CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Custom Appeal No. 89479 of 2013

(Arising out of Order-in-Original No. 132/2013-14 CC(I), JNCH dated 23.10.2013 passed by the Commissioner of Customs (I), JNCH, Raigad)

M/s. Niraj Cement Structurals Ltd. …..**Appellant**
Niraj House, Sunder baug,
Near Deonar Depot, Chembur,
Mumbai

Vs.

Commissioner of Customs (Import), Nhava Sheva …..**Respondent**
Jawaharlal Nehru Custom House,
Post Uran, District Raigad, Sheva

With

Custom Appeal No. 89480 of 2013

(Arising out of Order-in-Original No. 132/2013-14 CC(I), JNCH dated 23.10.2013 passed by the Commissioner of Customs (I), JNCH, Raigad)

Gulshan Chopra …..**Appellant**
M/s. Niraj Cement Structurals Ltd.
Niraj House, Sunder baug,
Near Deonar Depot, Chembur,
Mumbai

Vs.

Commissioner of Customs (Import), Nhava Sheva …..**Respondent**
Jawaharlal Nehru Custom House,
Post Uran, District Raigad, Sheva

APPEARANCE:

Shri S N Kantawala, Advocate for the appellant
Shri D S Maan, Deputy Commissioner (AR) for the respondent

CORAM: **Hon'ble Mr C J Mathew, Member (Technical)**
Hon'ble Mr Ajay Sharma, Member (Judicial)

FINAL ORDER No: 85477-85478/2024

DATE OF HEARING : 08.11.2023
DATE OF DECISION : 07.05.2024

PER: C J MATHEW

M/s Niraj Cement Structurals Ltd, in consequence of successful bid for award of project for ' providing 2-lane concrete pavement and widening of culvert including construction of new slab culvert for km 107.000 to 184.000 = 77.80 km of NH 21' by Public Works Department (PWD), Government of Chattisgarh on 24th June 2010, filed bill of entry no. 622089/22.12.2010 for import of 'slipform paver finisher for laying concrete pavement model S600' valued at ₹ 5,55,50,000 under claim for concessional duty available in notification no. 21/2002-Cus dated 1st March 2002 (at serial no. 230) which was duly assessed and cleared by customs at Jawaharlal Nehru Customs House (JNCH), Nhava Sheva. The order[1] of Commissioner of Customs, Jawaharlal Nehru Customs House (JNCH) denying eligibility thereto at the time of import with consequent recovery of duty foregone of ₹ 1,32,73,596 in full under section 28(1) of Customs Act, 1962, along with interest thereon under section 28AB of Customs Act, 1962, confiscation of the same under section 111(o) of Customs Act, 1962 though with offer of redemption,

[1] [order-in-original no. 132/2013-14 CC(I), JNCH dated 23rd October 2013]

under section 125 of Customs Act, 1962, on payment of fine of ₹ 55,00,000 along with penalty of like amount under section 114A of Customs Act, 1962 while invoking section 112 and section 114AA of Customs Act, 1962 for imposing penalty of ₹ 10,00,000 under each on Shri Gulshan Chopra is under challenge.

2. The factual matrix, set out on behalf of appellant by Learned Counsel, and the evaluation of facts in the impugned order being at variance, it behoves us to recall the chronology of events leading to seizure, ostensibly for breach of condition in exemption notification by retention of the goods at the Mumbai premises of importer. It is admitted that, upon clearance, the machinery was shifted to the premises to await clearance for commencement of the contractual undertaking which, however, did not, then or even later, occur owing to civil disturbances attributed to 'Maoist activity' in the intended project area. Subsequently, on 8th July 2011, the contract was terminated and dispute resolution, under the terms of the contract, initiated when customs authorities seized the goods on 4th October 2011. Admittedly, the impugned goods were never deployed on the intended project and notice issued, for recovery and detriments under Customs Act, 1962, on 30th March 2012 which the original authority, in order of 21st October 2013 and disregarding their plea for benefit of depreciation in computation of duty liability, held to be sufficient for confirmation of liability and detriment *supra*.

3. It is contended by Learned Counsel for appellant that the goods had been imported strictly in accordance with conditions in the impugned notification and that the failure to comply with 'post-importation' condition of deployment was attributable to reasons beyond their control, including *suo motu* termination of contract which was under redressal process, and that there had been no diversion of goods to warrant either recovery of duty foregone or for imposition of detriment. Reliance was placed by him on decisions of the Tribunal in *Director, Directorate of Agriculture v. Commissioner of Customs, Madras [2007 (214) ELT 279 (Tri-Del)]*, in *Gammon India Ltd v. Commissioner of Customs (Import), Mumbai [2019 (369) ELT 918 (Tri-Mum)]* and in *Ircon International Ltd v. Commissioner of Customs (Imports), Mumbai [2019 (366) ELT 1034 (Tri-Mumbai]*.

