

2023:BHC-OS:6792-DB



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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CUSTOMS APPEAL NO.9 OF 2021

The Commissioner of Customs (Import))
Air Cargo Complex, Sahar,)
Andheri (East), Mumbai .) .. Petitioners

Versus

Air India Ltd.)
Materials Management Department)
Old Airport, Kalina, Santacruz (East))
Mumbai 400 019.) .. Respondents

Mr. J.B. Mishra, a/w. Ms. Sangeeta Yadav and Mr. Umesh Gupta, for the Appellant.

Mr. Vijay Purohit, a/w. Mr. Faizan M. Mithaiwala and Mr. Samkit Jain, i/ b. P & A Law Offices, for the Respondent.

CORAM : **G.S. KULKARNI &
JITENDRA JAIN, JJ.**
RESERVED ON : **11th JULY 2023**
PRONOUNCED ON : **18th JULY 2023**

Judgment (per Jitendra Jain, J.) :-

. This appeal is filed by the appellant/revenue under Section 130 of the Customs Act, 1962, raising following substantial questions of law from the Customs, Excise & Service Tax Appellate Tribunal's (' the Tribunal') order dated 25th September 2019: -

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- “(a) Whether the CESTAT was right in setting aside the redemption fine imposed under section 125 of the Customs Act, 1962 on excess found goods cleared under bond ?
- (b) Whether the CESTAT was right in setting aside the penalty under section 112(a) of the Customs Act, 1962 on the Respondent assessee, even though confiscation of goods under sections 111(l), (m) & (o) of the Customs Act 1962 are upheld by the Tribunal ?
- (c) Whether the CESTAT, being the last fact finding authority, passed reasoned order to set aside the fine and penalty ?”

BRIEF FACTS :-

2. The period under consideration is 2010-2012. During the said period, the Appellant was a Public Sector Undertaking owned and controlled by the Union of India.

3. The Respondent is engaged in the business of plying the cargo and passengers by air. The Respondent imported various aircraft parts falling under the heading 8802 and the said parts were cleared by availing the benefit of exemption under Notification No.21/2002 dated 1st March 2002 as amended by Notification No.37/2007 dated 7th March 2007.

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4. The revenue conducted On-Site Post Clearance Audit of the respondent/assessee for the financial year 2011-12 on the basis of the records provided by the respondent assessee. The respondent assessee had imported parts of aircraft and claimed exemption under Notification No.21 of 2002. As per the condition of the exemption, the exemption from duties of customs is available for parts of aircraft imported for servicing, repair or maintenance of aircraft which is used for operating scheduled air cargo services and for the aircraft. The respondent/assessee informed the appellant/revenue that the records of imports and consumption are maintained on quarterly basis and the same is outsourced to the auditor M/s.Pee Dee Kapur and Co. the Chartered Accountant. The report showed shortage/excess of parts imported during the period 2010-11 and 2011-12. Based on the details of import of parts of aircraft, the value of short found parts was Rs.4,36,99,845 and the value of excess found parts was Rs.3,08,18,771/-. Based on these figures, the appellant/revenue alleged that short found parts mean the parts whose records of utilization as per the condition of exemption notification are not available and therefore, have been utilised for the purposes other than specified in the exemption notification. Similarly, the excess parts found was alleged to have not been declared in the import documents.

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5. On 29th December 2014, the Principal Commissioner of Customs issued a show cause-cum-demand notice to show cause why the custom duty amount to Rs.1,47,94,926/- on excess/shortage found should not be recovered under Section 28 of the Customs Act, 1962 along with interest. The said show cause notice also called upon the respondent/assessee to show cause as to why the excess goods valued at Rs.3,08,18,771/- and short found parts valued at Rs.4,36,99,845/- should not be held liable for confiscation under Section 111 of the Customs Act, 1962 and further why penalty under Section 112(a) or 114A of the Customs Act should not be imposed on the importer.

6. The respondent/assessee filed its submissions on the said show cause notice and explained the reason for shortage and excess found, namely shortage/ excess arose due to non completion of posting of documents, wrongly binning of item, shrinkage etc. The respondent/assessee further submitted that they had outsourced work of maintaining the records of spare parts imported to Chartered Account's firm. The Chartered Account's firm had deployed interns/freshers for physical verification of items/aircraft parts who had limited knowledge about the spare parts and their nomenclature. The respondent/assessee further submitted that the report of the Chartered Account which showed

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excess/shortage was reconciled by the noticee's internal audit team and after reconciliation, shortage found was valued at Rs.8,83,709/- and excess found was valued at Rs.6,02,240/-. The respondent/assessee further submitted that looking at inventory of more than Rs. 1100 crore, minor discrepancy is inevitable. On 28th April 2016, the Commissioner of Customs passed an Order-in-Original rejecting the contention of the respondent/assessee and confirming the demand of custom duty amounting to Rs.1,47,94,926/- . The Commissioner also passed an order confiscating the excess goods valued at Rs.3,08,18,771/-. However, respondent/assessee was given an option to redeem the same on payment of redemption fine of Rs.50,00,000/- under Section 125 of the Customs Act. The Commissioner also imposed a penalty of Rs.25,00,000/- under Section 112(a) of Customs Act.

