

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86762 OF 2019

[Arising out of Order-in-Appeal No: 51 (CAC)/2019(JNCH)/Appeal-I dated 28th March 2019 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Apex International
Plot No.2, Nand Nagar, Industrial Estate, Phase I
Mahau Khera Ganj, Kashipur - 244713

... Appellant

versus

Commissioner of Customs (NS-IV)
Jawaharlal Nehru Customs House, Nhava Sheva,
Tal: Uran, Dist: Raigad 407 707

... Respondent

APPEARANCE:

Ms Shamita Patel, Advocate for the appellant

Shri S B Hatangadi, Assistant Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: A / 85888 /2022

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| DATE OF HEARING: | 21/09/2022 |
| DATE OF DECISION: | 21/09/2022 |

This appeal lies against order-in-appeal no. 51 (CAC)/2019(JNCH)/Appeal-I dated 28th March 2019 of Commissioner of Customs (Appeals), Mumbai – II challenging the

redemption fine under section 125 of Customs Act, 1962 and penalty imposed under section 112 of Customs Act, 1962 upon them, albeit after reduction in appellate proceedings attendant upon confirmation of confiscation ordered under section 111(o) of Customs Act, 1962.

2. Learned Counsel for the appellant submits that the dispute revolves around duty of ₹ 10,38,685/- having been foregone on imports effected against advance authorization no. 6110001060/27.8.2013, covered by bond executed on 5th September 2013 for making good the said amount with interest for breach of notification no. 96/2009-Cus dated 11th September 2009, commencing on 12th September 2013. It was further pointed out that the period of eighteen months for fulfillment of obligation originally stood extended to 24 months in accordance with amendment sheet dated 11th March 2015, which, admittedly, the appellant was unable to comply with leading to show cause notice dated 24th November 2016 requiring deposit of duty foregone, along with interest thereon, under the authority of the applicable notification besides proposing confiscation of the imported goods under section 111(o) of Customs Act, 1962 as laid down in bond prescribed in section 143 of Customs Act, 1962.

3. According to Learned Counsel for the appellant, the duty along with interest thereon, totaling ₹ 15,86,879/-, had been deposited on

11th September 2017 and closure accorded by the licensing authority on 21st November 2017. It was submitted by her that these facts, though brought to the notice of the first appellate authority, was not appreciated sufficiently as the redemption fine and penalty were merely reduced in the impugned order instead of being set aside.

4. Learned Counsel relies upon the decisions of the Larger Bench of the Tribunal in *Bhagyanagar Metals Ltd v. Commissioner of Central Excise, Hyderabad – II* [2016 (333) ELT 395 (Tri.-LB)] which refers to *re Weston Components Ltd*. It was further pointed out that the decision of the Tribunal in *Global Boards Ltd v. Commissioner of Customs (Export), Mumbai* [2019 (368) ELT 1113 (Tri.-Mumbai)] and in *Maruti Udyog Ltd v. Commissioner of Customs, Kandla* [2001 (132) ELT 340 (Tri.-Mumbai)] disfavor resort to section 111 of Customs Act, 1962 when breach of conditions of licence had been regularized, and certified to be so, by the competent authority.

5. Learned Authorised Representative drew attention to the restitution only after the show cause notice had been issued under Customs Act, 1962. He also contends that it was an admitted fact that the export obligation had not been fulfilled and that, in accordance with the decision of the Tribunal in *Prakash Roadlines Corporation Pvt Ltd v. Commissioner of Customs (Export Promotion), Mumbai*

[2019 (369) *ELT* 663 (*Tri.-Mumbai*)] and in *KDL Biotech Ltd v. Commissioner of Customs (Export Promotion), Mumbai* [2015 (327) *ELT* 305 (*Tri.-Mumbai*)], of the Hon'ble High Court of Bombay in *Unimark Remedies Ltd v. Commissioner of Customs (Export Promotion), Mumbai* [2017 (355) *ELT* 193 (*Bom.*)] and of the Hon'ble Supreme Court in *Sheshank Sea Foods Pvt Ltd v. Union of India* [1996 (88) *ELT* 626 (*SC*)], the consequences should follow.

6. Having considered the rival submissions, it would appear that the sole issue for determination is the scope for invoking the detriment of confiscation under section 111(o) of Customs Act, 1962 with attendant penalty under section 112 of Customs Act, 1962. The appellant had conceded inability to execute export orders within the prescribed period and had, thus, not been in compliance with the conditions in the 'advance authorization scheme' elaborated in the Foreign Trade Policy issued under the authority of Foreign Trade (Development and Regulation) Act, 1992 mirrored in notification no. 96/2009-Cus dated 11th September 2009. It is also on record that the first appellate authority had held the said breach as not attributable to *malafide* and, therefore, reduced the redemption fine and penalty thereon. The various schemes incorporated in the Foreign Trade Policy are administered, insofar as imports and exports are concerned, though notifications issued under section 25 of Customs Act, 1962 emplacing the same conditions including execution of bond for

compliance and, failing which, duty foregone along with interest, is obliged to be deposited besides being liable to appropriate action under Customs Act, 1962. Such stipulation is necessitated as, generally, the period granted for fulfillment of export obligation lies well beyond the normal period of limitation prescribed in section 28 of Customs Act, 1962. The authority to confiscate under section 111(o) of Customs Act, 1962 follows from the breach of the specific conditions incorporated therein and which, in the circumstances impugned herein, may arise only for non-fulfillment of conditions prescribed at the time of import that continues to be so.

