CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: C/87078 of 2018

[Arising out of Order-in-Original No: 33/2017-18/CAC/CC(E)/RCB/ADJN dated 28th February 2018 passed by the Commissioner of Customs (Export-I), Mumbai.]

Prashant Trading Co
12, Mahesh Chambers, 391 Narshi Natha Street
Mumbai – 400009 … ***Appellant***

versus

Commissioner of Central Excise (Export-I)
2nd Floor, New Custom House, Shoorji Vallabhdas Road
Ballard Estate, Mumbai 400001 ***…Respondent***

WITH

(i) Customs Appeal No: 87277 of 2018 (Kamlesh Sheth), (ii) Customs Appeal No: 87291 of 2018 (Shree Simandhar Shipping Service), (iii) Customs Appeal No: 87299 of 2018 (Asit M Kothari)

[Arising out of Order-in-Original No: 33/2017-18/CAC/CC(E)/RCB/ADJN dated 28th February 2018 passed by the Commissioner of Customs (Export-I), Mumbai.]

APPEARANCE:

Shri Prakash Shah with Shri Prasad Paranjape and Shri Mohit Rawal, Advocates for the appellant

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

CORAM:

HON’BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON’BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/85664-85667 / 2020

DATE OF HEARING:	22/01/2020
DATE OF DECISION:	11/06/2020

PER: C J MATHEW

Four appeals, arising from a common order-in-original no. 33/2017-18/CAC/CC (E)/RCB/ADJN dated 28th February 2018 of Commissioner of Customs (Export-I), Mumbai, are disposed of by this common order. The appellant-assessee imported ‘float glass’, in sheets, valued at ₹ 2,11,09,189, against 12 bills of entry filed between 19th April 2012 and 28th August 2012 which the adjudicating authority held to be liable to confiscation under section 111 (d), (m) and (o) of Customs Act, 1962 and denied the benefit of exemption in notification no. 40/2006-Cus dated 1st May 2006, claimed in the bills of entry at that the time of import, to confirm the demand of ₹ 60,90,389 as duties of customs and ₹ 3,41,278 as anti-dumping duty under section 28 (1) of Customs Act, 1962, along with applicable interest under section 28AB of Customs Act, 1962, while imposing penalty of like amount under section 114A of Customs Act, 1962 on M/s Prashant Trading Company, the importer, and its working partner, Shri Kamlesh Sheth, and penalty of ₹ 20,00,000 on M/s Prashant Trading Company and of ₹ 5,00,000 each on M/s Shree Simandhar Shipping Service, Shri Kamlesh Sheth and Shri Asit M Kothari, partner in M/s Shree Simandhar Shipping Service, under section 114AA of Customs Act, 1962 in addition to imposition of penalty of ₹ 5,00,000 each on M/s

Shree Simandhar Shipping Service and Shri Asit M Kothari under section 112 of Customs Act, 1962. The prayer is limited to eligibility for exemption available to holders of 'duty free import authorizations' and not to the applicability of duties in the event of ineligibility for exemption.

2. We have heard the rival submissions on behalf of the appellants and on behalf of Revenue. Before proceeding to consider the principal grounds espoused by Learned Counsel, *viz*., that none of the pre-requisites in section 28 of Customs Act, 1962 for invoking the extended period are in evidence and that the policy prescriptions alleged, in the notice leading to the impugned proceedings, to have been breachedwere not in existence at the time of import, it would be worthwhile for us to recount the facts pertinent to the dispute, the framework of the scheme in the context of the imports effected by the appellant-assessee and the finding on which the adjudicating authority confirmed the demand of duty and penalties proposed in the show cause notice dated 18th November 2015.

