

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

APPEALS NO: C/369, 370 & 537/2010

[Arising out of Order-in-Original No: 2010/CAC/CC (I)/SHH dated 22nd January 2010 passed by the Commissioner of Customs (Import), Mumbai.]

For approval and signature:

Hon'ble Shri S K Mohanty, Member (Judicial)

Hon'ble Shri C J Mathew, Member (Technical)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : Yes
 2. Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
 3. Whether Their Lordships wish to see the fair copy of the Order? : Seen
 4. Whether Order is to be circulated to the Departmental authorities? : Yes
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Gammon India Ltd
Charan Singh
Umakant Tiwari

... Appellants

versus

Commissioner of Customs (Import)
Mumbai

...Respondent

Appearance:

Shri Prasad Paranjape, Advocate for appellant no. 1 and 2

Shri Prakash Patankar, Consultant for appellant no. 3

Ms P Vinita, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri S K Mohanty, Member (Judicial)
Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: 17/08/2018
Date of decision: 19/12/2018

ORDER NO: A/88154-88156/2018

Per: C J Mathew

The issue for resolution in this dispute of M/s Gammon India Ltd, at least from the perspective of Revenue, is the extent to which notification no. 21/2002-Cus dated 1st March 2002 exempting specified goods subject to certain conditions complied with at the threshold should bind the importer thereafter. On the part of the importer-appellant, the dispute is presented at a more basic level: that, despite being compliant with the conditions of notification and having sought time to submit relevant evidences, Commissioner of Customs (Import), Mumbai has, *vide* order-in-original no. 2010/CAC/CC (I)/SHH dated 22nd January 2010 decided *ex parte*, that the conditions of exemption notification had been breached with consequential liability to customs duty, along with interest, confiscation with fine for redemption and penalties. Besides, penalties were imposed on Shri Umakant Tiwari and Col Charan Singh, two employees, under section 112 of Customs Act, 1962 who have also filed appeals.

2. It is obvious from the identification of issues in the appeal as prosecuted on behalf of M/s Gammon India Ltd and the defence mounted by Revenue that there is a disconnect in the discourse itself. Such a disconnect can have only one resolution to which we shall turn presently following the narration of the facts and analysis of the notification in dispute.

3. M/s Gammon India Ltd imported 'hydraulically operated self-propelled piling rig Model No. HR-80' valued at ₹ 2,34,57,654 and, in bill of entry no. 672402/04.05.2006, claimed benefit of exemption cited *supra* at serial no. 230 available to 21 specified goods (enumerated in List 18 among which the impugned goods are at serial no. 14) subject to compliance with condition no. 40. As prescribed in the exemption notification thus

'40. *If,-*

(a) *the goods are imported by-*

(i) *the Ministry of Surface Transport, or*

(ii) *a person has been awarded a contract for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Government or by a road construction Corporation under the control of the Government of the State or Union Territory; or*

(iii) a person has been named as a sub-contractor in the contract referred to in (ii) above for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Government or by a road construction Corporation under the control of the Government of the State or Union Territory;

(b) the importer, at the time of importation, furnishes an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, to the effect that he shall use the imported goods exclusively for the construction of roads and that he shall not sell or otherwise dispose of the said goods, in any manner, for a period of 5 years from the date of their importation; and

(c) in case of goods of serial no. 12 and 13 of List 18.'

xxxxxxx'

the importer furnished the undertaking and submitted the agreement with National Highway Authority of India for 'widening and strengthening of 4-lane of existing carriageway of National Highway No. 57 from KM 230-KM 190 (Forbesganj to Sirachi sector), Bihar' as demonstration of their eligibility.

4. The facts in the show cause notice issued on 28th August 2009 are not in dispute. Immediately after clearance, the goods were transported to Taloja and thereafter to Delhi where it was commissioned on 23rd August 2000 for deployment in a work

contracted with M/s Delhi Metro Rail Corporation. Subsequently, the goods were utilised for various other projects among which was one for the National Highway Authority of India. However, the project for which they had entered into the agreement that was furnished at the time of import did not fructify.

