CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 715 OF 2012

[Arising out of Order-in- Appeal No: 181 to 183 (GR.VII D)/2012 (JNCH)/EXP-30 TO 32 dated 30th March 2012 passed by the Commissioner of Customs (Appeals), Nhava Sheva, Mumbai – II.]

Pankaj Extrusion Ltd
Survey No. 15/1/4 Village Rakholi, Silvassa - 396230 … ***Appellant***

versus

Commissioner of Customs (Export)
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad …***Respondent***

WITH

CUSTOMS APPEAL NO: 716 OF 2012

[Arising out of Order-in- Appeal No: 181 to 183 (GR.VII D)/2012 (JNCH)/EXP-30 TO 32 dated 30th March 2012 passed by the Commissioner of Customs (Appeals), Nhava Sheva, Mumbai – II.]

Hitesh H Shah
Pankaj Extrusion Ltd, Survey No. 15/1/4
Village Rakholi, Silvassa - 396230 … ***Appellant***

versus

Commissioner of Customs (Export)
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad …***Respondent***

APPEARANCE:

Shri Akhilesh Kangsia, Advocate for the appellant

Shri Bhushan Kamble, 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 / 86988-86989 /2021

DATE OF HEARING: 07/09/2021
DATE OF DECISION: 13/10/2021

PER: C J MATHEW

In these proceedings, though the rival set of submissions of M/s Pankaj Extrusion Limited and of Revenue do intersect as common ground that the impugned goods had been cleared on payment of duties of central excise, the stand of both depart beyond this concurrence to traverse parallel tracks. While it is submitted on behalf of the appellant that the impugned goods, *i.e.* 'aluminium alloy ingots' weighing 199.70 tons and valued at ₹ 1,67,44,920/-, cleared by them against 15 invoices between 8th July 2005 and 13th July 2005 on payment of duties of ₹ 30,32,303/- had been manufactured out of 'aluminium ingots' and bore 'PANKAJ' as the brand affixed on them, it is the contention of Learned Authorised Representative that the goods had been cleared as such without undergoing any manufacturing process.

2. The dispute arises from imports of 503.530 MTs of 'aluminium ingots' against bill of entry no. 906942/04.07.2005 and 906943/ 04.07.2005 which the attached invoices described as comprising of not less than 99.7% of aluminium. The said imports effected under 'advance authorization scheme' of the Foreign Trade Policy were

entitled to exemption under notification no. 93/2004-Cus dated 10th September 2004 subject to several conditions enumerated therein that were also reflected in the licence issued by Director General of Foreign Trade as well as in the contours of this scheme enunciated as paragraph 4.1 of the Foreign Trade Policy 2004-09 issued in pursuance of the powers conferred under Foreign Trade (Development and Regulation) Act, 1992.

3. The substance of the case is that the appellant had, against purchase order no. 131/04.07.2005 of M/s Diamond Exports Ltd for 200 MTs of 'aluminium alloy ingots', with magnesium and silicon content of not more than 1%, undertaken the said clearances and the test certificates against each invoice indicated aluminium content between 99.732 and 99.838 which, according to the tax authorities, did not differ from the content at the time of import. This, argued Learned Counsel for the appellant, did not suffice to counter their affirmation of aluminium ingots having been subjected to manufacturing process that was completed by affixing their brand on each. It was pointed out that the clearances were recorded in the books and against payment of duties of central excise which has not been disputed by the jurisdictional central excise authorities. It is his contention that the clearances of goods manufactured out of such imported goods is not barred either by the Foreign Trade Policy or by the relevant notification which is restricted to sale of goods in the

condition in which they are imported. It is further argued that the finding in the impugned order, from the aluminium content in the ingots adopted as the characteristic for classification under the First Schedule to the Customs Tariff Act, 1975 as well as the corresponding entry in the Schedule to the Central Excise Tariff Act, 1985, that no further processing had occurred is not tenable as the definition of 'manufacture' in Central Excise Act, 1944, and as incorporated in the Foreign Trade Policy, would prevail. It is further contended that they had furnished all details of the consumption of raw materials which establishes that the stock, at the relevant time, could not match the quantity alleged to have been cleared as such.