4. According to Learned Authorised Representative, the claim of the appellant for availment of the impugned notification is questionable as the intended project was to be executed by another, *viz*., M/s Super Build India Pvt Ltd, and that it was never intended to be used for any eligible project. It was further contended that the non-implementability of the project was an 'eye wash' as it is clear from the communication with the project agency that other contractors did fulfill their end of the agreements. It was submitted that eligibility for depreciation, emanating from the relaxation of terms of notification was subject to furnishing of certification from the agency concerned which has not

been. Reliance was placed on the decision of the Hon'ble Supreme Court in *Gammon India Ltd v. Commissioner of Customs, Mumbai [2011-TIOL-60-SC]* and of the Tribunal in *GMR Infrastructure Ltd v. Commissioner of Customs (Exports), Mumbai [2019-TIOL-3598-CESTAT-MUM]*, in *Patel Engineering Ltd v. Commissioner of Customs (Imp), Mumbai [2012-TIOL-2027-CESTAT-MUM]*, in *Venkata Rao Infra Projects v. Commissioner of Customs (Imp), Mumbai [2019-TIOL-1127-CESTAT-MUM]*, and in *Ashoka Buildcon -Valecha Engineering Ltd v. Commissioner of Customs (Imp), Mumbai [2013-TIOL-2347-CESTAT-MUM]*. Reliance was placed on decisions of the Tribunal in *Malu Paper Mills Ltd v. Commissioner of Central Excise, Nagpur [2018 (363) ELT 302 (Tri-Mum)]* and in *Pradeep Master Batches Pvt Ltd v. Commissioner of Customs (Export), Mumbai [2017 (348) ELT 692 (Tri-Mum)]* to support imposition of penalty on the individual-appellant.

5. The decisions cited on behalf of the respondent range from ineligibility of constituent of 'joint venture' to avail benefit of notification intended for awardee of contract in eligible projects which only the 'joint venture' was, strict construction enjoined by the decision in *re Dilip Kumar* precluding benefit from being availed of by sub-contractor to non-use in intended project or diversion for use in ineligible project. The fitment of the factual matrix of those disputes within the framework of the present dispute has not been brought out

except by reference to alleged intent and circumstantial suspicion about motives of the appellant which have been elaborately narrated in the impugned order. That, however, is of no concern in a dispute emanating from claim for eligibility to a particular notification granting concession in import duties. The backdrop to this facility from the Central Government has been set out thus

> *'10. For some unfathomable reason, this particular exemption, notified in acknowledgement of the importance of the liberalized policy of the Government of India for execution of road infrastructure development projects through private entities by resort to multifarious business models, has been dispute-prone ever since. In the process, the huge investment in capital goods providing returns only the long-term on planned programs of critical importance to the general development of the economy, appears to have been lost sight of. We do acknowledge that it is not the domain of tax enforcement to display leniency on this consideration. The scheme of the exemption, limited as it is to specified goods that, by and large, are deployed in road construction is contingent upon the retention of the goods for a period of five years. It does not take rocket science to conjunctive that it is highly improbable that single project would take five years to complete and, return of the goods to the overseas supplier not being contemplated in the notification, optimum utilisation of the goods by deployment must be construed, in the absence of specific embargo, as not objectionable in principle. There could, and should, be some constraints in*

> *the alternative utilisation; this is where we take note of the undertaking, prescribed as pre-condition, in the exemption notification.'*

in *re Gammon India Ltd*.

6. Further, the intendment of this facility, as evident from the notification, has also been elaborated thus

> *'11. The exemption itself, from a plain reading, accords the privilege to specified entities that are bound by the obligation enshrined therein. The obligation, of continued possession and of utilisation during the possession, transcends the moment of import to bind for the prescribed time. That, however, is a distinct engagement encapsulated in an enforceable undertaking binding such entities that conform to entitlement at the threshold.*
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> *12. At the threshold, the prescribed condition of eligibility must be met. Other than departments of Government and their statutory instruments, private entities or public commercial enterprises that contract with these departments or instruments fulfil the condition. The exemption notification does not, in relation to entitling of the entities, employ the expression 'for' to qualify such entitlement. Impliedly, the entitlement arises from a contractual engagement that permits access to the exemption notification. Not unnaturally, such a contract may terminate for manifold reasons. A mutual belief of such engagement that may, for some reason or the other, be disengaged even before commencement should not operate retrospectively to disentitle of the entity that derived the advantage of the exemption at the threshold. Indeed, it would appear that, with the insistence on retention and utilisation, the safeguard of public interest distinguishes the eligibility at the threshold from the continuing eligibility thereafter. The two conditions are, thus, to be enforced separately and distinctly. Hence, it*

