

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86381 OF 2013

[Arising out of Order-in-Original CAO No. 86/2012/CAC/CC(I)/AB/Gr.VA dated 26/12/2012 passed by the Commissioner of Customs (Import), Mumbai.]

Balkrishna Wadhavan

611/3 V N Purav Marg, Chembur, Mumbai - 400071

... Appellant

versus

Commissioner of Customs

New Custom House, Ballard Estate, Mumbai - 400038

...Respondent

WITH

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[Arising out of Order-in-Original CAO No. 86/2012/CAC/CC(I)/AB/Gr.VA dated 26/12/2012 passed by the Commissioner of Customs (Import), Mumbai.]

PBA Infrastructure Ltd

611/3 V N Purav Marg, Chembur, Mumbai - 400071

... Appellant

versus

Commissioner of Customs

New Custom House, Ballard Estate, Mumbai - 400038

...Respondent

APPEARANCE:

Shri V.M.Doiphode, Advocate, Advocate for the appellants

Shri Bhushan Kamble, Assistant Commissioner (AR) for the respondent

CORAM:

**HON'BLE MR ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)**

FINAL ORDER NO: A / 86245-86246 /2022

DATE OF HEARING:	15/02/2022
DATE OF DECISION:	15/02/2022

PER: C J MATHEW

The dispute in these two appeals of Shri Balkrishna Wadhavan and M/s PBA Infrastructure Ltd against order-in-original no. CAO 86/2012/CAC/CC(I)/AB/Gr.VA dated 26th December 2012 of Commissioner of Customs (Import), Mumbai, pertaining to import of 'hydraulic operated piling rig machine HR-130' vide bill of entry no. 219658/10.11.2001, is before us for the second time. On the former occasion, in disposing off the appeal preferred against order no. CAO 602/2010/CAC/CC(I)/SHH dated 15th July 2010, the Tribunal, acknowledging the plea of the appellants that jurisdiction to confirm recovery of duty was questionable and that consequential impact of clarification in DO letter F no. 334/1/2010 dated 26th February 2010 of Joint Secretary, Department of Revenue merited consideration, had remanded the matter back to the adjudicating authority and, while directing specific examination of these two submissions, had kept all issues open to be addressed therein.

2. Insofar as the two appeals are concerned, the dispute pertain to confiscation of goods valued at ` 1,59,06,288/- under section 111(o)

of Customs Act, 1962, though permitted for redemption on payment of fine of ` 40,00,000/-, and recovery of duty of ₹ 80,83,394/- owing to denial of exemption notification claimed at the time of import with imposition of penalties under section 112 of Customs Act, 1962 arising therefrom. The impugned order is, admittedly, in compliance with the directions of the Tribunal to the extent of recording discussions and recording findings but the unaltered outcome continues to be the cavil of the appellants.

3. The impugned goods had been cleared upon assessment that acknowledged the claim of eligibility for exemption under notification no. 17/2001-Cus dated 1st March 2001 (at serial no.217) subject to condition no. 38 which, *inter alia*, specifies exclusive use in 'road construction' for five years from the date of import on the furnishing of contract awarded to the importer, M/s Prakash Atlanta JV, by the National Highway Authority of India (NHAI) for construction of bypass on National Highway 56 linking National Highway 25 and National Highway 28 at Lucknow. The said project was reportedly completed on 17th July 2004 and, thereafter, as per the records submitted by the appellants, the equipment was deployed at Kahelgaon between August 2004 and April 2005, at Udupi between June 2005 and December 2005 and thereafter at Chennai from January 2006 in pursuance of agreement with M/s Valecha Engineering Ltd. The goods, having been found at a location not concerned with the

original project site, were seized on 13th June 2007 and show cause notice leading to the impugned order had been issued thereafter on 10th November 2007.

4. According to Learned Counsel for the appellants, the decision of the Tribunal on the previous occasion, in final order no. A/59-60/2012/CSTB/C-I dated 27th December 2011 directing that

‘7. As discussed above that the matter needs reconsideration at the end of the adjudicating authority in the light of clarification dated 26.2.2010, we remand back the matter to the adjudicating authority for de novo consideration. Needless to say that the appellants shall be given reasonable opportunity to present their case keeping all issues open.’

had not been complied with.

