

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

REGIONAL BENCH - COURT NO. 01

Customs Appeal No. 85085 of 2022

(Arising out of Order-in-Original CAO No. 102/2021-22/CAC/Commr./MMT/Adjn. (Exp.) dated 17.11.2021 passed by the Commissioner of Customs (Export), New Custom House, Mumbai)

M/s Namco Industries Pvt. Ltd.

.... Appellant

527, 5th Floor, Nav Vyapar Bhawan,
49, P. D'Mello Road, Caranc Bunder, Masjid (E),
Mumbai - 400001

Versus

Commissioner of Customs (Exp.), Mumbai Respondent

New Custom House, Ballard Estate,
Mumbai - 400001

Appearance:

Shri Vishal Agarwal a/w Shri Kartik Dedhia, Advocates for the Appellant

Shri Sydney D'Silva, Auth. Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86791/2023

Date of Hearing: 02.05.2023

Date of Decision: 12.10.2023

PER : M.M. PARTHIBAN

This appeal has been filed by M/s Namco Industries Private Limited (herein after, referred to as 'the appellants') with address at 527, 5th Floor, Nav Vyapar Bhawan, 49, P. D'Mello Road, Carnac Bunder, Masjid (East), Mumbai against Order-in-Original CAO No. 102/2021-22/CAC/ Commr./ MMT/Adj.(Exp.) dated 17.11.2011 (referred to as 'THE impugned order') passed by Commissioner of Customs (Export), New Custom House, Ballard Estate, Mumbai.

2. Briefly stated, the facts of the case are that the appellants herein are engaged in manufacture of flat rolled products of iron or non-alloy steel falling under Chapter 72 of the Schedule to the Central Excise Tariff duly

registered with jurisdictional GST authorities under GST No. 27AADCN0843L1ZC. They had obtained an Advance Authorization/license No.0310746001 dated 20.08.2013 for import of goods at concession rate of duty. The said EPCG license was issued to the appellants for 3% concessional duty as 'service provider' involving export obligation for a FOB value of exports of US\$2,731,313.37 or Rs.11,94,94,960/- with export obligation period of 8 years. The amount of duty saved was also given as Rs.1,49,36,870/-. On the basis of specific intelligence developed by the Directorate of Revenue Intelligence (DRI), Lucknow Zonal Unit (LZU), that the appellants have not fulfilled the export obligation in respect of the imports under Advance Authorisation/License, in violation of EXIM policy, an investigation was initiated. On completion of the investigation, show cause proceedings were initiated against the appellants for confiscation of the imported goods, demand of duty payable but for the Advance Authorisation/license concession availed and for imposition of penalties. Learned Commissioner of Customs upon adjudication of the case passed an Order-in-Original dated 17.11.2021 confirming the adjudged demands, confiscation of the impugned goods and imposed redemption fine and penalty. Feeling aggrieved of the impugned order, the appellants have filed this appeal before the Tribunal.

3. Learned Advocate appearing for the appellants had submitted that there is no violation of the conditions of Advance License under Customs notification No.96/2009-Cus. dated 11.09.2009, inasmuch as they have paid the differential duty and interest thereon. He further stated that though initially at the time of inquiry by DEEC Cell of Customs Commissionerate they did not have the permission of DGFT, subsequently they had obtained necessary permission from DGFT and had also applied for discharge of export obligation, as they had also fulfilled the proportionate export obligation and they had also obtained the same from DGFT. They claimed that there is no violation of the Customs notification or other provisions of the Customs Act, 1962 by citing the decision in the case of *Thiagarajar Mills Ltd. Vs. Commissioner of Customs, Trichy* reported in 1999 (111) E.L.T. 288 (Tribunal).

4. Learned Authorized Representative (AR) representing the department had reiterated the findings made in the impugned order and stated that inasmuch as the appellants did not fulfil the conditions of the customs

notification in respect of export obligation, the impugned order is legally sustainable.