5. Based on the allegation that these projects on which the imported goods had been deployed concerned activities other than construction of roads and with the finding that such utilisation constituted a breach of the undertaking that the imported goods would be used exclusively for road projects, the proposals in the show cause notice were confirmed in the impugned order. Admittedly, the order was passed in the absence of a final response from the noticee and, though not for want of opportunities having been granted to them, without being heard in person. This is the primary contest of Learned Counsel for appellants along with the claim that the goods were utilised, even if not for the agencies specified in the conditions of exemption, only for road construction and that, had they been given time as sought by them evidence to the satisfaction of the adjudicating authority could have been produced.

6. It is also contended by Learned Counsel that their request for cross-examination of an official of M/s Delhi Metro Rail Corporation, whose submission about the activities of that organisation had been

relied upon in the show cause notice, had met with a peremptory refusal, and that the duty liability should have been computed after allowing depreciation for the period of deployment on road works which was also refused by relying upon certain judgements that had no bearing on the specific facts pertaining to the present issue. The imposition of penalty under section 114A of Customs Act, 1962 without having been invoked in the show cause notice is also assailed by placing reliance on the decision of the Hon'ble High Court of Delhi in *Noble Moulds Pvt Ltd v. Commissioner of Central Excise [2010 (259) ELT 338 (Del)]* and of the Hon'ble Supreme Court in *Commissioner, Sales Tax, UP v. M/s Anoop Wines [1988 Supp SCC 731]*. It is a further claim of Learned Counsel that the restriction on use in other projects was liberalised in 2010 by a substitution in the exemption notification and the clarificatory nature of the substitution mandates retrospective effect.

7. Making an impassioned plea for setting aside the penalties imposed on the two individuals, Learned Counsel points out that the adjudicating authority appears to have based this part of the order on the premise that confiscation is sufficient for penal consequences even in the absence of any evidence, or even allegation, that some act of omission or commission on the part of the individuals was instrumental in the breach leading to confiscation. In support whereof, he places reliance on the decision of the Tribunal in *Associated*

Plastics and Rayons v. Commissioner of Central Excise & Customs, Vapi [2007 (210) ELT 524 (Tri-Ahmd)], in *Carpenter Classic Exim Pvt Ltd v. Commissioner of Customs, Bangalore [2006 (200) ELT 593 (Tri-Bang)]* affirmed by Hon'ble Supreme Court, in *OP Agarwal v. Commissioner of Customs, Kandla [2005 (185) ELT 387 (Tri-Del)]* and in *ZU Alvi v. Commissioner of Central Excise, Bhopal [2000 (117) ELT 69 (Tribunal)]* all of which lay emphasis on the penal consequences being preceded by a specific finding on the role of the individual in relation to the breach that led to the confiscation of the goods.

8. Learned Authorised Representative contends that, in the light of non-disputation of facts relating to import against declaration of deployment did not occur and utilisation on projects other than that of National Highway Authority of India, the judgement of the Hon'ble Supreme Court in *Novopan India Ltd v. Collector of Central Excise and Customs, Hyderabad [1994 (73) ELT 769 (SC)]* holding that

'18. We are, however, of the opinion that, on principle, the decision of this Court in Mangalore Chemicals - and in Union of India v. Wood Papers referred to therein - represents the correct view of law. The principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee - assuming that the said principle is good and sound - does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to

relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in Mangalore Chemicals and other decisions, viz., each such exception/exemption increases the tax burden on other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. As observed by a Constitution Bench of this Court in Hansraj Gordhandas v. H.H. Dave [1978 (2) E.L.T. (J 350) (SC) = 1969 (2) S.C.R. 253] that such a Notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption.'

did not brook any other alternative which is also taken note of in the later decision of the Hon'ble Supreme Court in *Gammon India Ltd v. Commissioner of Customs, Mumbai [2011 (269) ELT 289 (SC)]* while placing on record its disapproval of contrary stances adopted on the same notification by different benches of the Tribunal. This view was, according to her, followed by the Tribunal in *Rajhoo Barot v. Commissioner of Customs (Import), Mumbai [2017 (348) ELT 562 (Tri-Mumbai)]* in a dispute pertaining to diversion of or hiring out of goods imported by availing the same exemption. She drew attention to the finding, based on decisions, that the onus of establishing compliance resting on the claimant for exemption had not been duly

discharged. It was also pointed out that the applicability of the decision in *Commissioner of Customs, Mumbai v. Toyo Engg India Ltd* [2006 (201) ELT 513 (SC)] claimed by the noticee was correctly discarded as the facts were substantially different.