5. He contends that the appellants herein, who were not concerned with the import, could not be proceeded with under section 28 of Customs Act, 1962 and resort to section 12 of Customs Act, 1962 instead was motivated misconstruing of the legislative intent of that provision. He submits that, after 9th November 2006, the appellant could not be fastened with responsibility for retention of goods and the seizure, effected on 13th June 2007, was, therefore, without authority of law as also the show cause notice issued thereafter. According to him, there is no evidence on record that the goods had been deployed for any purpose other than ‘construction of roads’ and

that the direction of the Tribunal for examining the applicability of the clarification issued by the Ministry of Finance in 2010 providing for depreciation should have had the outcome of re-determination of liability, if at all, only on the depreciated value. He contends that this misadventure alone sufficed for setting aside the impugned order and placed reliance on the decision of the Tribunal in *Gammon India Ltd v. Commissioner of Customs (Import), Mumbai [2014 (314) ELT 545 (Tri.-Mumbai)]*, in *Larsen & Toubro Ltd v. Commissioner of Customs (Preventive), Kolkata [2019 (370) ELT 416 (Tri.-Kolkata)]* and in *Ircon International Ltd v. Commissioner of Customs (Imports), Mumbai [2019 (366) ELT 1034 (Tri.-Mumbai)]*.

6. We have heard Learned Authorised Representative who supports the order-in-original in its entirety for the cogent findings therein. He submits that the contractual arrangement between appellants herein and the importer makes it abundantly clear that the appellant is the real owner of the goods and, therefore, liable to discharge duty liability. It is also contended that resort to section 12 of Customs Act, 1962 in the show cause notice is necessary adjunct of devolution of liability arising under 125 of Customs Act, 1962 upon exercise of option to redeem confiscated goods. It is also contended that the appellant had failed to comply with conditions appended to the exemption notification and, therefore, was liable to be proceeded against for recovery of duty as well as for confiscation.

7. This is one of several disputes in which the exemption afforded on import of goods to be utilized in connection with projects undertaken by National Highway Authority of India (NHAI) or designated wing of Central Government or State Governments are alleged to have been misused. The period of dispute straddles the exemption afforded by notification no. 17/2001-Cus dated 1st March 2001 as well notification no. 21/2002-Cus dated 1st March 2002 with hardly any distinction between them. Thereafter, with issue of notification no. 21/2010-Cus dated 27th February 2010, it was clarified thus

'15.4 Specified road construction machinery items are presently fully exempt from customs duty subject to certain conditions in terms of S. No. 230 of notification No. 21/2002-Customs dated 1.3.2002. One of the conditions of this exemption is that the equipment imported under it cannot be sold or disposed of for a period of five years from the date of import. The condition is now being relaxed to allow the sale or disposal of such machinery items on payment of customs duties on depreciated value at the rate of duty applicable at the time of import. In order to claim this benefit, the importer is to produce a certificate from the sponsoring authority that the equipment is no longer required for the project. Another condition of the exemption is that the importer is required to undertake that he shall use the goods exclusively for the construction of roads. It has been brought to the notice of the Ministry that this is being interpreted to mean that the imported machinery may be used only for the project for which it was initially imported. This is resulting in the idling of machinery / equipment. It is clarified that it is permissible

to relocate or re-deploy the machinery imported under the exemption to another road construction project for which the importer would have been otherwise eligible to claim the benefit of the exemption. Pending cases may be disposed accordingly.'

on the reasoning that idling of equipment after completion of initial project was not in public interest. It was, therefore, intimated that deployment of such equipment in other projects for 'construction of roads' would not be breach of conditions and, if the importer so desired, the goods permitted for disposal by discharging duty liability on depreciated value.

8. It is seen from the records that the appellant had, indeed, merely contracted with M/s Valecha Engineering Ltd for the operation of the imported goods without sale or disposal contrary to condition in the notification availed at the time of import and within the ambit of the impugned clarification. In the absence of any evidence that deployment at Kahelgaon, Udupi or Chennai was for use other than 'construction of roads' and from enumeration in the list of eligible equipment, the legitimate use is not questionable. The proposition advocated by Learned Authorised Representative defies logic as the notification, though prescribing 'lock in' of ownership for five years, had not prescribed that the time frame of eligible projects should be co-terminus with the bar on disposal. The impugned clarification also makes it abundantly clear that it is neither reasonable nor in public interest for the equipment to remain idle till eligible for disposal.