> *can be concluded that the scheme of exemption is not intended for exclusive use in contracts furnished as evidence of entitlement to the exemption. In the present dispute, the eligibility at the threshold, arising from the agreement with the National Highways Authority of India whose genuineness is not controverted, cannot be denied notwithstanding the subsequent breakdown of the engagement.*
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> *13. With the dichotomy of entitlement at the threshold, which stipulates contract with the designated department, authority or instrumentality, and of continued use, restricted only to possession and utilisation exclusively on 'roads construction' without reference to the designated department, authority or instrumentality, utilisation for any kind of 'road construction' would suffice to meet the commercial objective of optimum utilisation and convergence with public interest that motivated the grant of exemption. Needless to say, deployment on a project other than road would serve as disentitlement.'*

in *re Gammon India Ltd* which, and not incidentally, can be reasonably said to proceed from policy of the Central Government for establishing road infrastructure and not as benevolent disbursement of patronage from the tax administration or by depleting the fruits of their labour in collecting of taxes. From the concatenation of the two, it is seen that the notification segregates threshold eligibility which earns concession in duty liability on import and continuing eligibility thereafter till the end of the 'lock in' period stipulated in the notification. It is only the adherence to these two stages that calls for the statutory engagement of customs administration. That this underlying foundation has been acknowledged by customs authorities is implicit in the recourse to section 111(o) of Customs Act, 1962, which is to be resorted for noncompliance with ‘post-importation’ conditions, in the impugned order. Appropriately, it must be premised, except where the contrary is evidenced, that threshold eligibility has been complied with.

7. While some attempt appears to have been made in that direction, the narration has gone beyond the presentation of imported goods for clearance under the prescription in section 46 of Customs Act, 1962, to be assessed in accordance with section 17 of Customs Act, 1962 and, thus, forayed into the character and behaviour of the importer which a taxing statute has nothing to do with except in relation to goods between landing in the territory of India and clearance for home consumption. In the context of the present dispute, the blossoming of events prior to import and after clearance, save for conditions of import, are irrelevant and reference to such in the adjudication order appears to be proverbial straw clutching of which does little to sanctify the adjudicatory process or promote the credibility of the adjudication order. We are concerned with deployment of goods that, having been procured on ‘high sea sale’ in a contractually secured transaction, are endorsed as not being for the intended project. Neither has the sale been voided nor has the award of work, and certified as being in favour of the importer by the competent authority, been questioned in the order. The threshold eligibility is, thus, beyond controverting.

8. There is no doubt that the goods were not used for the intended project which, for whatever reason and not relevant in determining the consequences of non-utilization, is certainly cause for triggering duty liability should the notification so warrant. There is also no controverting of the submission of the appellant that the goods were not used on any project let alone on any ineligible road project. The notification stipulates that the goods cannot to be used for any ineligible activity during the 'lock in' period. The goods were, in accordance with the notification, 'locked in' till December 2015 which happened to be truncated with effect from October 2011, barely a year into the 'lock in' period, and by premature action in the part of customs authorities. The hasty conclusion that contract cancellation did trigger the foreclosure of entitlement under the notification is not supported by the terms and conditions of the notification. The seizure and subsequent forced debarment from use, even within the scope of the relaxation extended by amendments, effectively interfered with the free run intended in the notification without even the excuse of goods having been diverted. For this reason, the entire period of inoperative 'lock in' from date of seizure should stand erased for the purposes of administration of the notification.

9. Accordingly, the recovery of duty and the confiscation ordered by the adjudicating authority are set aside, along with the consequential detriments, as also the show cause notice. The impugned goods are

restored to the appellant-importer for compliance with the post-importation condition in the notification. In the event of inability to comply thereby, owing to changed circumstances of the scheme of the Central Government, they are at liberty to approach the jurisdictional customs authorities for termination of the deferment as provided for in the impugned notification. Needless to say, eligibility for depreciation will be determined by the 'proper officer' empowered to assess liability on such termination.

10. Appeals are disposed off on these terms.

(Order pronounced in open court on 07.05.2024)

(Ajay Sharma) **Member (Judicial)**	**(C J Mathew)** **Member (Technical)**

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