

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Customs Appeal No. 178 of 2012

(Arising out of Order-in-Original No. 80/2011/CAC/CC/BKS dated 17.11.2011 passed by the Commissioner of Customs (Adjudication), Mumbai)

M/s. Global Boards Ltd

Plot no. K-5, Additioanl MIDC Indl Area
Mahad, Raigad

.....Appellant

Vs.

Commissioner of Customs (Export), Mumbai

New Customs House, Ballard Estate
Mumbai

.....Respondent

APPEARANCE:

Ms. Lakshmi Menon, Advocate with Shri T. Viswanathan,
Advocate for the appellant

Ms. P.V. Sekhar, Addl.Comm (Authorised Representative) for the
respondent

CORAM: HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER No: A/86346 / 2019

DATE OF HEARING : 06.02.2019

DATE OF DECISION : 05.08.2019

PER: C J MATHEW

This appeal of M/s. Global Boards Ltd lies against order-in-original no. 80/2011/CAC/CC/BKS dated 17th November 2011 of Commissioner of Customs (Adjudication), Mumbai in which goods

valued at ₹10,65,42,915/- were confiscated under section 111(o) of Customs Act, 1962, with offer for redemption on payment of fine of ₹2,00,25,298/-, differential duty of ₹2,00,25,298/-, along with interest thereon was demanded, and confirmed penalty of ₹10,00,000/- imposed on the appellant. It is common ground that the differential duty liability had been discharged limiting the present appeal to confiscation and penalty as well as the chargeability of interest on the differential duty.

2. Appellant filed bills of entry no. 833/02.06.1993 and 8072/23.07.1993 for import of machinery seeking clearance by classifying them under heading 9801 of First Schedule to Customs Tariff Act, 1975 applicable to 'project imports' but was assessed to appropriate duty with availment of notification no. 160/92-Cus dated 20th April 1992 intended for implementing scheme in EXIM Policy (1990-1993) for import of 'Export Promotion Capital Goods' with obligation to goods valued at of ₹42,13,83,648/- by December 1997. Admittedly, the obligation was not fulfilled.

3. According to Learned Counsel for appellant, the proceedings initiated in the show cause notice should not have been concluded while the assessments, claimed to be provisional, was yet pending for finalisation for which the decision of the Hon'ble Supreme Court, in *Commissioner of Central Excise & Customs, Mumbai v. ITC Ltd [2006 (203) ELT 532 (SC)]*, holding that

'21. Concededly, in terms of the provisions of the Act and the Rules framed thereunder, the amount becomes payable only in the event, the assessee does not deposit the amount levied within a period of ten days from the date of completion of the order of assessment. A provisional assessment is made in terms of Rule 9B inter alia at the instance of the assessee. Such a recourse is resorted to only when the conditions laid down therein are satisfied, viz., where the assessee is found to be unable to produce any document or furnish any information necessary for assessment of duty on any excisable goods.

22. Whereas provisional duty is levied in terms of Sub-Rule (1) of Rule 9B, final assessment is contemplated under Sub-Rule (5) thereof by reason of which the duty provisionally assessed shall be adjusted against the duty finally assessed and in the event, the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee will pay the deficiency or will be entitled to a refund, as the case may be. Ultimately, thus, the liability of the assessee would depend upon the undertaking of exercises by the assessing officer to complete the assessment proceeding as contemplated under the Rules.

23. On a plain reading of the provisions of the Act and the Rules framed thereunder, we have no doubt in our mind that the Tribunal was correct in its finding that the impugned show cause notices were illegal.'

4. On a perusal of the documents pertaining to the import, we find that, though the classification was originally claimed under heading no. 9801 of First Schedule to Customs Tariff Act, 1975 which is normally subject to provisional assessment till receipt of the

compliance report of installation prescribed in the Regulations notified for the purpose, there is no endorsement thereon, or any other evidence, of this claim having been accepted by the assessing officer. On the contrary, the assessment, by extending the benefit of notification no. 160/92-Cus dated 20th April 1992, which pertains to import under scheme embodied in the EXIM policy, would render such a claim to be untenable. We, therefore, find no reason to conclude that the assessments were anything but final and hence the consummation of proceedings does not lack legality or propriety.

