

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

APPEALS NO: C/302 & 303/2011

[Arising out of Order-in-Original CAO No: 11/2011/CAC/CC/SS dated 25th February 2011 passed by the Commissioner of Customs (EP), Mumbai.]

For approval and signature:

**Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)**

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| 1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | : Yes |
| 2. Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | : Yes |
| 3. Whether Their Lordships wish to see the fair copy of the Order? | : Seen |
| 4. Whether Order is to be circulated to the Departmental authorities? | : Yes |
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Prakash Roadlines Corporation Pvt Ltd
Vishnu Sureka

... Appellants

versus

Commissioner of Customs (EP)
Mumbai

...Respondent

Appearance:

Shri Arun Mehta, Advocate for appellants

Shri AP Kothari, Additional Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 18/03/2019
Date of decision: 07/05/2019

ORDER NO: A/85855-85856/2019

Per: C J Mathew

These appeals lie against proceedings initiated against M/s Prakash Roadlines Corporation Pvt Ltd and its Director, Shri Vishnu Sureka, in relation to the capital goods valued at ₹ 87,83,485/- that were imported against bill of entry no. 751359/09.03.2007. In the impugned order-in-original CAO no. 11/2011/CAC/CC/SS dated 25th February 2011 of Commissioner of Customs (EP), Mumbai Zone – I, it was held that the ‘capital goods’, imported under ‘export promotion capital goods scheme’ (EPCG) of the Foreign Trade Policy, viz. ‘screening plant’, was not eligible for exemption under notification no. 97/2004-Cus dated 17th September 2004 as those were not installed at the address indicated in the said licence but at the premises of M/s Essel Mining and Industries Ltd, Orissa; besides the differential duty liability of ₹22,71,520/-, the goods were confiscated, *albeit* permitted to be redeemed on payment of fine of ₹15,00,000/-. In addition, penalty of ₹ 22,71,520/- was imposed on M/s Prakash

Roadlines Corporation Pvt Ltd under section 114A of Customs Act, 1962 and penalty of ₹2,00,000/- on Shri Vishnu Sureka, Director, leading to the present appeals.

2. It is the contention of Learned Counsel for appellants, that, of the duty confirmed, they had paid ₹ 5,00,000/- during investigation and that another ₹ 3,41,000/- was encashed from the bank guarantees. Learned Counsel submits that the demand for duty, by enforcement of the bond, executed in compliance of condition in the exemption notification without embargo of limitation, should not have been resorted to invoking of section 28 of Customs Act, 1962. He contends that the decision of the Tribunal in *Sushant Minerals (P) Ltd v. Commissioner of Customs (Export Promotion), Mumbai [2015 (327) ELT 260 (Tri.-Mumbai)]* that is relied upon by Revenue is not of relevance as the dispute therein culminated with confiscation under section 111(o) of Customs Act, 1962 while confirming the differential duty under section 28 of Customs Act, 1962 whereas, in the present instance, the confirmation of duty liability arises from enforcement of the bond. He places reliance on the decision of the Tribunal in *Rajyalakshmi Labs Ltd v. Commissioner of Customs & Central Excise, Hyderabad – II [2007 (208) ELT 398 (Tri.Bang.)]* which has held that

‘6.2 Once full duty is demanded, the appellant cannot be penalized by confiscation of the capital goods. Therefore, confiscation under Section 111(o) of the Customs Act is not

sustainable and the same is set aside. Hence, redemption fine is also not imposable.'

He further claims that the decision of Tribunal in *Oswal Paper & Allied Industries v. Commissioner of Customs, Amritsar* [2006 (206) ELT 991 (Tri.-Del.)] is also on the same lines.

3. Learned Authorised Representative reiterates that the failure to install the equipment at the premises for which licence was issued has rendered the appellant liable to detrimental consequences. He also pointed out that there is a clear finding in the impugned order that the said licence was declared as inoperative by the licensing authority and that had not been challenged. He contends that the decision of the Tribunal in *re Sushant Minerals (P) Ltd* and the facts and circumstances in the present appeal are on the same footing and is a valid precedent. He drew attention to notification no. 97/2004-Cus dated 17th September 2004 which lays down conditions; some of these are to be discharged at the threshold to entitle the importer to exemption from duties in excess of 5% *ad valorem* while others are continuing conditions on utilization of the said capital goods for fulfillment of export obligation which are performance-related and are to be complied with failing which the detrimental consequence will arise.

4. We find that the decision of the Tribunal in *re Rajyalakshmi Labs Ltd* and in *re Oswal Paper & Allied Industries* pertain to the

failure in fulfilling export obligation with consequent duty liability. In both those disputes, the *bona fide* utilization of the goods during the prescribed period is not in question. The Tribunal has taken the stand that the confiscation proceedings cannot follow merely for the failure to fulfill export obligation which, in accordance with the provisions of exemption notification itself, is regularized by payment of proportionate duty that had been foregone. Hence, in our view, the reliance placed by the Learned Counsel on these decisions of the Tribunal would not apply to the present case.

5. On perusal of the decision in *re Sushant Minerals (P) Ltd*, we find that the dispute is on the utilization of the imported goods at a premises other than that of the importer. Such utilization is not fatal to the benefit of the exemption notification as it may be appropriately regularized by the licensing authority. However, the continued utilization, without making any reference to the licensing authority, constitutes breach of the eligibility at the threshold that was not regularized. The precedential value of the decision of the Tribunal is not derogated from. It is the facts and circumstances that should apply and we find no variance in the facts and circumstances therein and the present dispute. It is also on record that the licences were rendered inoperative by the licensing authority. Therefore, the eligibility for the exemption notification ceased to exist at the threshold. In these circumstances, the demand of differential duty will

necessarily have to sustain. We take note that the appellant has not seriously resisted this recovery. The claim of the appellant is that the goods are not liable to confiscation. We have found that a breach of condition of import is not at par with failure to fulfill export obligation which the notification itself has rendered flexible enough to be regularized and that breach, such as the present, must inevitably lead to confiscation. The imposition of penalty is a natural consequence. Accordingly, we find no flaw in the order of the adjudicating authority in having confirmed the duty liability, confiscated the goods and imposed penalty.

6. Turning to the penalty imposed on the Director, we find that there is no evidence of his role in deliberately utilizing the goods at a different location. It is also clear from the records that they had been advised that such utilization is within the scope of the scheme. Hence, it may be inappropriate to visit with penalty on the individual. Accordingly, we set aside the penalty on the director, Shri Vishnu Sureka.

7. In sum, the appeal of M/s Prakash Roadlines Corporation Pvt Ltd is dismissed and the appeal of Shri Vishnu Sureka is allowed.

(Pronounced in Court on 07/05/2019)

(Ajay Sharma)
Member (Judicial)

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(C J Mathew)
Member (Technical)