4. It is also a further submission on the part of the Learned Counsel that the discharge of duties of central excise should have been adjusted for determination of the duties of customs yet to be recovered. Reliance is placed on the decision of the Tribunal in *Royal Embroideries Pvt Ltd v. Commissioner of Customs, Chennai [2008 (221) ELT 446 (Tri.-Bang.)]* holding that

> *'5.2 On a very careful consideration of the issue, we find that the appellants imported goods free of duty under Advance Licensing Scheme in terms of the Customs Notification 30/97-Cus., which has been mentioned in the impugned Orders-in-Appeal. In the last paragraph, it is said that the fact that the goods in the present case were released by extending the benefit of Notification 30/97-Cus. cannot be disputed. Therefore it is clear that there is an obligation on the part of*

the appellant after import of the goods to use them only for manufacture of products, which are to be exported. Therefore, the contention that they have not violated any condition of the Notification is not correct. Moreover, at the time of import, they had also executed a bond and a bank guarantee. What is the purpose of the bond? The appellant binds himself for proper fulfilment of the conditions of the Notification. Once the conditions of Notification are not fulfilled, the appellant is liable to pay duty on merit rate. In this case, since the amounts have been adjusted by invoking the bank guarantee, in view of the non-fulfillment of the conditions of the said notification, no illegality has been committed by Revenue. Once the dues have been realized, there is no question of further fulfilling the conditions of the Notification. In view of the case-laws decided by this Bench, the redemption fine and penalty are not sustainable because by invoking the bank guarantee, the duty has already been recovered. Whatever the differential amount has not been recovered, the appellant is liable to pay and we confirm the same. Therefore, we cannot set aside the demand of duty as it is implicit that the appellants are liable to fulfil the conditions of Notification and to the extent that they had imported silk which has not been utilized for the purpose of export, they are liable to pay duty and there is no question of time-bar. Even if the wrong rules or sections have been invoked, that will not be a strong ground for the appellant not to pay the duty demanded. The duty demanded, it is seen, has already been adjusted with some differential amount due from the party. The appellant has to pay the amount.'

5. Their further contention is that, even if the conditions of the notification were violated it is only the duty foregone that could be demanded for which also reliance is placed on the decision in *re Royal*

Embroideries Ltd, and so far as the claim for offset of the duties of central excise already discharged, reliance is placed on the decision of the Hon'ble Supreme Court in *Collector of Central Excise, Hyderabad v. Divya Enterprises Ltd [2003 (153) ELT 497 (SC)]* and in *Nirlon Ltd v. Commissioner of Central Excise, Thane – II [2006 (194) ELT 321 (Tri.- Mumbai)]* which has relied upon the decision in *re Divya Enterprises* holding that

> *'4. After hearing both sides and considering the material it is found*
>
> *(a) Additional Excise Duty is to be recovered on per kg weight basis. It is accepted fact by both sides that the weight of Dipped Nylon Tyrecord fabrics is more than the weight of the 'Unprocessed Nylon Tyrecord Fabrics' as also the Dipped Nylon Tyrecord fabrics discharged Additional Excise Duty on the actual weight of such Dipped Nylon Tyrecord fabrics cleared. It is also accepted that if the 'Unprocessed Nylon Tyrecord Fabrics' have paid Additional Excise Duty then the Dipped Nylon Tyrecord fabrics are exempted from Additional Excise Duty under Notification No. 9/96-C.E. dated., 23-7-96.*
>
> *(b) We find force in the argument advanced in the facts of this case, since the duties were paid on the Dipped Nylon Tyrecord fabrics as per the instructions and audit objections as also it is a fact that the appellant have paid more duty than what was required to be paid on the 'Unprocessed Nylon Tyrecord Fabrics'. Therefore we find no reasons to deny them the benefit of adjustment for the duties paid and product i.e. Dipped Nylon Tyrecord fabrics towards duty demands being made on the raw material ('Unprocessed Nylon*

Tyrecord Fabrics') following the decision in the case of CCE, Hyderabad v. Divya Enterprises - 2003 (153) E.L.T. 497 (S.C.) and other cases permitting such adjustments.

(c) Since Additional Excise Duty will be paid after such adjustments rendering the 'Unprocessed Nylon Tyrecord Fabrics' duly paid. Thereafter the Processed Dipped Nylon Tyrecord fabrics would stand to be exempt. Therefore no duty demands could be made on the appellants.

(d) Since no duty demands could be made on the appellants, there is no question of visiting them with a penalty under the provisions of the Central Excise Rules.

In view of the findings the duty demands and penalties are required to be set aside and this appeal allowed.'

6. Relying on the decision of the Tribunal in *Titan Industries Ltd v. Commissioner of Central Excise, Chennai [2007 (217) ELT 423 (Tri.-Chennai)]* which held that

'2. After giving careful consideration to the submissions, we note that there is no serious contest in this appeal against the Commissioner's finding that the goods in question are chargeable to duty of excise on account of the fact that the post-import activity undertaken by the assessee on the goods amounted to 'manufacture'. This finding of learned Commissioner is based on Section 2(f)(iii) of the Central Excise Act and the same is beyond question. However, learned Commissioner ought to have enabled the assessee to honour the demand of duty by way of debit in Cenvat account. The impugned order itself has noted that Cenvat credit of CVD paid on the imported watches is admissible to the assessee. It appears from the records that

> *this credit exceeds the amount of duty of excise demanded. In the circumstances, we are of the view that the assessee shall pay the duty of excise by availing the CVD credit and utilizing the same. We, further, are of the view that, in the peculiar facts and circumstances of this case, any intent to evade payment of duty cannot be attributed to the assessee inasmuch as Cenvat credit of an amount higher than what is demanded by the Commissioner in the impugned order was lying with them, which could be utilized in the event of the demand of excise duty being enforced against them. Therefore, we think this is a fit case or vacating the penalty. Accordingly, the penalty is set aside and the appeal is disposed of. The impugned order is sustained with the above modification.'*

this was reiterated.