There is no evidence of irregular deployment between 17th July 2004 and 9th November 2006 when the restrictive condition was erased.

9. It is also the contention of the appellant that, even if duty liability did arise, it could not be fastened on partners in a joint venture that imported the goods and that the continued existence of the joint venture, in the absence of evidence of dissolution, precluded going beyond the importer on record. The observation of the adjudicating authority, attributing motives to high-seas sale – not being an issue in dispute - also transgress the adjudicatory jurisdiction. This is tantamount to critique of commercial structuring that is more appropriate to academic contemplation or in formulation of government policy.

10. We find that the, Tribunal in *Nalin Z Mehta v. Commissioner of Customs, Ahmedabad* [2014 (303) ELT 267 (Tri. Ahmd)], has, after considering

‘6. In order to appreciate the correct position, the basic facts needs to be stated which are in dispute as to the bills of entry which are filed with the Customs authorities for the clearance of vitrified tiles along with the complete set of documents were filed by M/s. Shobha Plastics Pvt. Ltd., M/s. H.V. Ceramics and M/s. PFZ Corporation. On perusal of the copies of Bills of Entry produced before us as filed by these assesseees, we find that they had specifically stated that they are importer of vitrified tiles coming from Malaysia and have also discharged the Customs duty as has been assessed by the

lower authorities. As against the above said undisputed facts it needs to be seen as to who is the importer of the goods as per the definition of Section 2(26) of Customs Act, 1962, which reads as under :

“importer”, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer.”

7. The above said definition clearly lays down that the importer’s definition includes any owner or any person holding himself out to be an importer. The adjudicating authority, while coming to such conclusion that the appellant herein is to be adjudged as an importer in Para 31.3.1 has recorded as under :

“31.3.1 From various statements of Shri Nalin @ Bakul Zaverilal Mehta, it is seen that Shri Nalin had clearly stated that :

(i) It was he who planned the import of Chinese vitrified tiles through Malaysia with the help of Shri Danny of Singapore who was to get the certificate of origin from Malay Chamber of Commerce by forging the documents to show the goods as of Malaysian origin.

(ii) He asked Shri Jayesh Mehta to act as a Custom House Agent for clearances of subject tiles to be imported.

(iii) It was on his instruction that Shri Jayesh D. Mehta approached Shri Harshadbhai Vadodaria of M/s. Shoba Plastics. Pvt. Ltd. and Shri Hitesh Parikh of M/s. H.V. Ceramics.

(iv) The import document in the name of PFZ Corporation were supplied to him by the associate of Shri Danny.

(v) All the finances relating to import consignment such as remittances abroad, customs duty, etc., required for the clearances of the imported consignments were arranged by him.

(vi) Shri Harshadbhai Vadodaria and Shri Hitesh Parikh had simply signed the blank documents required for the clearances of the imported tiles.

(vii) Shri Harshadbhai Vadodaria and Shri Hitesh

Parikh allowed their companies/firms to be used by him (Shri Nalin) on the assurance of commission.”

8. *It can be seen from the above reproduced findings of the adjudicating authority, we find that the adjudicating authority has totally misdirected himself for more than one reason. Firstly, we find that in the statement dated 7-12-2006 of the appellant Shri Nalin Z. Mehta, relevant paragraph as to financing of the entire operation reads as under :*

