(2021) 10 CESTAT CK 0032

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 30386 Of 2021

M/s. Oscar Commodities Pvt. Ltd. APPELLANT

Vs

Commissioner Of Customs RESPONDENT

Date of Decision : 13-10-2021

Acts Referred:

Customs Act, 1962 — Section 110, 111(d), 111(o), 112(a), 125, 125(1), 126, 129D(2), 141(2), 157
Handling of Cargo in Customs Area Regulation 2009 — Regulation 5, 6(l)
Constitution of India, 1950 — Article 142

Citation : (2021) 10 CESTAT CK 0032

Hon'ble Judges : Sulekha Beevi C.S., J;P.V. Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Partly Allowed

Judgement

1. Brief facts are that the appellant herein M/s. Oscar Pvt. Ltd. Kakinada imported 6479.30 MTs of 'Green Peas' falling under CTH 0713 against 21 bills of lading through Visakhapatnam Sea port. Out of this, 09 bills of entry were filed initially. As per DGFT Notification No. 37/2015-2020 dated 18.12.2019, import of peas is restricted. Nature of restriction is as under:-

EXIM Code

Item Description

Revised Import Policy

Current Policy Condition from 18.12.2012

07131000

Peas (Pisum Sativum) including Yellow peas, Green peas, Dun Peas and Kaspa peas

Restricted and subject to Minimum Import Price (MIP) of Rs.200/- CIF per kg.

Import of peas shall be subject to an annual (fiscal year) quota of 1.5 lakh MT as per procedure notified by DGFT and it will be subject to Minimum Import Price (MIP) of Rs.200/- and above CIF per kilogram and import is allowed through Kolkata Sea Port only. This restriction shall not apply to Government's import commitments under any Bilateral or Regional Agreement or Memorandum of Understanding.

2. The appellant / importer had obtained stay order against the above Notification / Trade Notices issued by DGFT from the Hon'ble High Court of Andhra Pradesh. However, the Hon'ble Supreme Court in Transfer Petition (Civil) No. 496 to 509/2020 dated 26.8.2020 upheld the validity of Notification and the Trade Notice imposing restriction of import of peas.

3. It appeared to the department that the appellant has violated the provisions of Foreign Trade Policy 2015 - 2020 and thereby goods under import are liable for confiscation under the provisions of Customs Act, 1962. The goods lying in Visakha Container Terminal CFS and Sravan CFS, Visakhapatnam were restrained under section 110 of the Customs Act, 1962. The appellant waived issuance of Show Cause Notice. After granting personal hearing the matter was adjudicated. The original authority ordered as under:-

i) "I confiscate the impugned goods, valued at Rs.19,81,53,817/- and weighing 6479.3 MTs (as detailed in the Annexure), under Section 111 (d) and 111 (o) of the Customs Act, 1962 for violating the conditions of the DGFT Notification No.37/2015-20 dated 18.12.2020. In lieu of confiscation I give an option to redeem the goods on payment of redemption fine of Rs.2,00,00,000/- (Rs. Two Crore only) under Section 125 (1) of the Customs Act, 1962;

ii) I also impose a penalty of Rs.1,00,00,000/- (Rs. One Crore only) on the importer M/s.-Oscar Commodities (P) Ltd., Kakinada, Andhra Pradesh under Section 112 (a) of the Customs Act, 1962.

This order is passed without prejudice to any other action that may be contemplated against the importer or any other person in terms of the provisions of the Customs Act, 1962 and/or any other law for the time being in force."

4. As seen from the above operative portion of the order passed by the adjudicating authority, the impugned goods though confiscated was allowed to be redeemed on payment of redemption fine of Rs. Two crores. A penalty of Rs. One crore was also imposed.

5. Aggrieved by the order allowing to redeem the goods, the department filed appeal before Commissioner (Appeals). The major contention put forward by the department was that the adjudicating authority ought not to have allowed redemption of the goods as it negates the intention of the Government in issuing the Notification. The department prayed for an order of absolute confiscation of the goods. The Commissioner (Appeals) vide order impugned herein allowed the appeal filed by the department thereby setting aside the order of the

adjudicating authority allowing redemption of the impugned goods under Section 125 (1) of the Customs Act, 1962. The relevant portion reads as under:-

"The appeal filed by the appellant department is allowed and the impugned order is modified to the extent ordered below :

The order passed by the original authority as regards to confiscation of imported goods is upheld. However, the order of the original authority to the extent of granting redemption of the impugned goods under Section 125 (1) of the Customs Act, 1962 is set aside.