7. The respondent assessee challenged the aforesaid Order-in-Original by filing an appeal to the Tribunal. On 25th September 2019, the Tribunal disposed of the said appeal and confirmed the demand of duty on the ground that the respondent assessee has not been able to satisfy the post importation condition in respect of shortages determined. However in para 4.7 of its order, the Tribunal set aside the order on confiscation of the goods and redemption fine imposed. In so far as the penalty under

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Section 112(a) of the Customs Act is concerned, the Tribunal set aside the penalty for the reasons mentioned in para 4.9 of its order. On the above backdrop, the appellant/revenue has filed the present appeal on substantial questions of law which are reproduced above.

8. On question (a) dealing with redemption fine, the appellant/revenue submitted that the Tribunal has failed to appreciate the finding in paragraph 23 of Order-in-Original that the goods were released under bond and therefore, redemption fine is imposable on these goods. The appellant/revenue further relied upon the decision of the Bombay High Court in case of *Unimark Remedies Ltd. Vs. Commissioner of Customs (Export Promotion)*¹ to contend that the redemption fine can be imposed even if the goods are not seized. They further relied upon the decision of the Madras High Court in case of *Dadha Pharma Private Ltd. Vs. Secretary to Government of India*² to contend that it is not necessary for the purpose of Section 111 of the Customs Act that there has to be actual confiscation but what is required is that the goods are liable for confiscation and therefore, even if the goods are not actually confiscated, the provisions of Section 111 dealing with confiscation are attracted and consequently redemption fine is rightly imposed in lieu of confiscation.

1 2017 (355) ELT 193 (Bom.)

2 2000 (126) ELT 535 (Mad.)

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9. Per contra the respondent/assessee contended that the goods in question were never seized, confiscated or cleared/released provisionally under bond, bank guarantee, surety etc. The respondent assessee further contended that there is no requirement in the Notification No.20 of 2007 for submitting any bond for clearance of the goods. The respondent assessee also relied on paragraph 22 in Order-in-Original wherein the original adjudicating authority has given a finding that the goods are not cleared provisionally under any bond, bank guarantee, surety etc. The respondent/assessee submitted that unless goods are actually confiscated, the imposition of redemption fine does not arise and for this proposition, he has relied upon the following decisions of this Court :-

- “i) Commissioner of Customs (Import) Vs.Finesse Creation Inc., 2009 SCC OnLine Bom 2269 (paras 6 and 7);*
- ii) The Commissioner of Customs (Import) Vs. Rishi Ship Breakers, Customs Appeal No. 70 of 2009 decided on 22nd September 2009 (para 3);*
- iii) Commissioner of Customs (Exports) Vs. Sudarshan Cargo Pvt.Ltd., 2010 SCC OnLine Bom 2092 (paras 3 & 4)”*
- iv) Commissioner of Customs Vs. National Leather Clothes Manufacturing Co., (2015) 321 ELT 135 (Bom.)”*

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10. The respondent/ assessee also contended that since the goods were not available for confiscation, there is no question of redemption fine.

11. Heard learned counsel for the appellant and the respondent.

12. Question (a) of the present appeal as raised deals with setting aside of the redemption fine imposed under Section 125 of the Customs Act on excess found goods cleared under bond. Section 125 of the Customs Act provides that whenever confiscation of any goods is authorised by this Act, the officer may give to the owner of the goods an option to pay in lieu of confiscation such fine as the said officer thinks fit. The provisions of Section 125 of the Customs Act are attracted if there is a confiscation of goods because redemption fine is in lieu of confiscation of goods. In the present case, the Tribunal in paragraph 4.7 of its order has set aside the order of confiscation of goods and the said finding of the Tribunal setting aside the order of confiscation of goods is not challenged by the appellant revenue in the present appeal as is evident from the questions raised in the memo of appeal. The sequitur of not challenging the setting aside order of confiscation of goods brings about a result of the Revenue taking a position that provisions of section 111 of

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the Act dealing with confiscation are not applicable to the case of the respondent/ assessee. If that be so, the question of redemption fine in lieu of confiscation would not arise. The provisions of Section 125 would get attracted only if the goods are confiscated. The appellant/revenue is not correct in stating in question (b) that the Tribunal has confirmed the confiscation since in para 4.7 of its order, the Tribunal has expressly stated that they are setting aside confiscation order. Since in the instant case, the appellant/ revenue has accepted the setting aside order of confiscation of goods, question of applying provisions of Section 125 dealing with the redemption fine which are in lieu of confiscation would not arise and therefore, on this ground itself, question (a) as raised by the appellant revenue does not arise.