3. The appellant-assessee imported consignments of 'float glass' and 'ultra float glass' sourced from Saudi Arabia and China, seeking exemption from duties of customs, including anti-dumping duty, otherwise leviable, on the two shipments from China by recourse to notification no. 40/2006-Cus dated 1st May 2006. To qualify for the

exemption, intended to operationalize the ‘duty-free import authorization (DFIA)’ scheme in the Foreign Trade Policy notified under Foreign Trade (Development & Regulation) Act, 1992, the appellant-assessee procured licenses originally issued to M/s MP Sons and M/s Magna Industries & Exports Ltd entitling import of, *inter alia*, ‘glazing glass’ for export of ‘leather goods’ and endorsed for transferability by the Directorate General of Foreign Trade upon fulfilment of the prescribed obligation. Consequent upon statements furnished by various manufacturers in the industry and the expert opinion obtained from Central Leather Research Institute (CLRI), to the effect that ‘glazing glass’ is in the form of a solid cylindrical mounted on glazing machines to give required finish for leather, Department of Revenue sought appropriate remedial action by Directorate General of Foreign Trade, *vide* letter dated 26th November 2012, to disqualify the import of ‘glass’ of any other description by holders of such licences. It was informed by the latter, *vide* letter dated 4th April 2013, that all their regional authorities had been advised to specify the description of the particular component that was permissible for import. Based on these developments, the show cause notice came to be issued for initiation of proceedings culminating the impugned order.

4. The claim of the appellant-assessee, during the investigations and in proceedings before the adjudicating authority, was that the

clarification issued by Directorate General of Foreign Trade, through the designated Advance Licensing Committee (ALC) in its meeting of 14th February 2002 on representation from the very same appellant-assessee, had included 'float glass' within the description of 'glazing glass' for the purposes of G7 (for finished leather from hide of cow/buffalo) in the Standard Input Output Norms (SION) appended to the Foreign Trade Policy and that 'glazing glass' was listed at serial no. 42(f) in the licences submitted by them at the time of import and that while considering the reference received from Department of Revenue and issuing the advisory *supra*, the Norms Committee of Directorate General of Foreign Trade, in its meeting of 6th December 2012, took the view that a more specific description was required in G7 of Standard Input Output Norms (SION) for which it was decided to solicit the expertise of Central Leather Research Institute (CLRI). Further developments on any changes having been affected thereafter is not on record but it has been clarified by Learned Counsel that subsequent licences were being issued only with specific description of the eligible item of import.

5. It is in this context that the impugned order finds that 'float glass' was not amenable to use in the manufacture of 'finished leather from hide of cow/buffalo', that the intent of the policy had been violated as the flexibility of importing alternative inputs, allowed in circular dated 24th March 2009, did not extend to goods that were not capable of being

used in the industry, and that clarification dated 14th February 2002 on use of 'float glass' as 'glazing glass' stood withdrawn by the advisory of 15th January 2013. Placing these findings in sequence, it was held by the adjudicating authority that the clarification dated 15th January 2013 was intended to cover all imports effected before such date as

> *'29.... it was issued to explain explicitly what was scientific, factual, technical and not a legal or interpretative issue. This is borne by a Catena of Judgement of Honourable Supreme Court where the factual and technical issues can be applied with retrospective effect the illegalities & grave violations of law so that the intent of the law & procedure could be correctly restored.... I find that the judgement relied by noticees in case of Monica Electronics Ltd versus Commissioner of Customs, New Delhi, is not applicable in this case encountered by the judgement of Honourable Supreme Court of India case of Indian Tobacco Association-2005-SC (Civil) 5196 of 2005. I find that Honourable Supreme Court of India in the matter of Indian Tobacco Association 2005 SC (Civil) 5196 of 2005 held that it is submitted that substitution of any word to correct obvious mistakes will have retrospective effect.... Therefore, I find DGFT clarification dated 15.01.2013 is meant to rectify the past technical, factual errors and remedy for such improper imports & safeguard government revenue by demanding duty for improper imports. Therefore, I am inclined to apply it for all such cases for past period and demanded duty for such violations.*
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> *I further rely upon the order of Honourable CESTAT, West Zonal Bench, Mumbai in the case of ASPI Rutomji Balsara Versus Commissioner of Central Excise, Vapi, 2006 (197) ELT 345 (Tri-Mumbai), in which it is clarified that the illegal possession cannot be said to have only prospective effect-Legal position remaining the same before and after issue of the Circular since law has not undergone any amendment. My find the further file support from the case of CCE, Delhi-IV, Versus Sandan Vikas India Ltd., Civil Appeal No. 9730 of 2003, dated 1.7.2015, in which in para no. 21, of the Judgement Honourable Supreme Court have relied that though the said circular has been brought at a later stage, but it really exposits the intention of the notification. The question of retrospective applicability or not does not arise, for the Simon pure reason is it really clarifies the position.'*