The appeal filed by the department stands disposed accordingly."

The Appellants:-

6. The learned counsel Shri Sanjay Kr. Dubey, Senior Advocate assisted by Shri Udit Malik, Advocate appeared and argued on behalf of the appellant. The learned Senior Counsel opened his arguments by adverting to the prayer in the appeal at page 19 of the appeal paper book. He asserted that the reliefs claimed in the appeal is to allow the appellant to redeem the goods only for the purpose of re-export; to grant demurrage waiver certificate; and to set aside the penalty of Rs. One crore.

7. The arguments put forward by the counsel was mainly requesting to allow the appellant to redeem the goods for the purpose of re-export. The appellant had imported the goods during the period when the Notification dated 29.3.2019 was stayed by the Hon'ble Andhra Pradesh High Court. Later, the validity of the Notification / Trade Notice was upheld by the Hon'ble Supreme Court in the case of Union of India Vs. Agricas LLP - 2020 (373) ELT 752 (SC).

8. Pursuant to this decision of the Hon'ble Supreme Court, other importers (M/s. Raj Grow Impex LLP & M/s. Harihar Collections) whose imported goods covered by these notifications were not yet released requested for adjudication waiving the Show Cause Notice. The adjudicating authority though ordered confiscation extended option to the importers to redeem the goods on payment of fine in lieu of confiscation. The department was aggrieved by such orders allowing to release the goods by payment of redemption fine and issued order not to issue delivery notes. The importers approached High Court by way of separate writ petitions seeking mandamus for release of the goods. While so, appeals were filed by department under sec. 129D(2) against the order of adjudicating authority. These department appeals were allowed. Hon'ble High Court disposed of the writ petition leaving the matter to be decided in the appeals, however with direction to release the goods. The department (UOI) sought to challenge this order before the Hon'ble Supreme Court by filing SLP and judgment was rendered by the Hon'ble Supreme Court on 17.6.2021.

9. He drew our attention to para 97 of the judgment of the Hon'ble Supreme Court in Civil Appeal No. 2217 - 2218/2021 dated 17.6.2021 (arising out of SLP (C) Nos. 14633 - 14634 of 2020) in the case of Union of India Vs. Raj Grow

Impex LLP & Ors. The Hon'ble Supreme Court held as under:-

Conclusions and directions

"97. Accordingly, and in view of the above:

(a) these appeals are allowed;

(b) the impugned order dated 15.10.2020 (read with modification order dated 09.12 2020), as passed by the High Court in Writ Petition (L) Nos.3502-3503 of 2020, is set aside and the writ petitions so filed by the respondent-importers are dismissed;

(c) the impugned interim order dated 05.01.2021, as passed by the High Court in Writ Petition (ST) No.24 of 2021 is also set aside and the said writ petition shall be governed by this judgment;

(d) the orders-in-appeal dated 24.12.2020, as passed by the Appellate Authority in the respective appeals, are approved and consequently, the orders-in-original dated 28.08.2020 in the respective cases of the respondent-importers stand quashed;

(e) the orders-in-appeal having been approved by this Court, the questions of release of goods as also the quantum of penalty stand concluded with this judgment and hence, the prayer for keeping open the option of further statutory appeal stands rejected; and

(f) the subject goods are held liable to absolute confiscation but, in continuity with the order dated 18.03.2021 in these appeals, it is provided that if the importer concerned opts for re-export, within another period of two weeks from today, such a prayer for re-export may be granted by the authorities after recovery of the necessary redemption fine and subject to the importer discharging other statutory obligations. If no such option is exercised within two weeks from today, the goods shall stand confiscated absolutely.

98. The matters relating to the interveners shall also be governed by the findings of this judgment and appropriate orders in their regard shall be passed by the authorities/Courts, wherever their matters relating to the subject goods are pending but, their options of further appeal, only in relation to the quantum of amount payable, including that of penalty, is left open.

99. The respondent-importers shall pay costs of this litigation to the appellants, quantified at Rs.2,00,000/- (Rupees two lakhs) each.

100. All pending applications stand disposed of."

(Emphasis supplied)

On coming to know the decision passed by Hon'ble Supreme Court in the case of Raj Grow Impex LLP (supra), the appellant requested for permission to redeem the goods for the purpose of re-export only. However, this request was denied stating that the direction in the judgment of the Hon'ble Supreme Court is applicable only to the parties therein.