5. Learned Counsel for appellant further contends that the demand of interest is not enforceable in the absence of any applicable provision in Customs Act, 1962 or without incorporation in notification no. 160/92-Cus dated 20th April 1992 for which reliance is placed on the decision of Tribunal in *Philips (India) Ltd v. Commissioner of Customs, Mumbai* [2001 (137) ELT 697 (Tri-Mumbai)], in *VBC Industries Ltd v. Commissioner of Customs, Chennai* [2003 (156) ELT 872 (Tri-Bang)], that in *Fal Industries Ltd v. Commissioner of Customs, Chennai* [2008 (231) ELT 524 (Tri-Chennai)] which found approval of the Hon'ble High Court of Madras in appeal of Revenue, in *Femco Filters (P) Ltd v. Commissioner of Customs, Bangalore* [2006 (203) ELT 494 (Tri-Bang.)] which was affirmed by Hon'ble Supreme Court and in *South India Corporation (Agencies) Ltd v. Commissioner of Customs, Trichy* [2009 (244) ELT

581 (Tri-Chennai)] affirmed by Hon'ble High Court of Madras on appeal of Revenue.

6. *Per contra*, Learned Authorised Representative placed reliance on the decision of Tribunal in *Sanghi Industries Ltd v. Commissioner of Customs (Export Promotion), Mumbai [2012 (277) ELT 365 (Tri-Mumbai)]* and that of the Hon'ble High Court of Bombay in *Commissioner of Central Excise, Aurangabad v. Padmashri V V Patil SSK Ltd [2007 (215) ELT 23 (Bom)]*. It was also pointed out by Learned Authorised Representative that the Tribunal, in *Parasrampuria Synthetics Ltd v. Commissioner of Customs, Jaipur [2004 (173) ELT 164 (Tri-Del)]*, had held that incorporation of the provision for charging of interest when proceedings for failure to discharge export obligation had been initiated would suffice even in relation to imports effected earlier. Furthermore, it was argued that the Hon'ble High Court of Delhi in *Rai Agro Industries Ltd v. Director General of Foreign Trade [2006 (206) ELT 123 (Del)]* had upheld the liability to interest based upon legal undertaking executed by the beneficiary of the scheme in the EXIM policy.

7. On a careful consideration of various cited decisions and the notification granting the benefit of exemption on import of capital goods, which, though not specifying levy of interest for the duty foregone, nevertheless, includes a reference to the provisions of EXIM policy which contains such a condition. The decisions cited on

behalf of the appellant negated the chargeability of interest in the absence of provision in the parent statute and have held that the want of any contractual obligation on the part of the importer under the scheme would render it inappropriate to infuse such a provision subsequently to the detriment of the importer. We have no doubt that this is so and that interest is leviable on delayed payment of duty or on recovery of duty by invoking the Customs Act, 1962 only after incorporation of such provision therein. However, it cannot be disputed that the EXIM policy pertaining to the scheme did provide for furnishing of an undertaking on the part of the importer/licensee to commit themselves to payment of interest in addition to the duty foregone at the time of import in the event of failure to fulfil the obligation. As the letter of undertaking furnished to the licensing authority contractually binds the appellant to such interest, invoking of the provisions of the policy for recovery of interest is not contrary to the various decisions cited by Learned Counsel. In *Jaiswal Neco Ltd v. Commissioner of Customs, Visakhapatnam* [2015 (322) ELT 561 (SC)], the Hon'ble Supreme Court was concerned with the ramification of insertion of provision for charging interest in section 18 of Customs Act, 1962 only with effect from 13th July 2006 and the present dispute does not pertain to provisional assessment or finalisation thereafter. In *re Philips (India) Ltd* the circumstances in which the Tribunal was compelled to accord a primacy to the

notification issued under section 25 of Customs Act, 1962 over the scheme in the EXIM Policy has been clearly explained thus:

'10. The departmental representative points to the provisions of paragraph 45 of the Policy, and paragraph 103 of the Handbook of Procedures referring to the legal undertaking required to be furnished by the importer and applying for a EPGC licence. This undertaking provides a clause that the importer shall pay full amount of Customs duty saved, and 24% interest thereon, for the total CIF value of imported goods from the date of import, in the event that the capital goods are not used for the purpose for which they were imported.

11. There is clearly a conflict between what is contained in the undertaking and what is contained in the notification. The undertaking provides for recovery of proportionate duty, that is the duty other than the "full amount of Customs duty saved". The meaning of the words occurring in the undertaking will only be that the duty is payable in case the export obligations is not completed has to be in proportion to the extent of shortfall in that export obligation. The notification, however, is clear that it is the entire duty that is to be paid. It requires the importer to pay duty leviable on such capital goods but for the exemption contained therein. That duty is obviously is the entire duty that has been exempted. As we have noted, there is no provision in the notification for recovery of interest, while there is no provision in the case of the undertaking.

12. In the situation of this kind, we do not have any uncertainty in saying that it is the provisions of the notification that have to be implemented. The notification that has been framed under Section 25 of the Customs Act, which

is administered by the Customs authorities, and it is that notification that has to be considered. This is obviously a case where there has been lack of co-ordination between the licensing authority and the Ministry of Finance, leading to what appear to be divergent views expressed by each of them. In that situation, we have to apply the provisions of the Customs Act and the notification issued thereunder. We therefore hold that there was no provision to recover interest under that law or that notification.'

The divergence between the notification and the Policy on the consequences of failure to fulfil the export obligation was held to favour the implementation of the former but such is not the issue in the present circumstances owing to there being no incongruity. In *re VBC Industries Ltd*, it was held that lack of the provisions for levy of interest excludes the scope for such charge and, as the present dispute does not arise from a demand under Customs Act, 1962, is not relevant. In *Akbar Knitting Co v. Commissioner of Customs (Exports), Chennai* [2017 (353) ELT 49 (Mad.)], the Hon'ble High Court of Madras, while distinguishing the decision of the Hon'ble High Court of Bombay in *Pratibha Syntext Ltd v. Union of India* [2003 (157) ELT 141 (Bom)] that had been relied upon by the Tribunal, was not called upon to decide the effect of linkage of notification to the EXIM Policy provision. In *Commissioner of Central Excise & Customs, Cochin v. Asianet Satellite Communications (P) Ltd* [2011 (271) ELT 369 (Mad.)] the issue

before the Hon'ble High Court was an order of the Settlement Commission.

8. In these circumstances, the decision of the Tribunal in *re Sanghi Industries Ltd* to the effect that

'6.3 In the instant case, the import took place in November, 1993 and the export obligation had to be fulfilled within a period of five years i.e., by November, 1998. Therefore, the liability to pay the differential duty arose in 1998, when the period for fulfilling the export obligation expired and the obligation was not fulfilled. Section 28AA and 28AB came into the statute book in 1996 itself and, therefore, in the light of the decision of this Tribunal in the case of Parasrampuriah Synthetics Ltd. (cited supra) the provision for charging interest was in the statute book. Secondly, interest has been demanded not under the provisions of the above Sections, but in terms of the bond and LUT executed by the appellant before the Customs and the licensing authorities and in terms of the Policy provision governing EPCG scheme. At the relevant time, Export Promotion Capital Goods Scheme was governed by Chapter VI of the Export Import Policy 1992-97. The capital goods in the instant case have been imported under the said provision. Vide Para 45 of the Exim Policy 1992-97, the importer was required to execute with the licensing authority a legal undertaking supported by a bank guarantee wherever necessary for the fulfilment of the export obligation as per the details specified in the Handbook of Procedures. As per the para 102 of the said Handbook of Procedures, the requirements were as under :

"102. Execution of Bank Guarantee and Legal Undertaking :

(i) *Before clearance of goods through Customs, but not later than six months from the date of issue of the licence, the importer shall execute a Legal Undertaking and Bank Guarantee in the manner indicated below, for fulfilment of the export obligation with the licensing authority in whose jurisdiction the licensee is situated or the Export Obligation Cell II in the Directorate General of Foreign Trade, Udyog Bhawan, New Delhi :-*

(a) *A Legal Undertaking valid for six years for an amount equal to the value of the export obligation imposed plus the value of duty saved plus the interest at the rate of 24% per annum for a period of six years.*

(b) *A Bank Guarantee for an amount equal to 50% of the value of duty saved, for a period of three years, where the importer is not an Export House/Trading House/Star Trading House.*

(c) *Where the export obligation has not been fulfilled atleast to the extent of 50% of the total export obligation imposed, within a period of two and a half years from the date of issue of the licence, the bank guarantee shall be enforced and forfeited unless the same is renewed for another three years by the licence holder on his own well before the expiry of the bank guarantee.”*

having considered the very issue before us would erase any doubt that the impugned order was correct in charging interest on the duty saved.

8. Insofar as the confiscation of the goods are concerned, it has been held in *re Sanghi Industries Ltd* that

‘6.8 The appellant has also raised a point that Section 111(o) of the Customs Act for confiscation of the goods is not invokable in the present case. The argument of the appellant is that under Notification 160/92-Cus, which is a conditional exemption Notification, there are two options given to the importer, namely, either to fulfil the export obligation or on

failure, pay duty. Thus by paying the duty, the appellants have fulfilled the conditions of Notification No. 160/92 and, therefore, there is no violation and consequently the goods are not liable to confiscation under Section 111(o) of the Act. This argument is totally irrational and illogical. Demand of duty and confiscation of the goods are two totally different aspects under the Customs law. Demand of duty arises on importation of the goods and if goods have been imported at a concessional rate of duty subject to fulfilment of certain conditions and such conditions are violated, then the duty concession would not be available at all. In the case under consideration, the demand of duty has arisen under the Notification itself in terms of the bond executed by the importer at the time of importation of the goods. Confiscation of the goods arise under Section 111 of the Customs Act in certain specified situations. Section 111(o) reads as follows :

“Any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer.”

In such an eventuality, the goods imported shall be liable to confiscation. In the instant case the goods were imported availing a concessional rate of duty on the condition that the goods will be put to use for manufacture and export of certain products up to certain value within a specified period. When the importer failed to fulfil the condition by not exporting the goods of required value within the stipulated period, then he was no longer eligible for the concessional rate of duty and the duty liability has to be discharged in full without availing the benefit of the exemption. For the same conduct, the goods also became liable to confiscation under the provisions of Section 111(o). The duty liability arises on account of

importation. The liability to confiscation or fine is for violation of the conditions of the importation. The act of importation and the conditions of importation are two different things and for violation of each of them, separate consequences would follow. In the instant case the duty liability has been imposed for the import of the goods and the goods have been confiscated for violating the terms and conditions of importation. Since the goods are liable to confiscation, the liability to penalty arises under Section 112 of the Customs Act. Penalty is an action (in personam) on the importer while the duty and fine are (action in rem) on the goods. As per Section 112 of the Customs Act, liability to penalty arises when a person who in relation to any goods acts or omits any act which act or omission would render the goods liable to confiscation under Section 111. Any person who abets or aids the commission of an act or omits to such an act (which renders the goods liable for confiscation) is also liable to penalty. Similarly when a person acquires possession or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other way dealing in goods which he knows or has reason to believe are liable to confiscation under Section 111 is also liable to penalty under Section 112. In the instant case the appellant imported the goods subject to a condition that he would fulfil the export obligation which obligation he failed to fulfil. Therefore, the goods became liable to confiscation under Section 111(o). Since the goods are liable to confiscation under Section 111(o), penalty under Section 112(a) is attracted. In this case, penalty has been imposed under Section 112(a) and there is no illegality or infirmity in imposing penalty apart from demanding differential duty and we hold accordingly. When the goods are liable to confiscation, the adjudicating authority has the power to allow the redemption of the goods on payment of fine in lieu of confiscation under section 125 of the Customs

Act. The goods were released to the appellants at the time of importation under a bond executed by the appellant. The release of the goods was thus provisional. Therefore, when the assessment is finalized subsequently, even if the goods are not available for confiscation, redemption fine in lieu of confiscation can be imposed as has been held in a number of judicial pronouncements on the subject. Therefore the imposition of redemption fine in the instant case is fully justified and is quite legal and we hold accordingly.'

9. However, a plethora of decisions of the Tribunal have held that the notifications issued in pursuance of the EXIM Policy, having provided for the alternative of payment of duty in the event of failure to fulfil the export obligation, renders the discharge of either of these option to be sufficient compliance with the condition to be fulfilled in the relevant notification issued under Customs Act, 1962, thus eliminating the scope for invoking section 111(o) of Customs Act, 1962 to confiscate the imported goods. Furthermore, in *re Sanghi Industries Ltd*, it was the deliberate defiance, noted by the Tribunal thus

'6.9 We further note that in the instant case the duty liability was confirmed by this Tribunal vide order dated 25-11-2005. However, in spite of such confirmation the appellant failed to discharge differential duty liability and made payment towards duty liability only on 5-9-2011 after a period of more than six years from the date of passing of the order and after a period of 9 years from the date of order of the adjudicating authority and almost two decades after the

importation of the goods. Such deliberate defiance of law needs to be dealt with in an exemplary manner so that respect for law is maintained and people do not take the law for granted.'

that appeared to have influenced the outcome therein.

10. It would also appear that the Tribunal when rendering the decision had not been appraised of the significance of the earlier decision of the Tribunal in *re Philips (India) Ltd.* The issue, therefore, for consideration is the binding nature of the decision in *re Sanghi Industries Ltd* to the present dispute. One of the essential requirements of jurisprudence is consistency that is manifested by judicial discipline. The Tribunal is enabled to exercise such discipline when the applicability of prior decision is highlighted before it. Even if the representatives of the assessee was derelict in doing so, the other side cannot be excused from its responsibility to bring settled law to the attention of the Tribunal. Failure to go along with judicial precedent is not attributable to the Tribunal in such cases but to failure of the representative of the two sides. Justice is always depicted as blindfolded and justice is rendered only after a hearing. To deprive the Tribunal of the wisdom of earlier judgment is to further hoodwink the blindfold and place the Tribunal at a disadvantage. In these circumstances, we do not consider the confiscation upheld in *re Sanghi Industries Ltd* to be precedent applicable in the circumstances of the present dispute before us.

11. Section 111(o) of Customs Act, 1962 empowers confiscation for non-fulfilment of 'post-importation conditions' which have not been regularised by the appropriate authority. In *re Philips (India) Ltd*, it has been clearly held that failure to fulfil export obligation is remedied by recovery of duty. With the recovery of duty, the requirement to comply with the 'post-importation condition' does not exist. Consequently, the imports stand regularised and section 111(o) of Customs Act, 1962 becomes inapplicable. With negation of section 111(o) of Customs Act, 1962, the imposition of penalty is not sustainable. Accordingly, we set aside the confiscation and penalty in the impugned order.

12. In sum, the recovery of differential duty and charging of interest in the impugned order are sustained and the order modified to set aside the confiscation and penalty.

(Order pronounced in open court on 05.08.2019)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)