7. In addition to the recovery of ₹ 47,74,151 under section 28 of Customs Act, 1962, redemption fine of ₹ 15,00,000/- on the said goods held as liable for confiscation under section 111(o) of Customs Act, 1962 besides imposition of penalty under section 114A of Customs Act, 1962, that is disputed by reliance on the decisions *supra*, the penalty of ₹ 5,00,000/- under section 112 of Customs Act, 1962 imposed on the Director Mr. Hitesh Shah, is sought to be questioned by placing reliance on the decision of the Tribunal in *Jayakrishna Aluminium Ltd v. Commissioner of Customs, Chennai [2005 (187) ELT 234 (Tri.Chennai)]* holding that

> *'7. Coming to the confiscation and the imposition of penalty and demand of interest, there is merit in the*

> *submission of ld. Counsel for the appellants. Accordingly, the confiscation of the goods, interest and penalty imposed on the Managing Director are set aside. We find no reason to interfere with the penalty imposed on the company, since the same is only about 10% of the duty demand.'*

and

> *'4. The very first contention of the Counsel for the appellants is that the order has not taken into account the appellant's claim of export of over 14 tonnes of materials under Shipping Bill No. 717392, dated 1-2-1996. He has also submitted that the Commissioner was not right in imposing separate penalties on the appellant-company and its Managing Director inasmuch as all the actions of the Managing Director were taken in his capacity as Managing Director and once the company had been penalised there was no justification for two penalties, both on the company and the Managing Director. It is also contended that there was no justification for confiscation of the goods inasmuch as the goods were rightly allowed duty-free clearance under a valid notification. Also the goods were not available for confiscation. The further contention of the ld. Counsel is that there was no legal basis for demand of interest on the duty amount inasmuch as the provision relating to interest was incorporated subsequent to the import of the goods.'*

8. Learned Authorised Representative asserts that, notwithstanding the several submissions on manufactured goods having been cleared, the utilization of the goods imported against the said exemption notification for purposes other than manufacture of export goods is not tenable in view of condition no. (vii) in

notification no. 93/2004-Cus dated 10th September 2004. It is also submitted that the claims of manufacture having been effected is also not tenable as the percentage of aluminium contained in the ingots said to be 'aluminium alloy ingots' did not vary from the content in 'aluminium ingots' as described at the time of import. It is pointed out that the test reports seized from the premises of the appellant suffices to establish the correctness of the allegation and, more so, as the goods, having been consumed by M/s Diamond Exports Ltd, were not available for verifying the improbable claims now preferred by the appellant; accordingly, he contends that the assertion of the goods having been branded during the manufacturing process is also without any material evidence.

9. The detriments in dispute are the duty liability of ₹ 47,74,151/- including additional duties of ₹ 29.47,106/-, the conclusion that the goods, for the purpose of imposition of fine for redemption despite the goods being unavailable, were liable for confiscation and the imposition of penalty under section 114A of Customs Act, 1962. The claim of the appellant that the goods were subject to manufacturing process does not appear to be credible in the light of their admission of the aluminium content in the goods supplied to M/s Diamond Exports Ltd. Furthermore, given the existence of test report indicating the aluminium content, the claim of affixing of brand is bereft of any degree of acceptability. The description in the purchase order and the

invoice raised by the appellant of the goods having been ‘aluminium alloy ingots’ may not pass muster as the content of aluminium has not varied from the composition described in the invoices furnished at the time of import. Furthermore, try as they might to convince us, the contention that the scheme does not bar sale of manufactured goods is not acceptable. The scheme has been designed in furtherance of export promotion strategy and require compliance with ‘actual user condition’ with any sale or transfer of the imported goods or the goods manufactured therefrom permissible only after completion of the ‘export obligation’ prescribed in the licence issued by the Director General of Foreign Trade. It is on record that the said obligations have not been fulfilled with and the sole issue pending before the licensing authority is the clubbing of the licences. Hence, by the clearance of the goods, the condition in notification no. 93/2004-Cus dated 10th September 2004 has been complied with in its breach for which the duty liability is the logical corollary as found in the adjudication order.