10. The events and circumstances prior to this appeal is summarized in the written synopsis as under:-

(i) On 25.4.2018, Ministry of Commerce had issued Notification No.4 of 2015 - 2020 whereby under EXIM Code No. 0713000, the import of Peas (Pisum Satvium) including Yellow Peas, Green Peas, Dun Peas and Kaspa Peas has been categories as 'restricted' item.

(ii) On 29.8.2018, Ministry of Commerce vide Notification No. 31 of 2015 - 2020 withdrew the restriction of import of Peas (Pisum Satvium) including Yellow Peas, Green Peas, Dun Peas and Kaspa Peas classified under EXIM Code No. 07131000.

(iii) On 29.3.2019, Ministry of Commerce issued Notification No. S01479(E) restricting the import of Peas (Pisum Satvium) including Yellow Peas, Green Peas, Dun Peas and Kaspa Peas having EXIM Code No. 0713000.

(iv) On 16.4.2019, DGFT issued a Trade Notice No. 06/2019 - 20 dated 16.4.2019. By the said trade notice, the quantity allowed to be imported for Peas (Pisum Satvium) including Yellow Peas, Green Peas, Dun Peas and Kaspa Peas under EXIM Code No. 0713000, 07139010 and 07139090 upto 1.50 lakhs MTs and further prescribed that it can only be imported by millers / refiners upon obtaining of license.

(v) On 20.7.2019, the Hon'ble High Court of Rajasthan stayed Notifications dated 29.3.2019 and 16.4.2019. That appellant under bonafide belief, placed orders for import of green peas in September 2019.

(vi) On 18.12.2019, Ministry of Commerce issued Notification 37/2015 - 2020 dated 18.12.2019 whereby import of peas shall be subject to a (fiscal year) quota of 1.5 lakhs MTs as per procedure notified by DGFT and subject to Minimum Import Price (MIP) of Rs.200 and above CIF per kg and import is allowed through Kolkata sea port only.

(vii) The appellant filed Writ Petition (Civil) No. 1662/2020 before the Hon'ble High Court of Andhra Pradesh. On 16.3.2020, the Hon'ble High Court was pleased to stay the notifications qua the appellant.

(viii) Subsequent to granting of stay, the appellant imported 6497.30 MTs of green peas through Visakhapatnam Port (Visaka Container Terminal CFS and Shravan CFS) under 21 bills of lading and filed 9 bills of entry.

(ix) The Government of India had filed Transfer Petitions (Civil) No.496 to 509/2020, titled as 'Agricas LLP Vs. Union of India and Ors.' before the Hon'ble Supreme Court against the stay being granted to the abovementioned notification by various High Courts in India. The Hon'ble Supreme Court vide judgment dated 26.8.2020 upheld the validity of the above mentioned notifications, inter alia, stating that the imports, if any, made relying on the interim orders would be held contrary to the Notification and Trade Notices issued under FTDR Act and would be so dealt under the provisions of Customs Act, 1962.

(x) The Customs Department issued notices dated 27.8.2020, 3.9.2020, 8.9.2020 and 15.9.2020 under section 110 of the Customs Act, 1962 for confiscation of the goods imported by the appellant.

(xi) On 24.9.2020, Writ Petition (Civil) No. 1662/2020 filed by the appellant was disposed by the Hon'ble High Court of Andhra Pradesh consequent to the judgment of the Hon'ble Supreme Court whereby the Hon'ble High Court granted liberty to the appellant to avail appropriate remedy under law.

(xii) The goods being perishable in nature, the appellant vide letter dated 2.11.2020 sought for adjudication after personal hearing and waived issuance of Show Cause Notice. That vide email dated 4.11.2020, the appellant was granted personal hearing on 5.11.2020 before the Additional Commissioner of Customs.

(xiii) As per Order in Original dated 20.11.2020, the adjudicating authority ordered for confiscation of goods, but however granted permission to the appellant to redeem the goods upon payment of redemption fine of Rs. Two crores under section 125 of the Customs Act, 1962 and imposed penalty of Rs. One crore.

(xiv) Thereupon, the appellant submitted various letters to the Customs authorities seeking expeditious clearance of the impugned goods. The appellant also approached the Hon'ble High Court of Andhra Pradesh by filing Writ Petition (Civil) No. 25081/2020 seeking release of the goods and waiver of demurrage charges.

(xv) Meanwhile, the Customs Department filed appeal before Commissioner (Appeals) against the Order in Original dated 20.11.2020.

