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

Appeal No. C/134 and 135/2012

(Arising out of Order-in-Original No. CAO No. 71/2011/CAC/CC(I)/SHH/Gr.VA dated 22.10.2011 passed by Commissioner of Customs (Import), Mumbai)

M.B. Patil Constructions Ltd. **Appellant**
Mallikarjun Basantrao Patil

Vs.

Commissioner of Customs (I), Mumbai **Respondent**

<u>Appearance:</u>

Shri G.B. Yadav, Advocate for appellant
Smt P. Vinita Sekhar, Jt. Commr (AR) for respondent

<u>CORAM:</u>

Hon'ble Mr. S.K.Mohanty, Member (Judicial)
Hon'ble Mr. P. Anjani Kumar, Member (Technical)

Date of Hearing: 29.01.2019
Date of Decision: 20.05.2019

FINAL ORDER NO. **A/85939-85940/2019**

Per: S.K. Mohanty

The facts of the case, in brief are that the appellant had imported and cleared one "Hot Mix Plant Batch Type with Electronic Control and Bag Type with Filter Arrangement" capacity 200 Tons per Hour Linnhoff Model" (for short, "Hot Mix Plant") vide Bill of Entry No.811495 dated 13.12.2007, after claiming the duty exemption under Sl.No.230 of Notification

No.21/2002-Cus dated 01.03.2002. The appellant had furnished an undertaking that it shall use the said Plant exclusively for the construction of NHAI Road Project namely, "Balance work of 4-laning from Km 9.4 to Km 22.3 of Hyderabad – Bangalore Section of NH-7 in the State of Andhra Pradesh", as per conditions of the exemption notification. During investigation, it was found that just after the import, the said Hot Mix Plant were directly sent to and installed and used at Lonihkand Taluka, Haveli, Pune, instead of NHAI Project at Hyderabad. A show-cause notice dated 09.12.2010 was issued, proposing to deny the benefit of the exemption notification, consequent demand of duty along with interest, confiscation of the goods, imposition of penalty on the appellant's Company and its Managing Director Shri Mallikarjun Basantrao Patil. By the impugned order, the Learned Commissioner of Customs (Import) has denied the benefit of the exemption notification, confiscated the imported machine, with redemption fine of Rs.45 lakhs, confirmed the demand of customs duty of Rs.68,54,082/- along with interest and imposed penalty of equal amount of duty on the appellant Company and also imposed a penalty of Rs.15 lakhs on the managing Director of the appellant Company. Feeling aggrieved with the impugned order, both the appellants have filed these present appeals.

2. Heard both sides and perused the records.

3. The ld. Counsel for the appellant drew the attention of the Bench to the Letter of Acceptance dated 29.06.2005 of NHAI. In his written submission, the ld. Counsel submitted that by letter dated 02.02.2007 and 03.02.2007 from NHAI, it was allowed sub-letting of the contract to M/s Sew Construction Ltd. It is also submitted that the said machine was used in Pune Municipal Corporation under the Jawaharlal Nehru Urban Renewal Mission Scheme under (JNNURM) and the project is funded by NHAI for 60% and 40% by the Central Government. Thus, it is contended that the appellant had fulfilled the conditions of the above notification.

4. The ld. A.R for the Revenue reiterated the findings recorded by the adjudicating authority. He submitted that on the identical issue, this Tribunal in the case of APCO Infratech Pvt. Ltd. vs. Commissioner of Customs (I), Mumbai vide order No. A/86750-86753/2018 dated 08.06.2018 has dismissed the appeal of the importer and its Director. He has also referred to various case laws.

5. For the purpose of proper appreciation of the case, the relevant portion of Notification No.21/2002, Serial No.230, condition No. 40 is extracted herein below:-

"If, -

(a) the goods are imported by –

(i) *the Ministry of Surface Transport, or*

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

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

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

(c) *in case of goods of serial no. 12 and 13 of List 18, the importer, at the time of importation of such goods, also produces to the Dy. Commissioner of Customs or the Asst. Commissioner of Customs, as the case may be, a certificate from an officer not below the rank of a Dy. Secretary to the Govt. of India in the Ministry of Surface Transport (Roads Wing), or an officer not below the rank of Chief Engineer of the National Highways Authority of India, to the effect that the imported goods are required for construction of roads in India.”*

