

(2008) 07 GUJ CK 0083

In the Gujarat High Court

Case No : Tax Appeal No. 757 of 2007 and Civil Application No. 212 of 2007 in
Tax Appeal No. 757 of 2007

Commissioner of Customs

APPELLANT

Vs

Jhunjhunwala Vanaspati Ltd.

RESPONDENT

Date of Decision : 04-07-2008

Acts Referred:

Customs Act, 1962 — Section 130, 149, 17, 2, 2(26)
Customs Tariff Act, 1975 — Section 90

Citation : (2008) 120 ECC 231 : (2008) 156 ECR 231 : (2008) 232 ELT 600

Hon'ble Judges : M.S. Shah, Acting C.J.; Ravi R. Tripathi, J

Bench : Division Bench

Advocate : Harin P. Raval, for the Appellant; K.L. Raval and Dipen A. Desai, for the Respondent

Final Decision : Allowed

Judgement

Ravi R. Tripathi, J.—By this appeal u/s 130 of the Customs Act, 1962, Commissioner of Customs, Kandla is before this Court being aggrieved by judgment and order dated 26.12.2006 rendered in Appeal No. C/978/2006 by the Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad bearing No. A/42/WZB/A''bad/07, whereby the Tribunal set aside the order of the Commissioner of Customs, Kandla dated 16.05.2006 being Order in Original No. KDL/COMMR/21/2006 and issued following directions:

7. Taking into account the ratio of various judgments quoted by the learned Advocate for the appellant, the order of the Commissioner is set aside with the following directions:

a. The bills of entry filed by M/s Magpie Overseas Co. should be treated as cancelled.

b. The present appellant shall be permitted to file fresh bill of entry/bills of entry in respect of the entire quantity of 500Mts.

c. The appellant shall file fresh bill of entry without claiming exemption under Notification No. 21/02 and the same shall be processed as per law and applicable duty and interest shall be collected.

d. The appellants are also directed to produce indemnity Bond to the satisfaction of the Commissioner of Customs for value of the goods indemnifying the department against claim/damage by M/s Magpie Overseas Co. in respect of this consignment.

e. No order is being passed with regard to duty remitted by M/s Magpie Overseas Co. on the basis of assessment made by customs.

2. The appeal was filed on 03.05.2007 on the following questions of law:

a. Whether or not bill of entry assessed to payment of customs duty on which customs duty is paid and out of charge order issued u/s 47 of the Customs Act, 1962 can be permitted to be amended in view of the provisions of Section 149 read with Section 30(3) of the Customs Act, 1962?

b. Whether or not CESTAT has erred in law in allowing cancellation of bill of entry after its assessment after out of charge order by permitting fresh bill of entry to substitute the name of the importer in the bill of entry?

3. On 13.06.2007, when the matter reached for hearing before the Court, learned Counsel for the appellant prayed for time to reframe the questions. The matter was adjourned to 28.06.2007. On 28.06.2007/10.07.2007, learned Counsel for the appellant submitted reframed substantial questions of law which read as under:

a. Whether in the facts and circumstances of the case, the Tribunal is justified in permitting the respondent to file a fresh bill of entry contrary to the provisions of Section 149 of the Customs Act, 1962 which provides that no bill of entry or a shipping bill or a bill of export shall be authorized to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse or the export goods have been exported?

b. Whether in the facts and circumstances of the case, the Tribunal is justified in permitting the respondent to file a fresh bill of entry in respect of 500 MT of imported goods despite a bill of entry having been assessed to payment of customs duty, customs duty having been paid and out of charge order having been issued u/s 47 of the Customs Act, 1962?

c. Whether in the facts and circumstances of the case, the Tribunal is justified in permitting filing of fresh bill of entry after an out of charge order is issued so as to substitute the name of the importer in the bill of entry as finalized?

The Court, by order dated 10.07.2007, admitted the appeal on the above referred reframed substantial questions of law a) and b).

4. In Civil Application No. 212 of 2007 in Tax Appeal No. 757 of 2007, the Court

passed following order on 09.10.2007:

We do not grant any interim order or interim direction, when the appeal is filed against the Tribunal's order.

Considering the facts, we deem it proper to hear the appeal itself finally on 20th November, 2007.

Learned Counsel for the Revenue prays time to prepare paper book.

List the appeal on 20th November, 2007.

Later on, the Court directed the learned Counsel for the Revenue to place on record notification dated 01.03.2002 on the basis of which the duty was assessed originally in 2005.

Similarly, on 20.12.2007, the Court asked the counsel for the parties to place on record the relevant agreement entered into between respondent and M/s Magpie Overseas Company.

BRIFE FACTS OF THE CASE

5. The brief facts set out by the appellant are as under:

5.1 M/s. Jhunjunwala Vanaspati Ltd. (hereinafter referred to as "the respondent") imported a consignment of Crude palm oil-non-edible grade/industrial grade falling under Chapter Heading No. 1511 90 90 of the Customs Tariff Act, 1975. Out of the same, the respondent sold quantity of 500 MT to M/s. Magpie Overseas Company, Delhi (hereinafter referred to as "M/s. Magpie") on High Sea Sale basis under an agreement dated 06.09.2005.

5.2 On the basis of the said High Sea Sale Agreement, M/s. Magpie filed two bills of entry Nos. 119410 and 119384 on 12.09.2005 of 250 MT each for home consumption and claimed benefit of concessional rate of duty under the Notification No. 21/2002 dated 01.03.2002 [Sr. No. 30(A)] as amended from time to time.