(xvi) While so, the Hon'ble High Court vide order dated 25.1.2021, disposed the writ petition filed by appellant with a direction to dispose of the appeal before the Commissioner (Appeals) not later than one month from the date of receipt of the order in the writ petition.

(xvii) On 19.2.2021, vide video conference, the appeal was heard by the Principal Commissioner (Appeals).

(xviii) On 02.03.2021, the Principal Commissioner (Appeals) passed the impugned order by which he modified the order passed by adjudicating authority by setting aside the option to redeem the goods and thus ordered for absolute confiscation of the goods.

(xix) Later, the Hon'ble Supreme Court in SLP (C) No.14633 -14634/2021 dated 17.6.2021, in the case of Union of India Vs. Raj Grow Impex & Ors., was seized of the issue in relation to the import of subject goods and conditions of notification wherein it was ordered that goods could be released on payment of redemption fine.

(xx) Though in the above judgment dated 17.6.2021, the Hon'ble Supreme Court held that the goods are liable for absolute confiscation, in para 97(f) under the heading 'Conclusions and Directions' inter alia it is stated that if the importer concerned opt for re-export, another period of two months from today, such a prayer for re-export may be granted by the authorities after the recovery of necessary redemption fine and subject to the importer discharging other statutory obligations.

(xxi) On 18.6.2021, the appellant in the light of the above directions given by the Hon'ble Supreme Court in the case of Raj Grow Impex, submitted a letter to the customs authorities seeking permission to re-export the green peas imported by them.

(xxii) The customs authorities at Visakhapatnam vide letter dated 25.6.2021 rejected the request of the appellant stating that the direction is applicable only to parties therein and that the goods stands absolutely confiscated vide order dated 2.3.2021.

11. It is submitted by learned counsel that the said direction, though is binding to the parties in the appeal before the Hon'ble Supreme Court, being a judgment in rem, the directions has to be applied in similar situations of import of peas. He submitted that the Hon'ble Supreme Court having granted permission to the parties in the above captioned appeal to re-export the impugned goods, the very same relief ought to be extended to the appellant also. No fruitful purpose would be served with the absolute confiscation of the said goods and it would only result in grave economic loss to the appellant. On 18.6.2021 and 06.07.2021, the appellant approached the Commissioner of Customs, Vishakapatnam Port seeking permission to re-export the peas lying at the Port. The request was rejected vide letter dated 25.6.2021 stating that the direction of Hon'ble Supreme Court does not apply to the appellant and that as per impugned order, the goods are under absolute confiscation. After the judgment of the Hon'ble Supreme Court in the case of Agricas LLP TP (Civil) Nos. 496 - 509/2020 dated 26.8.2020 reported in 2020 (373) ELT 752 (SC), the adjudicating authority had extended option to redeem the goods after paying redemption fine. The goods being perishable in nature, the appellant requested for release of the goods as per this order passed by the adjudicating authority. The goods were not released. The appellant thereafter filed writ petition before jurisdictional High Court praying for a mandamus for release of goods. The appellant was all along continuously requesting for release of goods. During the pendency of SLP (Civil) in the case of Raj Grow Impex LLP, before the Hon'ble Supreme Court, the appellant was waiting for the outcome of the litigation. When the judgment was rendered, the appellant on the next day itself requested permission to redeem the goods for the purpose of re-export only. The facts and law considered in the case of Raj Grow Impex LLP, are the same and the appellant is in identical situation of having imported the goods while there was stay granted by the jurisdictional High Court. The appellant has already suffered huge loss and release of the

goods for re-export would help the appellant to minimize the impact of the loss.

12. With regard to levy of redemption fine and penalty, the learned counsel submitted that as there was a stay of the Notification / Trade Notice granted by the Hon'ble High Court of Andhra Pradesh vide order dated 16.3.2020, the appellant was under reasonable belief that the import is legal and proper. The appellant had placed the order for Green Peas on 30.9.2019 and the impugned notification came to be passed only on 18.12.2019. Immediately on learning about the Notification, the appellant approached the Hon'ble High Court of Andhra Pradesh wherein the stay was granted. The goods were imported only after grant of stay. The genuineness on the part of appellant may be taken into consideration for levy of redemption fine. Further that original authority in his order had extended option to redeem the goods by looking into all these aspects.

13. In regard to penalty, the learned counsel requested that a lenient view may be taken as the notification itself was under litigation. Further now the appellant only intends to re-export the goods.

