CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86419 OF 2014

[Arising out of Order-in-Original CAO No: 136/2013/CAC/CC€/YG/GR.VII dated 29th November 2013 passed by the Commissioner of Customs (Export), Mumbai.]

Hi-Tech Engineers
Gurudware, South Balanda, Angul, Odissa - 759116 … ***Appellant***

versus

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

WITH

CUSTOMS APPEAL NO: 86470 OF 2014
WITH
CROSS-OBJECTION NO. 91028 OF 2015

[Arising out of Order-in-Original CAO No: 136/2013/CAC/CC€/YG/GR.VII dated 29th November 2013 passed by the Commissioner of Customs (Export), Mumbai.]

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

versus

Hi-Tech Engineers
Gurudware, South Balanda, Angul, Odissa - 759116 ***…Respondent***

APPEARANCE:

Shri AK Prabhakar, Advocate for the assesse-appellant

Shri Deepak Sharma, Deputy Commissioner (AR) for Revenue

CORAM:

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

FINAL ORDER NO: 85796-85797/2025

DATE OF HEARING: 07/11/2024
DATE OF DECISION: 06/05/2025

PER: C J MATHEW

M/s Hi-Tech Engineers has challenged imposition of penalty under section 114A of Customs Act, 1962 in order[1] of Commissioner of Customs (Export), Mumbai, that confirmed liability to duties of customs foregone at the time of import along with interest thereon besides fastening other detriments, on the limited ground that by acknowledging discharge of liability of ₹ 22,33,965 as duties of customs, along with ₹ 4,04,000 as interest thereon, jurisdictional competence precluded invoking of penal provisions for so doing. The jurisdictional Commissioner of Customs was directed by the competent committee of Chief Commissioners to appeal against the same order for not having determined fine goods that, admittedly, were not confiscated solely for want of availability and for not having enforced the bond executed by the importer at the time of import obligating itself to comply with conditions.

2. Briefly, M/s Hi-Tech Engineers had imported 'new extec screen S-5' with vibrating grid', valued at ₹ 86,38,227, against bill of entry no.

[1] [order-in-original CAO no. 136/2013/CAC/CC€/YG/GR.VII dated 29th November 2013]

767929/21.05.2007 claiming exemption, *vide* notification[2] intended for operationalizing the privileges on offer under the 'export promotion capital goods (EPCG)' scheme in the Foreign Trade Policy (FTP), that, subject to several conditions, *inter alia*, including fulfilment of obligation to export goods of proportionate value, was allowed to be cleared. One of the conditions, *viz*., that of installation of imported goods at the stipulated location was, admittedly, breached following which proceedings were initiated for recovery of duty foregone, along with interest, and for imposition of penalties contingent upon confiscation of the goods. The adjudicating authority confirmed the differential duty as proposed, along with applicable interest, but, while holding the goods as liable to confiscation under section 111 of Customs Act, 1962, refrained from fastening fine for redemption owing to non-availability thereof though penalty of ₹ 2,00,000 was imposed under section 112 of Customs Act, 1962 besides resorting to section 114A of Customs Act, 1962 for further detriment.

3. On submission of Learned Counsel that the dispute was restricted to the penalties alone, the disposal of the appeals had been transferred to a Single Member Bench; however, that bench, after having heard both sides at length and reserving orders for final decision, directed Registry to relist the matter before a Division Bench ostensibly for lack of jurisdiction.

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[2] [no. 97/2004 dated 17th September 2004]

4. In the circumstances as set out above, with action having been initiated as consequence of non-fulfilment of conditions of exemption notification and, consequently, concerned only with erasure of privilege of foregoing of duty already assessed at the time of import subject to fulfilment of export obligation, with no dispute over either rate of duty or value which vests jurisdiction exclusively with a division bench of the Tribunal, we are unable to fathom cause for the restoration. Be that as it may, we do not shirk from exercise of jurisdiction that, doubtlessly, is parallely not excluded and, though amounting to disregard of plea of the Learned Counsel, we proceed to dispose off this appeal.

5. We have heard Learned Counsel and Learned Authorized Representative at length on the facts and their rival submissions. Learned Counsel pointed out that there is no finding on the existence of ingredients warranting the invoking of extended period. It was contended that the importer had made good the duty along with interest thereon. According to Learned Authorized Representative, the goods, even if not available, should have been confiscated and fine charged as condition of redemption.