5. Heard both sides and perused the records of the case as well as the submissions made by both the parties.

6. Brief facts of the case are that the appellants had imported "prime non alloy steel slabs" falling under customs tariff item 7207 1290 vide seven bills of entries during August – September, 2013 against Advance Authorisation No. 0310746001 dated 20.08.2013 issued by DGFT, Mumbai under Notification No.96/2009-Customs dated 11.09.2009. As per the said Advance Authorisation, the appellants are permitted to import "non-alloy steel slabs" for a CIF value of Rs.115,06,44,000/- and were subjected to an export obligation to export Non-alloy steel plates for FOB value amounting to Rs. 135,15,70,000/-. The maximum period provided for fulfilment of export obligation is 18 months i.e., ending on 28.02.2015. The appellants had actually imported goods of total assessable value of Rs.38,39,52,127/- only as against the permissible higher limit as above, and exported goods of export FOB value of Rs.5,40,43,737/-. The Assistant Commissioner of Customs, DEEC Monitoring Cell of the jurisdictional Mumbai Customs Commissionerate vide letter dated 23.01.2018 had sought the details of fulfilment of export obligation against the Advance Authorisation. The appellants sought extension of time for fulfilment of export obligation by applying to the Policy Relaxation Committee of the DGFT and informed the same to the Customs authorities. The appellants claimed that they had also written to the DEEC cell of Customs about their willingness to pay the differential duty of customs on account of non-fulfilment of export obligation and also claimed to have taken a demand draft for Rs.9,10,69,946/- on 19.09.2018. However, due to the advice of the DEEC Cell about the incorrect amount of differential duty, they had submitted revised letter on 21.09.2018 to the DEEC Cell of Customs with a demand draft for Rs.8,85,52,866/- being the differential duty long with applicable interest. The appellants also claim to have written to the DGFT on 26.09.2018 informing the duty payment and confirmation of the correctness of such duty paid and requesting to inform the shortfall, if any. Directorate of Revenue Intelligence (DRI), Lucknow Zonal Unit (LZU) had conducted search proceedings at the factory and office premises of the appellants on 23 & 24.10.2018. During investigation of the case, on the basis of the

statement of physical exports done by the appellants, DRI had informed them about the error in calculation of duty to be paid in respect of non-fulfilment of export obligation and the objection regarding inclusion of Third party exports for calculation of export obligation fulfilment. They had specifically mentioned in their letter No. DRI/LZU-CI/26/Int-10/2018 dated 10.12.2018 that the appellants are required to pay Rs.91,15,479/- plus interest as applicable, arising on account of difference in duty structure correctly to be applied at 1.88% +12% +3% + 3% + 4% than that actually applied by the appellants at 1.25% +12% +0% +3% + 4% towards their earlier payment as per DEEC Cell of jurisdictional Customs Commissionerate. Accordingly, the appellants had submitted the required demand draft for Rs.91,15,479/- on 20.12.2018 to the DEEC Cell of Customs. Further, the appellants had also paid an amount of Rs.1,18,16,872/- on 04.02.2019. Again in response to the DEEC Monitoring cell letter dated 19.07.2019 for payment of short paid interest, the appellants have paid Rs.58,464/ through their letter dated 20.09.2019. On the basis of the various payments made for default in fulfilment of export obligation as detailed below, the DGFT had issued the Export Obligation Discharge/ Redemption Certificate in exercise of the provisions under Para 4.49 of Handbook of Procedures 2004-09 in it's file No.03/87/165/00188/AM-19.

Amount of duty/interest paid	Challan No. and date
Rs.91,15,479/-	81 dated 21.12.2018
Rs.58,464/-	302 dated 23.09.2019
Rs.5,55,48,140/-	23 dated 21.09.2018
Rs.3,30,04,726/-	619 dated 21.09.2018
Rs.1,18,16,872/-	76 dated 04.02.2019

Thus, the appellants were issued with the Redemption-cum-Regularisation letter dated 20.08.2013, by the DGFT, Mumbai vide its letter dated 19.02.2020 in respect of their Advance Authorisation. Upon completion of the investigation DRI, LZU, the jurisdictional Commissioner of Customs had issued a show cause notice dated 04.03.2021 which culminated with the issue of impugned order dated 17.11.2021.