“On being asked to explain the modus adopted by us, I state that the plan for import of vitrified tiles of Chinese origin by showing the same as of Malaysian origin was hatched two years back with Mr. Danny Singapuri, a Singaporean citizen the owner of M/s. Synergy Tradecom, Malaysia who was introduced to me by one of my friends Shri Bharatbhai Shah (NRI settled in Singapore), when he (Danny) came to India three years to attend one get together party arranged by Shri Bharatbhai at Mumbai, where I was also one of the invitee. Thereafter, when Mr. Danny again came to India two years back he met me and had offered me to supply vitrified tiles of Chinese origin for sale in India, I accepted that offer as there was very good demand for vitrified tiles at that time and the deal was finalized. At that time anti-dumping duty was charged @ 8.28 USD/SQ MT on the import of vitrified tiles of Chinese origin and to avoid this, it was decided to obtain the certificate of origin showing the country of origin as Malaysia and accordingly Mr. Danny has arranged the certificate of origin as Malaysia from Malay Chamber of Commerce. Further, the arrangement for the importation of the goods from Chinese port of Port Klang was also made by Mr. Danny. Thereafter, the goods were loaded from Port Klang to India. It was also decided to get “made in Malaysia” and our brand name “Globe” embossed on the vitrified tiles to be imported from China. This was done with an intention to show that the vitrified tiles imported by us were of Malaysian origin and to evade the payment of anti-dumping duty chargeable thereon. I also want to clarify that all the financing for the import of vitrified tiles were arranged by Shri Danny. As per the arrangement, Shri Rupesh Shah, employee of Shri Danny in India had given me import documents of the value of Rs. 12 lakhs (approx.) in the name of PFZ Corporation, Vapi, Rupesh Shah had also given me Rs. 6 to 7 lakhs (approx.) for payment of Customs duty. I had sent the original documents and the amount of Rs. 6 to 7 lakhs to Shri Javesh Mehta at Vapi for payment of Customs duty and get the clearance of vitrified tiles from the Customs. The goods released from the Customs, were immediately delivered to our buyers, the names of whom

were mentioned in my statement dated 29-11-2006. We used to take the payment in cash from our buyers. This payment in cash was further used to get release the subsequent consignments of vitrified tiles imported from Shri Danny - Synergy Tradecom. On being asked about the details of sales made and payments received in cash from our buyers of vitrified tiles, I state that at present I do not have the said details, however, I undertake to provide the same on reaching Mumbai.

(Emphasis provided)

9. It can be seen from the above reproduced paragraph from the statement of Shri Nalin. Z. Mehta, he has stated that for the first consignment which was imported, Shri Danny of Singapore has given the finances and said finances were utilized for first consignment and sold in the local market for cash and it was recycled to release subsequent consignments. We find that there is no categorical admission of the appellant herein that he had financed the entire operation, on the contrary it is otherwise. In view of the factual finding hereinabove, we find that the adjudicating authority recording the finding as to the finances relating to import are done by the appellant, seems to be incorrect. It is also to be recorded that investigating authorities have not traced one Shri Danny of Singapore and recorded any statement.

10. Secondly, in our view, the definition of importer as mentioned in Section 2(26) of Customs Act, 1962 would not cover the appellant, as it is undisputed that the appellant had not filed any Bill of Entry. We find that the issue seems to be settled in favour of the assessee by the following decisions. The relevant paragraphs in the judgments are also reproduced.

(i) *Bimal Kumar Mehta v. CC, Mumbai - 2011 (270) ELT 280*

“14. We have given careful consideration to the submissions. Having already overruled the jurisdictional objection raised by the learned counsel, we have now to

deal with another argument advanced by the counsel. It was submitted that “the person chargeable with the duty” in the present case has to be identified first before invoking Section 28 of the Customs Act. It was argued that, in a case like this, wherein the Bills of Entry are filed by a front man of the real importer, the latter should be identified as the person chargeable with the duty. Mr. Bimal Kumar Mehra had acted only as a front man of Mr. Javed Alam who had actually taken all the necessary steps for importing “Mulberry Raw Silk” and cleared the same duty-free. It was Mr. Javed Alam who had actually financed Mr. Bimal Kumar Mehra for obtaining bank guarantee in his name. Mr. Bimal Kumar Mehra only subscribed his signatures to the Bills of Entry and undertook other Customs formalities for the benefit of Mr. Javed Alam. The goods after clearance were also handled by Mr. Javed Alam. In these circumstances, according to the learned counsel, Mr. Javed Alam should be held to be the owner of the goods and, for that matter to be the importer of the goods. The show cause notices should have been directed mainly against Mr. Javed Alam for recovery of duty from him under Section 28 of the Act inasmuch as such demand of duty could be raised only on the “person chargeable with the duty”. This view, according to the counsel, would largely benefit the department in similar cases. The learned SDR has also referred to Section 28 of the Act and has submitted that the person who files the Bills of Entry is the importer of the goods and the “person chargeable with the duty” under the said section. We have no reason to disagree. “Importer” as defined under Section 2(26) of the Customs Act includes any owner or any person holding himself out to be the importer. In the present case, the appellant, by filing the Bills of Entry, held himself out to be the importer of the goods and, therefore, he is the importer for purposes of Section 28 of the Customs Act. Where the taxable event is ‘import’, the tax has to be paid by the importer. Therefore, the importer is the person chargeable with the duty on the goods imported and presented under the Bill of Entry. Accordingly, we hold that the liability to pay duty, in the present case, is on the appellant.”