6. It is seen from the impugned order that the recovery of differential duty has been effected not under section 28 of Customs Act, 1962 but as obligation in bond executed at the time of import. In such circumstances, we are unable to fathom the expectation in the appeal of

Revenue on plea for enforcement of bond inasmuch as adjudication is restricted to ordering of recovery, confiscation – either absolute or on offer of redemption – and imposition of penalty with actual enforcement to be effected either through self-compliance by person liable to pay duty or, in the event of non-compliance, by recourse to section 142 of Customs Act, 1962. With conclusion of adjudication, the authority becomes *functus officio* and 'certificate action' is an act of the executive. For enforcement to be pressed, resort to jurisdiction of Tribunal is inappropriate. To such extent, review by the competent committee has failed to exercise application of mind and, hence, not tenable for relief in appeal. As far as the impugned order is concerned, it is evident from

> *'114A. Penalty for short-levy or non-levy of duty in certain cases.*
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> *- Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (2) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined:*
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> *xxxx'*

of Customs Act, 1962 that penalty, amounting to no less than sum of duty and interest, is erected on two pillars, *viz*., non-levy or short-levy of duty liability - by reason of collusion, willful misstatement or suppression of facts - and that the ‘person liable to duty and interest’ stands determined under section 28 of Customs Act, 1962. In the instant case, the liability has not been determined with reference to empowerment under section 28 of Customs Act, 1962. There is also no evidence in the notice that any of the ingredients permitting resort to section 28(4) of Customs Act, 1962, and thereby to section 114A of Customs Act, 1962, was manifest at the time of assessment to duties, even if foregone then. And it does not appear to have impressed itself on the reviewing authority that the impugned order may have opted for that very lack to bypass resort to section 28 of Customs Act, 1962. The adjudication order has not drawn upon any evidence to suggest otherwise and appears merely to have relied upon the diversion of impugned goods had been diverted to suggest that this amounted to misrepresentation; misrepresentation is not a state of mind to be inferred but patent distortion of facts that must be established. The factual matrix, incorrectly appreciated by the adjudicating authority insofar as penalty was concerned and inappropriately overlooked in submission of Learned Authorized Representative, offers no scope for imposition of penalty under section 114A of Customs Act, 1962 on M/s Hi-Tech Engineers. Indeed, the plea in appeal of Commissioner of Customs for enforcement of the bond does not sit well with the contention of Learned Authorized Representative that equal penalty was in order.

7. Further, it is seen that the finding of

> *'11.5.7 As regards liability of the importer company M/s. Hi-Tech Engineers to be penalized under the provisions of Section 114A of the Act, I find that as discussed above,; the importer knowing fully well that they do not have any export orders or plans for export of iron ore, applied and obtained an EPCG Licence and imported the impugned goods saving customs duty amounting to Rs.22.33,965/-(Twenty Two Lac Thirty Three Thousand Nine hundred and Sixty Five only) based on such mis-declaration of their status as Manufacturer-Exporter, I find that penalty under Section 114A is imposable on the importer , I find that Section 114A prescribes that "Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined," However, I find that vide circular no. 61/2002-Cus. dated 20.09.2002 CBEC has clarified that "penalty under section 114A of the Customs Act, 1962 should be equivalent to duty and interest. The above-said clarification may kindly be kept in mind while imposing the penalty under section 114A of the Customs Act, 1962." The Hon'ble Supreme Court in case of Union of India Vs Arviva Industries reported in 2007(209) ELT 5(S.C.) has held that the CBEC Circulars are binding on the Department and thus I hold that penalty equal to duty and interest is leviable in this case under Section 114A of the Act.'*

merely narrates statutory empowerment and intra-mural instruction without establishing that the ingredients for invoking section 114A did exist. It is also not as if the notice did, in some way, provide the armament for persuading the adjudicating authority that this was so. Consequently, it may safely be said that the imposition of penalty under section 114A of Customs Act, 1962 is improper.

8. It only remains for us to examine the alleged impropriety in not quantifying fine under section 125 of Customs Act, 1962 as condition for redemption of goods. Goods are, admittedly, not available and not retainable, thereby, for transfer back to the title holder upon complying with payment of fine. Such is merely an option which does not present itself for exercise by importer in the absence of need for the goods. Non-exercise of option crystalizes the ownership in the hands of the Central Government and determination of fine for redemption of goods, that do not vest by confiscation and which cannot be made available by Central Government on compliance with fine, is nothing but a futile exercise bordering on farce. The Hon'ble High Court of Bombay, in *Commissioner of Customs (Import) v. Finesse Creation Inc [2009 (248) ELT 122 (Bom)]* that was affirmed by the Hon'ble Supreme Court, held that goods already cleared and not available physically for confiscation cannot be burdened with fine under section 125 of Customs Act, 1962.

9. In view of our finding *supra*, there is no merit in recourse to

section 114A of Customs Act, 1962 owing to which the appeal of importer is allowed to set aside the penalty therein. For the reasons cited *supra*, we hold the appeal of Commissioner of Customs (Preventive), Mumbai to be without merit and liable to be dismissed.

(Order pronounced in the open court on 06/05/2025)

(AJAY SHARMA)	**(C J MATHEW)**
Member (Judicial)	***Member (Technical)***

**/as*