CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO. 2

CUSTOMS APPEAL NO: 85311 OF 2021

[Arising out of Order-in-Original No: 42/CAC/COMMR/(I)/MKK/ADJ (IMPORT-I)/2020-21 dated 19th November 2020 passed by the Commissioner of Customs (Import-I), Mumbai.]

Dr Babasaheb Ambedkar Vaidyakiya Pratishthan
Hedgewar Rugnalaya, Sindhu Tir, Bhagyanagar
Near ST Workshop, Aurangabad - 431001 … ***Appellant***

versus

Commissioner of Customs (Import-I)
New Custom House, Ballard Estate, Mumbai - 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 85468 OF 2021

[Arising out of Order-in-Original No: 42/CAC/COMMR/(I)/MKK/ADJ (IMPORT-I)/2020-21 dated 19th November 2020 passed by the Commissioner of Customs (Import-I), Mumbai.]

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

versus

Dr Babasaheb Ambedkar Vaidyakiya Pratishthan
Hedgewar Rugnalaya, Sindhu Tir, Bhagyanagar
Near ST Workshop, Aurangabad - 431001 ***…Respondent***

APPEARANCE:

Ms Anjali Hirawat, Advocate for the assesse-appellant

Shri Ram Kumar, Assistant Commissioner (AR) for Revenue

CORAM:

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

FINAL ORDER NO: _85464-85465 /2024

DATE OF HEARING:	07/11/2023
DATE OF DECISION:	06/05/2024

PER: C J MATHEW

These two appeals, one of Revenue and the other of M/s Dr Babasaheb Ambedkar Vaidyakiya Pratishthan and arising from order[1] of Commissioner of Customs (Import-I), Mumbai, lies within the limited remit of the circumstances in which this dispute has come before us for the second time. On the earlier occasion, the Tribunal, considering the limited plea of the importer that their submission on availability of alternative exemption notification was not considered by the original authority, had remanded disposal of show cause notice back to the original authority for ascertainment thereof while directing deposit of the duty arising therefrom as a condition.

2. M/s Dr Babasaheb Ambedkar Vaidyakiya Pratishthan had imported 'phased array Doppler system model SSD-630' valued at ₹ 12,65,633/- under claim for exemption of notification no. 64/88-Cus dated 1st March 1988 which was held as ineligible with consequential duty liability of ₹ 15,35,846/- ordered to be recovered, along with interest thereon under section 28AA of Customs Act, 1962, upon payment of fine of ₹ 1,30,000/- imposed under section 125 of Customs

[1] [Order-in-original no. 42/CAC/COMMR/(I)/MKK/ADJ (IMPORT-I)/2020-21 dated 19th November 2020]

Act, 1962 for redemption after confiscation under section 111(o) of Customs Act, 1962 and of penalty of ₹ 15,000/- under section 112(a) of Customs Act, 1962. During the course of adjudication proceedings, even as the eligibility to avail the claimed exemption was re-iterated, it was submitted by the importer that notification no. 65/88-Cus dated 1st March 1988, entailing duty liability of ₹ 5,06,253/- was available to them, owing to which the Tribunal had remanded the matter back to the original authority with specific directions.

3. The appellant-importer had complied with the deposit as ordered by the Tribunal and the impugned order, too, was similarly compliant by affirming eligibility for the alternative notification to limit recovery of duty to ₹ 5,06,253/- and dropping fine in lieu of confiscation even while interest under section 47(2) of Customs Act, 1962 was charged as alternative to that proposed in the notice, and confirmed in the earlier round, on plea of noticee that the particular empowerment did not exist at time of import and penalty of ₹ 50,000/- under section 112 of Customs Act, 1962 was imposed this time around. The importer contests the fine and penalty in the proceedings before us and appeal of Revenue is against the acceptance of the plea of the importer that they were entitled to the alternative exemption notification when it had not been claimed in the entry filed by them.

4. We have considered the respective points and counters made by Learned Authorized Representative and Learned Counsel for the

importer-appellant in their respective submissions.

5. It transpires that the appeal of Revenue does not dispute that the alternative notification would entitle the importer to lesser duty than that proposed in the notice and resists the impugned order solely on the ground that such claim had not been made in the bill of entry filed by them. The finding in the impugned order of eligibility to avail the alternative exemption notification is not controverted and as *denovo* adjudication had been ordered by the Tribunal to consider that specific claim, we find no reason to detain ourselves in considering the appeal of Revenue. That appeal, being devoid of merit, is dismissed.