- (ii) *Dhirubhai N. Sheth v. CC, Bombay - 1995 (75) ELT 697*

“6. After hearing both the sides and on perusing the records made available by the Id. SDR, we find that Shri Mahendra Dalal in his statement dated 9-12-1991 has indicated the position as below :

“Since Shri Dhirubhai Sheth had requested me that he wanted to open a firm in Ahmedabad in order to avoid

certain taxes such as octroi, sales tax on imported consignments which could be directly imported in the name of the Ahmedabad based firm. Thus, I set up M/s. Western Sales Corporation having address of my friend Shri Rasiklal Shantilal Dalal at B-9, Bhumika Appts. Nawa Vikas Grih Rd. Paldi, Ahmedabad - 380 007 and I was to get certain percentage of the profit which was decided upon. At this stage, Shri Dhirubhai Nandlal Sheth took my signature on various forms, particulars of which I am not aware". (emphasis supplied).

From the aforesaid portion of the statement, it is clearly evident that Shri Mahendra Dalal agreed to commence the firm and also agreed to sign various blank forms at the instance of the appellant by receiving the monetary consideration by getting certain percentage of profit and this arrangement appears to have been motivated by saving of certain taxes such as octroi, sales tax levied on the consignment, which could be averted, if they are directly imported in the name of Ahmedabad firm. This statement, though retracted, was subsequently confirmed by Shri Mahendra Dalal and even during the adjudication proceedings, both, the appellant as well as Shri Mahendra Dalal, have agreed that the import was made in the name of M/s. Western Sales Corporation, Ahmedabad, though the entire import was motivated and financed by the appellant. In the circumstances, going by the benami arrangements, when the licences have been produced standing in the name of M/s. Western Sales Corporation and their validity otherwise is not questioned by the Department but accepted and debited, the goods cannot be said to have been imported in contravention of any prohibitions attracting the mischief of Section 111(d) of the Customs Act. All the same, in a benami transaction of this type, where, all the documents including the title to the goods standing in the name of M/s. Western Sales Corporation and even the import licences are standing in their name, the appellant, because of the fact that M/s. Western Sales Corporation are a benami firm, cannot plead for substitution of his name as the importer, for purpose of, either allowing clearance against those licences or allowing release on payment of redemption fine. It would have been a different question, if M/s. Western Sales Corporation were before us and had sought for clearance and in that case their plea could have been considered. In this case, M/s. Western Sales Corporation have indicated, even before the adjudicating authority, that they are not interested in the goods and they do not want to clear the goods, despite the fact that licences have been produced. Hence, the goods are to be treated as abandoned by the importer and another person, unless he could establish clear title to the goods, cannot claim release of the goods. Thus, in our view, even if confiscation under Section 111(d) cannot be justified,

release of the goods to the appellant, in the absence of producing clear title to the goods, cannot be ordered, as pleaded in the appeal memorandum. The Department is at liberty, to dispose of the goods in accordance with the provisions of Section 48 of the Customs Act.”