6. It is clear from the narration in the impugned order that the item

permissible for import in the norms relating to 'finished leather from hide of cow/buffalo', as well as in the impugned licences, was 'glazing glass' and, in the former, continues to be so. It is also on record that the clarification of the Advance Licensing Committee issued in 2002 was withdrawn by the Norms Committee in 2013. The foundation of the impugned order is the attribution of retrospective effect to the subsequent withdrawal so as to render the impugned imports to be contrary to the list appended to the licence. With the description in the norms continuing to remain unamended, the deemed insertion of the specific description, embodied in the advisory of 2013, may not find ready acceptance. The adjudicating authority has placed reliance on cited decisions to sustain such retrospectivity. In *Government of India & Ors v. Indian Tobacco Association [order dated 23rd August 2005 in civil appeal no. 5196/2005]*, the issue before the Hon'ble Supreme Court was the legality of the claim for 2% incentive under a scheme in the Foreign Trade Policy to be applicable to exports effected through Inland Container Depot, Guntur from 1st April 1997 even though the said location was incorporated in the relevant notification only on 27th November 1997 and the claim for retrospective effect and retroactive operation was allowed as the intention of the Central Government to rectify the mistake was evident in the absence of explicit stipulation to the contrary and the availability of the exception under an alternative provision in the original notification. In *re Aspi Rustomji Balsara*, the

Tribunal held that the impugned circular should be presumed to have retrospective effect for claiming benefit when the law has remained unchanged. In *re Sandan Vikas India Ltd*, the issue before the Hon'ble Supreme Court was the plea of Revenue for re-consideration of an earlier decision settling the placement of the impugned product in the notification prescribing effective rate of duty on several combinations of parts of air-conditioners and the clarificatory nature of the circular, explaining that fitment of air conditioner in a vehicle did not amount to manufacture, was highlighted on behalf of the assessee to enunciate the severability of different parts for discharge of differing rates of duty. In our opinion, the first two decisions relied upon by the adjudicating authority are in the context of extending benefit when the underlying statutory foundation remains unchanged and the third decision does not appear to have relevance in the present context.

7. In like vein, Learned Authorised Representative argued that the plea of bar of limitation does not find sustenance in the light of the decision of the Hon'ble Supreme Court in *Tata Iron and Steel Co Ltd v. Commissioner of Customs, Mumbai [2015 (319) ELT 546 (SC)]* and that, with the imports having been effected by fraud, the bar of limitation would not apply, as held by the Hon'ble Supreme Court in *Commissioner of Customs v. Candid Enterprises [2001 (130) ELT 404 (SC)]* and in *Commissioner of Customs (Preventive) v. Aafloat Textiles (I) P Ltd [2009 (35) ELT 587 (SC)]*, is his contention. The other

decisions relied upon by Learned Authorised Representative pertain to jurisdiction of customs authorities and liability to confiscation for violation of 'post-import' conditions; none of these are issues that are relevant to the present proceedings which has been set out *supra*.

8. In *re Tata Iron and Steel Co Ltd*, invoking of the extended period was upheld on establishing that a wrong declaration was made to the licensing authority for obtaining the endorsement of transferability. In the impugned order, it is clear that the licences had been originally issued to other entities and, that owing to their non-availability, proceedings against those holders were held in abeyance; as there is no evidence of such objectionable activity on the part of transferors of the said licences, the relevance of this decision to the case of Revenue is not immediately apparent. In *re Candid Enterprises*, the Hon'ble Supreme Court took objection to the Tribunal having rejected the application for condonation of delay in filing of appeal by Revenue without taking into consideration the doubts cast upon some of the documents that prompted the first appellate authority therein to set aside the order of the original authority. We have noted *supra* that, in the impugned order, it is the retrospective applicability of withdrawal of clarification, and not the original clarification itself, that was decided upon; the cited decision does not find the relevance. In *re Aafloat Textiles (I) P Ltd*, the licences had been established as bogus and that the responsible individuals were cognizant of it; in the present dispute

the licences themselves have not been tainted.