7. From the facts of the case as above, the short issue for consideration before us is that whether the appellants have violated the provisions of Customs notification No.64/2008-Cus. dated 09.05.2008, in terms of the show cause proceedings or not, and the impugned order confirming the

adjudged demands, confiscation of goods and penalty is sustainable. In order to examine these in detail, the allegations raised in the show cause notice dated 11.06.2012 are extracted and the same are as follows:

"Now, therefore M/s Namco Industries Pvt. Ltd. (IEC No. 1109004737) are hereby called upon to show cause to the Commissioner of Customs (Exports), New Custom House, Ballard Estate, Mumbai 400001 as to why:

a) The imported goods of having assessable value of Rs.33,90,97,340/- (Rupees Thirty Three Crore Ninety Lakh Ninety Seven Thousand Three Hundred and Forty only) should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962 read with conditions of the Bond executed in terms of Section 143 of the Customs Act, 1962 read with Notification No.96/2009-Cus dated 11.09.2009 as amended.

b) The Duty Foregone amount of Rs.6,46,63,619/- (Rs. Six Crore Forty Six Lakh Sixty Three Thousand Six Hundred Nineteen only) along with applicable interest should not be recovered in terms of conditions of Bond executed under Section 143 of the Customs Act, 1962 read with Notification No.96/2009-Cus dated 11.09.2009.

c) The amount of 6,46,63,619/- (Rs. Six Crores Forty-Six Lakhs Sixty-Three Thousand Six Hundred Nineteen only), so paid towards such differential Customs duty and Rs.4,48,80,062/- (Rs. Four Crores Forty-Eight Lakhs Eighty Thousands Sixty-Two only), so paid towards interest by way of TR-6 challans by the Licencee should not be appropriated and adjusted against the Customs duty payable and interest payable thereupon respectively.

d) Penalty should not be imposed on the Licencee under Section 112(a) of the Customs Act, 1962."

The impugned order after consideration of the reply of the appellants and after offering them a personal hearing had decided the case against the appellants passing the following order:

"In view of the above discussion and findings, I pass the following order:

(i) I order to confiscate the goods of having assessable value of Rs.33,99,97,340/- (Rupees Thirty Crore Ninety Seven Thousand Three Hundred and Forty only) under Section 111(o) of the Customs Act, 1962 read with conditions of the Bond executed in terms of Section 143 of the Customs Act, 1962 and Notification No. 96/2009-Cus. dated 11.09.2009 as amended and accordingly impose Redemption Fine of Rs.60,00,000/- (Rs. Sixty lakhs only) against the same on M/s Namco Industries Pvt. Ltd. under Section 125 of the Customs Act, 1962.

(ii) I order to confirm demand of duty amounting to Rs.6,46,63,619/- (Rs. Six Crore Forty Six Lakh Sixty Three Thousand Six Hundred and Nineteen only) along with applicable interest in terms of conditions of Bond executed under Section 143 of the Customs Act, 1962 read with Notification No.96/2009-Cus dated 11.09.2009.

(iii) I order to appropriate the amount of Rs.6,46,63,619/- (Rs. Six Crores Forty-Six Lakhs Sixty-Three Thousand Six Hundred and Nineteen only), so paid towards differential Customs duty as determined under (b) above and Rs.4,48,80,062/- (Rs. Four Crores Forty-Eight Lakhs Eighty Thousand Sixty-Two only), towards interest paid by way of TR 6 challans by the noticee.

(iv) I impose penalty of Rs.30,00,000/- (Rs. Thirty lakhs only) on M/s Namco Industries Pvt. Ltd. under Section 112(a) of the Customs Act, 1962."

8.1. We find that in the impugned order, learned Commissioner has found that as the appellants could not complete the entire export obligation within the stipulated period of time allowed under the Foreign Trade Policy (FTP) and Customs notification No.96/2009-Customs dated 11.09.2009, it amounted to failure of the appellants to fulfil the export obligation as per Customs Notification No.96/2009-Customs and that there was no sanction of the proper officer for the non-observance of such conditions and thus the imported goods became liable to confiscation under Section 111(o) of the Customs Act, 1962. Further, learned Commissioner had also concluded that such contraventions of the provisions of Customs notification No.96/2009-Customs dated 11.09.2009 and FTP, have resulted in the confiscation of imported goods, and the act of omission on the part of the appellants in such failure to fulfil export obligation have rendered them liable for penalty under Section 112(a) *ibid*. As the Customs notification No.96/2009-Customs dated 11.09.2009 and the conditions of import specified therein forms the base for examination of the fact whether these have been complied with or violated by the appellants resulting in consequential action as per the impugned order, we would like to examine these aspects, firstly. The said notification has been extracted below for ease of reference:

*"[PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY,
PART II SECTION 3, SUB-SECTION (i)]*

*GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)*

*New Delhi, the 11th September, 2009.
20 Bhadrapad, 1931 SAKA*

Notification No. 96 /2009 – Customs

G.S.R. 662(E),- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into India against an Advance Authorisation issued in terms of paragraph 4.1.3 of the Foreign Trade Policy (hereinafter referred to as the said authorisation) from the whole of the duty of customs leviable thereon

which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty, safeguard duty and anti-dumping duty leviable thereon, respectively, under sections 3, 8B and 9A of the said Customs Tariff Act, subject to the following conditions, namely :-

- (i) that the said authorisation is produced before the proper officer of customs at the time of clearance for debit;
- (ii) that the said authorisation bears,-
 - (a) the name and address of the importer and the supporting manufacturer in cases where the authorisation has been issued to a merchant exporter; and
 - (b) the shipping bill number(s) and date(s) and description, quantity and value of exports of the resultant product in cases where import takes place after fulfilment of export obligation; or
 - (c) the description and other specifications where applicable of the imported materials and the description, quantity and value of exports of the resultant product in cases where import takes place before fulfilment of export obligation;
- (iii) that the materials imported correspond to the description and other specifications where applicable mentioned in the authorisation and the value and quantity thereof are within the limits specified in the said authorisation;
- (iv) that in respect of imports made before the discharge of export obligation, the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this notification are not complied with, together with interest at the rate of fifteen percent per annum from the date of clearance of the said materials;
- (v) that in respect of imports made after the discharge of export obligation, if facility of CENVAT Credit under CENVAT Credit Rules, 2004 has been availed, then the importer shall, at the time of clearance of the imported materials furnish a bond to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself, to use the imported materials in his factory or in the factory of his supporting manufacturer for the manufacture of dutiable goods and to submit a certificate, from the jurisdictional Central Excise officer or from a specified chartered accountant within six months from the date of clearance of the said materials, that the imported materials have been soused:
 Provided further that if the importer pays additional duty of customs leviable on the imported materials but for the exemption contained herein, then the imported materials may be cleared without furnishing a bond specified in this condition and the additional duty of customs so paid shall be eligible for availing CENVAT Credit under the CENVAT Credit Rules, 2004;
- (vi) that in respect of imports made after the discharge of export obligation in full, and if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or CENVAT credit under CENVAT Credit Rules, 2004 has not been availed and the importer furnishes proof to this effect to the satisfaction of the Deputy Commissioner of Customs or the Assistant Commissioner of Customs as the case maybe, then the imported materials may be cleared without furnishing a bond specified in condition (v);
- (vii) that the imports and exports are undertaken through seaports at Bedi (including Rozi-Jamnagar), Chennai, Cochin, Dahej, Dharamtar, Haldia (Haldia Dock complex of Kolkata port) Kakinada, Kandla, Kolkata, Krishnapatnam, Magdalla, Mangalore, Marmagao, Muldwarka, Mumbai, Mundhra, Nagapattinam, Nhava Sheva, Okha, Paradeep, Pipavav, Porbander, Sikka, Tuticorin, Visakhapatnam and Vadarinar or through any of the airports at Ahmedabad, Bangalore, Bhubaneswar, Chennai, Cochin, Coimbatore, Dabolim (Goa), Delhi, Hyderabad, Indore, Jaipur, Kolkata, Lucknow (Amausi), Mumbai, Nagpur, Rajasansi (Amritsar), Srinagar, Trivandrum and Varanasi or through any of the Inland Container Depots at Agra, Ahmedabad, Anaparthi (Andhra Pradesh), Babarpur, Bangalore, Bhadohi,