(iii) *Ashwin Doshi v. CCE, Goa - 2004 (173) ELT 488*

“2. After hearing both sides and considering the material it is found -

(a) The Commissioner arrived at the following -

“It can be seen that the fact regarding undervaluation has been accepted by Shri Ashwin Doshi and Shri Doshi has also produced the Manufacturer’s Invoice and voluntarily paid the differential duty worked out on the basis of discounted Manufacturer’s Invoice and the duty paid by them at the time of assessment of the relevant Bills of Entry. Shri Doshi also admitted that he is the financier of the consignments imported in the name of M/s. Goodrick Enterprises, and upon his specific instructions to the suppliers the goods have been underinvoiced. The retraction during submissions is only an afterthought more so in view of the fact that duty on manufacturers invoice has been paid. Moreover statement made before a Customs Officer is necessary and sufficient to be admitted. There is no proof given that there was coercion. As such I am inclined to accept the original submissions before the investigating Officer and reject the subsequent retraction as an afterthought.”

Therefore the appellant has been imposed a penalty of Rs. 1,50,000/- under Section 112(a) of the Customs Act.

(b) After appreciating the role of the appellant herein, it can be safely concluded that his interest in the import was that of a financier. Therefore, he was reportedly assisting the import. The Customs Act definition of importer, envisages a person, natural or juristic, but not more than one person at a time. The reliance of the Id. Advocate on the decisions of Dhirubhai N. Seth [1995 (75) ELT 697] is well founded. There is nothing on record about the appellant herein having handled or have made any declarations on the Bill of Entry filed. No act of misdeclaration therefore could be brought on him, which would call for a liability to confiscation and therefore penalty under Section 112(a).”

(iv) *J.B. Trading Corporation v. UOI - 1990 (45) ELT 9 (Mad.)*

“11. Before I proceed to consider the legal issues involved

the facts may be detailed out. M/s. A.S. Shipping Agencies (P) Ltd., Madras Steamer Agents, for Vessel) M.V. Velenje (by which the goods in question arrived) filed an import Manifest I.M. No. 887/86 on 17-9-1986. This is in accordance with Section 30 of the Act. The impugned consignments are covered by Line Nos. 150, 151 and 152 of the Import Manifest. The entries indicated in the Manifest against the above three lines are as under :

Line No.	B/L. No.	No. of Bales	Marks & Nos.
(1)	(2)	(3)	(4)
150	0099/4871 G2 MDS-010	25	C.S-BC/Madras No. 80424/80448
151	C.990/4873 ZMDS-008 G	25	CSC/Madras No. 80374/80398
152	C/089/4872 ZMDS-009 G	25	CSC/Madras No. 80399/80423
Description of Goods			Name of the Consignee/Importers
White Steam Filature (in all)			M/s. Continental Silk House, 47, 32nd Main Road, Rajaji Nagar, Bangalore (in all)

It will be seen that the Importer is M/s. Continental Silk House, the holders of the bills of lading. The Customs House Agents M/s. Jeena & Co., Madras filed the bills of entry with invoices dated 4-9-1986 of M/s. Brightex, Hong Kong, on 20-9-1986. The goods arrived on 27-9-1986. The bills of entry were admitted by the Department. They were assigned Nos. 5059 to 5061. They were manifested as GM-837/86 Line Nos. 150 to 152 on 29-9-1986. It came to the light of the Customs Department that M/s. Continental Silk House was not in existence and the licence itself had been obtained by fraud and misrepresentation on the strength of fabricated documents. Therefore, a complaint was lodged on 27-11-1986 by the Deputy Chief Controller of Imports and Exports with the Superintendent of Police, C.B.I. (EOW), Madras to take up investigation against the bogus firm. Accordingly, a First Information Report was prepared in Crime No. R.C. 19 of 86, dated 2-12-1986 and investigation was taken up. On 13-3-1987, the Joint Chief Controller of Imports and Exports passed an order of cancellation of the imprest licence dated 4-4-1986 for C.I.F. value of Rs. 9,59,280/- for the import of mulberry raw silk issued in favour of M/s. Continental Silk House after satisfying himself that it will not serve the purpose for which it was granted. This was in exercise of the powers conferred under Clause 2(aaa) read with Clause 9(1)(d) of the Imports (Control) Order, 1955. It had also come to the notice of the Customs Department that neither M/s. Continental Silk House nor the supporting