6. On perusal of the Letter of Acceptance dated 29.06.2005 of NHAI, we find that the contract was for balance work of 4 laning of Nagpur – Hyderabad section and Hyderabad – Bangalore section of NH-7, in the State of Andhra Pradesh. But

it was found that the said contract had been sub-contracted to M/s Sew on 03.02.2007, prior to the date of filing the Bill of Entry. It is admitted by the appellant that after clearance of the goods from Mumbai Port, the same were transferred to Lonikhand, Pune, though the lorry receipts were issued for Hyderabad, to be utilised in construction of road projects awarded by Pune Municipal Corporation. The adjudicating authority observed that such Projects / Contract awarded by Pune Municipal Corporation would not qualify for duty exemption under the notification. In this context, the ld. Counsel submitted that NHAI by letter dated 02.02.2007 had informed the Project Director, NHAI, Hyderabad regarding sub-letting of contract. We find that these documents were not placed before the lower authorities, even at the time of hearing before the Tribunal. It has been submitted after the hearing of the matter. In any event, we find that the appellant had filed the Bill of Entry on 13.12.2007 for use of the machine at Nagpur - Hyderabad section and Hyderabad – Bangalore section in the State of Andhra Pradesh. Hence, the letter dated 02.02.2007 of NHAI has no relevance in the present case. Admittedly, the appellant had violated / contravened the conditions of the notification and therefore, the adjudicating authority has correctly denied the benefit of notification.

7. The learned A.R. for Revenue has referred to the following case laws:-

(a) Patel Engineering Ltd. CC – 2013 (295) ELT 243 (Tri.Mum).

(b) Patel Engineering Ltd. v. Commissioner – 2016 (338) ELT A35(SC).

(c) Shreeji Construction v CC, Mumbai – 2014 (313) ELT 566 (Tri. Mum)

(d) Rajhoo Narot v. CC – 2017 (348) ELT 562 (Tri Mum)

(e) Gammon India Ltd. v. CC – 2011 (269) ELT 289 (S.C.)

(f) Navopan India Ltd. v. Commissioner of Central Excise and Customs, Mumbai 0 1994 (73) ELT 769(SC)

7.1 The learned A.R. has also referred to the decision of the Tribunal in the case of *M/s. Apco Infratech Pvt. Ltd.* (supra), wherein in the identical situation, the Tribunal had dismissed the appeal of the importer and its Director. The relevant portion of the said order is reproduced below:-

> *"7. Heard both the sides and perused the records of the case. We find that the Appellant M/s Apco had imported the "Hot mix plant" under Notification No. 21/2002-Cus. Sr. No.230. It is apparent from the facts of the case that the plant was never utilized as provided under the conditions of the notification. The contention of the appellant that they were eligible for multiple road construction contract issued by Govt. of U.P. for different road construction sites does not mean that the condition of the notification has been followed. In fact the plant was never used for such contracts as canvassed by the Appellant during the importation of goods*

and claiming exemption. The Appellant has not adduced single evidence that they have followed the conditions of the notification. They declared that they had contracts awarded by the state of U.P. wherein the imported plant would be used. However they never used the said imported equipments in state of U.P. for constructio C/794-796,874/2010 8 road. As per the conditions of the exemption notification, an importer can claim the benefit of exemption provided they are named as sub-contractor for construction of road. Even this condition was not satisfied. It clearly shows that the appellant never complied with the conditions of the exemption notification and has knowingly violated the conditions. We also find that since the conditions of the notification were not complied with and from the facts of the case it is very clear that the same were never intended to be complied with, we hold that the impugned order confirming demand, penalties and confiscation of goods has been rightly passed. We also find that the officers had handed over the plant for safe custody after seizure and the same could not have been used without permission from the department. Having violated the conditions of Section 110 safe keeping by using the plant even after seizure makes the Appellant liable for penalty under Section 117 of C.A.1962. Further we find that Shri Anil Singh, Managing Director was fully aware about the benefits likely to accrue by availing ineligible notification and use of machine and therefore in such case his complicity in deliberate violation of the condition of notification is apparent. However in case of Shri V. S. Rao, Chief Manager (F & A), we find that he was only concerned with the taxation matter to the extent of availing benefit of exemption notification and was not concerned/ connected with the decision to use machine and his role in *violation of condition is also not C/794-796,874/2010 9 visible. We are therefore of the view that he cannot be burdened with penalty. Resultantly, in view of our above findings, we uphold the impugned order in as much as it has confirmed demand, confiscation of goods and penalties against M/s Apco and Shri Anil Singh. However the penalty imposed upon Shri V. S. Rao is set aside. The impugned order is modified to the above extent. The Appeals filed by M/s Apco Infratech and Shri Anil Kumar Singh is rejected and the appeal filed by Shri S.V. Rao is allowed."*

8. In view of the above discussion, we do not find any reason to interfere with the impugned order. Accordingly, both the appeals filed by the appellants are dismissed.

(Order pronounced in Court on 20/05/2019)

(P. Anjani Kumar)
Member (Technical)

(S.K. Mohanty)
Member (Judicial)

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