Bhatinda, Bhilwara, Bhiwadi, Bhusawal, Chheharata (Amritsar), Coimbatore, Dadri, Dappar (Dera Bassi), Daulatabad (Wanjarwadi and Maliwada), Delhi, Dighi (Pune), Durgapur (Export Promotion Industrial Park), Faridabad, Garhi Harsaru, Gauhati, Guntur, Hyderabad, Jaipur, Jalandhar, Jamshedpur, Jodhpur, Kanpur, Karur, Kota, Kundli, Loni (District Ghaziabad), Ludhiana, Madurai, Malanpur, Mandideep (District Raisen), Miraj, Moradabad, Nagpur, Nasik, Pimpri (Pune), Pitampur (Indore), Pondicherry, Raipur, Rewari, Rudrapur (Nainital), Salem, Singanalur, Surat, Surajpur, Tirupur, Tuticorin, Udaipur, Vadodara, Varanasi, , Waluj (Aurangabad) or through the Land Customs Station at Agartala, Amritsar Rail Cargo, Attari Road, Changrabandha, Dawki, Ghogadanga, Hilli, Jogbani, Mahadipur, Nepalganj Road, Nautanva (Sonauli), Petrapole, Ranaghat, Raxaul, Singhabad and Sutarkhandi or a Special Economic Zone notified under section 4 of the Special Economic Zones Act, 2005 (28 of 2005):

Provided that the Commissioner of Customs may with in the jurisdiction , by special order, or by a Public Notice, and subject to such conditions as may be specified by him, permits import and export from any other seaport/airport/inland container depot or through any land customs station;

(viii) that the export obligation as specified in the said authorization (both in value and quantity terms) is discharged within the period specified in the said authorization or within such extended period as may be granted by the Regional Authority by exporting resultant products, manufactured in India which are specified in the said authorization and in respect of which facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 has not been availed:

Provided that an Advance Intermediate authorization holder shall discharge export obligation by supplying the resultant products to exporter in terms of paragraph 4.1.3 of the Foreign Trade Policy

(ix) that the importer produces evidence of discharge of export obligation to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, within a period of sixty days of the expiry of period allowed for fulfilment of export obligation, or within such extended period as the said Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may allow;

(x) that the said authorisation shall not be transferred and the said materials shall not be transferred or sold;

Provided that the said materials may be transferred to a job worker for processing subject to complying with the conditions specified in the relevant Central Excise notifications permitting transfer of materials for job work;

Provided further that, no such transfer for purposes of job work shall be effected to the units located in areas eligible for area based exemptions from the levy of excise duty in terms of notification Nos. 49/03-CE and 50/03-CE both dated 10th June, 2003, 32/99-CE dated 8th July, 1999, 33/99-CE dated 8th July, 1999, 8/04-CE dated 21st January, 2004, 20/07-CE dated 25th April, 2007, 56/02-CE dated 14th November, 2002, 57/02-CE dated 14th November, 2002, 71/03-CE dated 9th September, 2003, 56/03-CE dated 25th June, 2003 and 39/01-CE dated 31st July, 2001;

(xi) that in relation to the said authorisation issued to a merchant exporter, any bond required to be executed by the importer in terms of this notification shall be executed jointly by the merchant exporter and the supporting manufacturer binding themselves jointly and severally to comply with the conditions specified in this notification.

2. Where the materials are found defective or unfit for use, the said materials may be re-exported back to the foreign supplier within six months from the date of clearance of the said material or such extended period not exceeding a further period of six months as the Commissioner of Customs may allow:

Provided that at the time of re-export the materials are identified to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, as the materials which were imported.

3. Notwithstanding anything contained in this notification, the actual user condition specified in condition numbers (viii) and (x) shall not be applicable in respect of authorisation issued for import of raw sugar for imports made from the 17th February, 2009

till 30th September, 2009 and the export obligation may also be fulfilled by procuring white sugar from any other factory with effect from the 17th February, 2009.