manufacturer indicated by them, namely, M/s. J.K. Silk Industries were functioning at the addresses given by them and also at the other addresses furnished by M/s. Continental Silk House, at Madras-19. The show cause notice issued on 6th March, 1987 for the proposed cancellation of the licence dated 4-4-1986 had been returned by the postal authorities with the remarks 'No such Continental Silk House, "No. 26, IInd Street, Kanniappa Grarrvii Nagar at Tiruvettiyur, Madras - 600 019 and hence returned to sender'. On 27-3-1987 in view of the above, M/s. Continental Silk House, M/s. J.K. Silk Industries and M/s. Jeena & Co., were called upon to show cause as to why the consignments should not be confiscated under Section 111(d) of the Act read with Section 3(2) of the Imports & Exports (Control) Act, 1947. This was because the licence was obtained by fraud on the strength of the forged documents. The Importer and the Supporting manufacturers are fictitious firms. The said licence had, therefore, been cancelled. Meanwhile, by letter dated 21-2-1987 Mr. Balani, Advocate addressed a letter to the Assistant Collector of Customs on behalf of the petitioner stating that the three bills of entry filed for the clearance of the consignments could be noted and the clearance of the goods be allowed. To the said letter, the Assistant Collector of Customs replied on 31-3-1987 as follows :

Please refer to your Letter dated 21-2-1987 on behalf of M/s. J.B. Trading Corporation, Bombay addressed to the Assistant Collector of Customs (Imports).

You are hereby informed that one M/s. Continental Silk House filed three Bills of Entry for the clearance of the consignments under reference and adjudication proceedings were already initiated by this office for confiscation of the goods and imposing penalties on the importers and others by way of issue of show cause notice. Since, adjudication proceedings are underway, your request for noting the bills of entry in favour of your client M/s. J.B. Trading Corporation, Bombay cannot be acceded to.'"

(v) *Chaudhary International v. CC, Bombay - 1999 (109)*

ELT 371

"33. In this connection we find that the department is correct in pointing out that in terms of Section 2 of the Customs Act the importer is one who is the owner of the goods at the time of importation or any other person who holds himself out as the importer before the clearance of the goods. In this respect we observe that since the goods were consigned to M/s. Chaudhary Intt. and the Bill of

Lading as well as other relevant import documents were in the name of M/s. Chaudhary Intt., therefore, M/s. Chaudhary Intt. could alone be considered as owner of the goods at the time of importation. It is significant that Bill of Lading is not merely a document of afreightment or carriage of the goods but is also universally recognised as a document of title during international trade and commerce.

34. Furthermore, the second part of the definition of the importer as given in Section 2 comes into play in the absence of any information or knowledge or documentation regarding the owner at the time of importation. But once the nationally and internationally recognised documents which were available show that M/s. Chaudhary Intt. were the title holders and importer of the goods, we do not have to proceed further to see whether anybody else was desirous of clearing the goods, because a mere expression of such a desire or willingness was not sufficient to consider one as an importer. In our opinion it is also immaterial whether the order was placed by Sh. Biren Shah/M/s. Audio Visual Devices - whether directly or through M/s. Chaudhary Intt. or the clearance was sought with reference to DEEC passbook of M/s. Chaudhary Intt. for the purpose of determining who was the importer particularly when they did not held themselves out to be the importer of the goods before clearance. The fact that they had agreed to clear the goods and were willing to pay duty or fine was not relevant. Similarly purchase of the goods after importation was a different issue. As rightly pointed out before us even in the second part of Section 2 of Customs Act, 1962 the significant words are before the clearance of the goods and there is no evidence to the effect that they held themselves out to be the importer of the goods by filing any proof of being the real importer before clearance. Even at this stage they have merely stated that they had placed orders and also emphasised that they had not imported but simply purchased the goods and had taken clearance because it was allowed by the customs themselves. In view of the above facts and circumstances even if there was a violation of the customs or the ITC provisions as held by the Collector, he could have given the option to redeem the goods only to M/s. Chaudhary Intt. and not to Sh. Biren Shah or Audio Visual Devices. He has therefore grossly erred in holding Sh. Biren Shah/Audio Visual as the importer and allowing them the clearance.