9. She also places reliance on the decision of the Tribunal in *Patel Engineering Ltd v. Commissioner of Customs (Imports), Mumbai* [2013 (295) ELT 243 (Tri-Mumbai)], and affirmed by the Hon'ble Supreme Court, which held that

'13. As per the condition of the Notification, the undertaking was given by the appellant at the time of import that the impugned paver finisher shall be used only and only for construction of roads for a period of 5 years. From the facts ascertained hereinabove, we find that the paver finisher was not used for the intended purpose as undertaken by the appellant. In view of this finding, the department has rightly issued show-cause notice to the appellant for violation of condition of their undertaking and thereby for denying the exemption under Notification 21/2002. As show-cause notice has been rightly issued and in the adjudication order it is also found that the impugned paver finisher was not used for construction of road, therefore they have not fulfilled the condition terms of undertaking/bond at the time of import. As they have violated the terms of condition of their bond/undertaking, therefore they are liable to pay duty as demanded in the impugned order. On limitation, we find that the show-cause notice has been issued for violation of undertaking given at the time of importation for intended use and the fact that the imported paver finisher was not found to

be used for intended purpose during investigation which amounts to suppression, therefore, the show-cause notice issued is within limitation.'

and on the decision in *Shreeji Construction v. Commissioner of Customs (Import), Mumbai [2014 (313) ELT 566 (Tri-Mumbai)]*. The latter, though referring to the expression 'road construction', we do not find to be of any relevance to the present dispute on an entirely different matter. On the contrary, the reference in that order to the decision of the Hon'ble Supreme Court in *Collector of Central Excise, Guntur v. Andhra Sugar Ltd [1988 (38) ELT 564 (SC)]* to the effect that

'It is well-settled that the meaning ascribed by the authority issuing the Notification, is a good guide for contemporaneous exposition of the position of law. Reference may be made to the observations of this Court in KP Varghese v. The Income Tax Officer, Ernakulam, [1982] 1 SCR 629. It is a well-settled principle of interpretation that courts in construing a Statute will give much weight to the interpretation upon it at the time of enactment and since, by those whose duty as been to construe, executive and apply the same enactment.'

may offer life to the plea of the appellant that the subsequent amendment, being clarificatory, was the remedial substitution to give effect to the original intent.

10. For some unfathomable reason, this particular exemption, notified in acknowledgement of the importance of the liberalised

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.

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.

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 fulfill 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 Highway

Authority of India whose genuineness is not controverted, cannot be denied notwithstanding the subsequent breakdown of the engagement.

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.

14. According to the adjudicating authority, strict construction of the undertaking furnished by the importer precludes the deployment of the imported 'piling rig' at non-specified projects. The utilisation for some work on behalf of M/s Delhi Metro Rail Corporation, indisputably not among the statutory instruments enumerated in the exemption notification, as well as other bodies has been held to be breach of the undertaking. An averment of an official of the said Corporation has been relied upon to exclude the possibility of deployment in road contracts. It is common knowledge that the Corporation, though established for urban rail networks, does also

construct, repair and maintain roads. As for as the other deployments are concerned, the adjudicating authority could not be expected to arrive at a conclusion in the absence of material furnished by the noticee. The appellant, admittedly, did not comply with the timelines insisted upon in the adjudication proceedings. The reasons for such failure were placed on record before the original authority.

15. In the circumstances of our finding that deployment on any road construction project would suffice for continuing entitlement to the exemption, the object of utilisation on the different projects must be examined. To enable that be done, the matter is remanded back to the original authority before whom the appellant shall produce details of deployment and that authority shall cause the veracity to be ascertained before rendering a fresh adjudication order.

16. Considering the various decisions cited by Learned Counsel for the individual appellants, all of which lay particular emphasis on the need for isolating the role of each individual in the breach that led to confiscation, and considering the lack of such allegation in the show cause notice, no purpose is served by a fresh consideration of the matter. We do not find any reason to conclude that some specific act of omission or commission on the part of these two individuals contributed to the confiscation. Moreover, these are two employees who, not standing to benefit in any way, are entrusted with executing

direction emanating from more responsible levels. Accordingly, the penalties imposed on these two individuals will not sustain. The appeals of Shri Umakant Tiwari and Col Charan Singh are allowed.

(Pronounced in Court on 19/12/2018)

(S K Mohanty)
Member (Judicial)

(C J Mathew)
Member (Technical)

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