Explanation, – For the purposes of this notification,

(i) "Dutiable goods" means excisable goods which are not exempt from central excise duty and which are not chargeable to 'nil' rate of central excise duty;

(ii) "Foreign Trade Policy" means the Foreign Trade Policy 2009-2014, published by the Government of India in the Ministry of Commerce and Industry vide notification No.1 /2009-2014, dated the 27th August 2009 as amended from time to time;

(iii) "Licensing Authority or Regional Authority" means the Director General of Foreign Trade appointed under section 6 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) or an officer authorized by him to grant a licence under the said Act;

(iv) "Manufacture" has the same meaning as assigned to it in paragraph 9.37 of the Foreign Trade Policy;

(v) "Materials" means-

(a) raw materials, components, intermediates, consumables, catalysts and parts which are required for manufacture of resultant product;

(b) mandatory spares within a value limit of ten per cent. of the value of the licence which are required to be exported along with the resultant product;

(c) fuel required for manufacture of resultant product;

(d) packaging materials re required for packing of resultant product;

(vi) "Specified Chartered Accountant" means a statutory auditor or a Chartered Accountant who certifies the importer's financial records under the Companies Act, 1956 (1 of 1956) or the Sales Tax/ Value Added Tax Act of the State Government or the Income Tax Act, 1961 (43 of 1961)."

8.2. From the perusal of Notification No.96/2009-Customs dated 11.09.2009 as above, it is clear that the import of goods specified in the Import Authorisation issued by DGFT in the name of the appellants, are exempt from the whole of the duty of customs, additional duty of customs and safeguard duty or anti-dumping duty, if any, leviable on such imported goods. However, the said exemption was subjected to certain conditions specified therein. These are in brief, as follows:

(i) the Advance Authorisation shall be produced before the proper officer of customs at the time of clearance of imported goods for making necessary debit entry in such authorisation;

(ii) imports and exports shall be undertaken from the notified customs ports mentioned therein;

(iii) export obligation as per Advance Authorisation (both in value and quantity terms) shall be discharged within the period specified or within such extended period as may be granted by Licensing/ Regional Authority;

(iv) Advance Authorisation shall not be transferred and the imported materials shall not be sold or transferred;

(v) importer shall produce evidence of discharge of export obligation to the satisfaction of DC/AC of Customs within sixty days of the expiry period allowed for fulfilment of export obligation or within such extended period;

(vi) Authorisation holder executes a bond with surety or security binding himself to pay on demand an amount equal to the duty leviable on the imported goods, but for this exemption, in the event non compliance of the conditions of the notification.

8.3. From the records of the case, it is clear that the appellants have produced the Advance Authorisation at the time of import of goods through the notified sea port Mumbai, and executed the Bond for Rs.47,58,98,750/- along with necessary undertaking before the Customs authorities in respect of Advance License No. 0310746001 dated 20.08.2013. There is no case of sale or transfer of advance authorisation in this case. Thus, we find that prima facie the appellants have fulfilled the conditions (i), (ii), (iv) and (vi). In respect of the conditions (iii) and (v), since the competent authority as per the Notification No.96/2009-Customs is the DGFT, who would issue an export obligation fulfilment or discharge certificate, redemption, regularization certificate upon scrutiny of exports and other relevant details as in ANF 4F document, these conditions will be able to be met upon production of such certificate from DGFT authorities.

9. The facts of the case and the chronology of events indicate that in respect of the import of goods vide seven Bills of Entry during 20.5.2014 (2 B/Es), 17.07.2014, 18.07.2014, 04.08.2014 and 13.01.2015 (2 B/Es) under Advance Authorisation No. 0310746001 dated 20.08.2013 (AA), the Assistant Commissioner of DEEC Monitoring Cell of the New Custom House, Mumbai had sought for the details of fulfilment of export obligation vide letter F. No. S/16-12/ 2014. Gr.VII(MC) dated 23.01.2018. It is also a fact on record that as against the total import of duty free raw material permitted as per Advance Authorisation for 44000 MTs, the actual quantity of import of such raw material was only 14156.03 MTs by the appellants. As per the said AA the quantity of finished product that is required to be exported in fulfilment of export obligation is 40,000 MTs, whereas the actual quantity exported by the appellants within 18 months period was only 1492.353 MTs. Thus, as per SION norms (61/509 mentioned in condition sheet of AA) i.e., 1.1 : 1 decided by the Ministry of Commerce, the appellants had the export liability of 12869.12 MTs ($14156.03 \times 100 \div 110$) of the finished goods, whereas they had actually exported only 1492.353 MTs i.e., 11.6% of actual export obligation ($1492.353 \div 12869.12 \times 100$). Thus, the appellants were liable to pay customs duty against 12514.22 MTs of unutilised raw material, calculated on prorata basis after deducting the imported raw material used in

