CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85847 OF 2022

[Arising out of Order-in-Appeal No: MUM-CUS-JSN-IMP-04/2020-21 dated 30th April 2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone – I.]

Commissioner of Customs (Import-II)
New Customs House, Ballard Estate, Mumbai - 400001 … ***Appellant***

versus

Tata Hitachi Construction Machinery Company Pvt Ltd
Jubilee Building, 45 Museum Road, Bangalore 560025 ***…Respondent***

APPEARANCE:

Shri D S Maan, Deputy Commissioner (AR) for the appellant

Shri Abhishek Mishra, (Head Tax Planning) Authorised Representative for the respondent

CORAM:

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

FINAL ORDER NO: A /85531 /2023

DATE OF HEARING: 08/02/2023
DATE OF DECISION: 08/02/2023

PER: C J MATHEW

Commissioner of Customs (Import-II), New Customs House, Mumbai is in appeal against order-in-appeal no. MUM-CUS-JSN-IMP-04/2020-21 dated 30th April 2020 of Commissioner of Customs (Appeals), Mumbai Zone – I which, in proceedings consequent upon challenge to order of the original authority confirming recovery of duty of ₹ 12,77,469/- under section 28 of Customs Act, 1962, along with applicable interest under section 28AB of Customs Act, 1962, besides imposing penalty of ₹ 5,000/- under section 112 of Customs Act, 1962, granted relief to the respondent herein with the finding that

> *'7. On the basis of the above discussions and on the basis of the Hon'ble Punjab and Haryana High Court Order and Hon'ble Supreme Court Order quoted above, I am of the opinion that Customs duty is not recoverable from the importers jointly or severally under the extended period provisions of section 28 of the Customs Act. 1962 along with interest under section 28AB/28AA of the Customs Act, 1962.*
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> *8. Consequent to the above findings that Customs duty is not recoverable from the importers jointly or severally under the extended period provisions of section 23 of the Customs Act, 1962, I hold that no penalty is imposable on the importers under Section 112(a) of the Customs Act, 1962.*
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> *9. I find that the demand of Customs duty from the importers is hit by the bar of limitation. I find that nowhere in the show cause notice it has been alleged that the importers had themselves committed any act of fraud, collusion, mis-statement or mis-declaration. The credits utilised by them vis-a-vis the goods imported while utilizing the DEPB scrips has been held invalid on account of the fraud committed by the impugned exporters. Therefore, the invocation of extended period clause in respect of importers is inappropriate. At the most, the demand could have been for one year period from the date of import and its assessment. Beyond the normal period of one year, the demands against the importers are hit by clause of limitation, owing to no allegation of fraud, collusion, mis-declaration or mis-statement.'*

2. The respondent had been issued with a show cause notice on 4th September 2009 for recovery of duty foregone on goods imported against bill of entry no. 489010/27.08.2004, 491570/08.09.2004, 492071/08.09.2004 and 492212/08.09.2004 claiming exemption thereof on production of 'duty entitlement passbook (DEPB) scrip' procured from the market. It was later ascertained by the customs authorities that the said scrips had been issued to the purported exporter who had conspired to lay claim to these by furnishing ARE-1s to the licensing authority without actual transportation of goods from the factory of manufacture. The finding of the original authority has brought out these facts and circumstances to hold that submission of such scrips were not valid fulfillment of the conditions prescribed for clearance in terms of notification no. 34/97-Cus dated 7th April 1997. The first appellate authority had held that the respondents herein had nothing to do with the presentation of documents to the licensing authorities, that the scrips themselves were not forged and that the importer had purchased the scrips in good faith for setting aside the order of the lower authority.

3. Learned Authorised Representative submits that the liability for discharge of duties of customs is no longer in doubt as the Hon'ble Supreme Court, in *Munjal Showa Ltd v. Commissioner of Customs and Central Excise (Delhi-IV)*[1], has held that there are no circumstances permitting the continued validity of 'instruments of

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[1] [order dated 23rd September 2022 in civil appeal no. 2576 of 2010 and 5608 of 2011]

foreign trade policy' that are void *ab initio*.

4. According to 'authorised person' appearing for the respondent, the demand itself is time-barred as no evidence of any willful mis-statement or suppression of facts has been found by the original authority. It was pointed out that the elapse of time between the filing of the bill of entry for one of the consignments and issue of the show cause notice is beyond the extended period of limitation and, considering the absence of enumerated ingredients, also carries the other components of the demand beyond that permitting the invoking of the extended period. It is also contended that the first appellate authority had accorded proper consideration to the circumstances in which the scrips have been obtained by them, that the scrips continued to be valid in the absence of cancellation by the licensing authority till date and that the importer cannot be held responsible for any misdemeanor on the part of the exporter. He also argued that the decision in *re Munjal Showa Ltd* had been considered by the Hon'ble High Court of Punjab & Haryana in *Commissioner of Customs, Amritsar v. Vallabh Design Products [2007 (219) ELT 73 (P&H)]* and distinguished therein. It was also pointed out that the Tribunal had, in *Neev Trading Co v. Commissioner of Customs, Delhi*[2], also held against the leviability of duty in such circumstances from the importer. It was also contended that the scrips had been verified by

2. [final order no. 50271-50272/2022 dated 22nd March 2022 disposing off appeal no. C/53589-53590/2018 against order-in-original no. 19/Commr/BBG/PPG/2018 dated 25th July 2018 of Commissioner of Customs, ICD, Patparganj, Delhi]

customs authorities before the goods were permitted to cleared.

5. It is abundantly clear from the chronology of events that the decision of the Hon'ble Supreme Court in *re Munjal Showa Ltd* was not available to the lower authorities while disposing off the matter before them. It is also seen that the finding of the original authority on the invalidity of the scrips is based on an independent assessment of the facts presented before him.

6. In these circumstances of lack of appreciation of facts relating to the import of goods, in the light of the decision in *re Munjal Showa Ltd,* as well as the lack of scrutiny of the claim of bar of limitation, it would be appropriate for the impugned order to be set aside and remanded back to the original authority for a fresh decision in accordance with the provisions of law, as enacted, as well as the decision of the Hon'ble Supreme Court in *re Munjal Showa Ltd.*

7. Accordingly, we allow this appeal by way of remand.

(Operative part of the order pronounced in the open court on 8th February 2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*