10. The appellant has claimed entitlement to adjust the duty discharged on clearance of the goods against the duty liability arising from the impugned order; no doubt, the proposition sounds attractive and equitable but, nonetheless duty liability had been discharged under Central Excise Act, 1944 whereas the duty confirmed in the impugned order, including additional duties, are leviable under

Customs Act, 1962 and Customs Tariff Act, 1975. In accordance with the provisions of Central Excise Act, 1944, any adjustment of duties paid thereunder is allowable only upon sanction of refund of the same. It is not on record that such refund has been sanctioned. There is, therefore, no reason for us to heed this particular submission.

11. In so far as the confiscation of the goods which, admittedly, stand converted into the final product of M/s Diamond Exports Ltd is concerned, it has been settled by the decision of the Hon'ble High Court of Bombay in *Commissioner of Customs (Import), Mumbai v. Finesse Creation Inc [2009 (248) ELT 122 (Bom.)]* holding that

> *'5. In our opinion, the concept of redemption fine arises in the event the goods are available and are to be redeemed. If the goods are not available, there is no question of redemption of the goods. Under Section 125 a power is conferred on the Customs Authorities in case import of goods becoming prohibited on account of breach of the provisions of the Act, rules or notification, to order confiscation of the goods with a discretion in the authorities on passing the order of confiscation, to release the goods on payment of redemption fine. Such an order can only be passed if the goods are available, for redemption. The question of confiscating the goods would not arise if there are no goods available for confiscation nor consequently redemption. Once goods cannot be redeemed no fine can be imposed. The fine is in the nature of computation to the state for the wrong done by the importer/exporter.'*

and, having distinguished the decision of the Hon'ble Supreme Court in *Weston Components Ltd v. Commissioner of Customs, New Delhi [2000 (115) ELT 278 (SC)],* relied upon by Learned Authorised Representative, thus

> *'6. In these circumstances, in our opinion, the tribunal was right in holding that in the absence of the goods being available no fine in lieu of confiscation could have been imposed. The goods in fact had been cleared earlier. The judgment in Weston (supra) is clearly distinguishable. In our opinion, therefore, there is no merit in the questions as framed. Consequently appeal stands dismissed.'*

and which has since been upheld by the Hon'ble Supreme Court, the submission made on behalf of the appellant must be endorsed. Accordingly, though the goods are liable for confiscation under section 111(o) of Customs Act, 1962 for breach of post-importation condition, confiscation itself is not tanable in law. The finding in the impugned order that the decision in *re Weston Components Ltd* would apply owing to the execution of bond does not find favour as the security therein was an earnest of the assurance of the goods being made available for confiscation during the adjudication proceedings; the bond security offered in the present instance is in relation to the conditions of import generally.

12. In the light of the finding on the duty liability, and, even in the face of records of clearance on payment of duties of central excise, the suppression insofar as Customs Act, 1962 is concerned cannot be

detracted from. Consequently, the penal liability under section 114A of Customs Act, 1962 is sustained.

13. Turning to the penalty on the Director of the company, Mr Hitesh Shah, we note that the finding of

> *'4.5 The goods are diverted by the unit violating the conditions of the license and notification. I find that the allegation in the Show Cause Notice are supported by the evidences like test report indicating the invoice number, the invoices issued to M/s. Diamond Cables, statements of the responsible persons from both the parties etc. I find that the unit has deliberately misdeclared the goods as aluminium alloy ingots in order to hide their original identity as imported aluminum ingots under Advance Authorization. Thus the goods are liable for confiscation under section 111(o) of the Custom Act and unit is liable for the penal action under section 114A of the Act. Shri Hitesh Shah, Director of the company was aware of the diversion of the goods and responsible for evasion of the duties as alleged in the Show Cause Notice hence I find that he is liable for the penalty under section 112(a) of the Act. The party has executed a bond for the relevant license and thus I find that there is obligation on the party to use the imported goods in the finished product for the export. The party has executed a bond for following conditions of the license and notification. However the party has diverted the goods and hence I find that the goods can be confiscated and fine can be imposed. In view of above discussion I pass the following order.'*

in the impugned order is deficient in ascertaining the exact role of the appellant-Director in the diversion, other than by his position in the company, is concerned. Furthermore, the decision in *re Jayakrishnan Aluminium Ltd* would require an adjudicating authority to render a clear finding of the specific role of the individuals against whom penalty is imposed and the lack thereof in the impugned order renders the imposition of penalty on the Director to be inconsistent with law. Accordingly, the personal penalty on Mr Hitesh Shah is set aside.

14. Appeals are thus disposed off in the above terms.

(Order pronounced in the open court on 13/10/2021)

(AJAY SHARMA)	**(C J MATHEW)**
Member (Judicial)	***Member (Technical)***

**/as*