It is immaterial in this connection as to whether Sh. Biren Shah or Audio Visual Devices gave any letter or stated that they were prepared to take clearance on payment of duty and fine or otherwise. As a matter of fact since it is not a case of high sea sale and there is no indication that the Bills of Lading or Bill of Entry or other documents

were endorsed in the name of Sh. Biren Shah/Audio Visual Devices or that they were authorised by M/s. Chaudhary Intt. to make any submissions or admit anything on their behalf, or to clear the goods or to pay duty, fine or penalty on their behalf and there is no evidence that they had held themselves to be importer of the goods before clearance, or there was any other proof to this effect that the Collector must not to have allowed them to clear the goods confiscated by him whether on payment of fine or otherwise.

Whether they had abetted in any commission or omission of an offence by M/s. Chaudhary Intt. or otherwise was another matter and a different issue but even if it was so established the goods in any case could not have been allowed to be cleared from the docks or redeemed by Sh. Biren Shah/Audio Visual Devices (as aforesaid whether on payment of fine or otherwise).”

(vi) *Hamid Fahim Ansari v. CC, Nhava Sheva - 2009 (241) ELT 168 (Bom.)*

“5. In other words, imports have been done in the name of the petitioner but for some other person. In so far as respondents/Customs Authorities is concerned, they have not pointed out to us any provision under the Customs Act or any Rule or Regulation framed thereunder by which the person having valid IEC Number and having paid the custom duty is prevented from importing goods. At the highest, if the petitioner has obtained IEC number by misrepresenting the Ministry of Commerce and Industry and Director General of Foreign Trade, it is for that body to take action.”

(vii) *Proprietor, Carmel Exports & Imports v. CC, Cochin - 2012 (276) ELT 505 (Ker.)*

“15. Coming to the submission that the appellant is only a “name lender” for the import of goods by one Anwar, we shall presume for the time being that the appellant is only a name lender, but the actual beneficiary of the import is one Anwar. We called upon learned counsel for the respondents to place the relevant provision which prohibits such an activity on the part of an Import Export Code Number holder. Learned counsel for the respondents categorically made a statement that he is not able to place any such prohibition in law except Section 7 of the Foreign Trade (Development and Regulation) Act, 1992, which reads as follows :-

“7.Importer-exporter Code Number. - No person shall make any import or export except under an Importer-exporter Code Number granted by the

Director-General or the officer authorised by the Director General in this behalf in accordance with the procedure specified in this behalf by the Director General”.

The expression “import” occurring in the said section means bringing into India of goods as defined under Section 2(e). There is nothing in the law which requires an importer to be either the consumer or even the buyer of the goods also. Even otherwise, we are of the opinion that it is a matter of common sense that no importer would consume all the materials imported. Necessarily, the goods imported are meant for sale to the consumer, in which case, if an importer, who enjoys the facility of I.E. Code imports certain goods in the normal course of business on the strength of a contract entered by such importer with either a consumer or a trader who eventually sells the imported goods to consumers. We do not understand what can be the legal objection for such a transaction especially where the import of such goods is otherwise not prohibited by law. At any rate, if the respondents have any tenable legal objection on that count, the respondents must pass an appropriate order indicating the legal basis on which the action is proposed and also the nature of the action proposed for such perceived violation of law on the part of the respondents after giving a reasonable opportunity to the importer to meet the case against him, Instead of proceeding to determine the duty leviable on the imported goods by following the appropriate procedure or passing an order of confiscation if they believe that they are justified in the facts and circumstances, the respondents, it appears, are indefinitely detaining the goods without, any appropriate order being passed thereon. Such a course of action, in our opinion, is absolutely illegal.”

held that

‘11. In view of the above reproduced ratio of various judgments, it has to be concluded that an importer under Section 2(26) is a person who has filed the Bills of Entry for the clearances and has paid the Customs duty. The above said judgments also lay down a ratio that an IEC code holder cannot be denied the clearances of consignments if he has filed the Bills of Entry. In these appeals before us, it is undisputed that Bills of Entry are not filed by the appellant

herein and in our considered view, he cannot be held as an importer.'

11. The terms of referral and fresh determination ordered by the Tribunal are no longer material in the light of the decision *supra* which discharged the appellants from consequences under Customs Act, 1962.

12. In view of the above, we set aside the impugned order and allow the appeal.

(Operative Part of the Order pronounced in the open court on 15th February 2022)

(ANIL CHOUDHARY)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*