9. Learned Counsel cited the decision of the Hon'ble Supreme Court in *Northern Plastic Ltd v. Collector of Customs & Central Excise [1998 (101) ELT 549 (SC)]* and on the decision of the Hon'ble High Court of Bombay in *Commissioner of Customs v. Gaurav Enterprises [2006 (193) ELT 532 (Bom)]*, which placed reliance on the former, to challenge the recovery of duty under section 28 of Customs Act, 1962 and the imposition of penalty under section 114A of Customs Act, 1962.

10. Demand of duty has been crystalised with reference to the advisory of the Norms Committee in January 2013 permitting only the import of glass of specific dimension and of cylindrical shape as 'glazing glass' and by holding the withdrawal of the earlier clarification, permitting import of 'float glass', to be tantamount to the erasure of that clarification. Admittedly, at the time of import, such clarity was not available to the importer. Furthermore, there is no allegation that the importer had stretched the description of 'glazing glass' on its own and it is not denied that the clarification of the Advance Licensing Committee in 2002 could have prompted the importer to seek clearance of 'float glass' against the said licences. The existence of officially communicated clarification that was so specific and valid at the time of import erases the taint of suppression or

misrepresentation in the declarations for clearing of the impugned goods. The decision of the Hon'ble High Court of Bombay in *re Gaurav Enterprises* precludes the scope for invoking the extended period in the absence of ingredients that are a prerequisite as well as the allegation of misdeclaration merely for having claimed the benefit of an exemption notification. This suffices to set aside the demand under section 28 of Customs Act, 1962 and penalty imposed under section 114A of Customs Act, 1962.

11. The adjudicating authority has appeared to stretch the proposition for retrospective application of withdrawal of clarification on the basis of cited decisions which, as we have pointed out, were made in an entirely different context. Furthermore, to permit any individual acting on deliberated decisions of an authorized body to be subject to any detriment subsequently is tantamount to incentivizing the irresponsible decision-making by designated authorities. Indubitably, passage of time and hindsight tend to promote wisdom and the perception of errors of the past, in the light of such wisdom, does not erase an assurance offered. The Hon'ble Supreme Court, in *Union of India & another v. VVF Limited & another [judgement dated 22nd April 2020 disposing off civil appeals no. 2256-2263/2020]*, while deciding on a challenge to a reframed scheme of exemption seeking continuity of benefits, notwithstanding the lessening of benefit permissible thereafter, to the investors who had been motivated by the scheme as it

originally stood, discarded the plea observing that

> *12. '14.1... At the time when the earlier notifications were issued, the Government did not visualise that such a modus operandi would be followed by the unscrupulous manufacturers indulging different types of tax evasion tactics. It is only by experience and on analysis of cases detected the Excise Department the Government came to know about such tax evasion tactics being followed by the unscrupulous manufacturers which prompted the Government to come out with the subsequent notifications….which cannot be said to be bad in law, arbitrary and/or hit by the doctrine of promissory estoppel.'*

but, nevertheless, held that such ring fencing would stand as

> *'14.... It cannot be said that by the subsequent notifications/industrial policies the benefits which were accrued/granted under the earlier notifications were sought to be taken away. It also cannot be said that by the subsequent notifications/industrial policies, the rights which have been accrued under the earlier notifications had been taken away.'*

If such be the test of validity for retrospective effect of notifications, it surely must be no less applicable to clarifications. Imports, if any, made against the impugned licences after issue of clarifications of 2013 are on a footing entirely different from those made before.

13. The impugned order, thus, stands on weak foundations in penalizing past imports. Accordingly, the confiscation as well as imposition of penalties under section 112 and 114AA of Customs Act,

1962 fails.

14. For the above reasons, we set aside the impugned order and allow the appeals.

(Order pronounced in the open court on 11/06/2020)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

**/as*