the exported quantity, as per Annexure-A worksheet of the show cause notice dated 04.03.2021, as these were imported by availing the customs duty exemption notification but failed to fulfil the proportionate export obligation. From the records of the case, it is also seen that the appellants had written a letter on 06.02.2018 to the Additional DGFT, Mumbai, i.e., the licensing authority for extension of the export obligation period due to adverse international business scenario faced by them and had also requested the Policy Relaxation Committee of DGFT to allow export obligation period upto 19.08.2018. Further, as claimed by the appellants it is seen from the record that the appellants had taken a demand draft No.478828 dated 19.09.2018 for Rs.9,10,69,948/- drawn on HDFC Bank, Nariman Point Tulsiani Chambers, Mumbai payable to the account of Commissioner of Customs, Mumbai a/c Namco Industries Private Limited, towards the customs duty and interest payable on account of non-fulfilment of export obligation by submitting it in writing to the Deputy Commissioner of Customs, DEEC Monitoring Cell of New Custom House, Mumbai. However, the calculation sheet and copy of challans for payment of government dues given by the said DEEC Monitoring cell indicated the duty amount payable on account of non-fulfilment of export obligation in respect of the appellants as Rs.5,55,48,140/- towards duty and Rs.3,30,04,726/- towards interest in file No. S/16-DEEC-49/2018-19 GR.VII M.Cell. The same was paid by the appellants vide Demand Draft / Manager's Cheque No.478831 dated 21.09.2018 to the government exchequer. Subsequently, on the basis of the DRI, LZU's letter DRI/LZU-CI/Int-10/2018 indicating the shortfall in payment of differential customs duty, the appellants paid Rs.91,15,479/- on 21.12.2018. Due to delay in deposit of the amount submitted by the appellants, further interest of Rs.1,18,16,872/- was also paid on 04.02.2019. Later, on further reminder of DRI, LZU vide letter F. No. S-16-Misc.155/2017-18 Gr.VII M.Cell dated 19.07.2019 for payment of remaining interest amount of Rs.58,464/-, the same was paid on 23.09.2019. Thus, in total, the appellants have paid an amount of Rs.6,46,63,619/- towards differential customs duty and Rs.4,48,80,062/- towards interest thereon to the government arising on account of non-fulfilment of export obligation in the Advance Authorisation No. No. 0310746001 dated 20.08.2013.

10. We find that the Notification No.96/2009-Customs dated 11.09.2009 provide that for the purpose of this notification, the "Licensing Authority or

Regional Authority” would mean the Director General of Foreign Trade appointed under section 6 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) or an officer authorized by him to grant a licence under the said Act, in terms of Explanation to the said notification. Thus, it is clear that the export obligation discharge certificate shall be issued by the DGFT and the same would be submitted by an importer to the Customs authorities for completion of the Advance Authorisation imports and cancellation of bond and undertaking.

11. We further find that the DGFT authorities i.e., office of the Zonal DGFT, Mumbai had issued Redemption cum Regularisation letter dated 19.02.2020 in respect of the Advance Authorisation No. 0310746001 dated 20.08.2013 in the case of appellants. The gist of the approval given by the DGFT indicates as follows:

"Export obligation met in full value as well as in quantity term, in proportion to import made. Consequently, the case has been redeemed in terms of para 4.49 of Handbook of Procedures 2004-09"

Thus we are of the considered view that the appellants have fulfilled the conditions of export obligation at (iii) and (v), after the expiry of the export obligation period but upon payment of an amount of Rs.6,46,63,619/- towards differential customs duty and Rs.4,48,80,062/- towards interest thereon to the government. These payments made by the appellants have been duly taken into account by the DGFT in their letter dated 19.02.2020 while giving the redemption cum regularisation permission to the appellants.

