioner has himself allowed the remission to the extent of the damaged caused to the goods. Since the goods have not been destroyed but damaged and have remnant value, the order of Deputy Commissioner demanding duty on the abetted value cannot be faulted with. If the case of appellants is that goods had been fully damaged abetted value shall automatically be zero. This fact distinguishes the case under consideration from all the case relied upon by the Appellants.

5.10 We find that the entire gamut of case law has evolved on the premise of remission under Section 23 without taking into consideration the provision of Section 22, which allow the abetment of value and duty to the extent of damage suffered. From the reading of both the sections, it is evident that in case of complete loss of goods before clearance of the goods for home consumption remission of duty under Section 23 needs to be considered, however in case of damage to the goods, the duty is abetted by the difference in value of the goods as imported and the damaged value. In case where the lower authorities have themselves allowed the abetment under Section 22(2) there can be no grievance.

6.1 In view of the above we do not find any merits in the appeal filed by the appellants and dismiss the same.

(Pronounced in court on 19.02.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)