5.3 The said bills of entry were assessed by the concerned officer on 26.09.2005, taking into consideration the documents presented. After the assessment order was passed on bill of entry No. 119410 dated 12.09.2005, M/s. Magpie paid duty amounting to Rs. 9,53,771/- together with interest thereupon of Rs. 1568/- on the same day, i.e. 26.09.2005. On payment of duty, orders for "out of charge" were passed on the same day, i.e. 26.09.2005 with regard to the goods covered under the bill of entry No. 119410. So far as bill of entry No119384 is concerned, M/s. Magpie did not pay any duty though the said bill of entry was duly assessed.

5.4 On the basis of the intelligence received and preliminary investigation report sent to the Customs authorities to the effect that the goods lying at Kandla Port would not be used by the importer in absence of capacity to store/process for the manufacture of soap. The officers of SIIB, Customs House, Kandla placed the goods under seizure by drawing panchnama on 08.02.2006, as according to the

officers, the goods were liable for confiscation under the provisions of the Customs Act, 1962.

5.5 In view of the above, the respondent (M/s. Magpie) preferred a petition being Special Civil Application No. 5037 of 2006 before this Court. The same was disposed of by order dated 21.03.2006. The Court directed respondent No. 2 to appellant herein Commissioner of Customs, Kandla to take a final decision on applications/letters submitted by the present respondent the petitioner in that petition on 06.10.2005 and 30.12.2005 within four weeks from the date of receipt of the said order. The Court was also pleased to direct that if respondent No. 2 thought it necessary to hear the petitioners (of that petition) respondent herein, he shall issue notice so as to procure presence of the petitioners and in that event, the Court was pleased to direct that the petitioners shall extend full cooperation to respondent No. 2 so that the final decision could be taken as directed by the Court. The Court was also pleased to direct that if the order that may be passed by respondent No. 2 is not in favour of the petitioners, the respondent shall record the reasons for which he is unable to accept the request which was made by the petitioners in the said letters. A copy of the order of this Court disposing of Special Civil Application No. 5037 of 2006 is produced at Annexure-A to this appeal.

5.6 After the disposal of the aforesaid Special civil Application by this Court, the respondent submitted letter dated 04.04.2006 requesting to release the seized goods by treating High Sea Sale Agreement as cancelled and permit them to substitute the bills of entry in place of M/s. Magpie by adjusting the duty paid by M/s. Magpie at normal rate of 65% ad valorem.

5.7 Pursuant to the aforesaid order passed by this Court in Special Civil Application No. 5037 of 2006 the respondent as well as M/s. Magpie were issued notice bearing No. F. No. S/23-3/Jhunjhunwala/2006 Gr.-I dated 02.05.2006 in the following terms: The respondent was called upon to show cause on or before 09.05.2006.

- a. In respect of bill of entry No. 119410 where the clearance for home consumption u/s 47 of the Customs Act, 1962 has already been passed, why the request for cancellation and permission for filing a fresh bill of entry be not rejected.
- b. Why the seized goods covered by the aforesaid bill of entry which were attempted to be cleared under concessional rate of duty based on declarations made by Magpie, be not proceeded against in terms of the relevant provisions of the Customs Act, 1962 for specific violations by way of separate proceedings and;
- c. Why the request of notice for cancellation of bill of entry No. 119384 on which order for clearance for home consumption u/s 47 of the Customs Act, 1962 has not been passed by considered for amendment, subject to compliance with the requirements of Section 30 of the Customs Act, 1962 read with Section 149 of Customs Act, 1962 and be not assessed to duty, subject to the relevant

provisions of Customs Act, 1962 and of any other law for the time being in force to be considered by the proper authority.

5.8 Personal hearing was fixed on 15.05.2006, wherein the respondent was represented by an advocate along with their authorised representative. The respondent submitted written submissions.

5.9 The Commissioner of Customs, Custom House, Kandla, taking into consideration the facts of the case and the arguments advanced on behalf of the respondent, recorded the following findings:

I. M/s. Magpie had filed two bills of entry bearing Nos. 119410 and 119384 both dated 12.09.2005 for home consumption of goods and they made declarations as prescribed u/s 46 of the Customs Act, 1962 and that there was no dispute over the fact that M/s. Magpie had filed these two bills of entry in pursuance to a High Sea Sale Agreement dated 06.09.2005 between them and the noticee.

II. Bill of entry No. 119410 dated 12.09.2005 was assessed to duty based on declarations made on the bill of entry as provided u/s 17 of Customs Act, 1962 and upon Magpie making payment of duty amount (along with interest) as assessed. Out of charge order as envisaged u/s 47 of Customs Act, 1962 was given on 26.09.2005. The Noticee vide his letter dated 06.10.2005 has pleaded for cancellation of above bill of entry and permission for filing a fresh bill of entry for the same goods by stating that Magpie were unable to clear the goods. They reiterated this request through another letter dated 30.12.2005. This request of Noticee (the respondent M/s. Jhunjhunwala Vanaspati Ltd.) as contained in these two letters (for which Hon"ble High Court has passed the oral order dated 21.03.2006) is not supported by Customs Law. There is no provision under Customs law for cancellation of a bill of entry once goods are given out of charge. M/s. Magpie on the basis of High Sea Sale agreement had held themselves out to be the importer and it cannot be said that there was any documentary evidence as envisaged u/s 149 of Customs Act, 1962 so as to consider amendment in the bill of entry with regard to name of importer...

III. As far as the second bill of entry is concerned which has been presented to the department on the basis of High Sea Sale agreement effected by the Noticee in the name of Magpie, claiming concessional rate of duty in terms of notification No. 21/2002 Cus., as amended, it may be seen that this bill of entry has already been assessed and released for payment of duty on 26.09.2005. In this case, Magpie has already held themselves out as importer and filed bill of entry on the basis of High Sea Sale Agreement. The definition of the term importer in Section 2(26) of the Customs Act, 1962 very clearly specifies that importer, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer. As such, Customs Law, in the period between the importation of the goods and the time when they are cleared for home consumption does not hold any ownership test. In short, for holding oneself out

to be an importer, a person need not be the owner of the goods. That Magpie held themselves out as importer and filed a bill of entry subscribing to declarations and claiming certain concessions to which apparently they were not entitled as per investigation which were commenced by Department at the relevant time and the Noticee were party to the whole act facts well borne out by record.

IV. In this case, the import had taken place in the name of M/s. Jhunjhunwala Vanaspati Ltd. They had put on record a High Sea Sale Agreement and M/s. Magpie held themselves out as importer and claimed certain duty concessions on the basis of declarations made on the bill of entry. When investigation commenced by the department on their entitlement for such concession, M/s. Magpie vanished and M/s. Jhunjhunwala Vanaspati Ltd. (Noticee) re-appeared on the scene. That M/s. Magpie was a fictitious firm is clear when even letters sent across to them returned undelivered as addressee not found and during personal hearing, the noticee themselves admitted that they are also not able to trace them. The issue herein is that matter is still under investigation and not so much known whether the fiction of M/s. Magpie was the creation of Noticee themselves. The fact of the fiction is, however, a reality and M/s. Magpie sought to defraud the revenue by false declarations on the bill of entry is very much evidenced by that very bill of entry which is not sought to be cancelled by this application of the Noticee.

5.10 The Commissioner of Customs, Custom House, Kandla did take into consideration the judgment of the Hon''ble the Apex Court in the case of Union of India and another Vs. Sampat Raj Dugar and another, and recorded its reasons in the later part of paragraph No. 5.2.5 of the Order in Original for which the same is held to be not applicable to the facts of the present case. The said reasons read as under:

The ratio of Hon. Supreme Court's judgment in the case of Union of India and another Vs. Sampat Raj Dugar and another, is with reference to an importation by a person who had an advance license issued in his name which got cancelled and as such, the foreign supplier's rights with reference to the goods were sought to be established for smooth functioning of foreign trade. This case, however, as explained above, is with regard to a high sea sale effected by the Noticee who has initially imported the goods and then transferred it on high sea sale basis to a fictitious firm, with or without motive, and once that firm was investigated and vanished from the scene, seeks to substitute themselves as the importer. The bill of entry filed by M/s. Magpie which has been duly assessed by the department is still very much on record. As such, the element of fraud which is very much involved in the present case was not an issue before Hon. Supreme Court in the case of Sampat Raj Dugar....

5.11 After recording the aforesaid findings and relying upon the decisions, set out in paragraph No. 5.2.5, the Commissioner of Customs passed the Order in Original rejecting the request of the respondent for cancellation of bills of entry

Nos. 119410 and 119384 dated 12.09.2005 filed by M/s. Magpie, which the Commissioner of Customs found to be a fictitious company. The Commissioner of Customs also declined to accept the request made by the respondent (M/s. Jhunjhunwala Vanaspati Ltd.) for substitution of its name in place of M/s. Magpie as importer. The Commissioner of Customs orders initiation of separate proceedings in accordance with provisions of the Customs Act, 1962 against the assessed goods covered by aforesaid two bills of entry. A copy of the Order in Original is at Annexure-B.

5.12 The respondent herein, being aggrieved and dissatisfied with the said Order in Original, preferred an appeal before the Customs Excise Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad being Appeal No. C/978/2006, which was allowed by order dated 26.12.2006, against which present appeal is filed.

Submissions Made By Mr. Harin P. Raval, Learned Assistant Solicitor General of India on Behalf of The Appellant:

6. Mr. Harin P. Raval, learned Assistant Solicitor General of India, strenuously contended before this Court that the order passed by the CESTAT in Appeal No. C/978/2006 is not in accordance with law and is required to be quashed and set aside by this Court, answering the substantial questions of law accordingly. The learned Assistant Solicitor General of India supported the order passed by the Commissioner of Customs.

6.1 The learned Assistant Solicitor General of India invited attention of the Court to Sections 2(26), 46(1) 47 and 149 of the Customs Act, 1962.

6.2 The learned Assistant Solicitor General of India submitted that in the present case, it was M/s. Megpie who presented the bill of entry and thus, it presented itself as the importer of the goods.

6.3 The learned Assistant Solicitor General of India submitted that Section 45 of the Act provides for, "restrictions on custody and removal of imported goods, whereas Section 46 of the Act provides for, "Entry of goods on importation". He submitted that Sub-section (1) of Section 46 is relevant for our purpose, which is as under:

(1) The importer of any goods, other than goods intended for transit or transshipment, shall made entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form.

6.4 The learned Assistant Solicitor General of India submitted that under Sub-section (1) of Section 46, the importer of the goods is under a duty to make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing, as the case may be, in the prescribed form. He submitted that in the present case, it was M/s. Magpie who presented the bill of entries for the goods in question.

6.5 The learned Assistant Solicitor General of India invited attention of the Court

to Section 47 of the Act, which deals with, "clearance of goods for home consumption". Section 47 of the Act reads as under:

47. Clearance of goods for home consumption.- (1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption.

(2) Where the importer fails to pay the import duty under Sub-section (1) [within [five days], excluding holidays] from the date on which the bill of entry is returned to him for payment of duty, he shall pay interest [at such rate, not below [ten per cent] and not exceeding thirty-six per cent, per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette] on such duty till the date of payment of said duty:

Provided that where the bill of entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 and the importer has not paid such duty before such commencement, the date of return of such bill of entry to him shall be deemed to be the date of such commencement for the purpose of this section:]

[Provided further that if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons to be recorded, waive the whole or part of any interest payable under this section].

6.6 The learned Assistant Solicitor General of India emphasized Sub-section (1) of Section 47 and submitted that in the present case, it was M/s. Magpie, who having presented the bill of entry, after the same was processed, did pay the necessary duty, qua one of the bills of entry, whereupon the proper officer passed necessary orders. He submitted that after the aforesaid events have taken place, a claim of the respondent (Jhunjhunwala Vanaspati Ltd.) to permit it to file fresh bill of entry by substituting M/s. Magpie in place of importer, is not permissible under the law.

6.7 The learned Assistant Solicitor General of India also invited attention of the Court to Section 149, which deals with, "amendment of documents". Section 149 reads as under:

149. Amendment of documents.- Save as otherwise provided in Sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the customs house to be amended:

Provided that no amendment of a bill of entry or shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be.

6.8 The learned Assistant Solicitor General of India emphatically submitted that save as otherwise provided in Sections 30 and 41, a proper officer, in his discretion, can authorise any document, after it is presented in the custom house, to be amended. He submitted that Section 149 confers discretion, but then the said discretion is curbed by the proviso, whereby the legislature provided that no bill of entry shall be authorised to be amended after the imported goods are cleared for home consumption or deposited in a warehouse, meaning thereby except in the aforesaid circumstance, an officer can exercise the discretion vested in him. So far as in eventualities contemplated in the proviso are concerned, the proper officer has no discretion to allow any amendment.

6.9 The learned Assistant Solicitor General of India submitted that in the present case, there was no question of exercise of discretion by the proper officer because after the goods landed, M/s. Magpie filed the bill of entry after which the same were not only assessed but in case of one of the bills of entry, even the duty was paid.

6.10 The learned Assistant Solicitor General of India relied upon a decision of the Hon"ble the Apex Court in the case Bharat Commerce and Inds. Ltd., New Delhi Vs. Collector of Customs, Bombay, Paragraph Nos. 1 to 3 and 8 to 12 of the said judgment read as under:

1. On 16-8-1985, the appellant, through its clearing agents, lodged a bill of entry for home consumption. On 20-8-1985, the appellate wrote the following letter to the Assistant Collector of Customs:

Sub: 40 Bales Cashmilon Brand Acrylic Fibre IGM No. 1958/249 S.S. Eastern Splendour, M/s Bharat Commerce & Ind. Ltd., Bombay.

Dear Sirs,

The above-mentioned B/entry was noted for Home Consumption on 16-8-1985, but the Importer has instructed us now to prepare and clear the Material under Bond. Since they are having shortage of funds and are unable to pay the import duty for the time being.

Kindly allow us to cancel the Home Consumption B/Entry and allow fresh B/Entry under Bond.

2. The grievance of the appellant is that no action was taken on this application. On 26-8-1985 the appellate wrote a second letter to the Assistant Collector of Customs to the following effect:

Sub: Allow to cancel the Home Consumption Bill of Entries Nos. 1958/249, 252 and 251 and to file Bond B/Entries. Imported M/s Bharat Commerce and Industries Limited.

Dear Sir,

As per the instructions by importer, we request you to kindly allow us to file Bond Bill of Entries.

3. It has been recorded by the Tribunal that this letter dated 26-8-1985 was received by the Assistant Collector in the morning of 28-8-1985. In the afternoon of 28-8-1985, it came to be known that the rate of duty on the imported goods were reduced. The question is whether the appellant was liable to pay the duty at the newly-introduced lower rate.

8. It was contended that this letter dated 20-8-1985 should have been treated as sufficient by the Customs Officer to pass suitable order under Sub-section (5) of Section 46 allowing substitution of the bill of entry for home consumption for the bill of entry for warehousing.

9. It was also contended that no particular form is prescribed for making an application of this nature. There is no formality to be complied with. The Customs Officer was in error in ignoring this letter.

10. We are unable to uphold the contention. Assuming that the letter dated 16-8-1985 was sent to the Customs Officer, that letter by itself could not be treated as a bill of entry for warehousing. Sub-section (1) of Section 46 requires presentation to the proper officer of a bill of entry for home consumption or warehousing in the prescribed form. Sub-section (2) lays down that the bills of entry shall include all the goods mentioned in the bill of lading or other receipts given by the carrier to the consignor. Sub-section (4) of Section 46 requires the importer to make a declaration as to the truth of the contents of such bill of entry and to produce documents in support of such declaration. It is difficult to see in the context of these provisions how the letter could be treated as a bill of entry for warehousing. What Sub-section (5) contemplates is substitution of one bill of entry for another. In order to effect the substitution, a second bill of entry must be lodged which will be in substitution of the first bill of entry.

11. Our attention was drawn to a judgment of the Bombay High Court in the case of *Chowgule and Co. (P) Ltd. v. Union of India*. It was contended on the strength of this judgment that the wordings of Section 46 and particularly the expression 'shall make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form?' make it appear at the first glance that the filing of the bill of entry in the prescribed form was mandatory and that, therefore, non-compliance thereof may make the importer liable to the penalty. This view, however, overlooked that presentation of a bill of entry in the prescribed form was only procedural, non-compliance of which could not be visited with penalty.

12. We do not have a case of penalty before us. We are also of the view that filing of a bill of entry in the prescribed form is not a procedural formality. Otherwise any importer may write a letter to the proper officer stating that certain quantities of goods have been imported and the goods will have to be cleared on the strength of the letter only. If a statutory form is prescribed for

presentation of a bill of entry, then the bill of entry has to be in the prescribed form. Section 46(5) contemplates substitution of one bill of entry by another. The second bill of entry must also be prepared and lodged with the proper officer in the prescribed form. It cannot be said that the first application was in the prescribed form. No order could be passed upon it by the proper officer by treating it as a bill of entry for warehousing.

6.11 The learned Assistant Solicitor General of India also relied upon a decision of the Hon'ble the Apex Court in the case of Commissioner of Customs (Preventive) Vs. Vijay Dasharath Patel, Paragraph Nos. 23, 25, 27, 36, 37 and 39) of the said judgment read as under:

23. Moreover, although, a finding of fact can be interfered with when it is perverse, but, it is also trite that where the courts below have ignored the weight of preponderating circumstances and allowed the judgment to be influenced by inconsequential matters, the High Court would be justified in considering the matter and in coming to its own independent conclusion. (See Madan Lal Vs. Mst. Gopi and Another,

25. Even in a case where evidence is misread, the High Court would have power to interfere. (See West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc., and also Commissioner of Customs, Mumbai Vs. Bureau Veritas and Others,

27. We have hereinbefore noticed the judgment of Tribunal as also the one rendered by the Commissioner of Customs. The Commissioner of Customs, inter alia, has gone into the entire materials brought on records by the parties. It has taken into consideration a number of circumstances in arriving at its findings. The Tribunal, however, as noticed hereinbefore, inter alia, not only proceeded on the basis that one of the carriers had been let off but also the purported normal fashion of transport of gold bars for which no evidence was brought on records.

36. The learned Commissioner had opined that there existed serious discrepancies in the bills or vouchers. The Tribunal, in our opinion, should have dealt with the aforementioned findings of the Commissioner.

37. Mr. Vella Palli has strongly relied upon Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras, wherein it was held:

...On these facts, the Tribunal came to the conclusion that the contentions of the Department had been fully established, namely, that the intermediaries were dummies brought into existence by the appellant for concealing its profits, that the sales standing in their names were sham and fictitious, and that the profits ostensibly earned by them on those transactions were, in fact, earned by the appellant, and should be added to the amounts shown as profits in its accounts. The point for decision is whether there arises out of the order of the Tribunal any question which can be the subject of reference u/s 66(1) of the Act. Under that section, it is only a question of law that can be referred for decision of the court,

and it is impossible to argue that the conclusion of the Tribunal is anything but one of fact.

39. For the reasons aforementioned, we are of the opinion that the High Court may not be entirely correct in holding that no substantial question of law arise for its consideration. Ordinarily, although, we have referred the matters back to the High Court, having regard to the fact that we have ourselves examined the findings of the Tribunal and the findings of the Commissioner, we are of the opinion that instead of remitting the matter back, interest of justice would be met if upon setting aside the judgment of the High Court and Tribunal the matters are remitted to the latter for considering them afresh. The parties shall be entitled to raise their respective contentions before the Tribunal. We intend to make it clear that our reference to the findings of the Commissioner as also the Tribunal was made only for the purpose of considering as to whether any substantial question of law arose for consideration before the High Court and for no other purpose. We may not therefore be understood to arrive at any finding in regard to any question which would arise for the consideration of the Tribunal.

Submissions Made By Mr. Klawal on Behalf of the Respondent:

7. Mr. K.L. Rawal, a senior advocate, with Mr. Dipen A. Dasai for the respondent submitted that at the relevant time, the rate of duty was 75% ad velorum for the goods imported being Crude palm oil-non-edible grade/industrial grade falling under Chapter Heading No. 1511 90 90. He submitted that in terms of notification No. 21/02 for actual user manufacture of soap, it was 20%. Learned advocate for the respondent submitted that it is important to note that at present, i.e. at the time of allowing the appeal, the rate of duty is 100% ad velorum. He submitted that the respondent is ready and willing to pay the duty at the current rate, net effect of that will be that the revenue will get more duty than what it would have got at the relevant time.

7.1 This readiness and willingness on the part of the respondent, brought desired result. It weighed with the Tribunal in deciding the appeal. The Tribunal has recorded in paragraph No. 4 that:

...They are ready and willing to clear the goods on payment of applicable rate of duty without claiming the benefit of exemption under notification No. 21/02....

7.2 The Tribunal, taking this into consideration, directed vide Clause (c) of paragraph No. 7 that:

The appellant shall file fresh bill of entry without claiming exemption under Notification No. 21/02 and the same shall be processed as per law and applicable duty and interest shall be collected.

7.3 But then, unfortunately, the Tribunal lost sight of the fact that, the case of the revenue is that, "respondent (M/s. Jhunjhunwala Vanaspati Ltd.) cannot be allowed to file fresh bill of entry, more particularly in light of the fact that the revenue has found M/s. Magpie to be a fictitious entity". Not only that, "the

respondent is not able to procure presence of M/s. Magpie at the time of hearing, which was fixed by the authorities after the matter was ordered to be decided by taking a final decision on applications/letters submitted by the respondents dated 06.10.2005 and 30.12.2005 within 4 weeks from the date of receipt of order of this Court".

7.4 Learned advocate for the respondent emphatically submitted that as the duty was not paid by M/s. Magpie, the respondent continues to be the owner and therefore, the authorities ought to have allowed the respondent to file fresh bill of entry, though M/s. Magpie had filed two bills of entry, which were cleared by the authorities on 12.09.2005 pursuant to a High Sea Sale Agreement dated 06.09.2005.

7.5 Learned advocate for the respondent placed reliance on certain communications, which were part of the record of the Tribunal being letters dated 06.10.2005 and 30.12.2005, which were not placed before this Court. The learned advocate for the respondent filed a pursis to produce the said two documents before this Court, on which the respondent was permitted to produce the said documents, along with the written submissions which were filed before the Commissioner of Customs at the time of hearing of show cause notice dated 02.05.2006. Learned advocate for the respondent submitted that from the documents produced by the respondent and from the written submissions, it is clear that the case of the respondent is, "that M/s. Magpie, after having entered into a High Sea Sale Agreement, did not pay the sale consideration to the respondent and this fact was informed to the Commissioner of Customs by letter dated 06.10.2005". It was stated in the said letter that:

...The buyer has filed the bill of entry, but despite repeated reminders, through the broker he has failed to fulfill the conditions of the high sales agreement by not paying the payment for the goods. The buyer has informed us that the production in their unit has been suspended, due to which they are unable to accept the delivery of the goods and release the payment for the same. He wants to cancel the high-seas agreement....

7.6 But then, it cannot be lost sight that much before the said letter was written, i.e. on 12.09.2005, M/s. Magpie filed two bills of entry Nos. 119410 and 119384 home consumption for import of 250 MT each of the above goods and claimed benefit of concessional rate of duty under the Notification No. 21/2002 dated 01.03.2002 [Sr. No. 30(A)] as amended from time to time. The said bills of entry were assessed by the concerned officer, taking into consideration the documents presented on 26.09.2005. The assessment order was passed on bill of entry No. 119410 dated 12.09.2005 and M/s. Magpie paid duty amounting to Rs. 9,53,771/- together with interest thereupon of Rs. 1568/- on 26.09.2005. Accordingly, orders for "out of charge" with regard to the goods covered under the bill of entry No. 119410 were passed on 26.09.2005.

7.7 Learned advocate for the respondent emphatically submitted that the

authorities have mis-read and mis-interpreted Clause 26 of Section 2 of the Customs Act, which provides the definition of the term "importer". He submitted that until the goods are cleared for home consumption, a request for filing fresh bill of entry ought to have been allowed by the authorities. He submitted that as M/s. Magpie did not pay to the respondent, which fact was intimated to the authorities by letter dated 06.10.2005, the respondent continued to be the importer and therefore, the respondent ought to have been allowed to file fresh bill of entry.

7.8 Learned advocate for the respondent heavily relied upon decision of the Hon"ble the Apex Court in the case of Union of India and another Vs. Sampat Raj Dugar and another, Learned advocate for the respondent relied upon paragraph Nos. 6, 7, 8, 10 and 19 of the judgment and submitted that the decision of the Hon"ble the Apex Court applies to the facts of the present case in all fours. The said paragraph read as under:

6. The first respondent did not prefer an appeal against the said order. He directly challenged the same in the Bombay High Court by way of a Writ Petition. H reiterated his contention viz., since the second respondent has failed to pay and receive the documents regarding the said four consignments, he himself continues to be the owner thereof; if so, the said goods cannot be confiscated or proceeded against in any manner for any act or default of the second respondent. He claimed to be entitled to re-export the same to Hong Kong. The case of the Collector of Customs and the Union of India was that the second respondent must be deemed to be the owner of the said four consignments by virtue of the definition of "importer" in Section 2(26) of the Customs Act read with Clause 5(3)(ii) of the Imports (Control) Order 1955. Reliance was also placed upon para 26(iv) of the Import and Export Policy issued for the year 1985-86. It was accordingly submitted that the said goods are liable to be confiscated for the acts and defaults of the second respondent. It was also submitted that by virtue of the noncompliance with the condition (relating to export of garments manufactured out of the imported raw silk yarn) the second respondent has rendered all the goods covered by the import licence liable to confiscation.

7. The learned single Judge allowed the Writ petition on the following findings: On the date the goods were imported, they were covered by a valid import licence. The subsequent cancellation thereof is of no consequence inasmuch as Section III(d) of the Customs Act provided for confiscation of the imported goods only where they are imported contrary to law. Even if the second respondent was guilty of any misuse or of noncompliance with any of the conditions of licences, it only furnishes a ground for cancellation/suspension of licence so long as the licence was not suspended or cancelled, it was valid and effective. The importing of the goods was thus under a valid licence and was not contrary to law. Since the second respondent has failed to pay and receive the documents of title, the title to the goods did not pass to her. The provisions in Clause 5(3)(ii) of the

Imports (Control) Order is of limited effect. Where the clearance of goods through customs is not even attempted but abandoned, such importer cannot be treated as the owner. The definition of "importer" in Section 2(26) of the Customs Act also does not avail the authorities. Since the first respondent continued to be the owner of the goods, he is entitled to re-export the same.

8. The Letters Patent Appeal preferred by the Collector of Customs and the Union of India was dismissed by the Division Bench affirming the reasoning of the learned single Judge in its entirety.

10. For a proper appreciation of the controversy arising herein, it is necessary to notice certain provisions of the Customs Act as well as of the Imports and Exports (Control) Act, 1947 and the Imports (Control) Order, 1955.

19. At this stage, it may be appropriate to clarify one aspect. There may be cases, where the importer opens a letter of credit and makes some other arrangement ensuring/guaranteeing payment of price of imported goods. In such a case, it will be open to the exporter, in case of non-payment of price or abandonment by the importer, to collect the price by invoking such arrangement. In such a case, it is obvious, the exporter will not be allowed to claim title to and/or to re-export the goods. (Indeed, it is unlikely that in such a case, the importer abandons the goods ordinarily speaking.) It is therefore necessary that in all such cases, the authority should issue a notice to the importer and/or his agent before allowing the exporter to deal with or seek to re-export the goods. So far as this case is concerned, both the importer and exporter (Rules 2 and 1 respectively) were present before the Collector (Customs) as well as before the High Court. Rule 2 did not plead any such arrangement.

7.9 Learned advocate for the respondent also relied upon the following decisions:

I. Agrim Sampada Ltd. v. UOI reported in 2004 (168) ELT 15.

II. 1992 (42) ECR 454

III. Dr. Prasad v. CC reported in 1994 (73) ELT 93.

IV. Worldwide East Pvt. Ltd. v. CC reported in 2001 (136) ELT (88).

V. 1991 (33) ECR 289

VI. Audio Vision Electronics v. CC reported in 1987 (31) ELT 196.

VII. 1991 (33) ECR 1 38

VIII. Jayswals Nico Ltd. v. CC reported in 2006 (195) ELT 142 (SC).

IX. UOI v. Kamlakshmi Finance Corporation Ltd. reported in AIR 1992 SC 771.

X. K.L. Tripathi Vs. State Bank of India and Others,

DISCUSSION

8. Taking into consideration the rival submissions of both the parties, it is clear that the respondent imported consignment of Crude palm oil-non-edible grade/ industrial grade. It is also not in dispute that the respondent sold quantity of 500 MT to M/s. Magpie Overseas Company on High Sea Sale basis under an agreement dated 06.09.2005. Said M/s. Magpie filed two bills of entry Nos. 119410 and 119384 on 12.09.2005 for home consumption for import of 250 MT each. Not only that M/s. Magpie claimed benefit of concessional fate of duty under Notification No. 21/2002 dated 01.03.2002 [Sr. No. 30(A)] as amended from time to time. It is also not in dispute that on the basis of the documents presented by M/s. Magpie, both the bills of entry were assessed by the proper officer on 26.09.2005. Pursuant to that order of assessment passed on bill of entry No. 119410 dated 12.09.2005, duty amounting to Rs. 9,53,771/- together with interest thereupon of Rs. 1568/- was paid on 26.09.2005. Accordingly, orders for "out of charge" for the goods covered under the bill of entry No. 119410 was passed on 26.09.2005. It is not in dispute that no duty was paid by M/s. Magpie against bill of entry No. 119384 which was filed on 12.09.2005 with respect of 250 MT. But the said bill of entry No. 119384 was also assessed. It is only thereafter that on 06.10.2005, for the first time, the respondent wrote to the Commissioner of Customs particularly about non-payment of the amount by M/s. Magpie. For ready reference, relevant part of that communication dated 06.10.2005 is reproduced:

We imported the above goods and sold the same in high-seas to M/s. Magpie Overseas Co. (the buyer) under the high-seas sales agreement dated 6th September 2005.

The buyer has filed the bill of entry, but despite repeated reminders, through the broker he has failed to fulfill the conditions of the high sales agreement by not paying the payment for the goods. The buyer has informed us that the production in their unit has been suspended, due to which they are unable to accept the delivery of the goods and release the payment for the same. He wants to cancel the high-seas agreement....

9. The case of the authorities is that on the basis of the intelligence received and on the basis of preliminary investigation report received from the Headquarter, Preventive Wing of Delhi-II to the effect that the goods lying at Kandla Port would not be used by the importer in absence of capacity to store/process and manufacture soap, the officers of SIIB, Customs House, Kandla placed the goods totally weighing 494.085 MT as per port out turn report under seizure by drawing panchnama on 08.02.2006, under a reasonable belief that the goods are liable for confiscation under the provisions of the Customs Act, 1962.

9.1 The respondent, having failed to trace M/s. Magpie, as they admitted during the course of personal hearing, have tried to adopt a course which is favourable to them by asking the authorities to allow the respondent to file fresh bill of entry.

9.3 The fact that M/s. Magpie vanished after paying existing duty to the tune of

Rs. 9,53,771/- together with interest thereupon of Rs. 1568/- as early as on 26.09.2005, there is no option then to draw an adverse inference against the present respondent that said M/s. Magpie was creature of the respondent itself to avail the benefit of the concessional rate of duty under notification No. 21/02 dated 01.03.2002. The fact that after an intelligence and a preliminary report, M/s. Magpie vanishes and respondent re-appears, in the considered opinion of this Court, the Commissioner of Customs was right in rejecting the request made by the respondent (M/s. Jhunjhunwala Vanaspati Ltd.) for cancellation of bills of entry Nos. 119410 and 119384 dated 12.09.2005 filed by M/s. Magpie. The Commissioner of Customs was also right in not permitting the respondent to file fresh bill of entry in respect of the goods covered by aforesaid bills of entry. The Commissioner of Customs is right in rejecting the request of the respondent for substituting their name in place of M/s. Magpie importer in the aforesaid bills of entry.

9.4 In the opinion of this Court, it is clear from the conduct of the respondent that instead of finding out M/s. Magpie, to whom they sold the goods under a High Sea Sale Agreement, for recovery of their dues they are trying to pressurize the authorities for allowing them to cancel the bills of entry filed by M/s. Magpie and allow the respondent to file fresh bills of entry and substitute the name of the respondent in place of M/s. Magpie.

10. The foremost argument of the learned advocate for the respondent that the decision of the Hon''ble Apex Court in the case of Union of India v. Sampat Raj Dugar is applicable to the facts of the present case, is found to be not well-founded. Even the Commissioner of Customs had considered the said decision of the Hon''ble the Apex Court and observed as under:

The ratio of Hon. Supreme Court's judgment in the case of Union of India and another Vs. Sampat Raj Dugar and another, is with reference to an importation by a person who had an advance license issued in his name which got cancelled and as such, the foreign supplier's rights with reference to the goods were sought to be established for smooth functioning of foreign trade.

10.1 The Commissioner of Customs has considered the facts of the present case in the same paragraph as under:

This case, however, as explained above, is with regard to a high sea sale effected by the Noticee (present respondent) who has initially imported and then transferred it on high sea sale basis to a fictitious firm, with or without motive, and once that firm was investigated and vanished from the scene, seeks to substitute themselves as the importer. The bill of entry filed by M/s Magpie which has been duly assessed by the department is still very much on record. As such, the element of fraud which is very much involved in the present case was not an issue before Hon. Supreme Court in the case of Sampat Raj Dugar....

10.2 This Court, having perused the aforesaid judgment of the Hon''ble the Apex Court, is of the considered opinion that the facts of that case are different and

therefore, the decision has no application to the facts of the present case.

11. Coming to the order passed by the CESTAT the appellate authority, it is clear that the order is nothing more than a cryptic order. The Tribunal, except narrating the facts the case of the parties in a form of *presis*, has not considered and has not recorded any reasons for which it accepted the case of the appellant and the reasons for which it did not find favour with the case of the authorities. The Tribunal did not pay necessary attention to the fact that the importer M/s. Magpie, the purchaser in a High Sea Sale Agreement, after having paid the duty to the tune of Rs. 9,53,771/- together with interest thereupon of Rs. 1568/-, disappeared for no reasons which could be conceived by a reasonable person. This fortifies the case of the revenue and the view taken by the Commissioner of Customs in the matter, viz. M/s. Magpie was a fictitious firm and it vanished from the scene only after intelligence and preliminary report. It is only after M/s. Magpie vanished from the scene that the present respondent re-appeared on the scene with the request of cancellation of bill of entry filed by M/s. Magpie with a request to file fresh bills of entry in respect of the same goods and with request for substitution of their name in place of the name of M/s. Magpie Overseas Company as importer.

12. So far as law is concerned, Clause 26 of Section 2, which provides the definition of the term "importer", reads as under:

(26) "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer;

12.1 The fact that M/s. Magpie filed bills of entry before the authorities, not only that after filing bills of entry on 12.09.2005, it did pay the required duty on one of the bills of entries on 26.09.2005, it is thereafter that all of a sudden the said party vanishes from the scene, but then a important fact remains that in between there was an intelligence and preliminary report from the Preventive Wing of Dehli-II Central Excise Commissionerate, this cannot be overlooked and it is rightly not overlooked by the Commission of Customs. Incidentally, it is required to be noted that the Tribunal has not taken note of this fact in the right perspective.

13. So far as amendment of documents is concerned, Section 149 holds the field. Section 149 reads as under:

149 Amendment of documents.- Save as otherwise provided in Sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the customs house to be amended....

13.1 The law is clear that it is the proper officer who is vested with the discretion to authorise any document after it has been presented in the customs house to allow the party to amend or not. In the opinion of this Court, the authorities the Commissioner of Customs has not committed any error in rejecting the request

of the respondent in light of the facts of the case, which are set out in detail hereinabove.

14. Learned advocate for the respondent paid emphasis on the provisions of Section 149 which reads as under:

Provided that no amendment of a bill of entry or shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a ware house, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be.

14.1 Learned advocate for the respondent did not give due importance to the word, "shall". The proviso puts a restriction on the discretion conferred on the proper officer in the main body of Section 149. It cannot be read that proviso mandates the exercise of discretion in favour of a party so as to allow the party to amend the documents if the eventualities set out in the proviso have not taken place. In fact, discretion is absolute and the proviso only provides that if the eventualities set out therein have taken place then the discretion is curtailed of the same cannot be raised even when it is vested in the proper officer if those eventualities have taken place.

15. In view of the aforesaid discussion, the Court finds that the order of the Tribunal cannot be allowed to stand and the same is hereby quashed and set aside. The appeal is allowed. The questions re-framed by the appellant are answered in negative, meaning thereby it is held that the Tribunal was not justified in permitting the respondent to file a fresh bill of entry contrary to provisions of Section 149 of the Customs Act, 1962. Similarly, the Tribunal was not justified in permitting the respondent to file a fresh bill of entry in respect of 500 MT of imported goods. The Tribunal was also not justified in permitting filing of fresh bill of entry after an out of charge order is issued so as to substitute the name of the importer as finalized.

In view of the order passed in the Tax Appeal, Civil Application does not survive and it is disposed of accordingly.