6. We observe that proposal in the show cause notice to charge interest under section 28AA of Customs Act, 1962, though affirmed in the earlier round of adjudication, was fairly dropped in the impugned order on consideration of plea of noticee only to be reinstated by recourse to section 47(2) of Customs Act, 1962 while the penalty imposed under section 112 of Customs Act, 1962 was enhanced from ₹ 15,000 in the earlier round to ₹ 50,000 in the impugned order and it is these two that remain in dispute in appeal of M/s Dr Babasaheb Ambedkar Vaidyakiya Pratishthan.

7. According to Learned Counsel, it is settled law that adjudicatory proceedings be limited to the framework of show cause notice and that consequence of challenge to detriment by appellant cannot be attended

by enhancement of detriment in the absence of dispute to such by Revenue. It was also contended that the decision of the Tribunal in *Commissioner of Customs, Vijayawada v. Ruchi Soya Industries Ltd [2016 (339) ELT 613 (Tri.-Bang.)]* which held that

> *'26. The goods were cleared or the out of charge order was made on 23-11-2000. It is after this that a letter was issued demanding enhanced duty. The appellants paid the differential duty on 10-3-2001. It is to be noted that the assessed duty stands discharged by respondents on 20-11-2000 itself. Thus there was no delay in paying duty assessed in terms of Section 47(1) of the Act. Sub Section (2) of Section 47, states that interest is payable if the duty is not paid within 2 days from the date on which the assessed bill of entry is returned to the assessee for payment of duty. I have to agree with the Member (J) that in the present case in terms of Section 47(1), there is no delay in payment of duty and consequently there is no liability to pay interest under Section 47(2) of the Act. The learned counsel appearing for respondents, Shri Karan Talwar has relied upon the judgment laid in India Carbon Ltd. v. State of Assam 1997 (106) STC 460 SC to canvass the proposition that interest is substantive in nature and for levy of interest there should be a substantive provision. The demand and recovery of interest thus can be only as provided by law.'*

precluded recourse to section 47(2) of Customs Act, 1962 once the goods had been cleared for home consumption and with section 28AA of Customs Act, 1962 being the sole empowerment which, in the present instance, was beyond jurisdictional ambit owing to lack in the statute at the time of import, fastening of interest liability was not legal.

8. This is, indeed, an interesting proposition that, at first blush, appears to be unimpeachable. But it would not be so on emplacing the entire *de novo* proceedings in the proper framework as liability to penalty is challenged in entirety, and not to the extent of enhancement, on the ground that the fresh adjudication was to be deemed as fresh assessment with the claim for alternative exemption notification deemed to have been included in the entry made under section 46 of Customs Act, 1962 at the time of import. The order of the Tribunal in the earlier round is not explicit on that aspect and, indeed, could not, in absence of ground canvassed then that bill of entry should stand amended, under the authority of section 149 of Customs Act, 1962, have been. Thus, the direction of the Tribunal was limited to the factual matrix as set out in the show cause notice except for consideration of 'post-notice' please for alternative, and more beneficial, duty liability on the specific plea of the appellant.

9. Were the bill of entry to be deemed to have not been assessed as on date of issue of show cause notice to enable the claim of exemption to be deemed to exist therein, the chargeability of interest under section 47(2) of Customs Act, 1962 could not have been disputed and the decision of the Tribunal, in *re Ruchi Soya Industries Ltd*, would not be applicable to the appellant-importer. It is solely on the fact of 'post-assessment' notice that the plea against recourse to retrospective jurisdiction under section 47(2) of Customs Act, 1962 could lie and is

allowed now. Consequently, the stand cannot be reversed to press for lack of jurisdiction to invoke section 112 of Customs Act, 1962.

10. It is settled law that penalty cannot be enhanced in subsequent proceedings except in challenge that places importer on notice of intend to do so. That would have been valid premise had appeal of Revenue been preferred for that purpose. The erstwhile adjudication order had limited the penalty to ₹ 15,000/- for not having discharged duty liability of ₹ 15,35,846/- at the time of clearance against claim of condition of eligibility which, uncontestably, had not been complied with. Subsequently, with the duty liability determined at ₹ 5,06,253/- in the fresh proceedings, the enhancement is not only against settled law but also, unquestionably, inequitable. It would, therefore, be appropriate that the penalty be restricted to ₹ 15,000/-.

11. Accordingly, the impugned order is modified to set aside the interest liability and to limit the penalty of ₹ 15,000/-. Appeal of Revenue is dismissed.

(Order pronounced in the open court on 06/05/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*