12. As regards the DRI investigation, it is on record as Relied Upon Document (RUD) No.1 to the show cause notice, in the form of intelligence Note dated 30.08.2018, which captures the details of import and export by the appellants in respect of Advance Authorisation No. 0310746001 dated 20.08.2013, and states about the non-fulfilment of export obligation suggesting recovery of duty foregone, seeking approval by competent authority and for initiating necessary investigation. It is also seen from the RUD No.2&3 that the search proceedings by DRI, LZU at the premises of factory and office took place on 23.10.2018 and 24.10.2018 in initiation of the investigation. However, it is on record that the jurisdictional Customs authorities monitoring the Advance Authorisations i.e., DEEC Cell of New Custom House, Mumbai had already initiated action on 23.01.2018 much before the intelligence was even approved and the appellants have already

paid the differential customs duty and interest to the government account on 21.09.2018 before the actual investigation proceedings was initiated by search on 23/24.10.2018. In fact, the appellants have duly taken the Demand Draft for higher amount on 19.09.2018 as calculated by them and it is on account of the DEEC Monitoring cell calculation and duty challans, they had paid lesser amount of duty and interest thereon. Subsequently, whenever the short payment was pointed out by the DRI, LZU or Customs authorities, the same was duly paid by the appellants within a reasonable period of time. We also find it important to note that while the show cause notice alleged that the appellants did not come forward to pay the differential duty voluntarily on their own but for the intervention of DRI, and hence the said duty evasion would have remained undetected due to suppression of facts by the appellants, the learned Commissioner summarily rejected this by concluding in his order that the appellants have co-operated with the department and complied with the payment of entire customs duty and interest due to the government. The extract of the said portion of the order is as below:

"4.31. As I discussed earlier, the noticee has co-operated with the department and paid the entire amount of duty and applicable interest before issuance of show-cause notice, I am inclined to take a lenient view while imposing the redemption fine and penalty."

In view of the above discussions and the conclusion arrived at by the learned Commissioner in para 4.31 of the impugned order, we are unable to find any reason to agree with the findings of learned Commissioner that the imported goods have violated the conditions of Customs Notification No.96/2009-Customs dated 11.09.2009 and thus it is liable for confiscation under Sections 111(o) and 143 *ibid* and that the appellants are liable to penalty for their omission in respect of non-fulfilment of export obligation and non compliance with the conditions of the above notification.

13. We also find that our above views are also concurred in the order of the Co-ordinate Bench of the Tribunal in the case of *M/s Thiagarajar Mills Ltd. (supra)*. The relevant portion of the above order is extracted below:

"The only ground on which the learned Commissioner has confiscated the goods and imposed penalty is that the appellants had not informed the Custom House and therefore a unilateral decision to relocate these machines. While non-intimation to the Assistant Commissioner of Customs was certainly a procedural lapse on the part of the appellants, however, since the DGFT has allowed under EPCG scheme to the unit where the machines have been relocated and a revised LUT has also been

accepted by the authorities concerned, therefore, we find that even if the appellants had approached the Assistant Commissioner of Customs for permission to relocate the machines, the Customs authorities could not have been able to give such a permission and could have only directed the appellants to approach the DGFT. Thus, it is the Order-in-Original. DGFT who are the final authority to sanction under EPCG scheme, for the relocated premises. This has been done on post facto basis. We feel there is no contravention involved after this regularisation under the Customs Act; therefore, we set aside the Order-in-Original impugned and allow the appeal with consequential relief, as per law.”

14. Since the appellants have already paid the amounts of Rs.6,46,63,619/- towards differential customs duty and Rs.4,48,80,062/- towards interest thereon before the issuance of show-cause notice, we uphold the order of the learned Commissioner in confirming the adjudged demands and appropriating the same to the account of government exchequer. However, in view of the detailed discussions and findings in paragraphs 8.1 to 8.3 to 12, we set aside the portion of the impugned order imposing redemption fine of Rs.60,00,000/- in lieu of confiscation of subject goods and also set aside the imposition of penalty of Rs.30,00,000/- on the appellants.

15. In view of the above discussions and analysis, the impugned order insofar as it has imposed redemption fine and penalty on the appellants is set aside.

16. In the result, the appeal is partly allowed in favour of the appellants to the extent of setting aside the redemption fine and penalty imposed in the impugned order.

(Order pronounced in open court on 12.10.2023)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha