CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Customs Appeal No: 667 of 2012

[Arising out of Order-in-Original No: 15/2012/CAC/CC/BKS dated 22nd March 2012 passed by the Commissioner of Customs (Adjudication), New Custom House, Mumbai.]

Graphite India Ltd … ***Appellant***
Bakhtawar, 2nd Floor, Nariman Point, Mumbai - 400021

versus

Commissioner of Customs ***…Respondent***
New Custom House, Ballard Estate, Mumbai – 400001

APPEARANCE:

Shri Mayank Jain, Advocate for the appellant

Shri Manoj Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/86745 / 2019

DATE OF HEARING: 12/03/2019
DATE OF DECISION: 17/09/2019

PER: C J MATHEW

In this appeal of M/s Graphite India Ltd, against order-in-original no. 15/2012/CAC/CC/BKS dated 22nd March 2012 of Commissioner of Customs (Adjudication), New Custom House, Mumbai, disputing the charging of interest under section 28AB of

Customs Act, 1962 on the duty liability of ₹ 32,78,439, ₹ 13,11,766 and ₹ 33,36,786 paid by M/s Rajat Pharmachem Ltd, and accepted as 'settlement' in accordance with the provisions of Customs Act, 1962, by lawfully constituted authority for such, on imports effected by the appellant and penalties imposed under section 114 A of Customs Act, 1962, the issue for determination is the applicability of these two provisions of Customs Act, 1962 when duty liability has been fastened on the transferor of tradeable scrip.

2. Appellant imported goods against bills of entry no. 685204/28.01.08, no. 685193/28.01.08, no. 717429/20.02.08, no. 779470/08.04.08, no. 704804/11.02.08, no. 836527/25.04.08, no. 822714/08.02.08, no. 831615/29.03.08, no. 675959/18.01.08, no. 067/11.0 2.08, no. 070/16.02.08 and no. 072/20.02.08 at Jawaharlal Nehru Customs House, Nhava Sheva, New Custom House, Mumbai and ICD, Nashik against scrips issued under Duty Entitlement Passbook scheme in the Foreign Trade Policy to M/s Rajat Pharmachem Ltd who, on fulfilment of export obligation, allegedly by overvaluation of exports, had obtained authority for such transfer to various buyers. Consequent upon the issue of show cause notice, elaborating upon the various elements of concealed trading cycle, the scrip holder approached Central Excise & Customs Settlement Commission and, by order dated 26 November 2009, got the duty liability on all imports effected against the transferred scrips at

₹2,46,89,991 settled besides obtaining full immunity from penalty and prosecution. The show cause notice dated 29 August 2009 had demanded from M/s Rajat Pharmachem Ltd, and the several transferees, the duty that was, since, settled. On the basis of this statutory process, further proceedings were restricted to the several transferees and, that too, to the interest on the said the duties, under section 28AB of Customs Act, 1962 and penalties under section 114A of Customs Act, 1962 as the order of settlement foreclosed such, normally devolving upon the 'person liable to pay duty', on the entity responsible for action leading to invalidation of the said scrips.

3. Interestingly, the impugned order takes note of the order of settlement, which included interest component of ₹ 6,91,633 though excluding that due against the show cause notice *supra* by reference to the decision of the Hon'ble High Court of Bombay in *Commissioner of Customs v. Jupiter Exports & others [2007 ECR 395 Bombay]* which confirmed that the opinion of the Tribunal that recovery could be affected only from 'importer', as defined in section 2 of Customs Act, 1962, and not from any other person because '*demand for duty can be based on law and not on equity or moral considerations*'.

4. In that decision, the Hon'ble High Court was concerned with an appeal of Revenue against the finding of the Tribunal that the adjudicating authority had erred in fastening the liability for recovery of duty foregone on imports made by transferees of licenses, made

eligible for such transfer by marking up the quantity of exports, upon the original holder of the license which has been nullified leading to the proceedings under Customs Act, 1962. The proceedings against the transferees had been dropped by the adjudicating authority and that exclusion was not challenged by Revenue. The transfer of the liability to the person, whose acts of omission and commission had led to nullification of the licenses, was the sole plea made to the Hon'ble High Court in the appeal of Revenue; the restrictive definition of 'importer' by the Hon'ble High Court to exclude the recovery jurisdiction over the 'exporter', *ipso facto*, was not a decision to uphold the liability on the transferees. It is a well-settled in law that the decisions in appeal are limited to the grounds proposed and the relief sought. Therefore, notwithstanding the observations of the Settlement Commission on the interest liability, the adjudicating authority was required to decide the liability of the transferees in accordance with the law in section 28AB of Customs Act, 1962 and section 114A of Customs Act, 1962. It would appear that the adjudicating authority, constrained by the order of settlement from deciding on the liability of the transferees for the duty foregone, contrived a way to fastening the detriments, which the applicant before the Settlement Commission, escaped from on the transferees, in default, without ascertaining, for himself, the legal authority to do so.

5. It is in this framework as narrated *supra*, which may well preclude us from deciding on the legal position for the very first time since issue of show cause notice, that the relevant submissions of Learned Counsel and Learned Authorised Representative have been considered by us in these proceedings.

6. According to Learned Counsel, in order no. A/2919-2994/15/CB dated 31 August 2015, the Tribunal had, *inter alia*, considered the appeal of M/s Indorama Synthetics (I) Pvt Ltd, one of the transferees, against the detriment visited upon them in the very same order now impugned before us. The discharge of the detriments by that order is cited as binding for closure of the present proceedings. It was also pointed out that the Hon'ble High Court of Bombay, in *Commissioner of Customs (Import), Mumbai v. Coromandel Fertilisers Ltd [judgement dated 5th December 2018 in Customs appeal no. 11 of 2018]*, had held that the questions presented for consideration by Revenue could not be construed as 'questions of law' before dismissing the appeal.

7. Therefore, the liability of transferees, limited to detriment of interest and penalty, when acceptance of application for settlement, under a statutory process that is restricted to only to specified persons, implicitly declares such person to be liable to duty within the meaning of section 28 of Customs Act, 1962 has not been adjudicated upon in the impugned order. In the absence of any finding, we are unable to

subject the said order to the test of being legal and proper.

8. In order that the adjudication proceedings be completed, we set aside the impugned order and remand the matter back to the original authority for a fresh decision in accordance with law.

(Order pronounced in the open court on 17/09/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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