7. The decision of the Tribunal in *re Global Boards Ltd* has made it abundantly clear, thus,

'8. Insofar as the confiscation of the goods are concerned, it has been held in re Sanghi Industries Ltd. that -

'6.8 The act of importation and the conditions of importation are two different things and for violation of each of them, separate consequences would follow. In the instant case the duty liability has been imposed for the import of the goods and the goods have been confiscated for violating the terms and conditions of importation. Since the goods are liable to confiscation, the liability to penalty arises under Section 112 of the Customs Act. Penalty is an action (in personam) on the importer while the duty and fine are (action in rem) on the goods. As per Section 112 of the Customs Act, liability to penalty arises when a person who in relation to any goods acts or omits any act which act or omission would render the goods liable to confiscation under Section 111. Any person who abets or aids the commission of an act or omits to such an act (which renders the goods liable for confiscation) is also liable to penalty. Similarly when a person acquires possession or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other way dealing in goods which he knows or has reason to

believe are liable to confiscation under Section 111 is also liable to penalty under Section 112. In the instant case the appellant imported the goods subject to a condition that he would fulfil the export obligation which obligation he failed to fulfil. Therefore, the goods became liable to confiscation under Section 111(o). Since the goods are liable to confiscation under Section 111(o), penalty under Section 112(a) is attracted. In this case, penalty has been imposed under Section 112(a) and there is no illegality or infirmity in imposing penalty apart from demanding differential duty and we hold accordingly. When the goods are liable to confiscation, the adjudicating authority has the power to allow the redemption of the goods on payment of fine in lieu of confiscation under Section 125 of the Customs Act. The goods were released to the appellants at the time of importation under a bond executed by the appellant. The release of the goods was thus provisional. Therefore, when the assessment is finalized subsequently, even if the goods are not available for confiscation, redemption fine in lieu of confiscation can be imposed as has been held in a number of judicial pronouncements on the subject. Therefore the imposition of redemption fine in the instant case is fully justified and is quite legal and we hold accordingly.'

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11. Section 111(o) of Customs Act, 1962 empowers confiscation for non-fulfilment of 'post-importation conditions' which have not been regularised by the appropriate authority. *In re Philips (India) Ltd.*, it has been clearly held that failure to fulfil export obligation is remedied by recovery of duty. With the recovery of duty, the requirement to comply with the 'post-importation condition' does not exist. Consequently, the imports stand regularised and Section 111(o) of Customs Act, 1962 becomes inapplicable. With negation of section 111(o) of Customs Act, 1962, the imposition of penalty is not sustainable. Accordingly, we set aside the confiscation and penalty in the impugned order.'

8. Well before that decision, the Tribunal, in *re Maruti Udyog Ltd*, had also settled the issue thus

'9. One of the conditions of the exemption itself was that the duty was to be paid within the period specified. It cannot therefore be said that there is breach of the condition of the exemption. We have to distinguish this kind of exemption from an unconditional exemption, or an exemption to which no conditions are attached requiring payment of any duty within a specified period. In such cases, the duty to be recovered either by recourse to Section 28 or by enforcing any bond or undertaking that the importer has executed. In the case before us, such a step might have been necessary, if Maruti Udyog Ltd. had not paid the amount within 30 days from the close of the financial year. It could then be said that one of the conditions of the exemption have not been complied with. That is not the case. It is not in dispute that Maruti Udyog Ltd. paid the amount within this period. Therefore, there in fact has been no breach in the condition of the exemption. The goods were therefore not liable to confiscation under clause (o) of Section 111 and the importer not liable to penalty.'

9. The question that arises, therefore, is whether the regularization had occurred, as argued by Learned Authorised Representative, to extricate the appellant from the consequence of the show cause notice. A decision on the contractual breach of obligation entered into in relation to schemes under the Foreign Trade Policy vests with the licencing authority and it is only upon such occurrence that it may be conclusively held that breach of condition is demonstrated. It is relevant here that the show cause notice has invoked section 143 of Customs Act, 1962 which provides for the execution of bonds for ensuring fulfillment of conditions. It is, therefore, not a demand under

section 28 of Customs Act, 1962 following allegation of short payment, non-payment or evasion of duties but for enforcing the obligation under 'advance authorization scheme' of the Foreign Trade Policy. It is seen from the records that the competent licensing authority had accorded closure in terms of the scheme upon discharge of appropriate duty, and interest thereon, as prescribed in the condition. In such circumstances, the regularization is complete in all respects and it is only in the absence of such regularization that proceedings under section 111(o) of Customs Act, 1962 could have been brought to conclusion.

10. The decisions of the Tribunal cited by the Learned Authorised Representative relate to ineligibility at the threshold by non-fulfilment of the conditions of import and, therefore, remaining out of the ken of regularization by the licensing authority. In *re Unimark Remedies Ltd*, the issue for consideration before the Hon'ble High Court of Bombay was the role of the appellants in diversion of goods manufactured from the imported raw material which could not have been undertaken until after completion of export obligation and the decision of the Hon'ble Supreme Court in *re Sheshank Sea Foods Pvt Ltd* pertains to the jurisdictional authority of customs officers to initiate proceedings when conditions of import under the schemes in Foreign Trade Policy (or the EXIM policy as it then was) had not been fulfilled. These are not the issues canvassed in the present appeal. Thus, in effect, the

decisions of the Tribunal in *re Global Boards Ltd* and *re Maruti Udyog Ltd*, cited by the Learned Counsel, pertaining to law on invoking of section 111(o) of Customs Act, 1962 in circumstances of the imports having been regularised, must be followed.

11. In view of the above, the impugned order is set aside and the appeal allowed.

(Dictated and Pronounced in Open Court)

(C J MATHEW)
Member (Technical)

**as*