13. Be that so, the Order-in-Original in paragraph 22 categorically states that the goods were not available for confiscation and further the goods were not cleared provisionally under any bond, bank guarantee, surety etc. However in paragraph 23 in Order-in-Original, the authority observes that the goods were released under bond and therefore, redemption fine is imposable on these goods. The Tribunal in its order in paragraph 4.6 has given categorical finding of fact that the goods were never seized or released provisionally against bond and bank

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guarantee. This finding of fact has not proved as wrong by the appellant/revenue in the present appeal. On a query by the Court to the appellant/revenue to produce any bond or any bank guarantee against which the goods were released provisionally, the appellant revenue could not produce the same. Therefore, this finding of fact that goods were not released against bond and bank guarantee is uncontroverted.

14. This Court in the decision in cases of *Commissioner of Customs (Import) Vs. Finesse Creation Inc. (supra)*, *Commissioner of Customs (Import) Vs. Rishi Ship Breakers (supra)* and *Commissioner of Customs (Exports) Vs. Sudarshan Cargo Pvt. Ltd. (supra)*, have held that if the goods are not available for confiscation there cannot be any redemption fine. The Supreme Court has dismissed the SLP of the revenue in the case of *Commissioner of Customs (Import) Vs. Finesse Creation Inc.*³ In the instant case, admittedly the appellant/revenue could not find actual goods for confiscation and therefore, the order setting aside the redemption fine is in consistence with the decisions of this Court. The appellant/revenue has relied upon the case of *Unimark Remedies Ltd. (supra)* which has taken a view that the redemption fine can be imposed even though there was no seizure and the goods were

3 2010 SCC Online SC 1452

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already cleared. In our view, this decision is distinguishable on the facts since in the present case, there was no actual excess stock found but it was only in the account books that an excess was worked out by the Chartered Accountant which too was reconciled by the internal audit team of the respondent/ assessee and excess figure was substantially reduced whereas in the case of Unimark (*supra*) actual goods were available for confiscation and penalty was sought to be levied on non fulfillment of post import condition. In the present case there is no actual physical excess stock found by the revenue. In our view, the view taken by the Tribunal is a plausible view in the light of three decisions of this Court directly on the issue and therefore even on this account no substantial question of law would arise.

15. With respect to Question (b), the appellant/revenue has contended that the Tribunal has set aside the penalty without considering the finding of adjudicating authority and therefore, there arises question of law for consideration of this Court. Per contra, the respondent assessee has contended that there is no deliberate or dishonest act by the respondent to evade the payment of duty since the assessee was a Public Sector Undertaking under direct control of Government of India and the inventory managed by the respondent assessee was to the extent of

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Rs.1120 crores which led to various difficulties in maintaining the inventory records accurately and therefore the Tribunal is justified in setting aside the penalty.

16. In so far as question (b) is concerned, it deals with penalty under Section 112(a) of the Customs Act which provides that any person who in relation to any goods does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111 or abets the doing or omission of such an act shall be liable to penalty.

17. In the instant case, as observed above, the Tribunal in paragraph 4.7 has set aside the order of confiscation and the said finding has not been challenged in this appeal. The appellant/revenue is wrong in saying in question(b) that the Tribunal has confirmed the confiscation. Therefore, the appellant/revenue has accepted that the goods were not required to be confiscated. If that be so, the penalty under Section 112(a) is in relation to such goods liable for confiscation. The confiscation order having set aside, consequently the penalty under Section 112 (a) is also consequently not applicable. Even otherwise, the Tribunal in paragraph 4.9 of its order has deleted penalty on the ground

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that looking into the enormity of the inventory managed and handled by the respondent/assessee and the fact that the respondent/assessee is a Public Sector Undertaking, the order imposing penalty is not justified. The Tribunal also took note of the fact that the entire case is made on the basis of the report prepared by the external auditors as part of internal assessment and control mechanism adopted by the respondent/ assessee to verify and manage the inventory of imported goods and therefore, there is no deliberate act on the part of the assessee to evade the duty . In our view, these are the findings of facts on the basis of which the penalty has been set aside and the same being not alleged as perverse, no question of law would arise.

18. In view of the above and for the reasons stated, in our view, no substantial question of law arises for consideration of this Court and the appeal of the revenue is to be dismissed.

JITENDRA JAIN, J.

G. S. KULKARNI, J.