14. The learned counsel submitted that in similar case of import of Peas, the Commissioner (Appeals), Chennai vide Order in Appeal F. No. C3/11/172/O/2021/ SEA dated 30.6.2021 allowed re-export of the goods. The Commissioner (Appeals) had referred to the direction of Hon'ble Supreme Court in para 97 (f) in the case of Raj Grow Impex LLP (supra). He argued that the department cannot discriminate the litigants by taking different views on identical set of facts, law and situation.

15. The learned Senior Counsel put forward arguments for issuance of demurrage free certificate to the appellant. He referred to sub-section (2) of Section 141 r/w Section 157 of Customs Act, 1962 as well as Handling of Cargo in Customs Area (Amendment) Regulation, 2019. That demurrage charges can be waived as per these Regulations. Regulation 6(l) of the Handling of Cargo in Customs Area Regulation reads as under:-

"Subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or Appraiser or Inspector of Customs or Preventive Officer or examining officer, as the case may be."

16. The seizure of the goods was ordered by the customs authorities stating inter alia as under:-

"..... as it is not practicable to move the goods to customs warehouse, therefore, in exercise of powers vested in me, under section 110 of the Customs Act, 1962, I do hereby order that you shall not remove, part with or otherwise deal with the goods as detailed ....."

17. As seen from above, the appellant was not allowed to remove the goods from the port area. If the demurrage charges are levied on the appellant, it would be against the provisions envisaged under Regulation 6(l) of Handling of Cargo in

Customs Area Regulation, 2009 which provides that the customs cargo providers shall not, subject to any other law for time being in force, charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or the Appraiser or Inspector of Customs or Preventive Officer or examining officer, as the case may be. To support his contentions, he relied on the following decisions. That the demurrage charges have become very huge and it may not become feasible or viable to seek export of the impugned shipment. He prayed that the appeal may be allowed. The following decisions were referred by him:-

(a) Continental Carbon India Ltd. Vs. UOI & Ors. - (2018) 17 SCC 258

(b) DIAL Pvt. Ltd. Vs. UOI & Ors. - (2016) 234 ELT 445

(c) M/s. Pasarwa Chemicals Ltd. Vs. UOI - Civil Misc. W.P. No. 75 of 2015 passed by the Hon'ble High Court of Allahabad

(d) Ideal Sheet Metal Stamping Vs. UOI - (2012) 276 ELT 59

(e) R.K. Enterprises Vs. Board of Trustees, Chennai Port.

The Department:-

18. The learned AR Rangdham appeared and argued for the department. Detailed written submissions were also filed. He submitted that the prayer of the appellant in the instant appeal is to set aside the order passed by Commissioner (Appeals) dated 2.3.2021 wherein the subject goods were ordered for absolute confiscation. The appellant seeks permission to redeem the goods for purpose of re-export. Appellant also request to grant demurrage waiver certificate besides prayer to set aside the penalty of Rs. One crore.

19. The appellant had imported Green Peas under Chapter 07131000 which is restricted item in terms of Notification No. 37/2015 - 2020 dated 18.12.2019 issued by DGFT. The Notification imposes the following conditions namely:-

(i) Quota of 1.5 lakhs MT

(ii) Minimum Import Price (MIP) of Rs.200/- per kg (CIF)

(iii) Port of import if Kolkata

20. When there are restrictions imposed, it is necessary to obtain a license / authorization from DGFT and consequently the additional condition of "actual user" is also attracted. The appellant has imported Green Peas through Visakha Container Terminal CFS and M/s. Sravan Shipping and Services CFS under 21 bills of lading and filed 9 bills of entry. They claimed to have imported the consignment pursuant to the interim stay granted by the Hon'ble High Court of Andhra Pradesh vide order dated 16.3.2020 in W.P. (C) No. 1662 of 2020.

21. Consequent to the interim stay granted by various High Courts, the Government filed Transfer Petition (Civil) before the Hon'ble Supreme Court to

hear all the matters together so as to give quietus to the matter. The Hon'ble Supreme Court in Transfer Petition (Civil) No. 496 to 509 of 2020 dated 26.8.2020 as reported in 2020 (8) TMI 705 - Supreme Court inter alia upheld the validity of Notification dated 29.3.2019 bearing SO No. 1478-E, 1479-E, 1480-E and 1481-E and Trade Notice dated 16.4.2019 issued by DGFT. It was held by the Hon'ble Supreme Court that once Green Peas are removed from 'free' to 'restricted category', the imports in question would require a prior authorization for import and 'actual user' condition has to be met. It was also held that traders are not actual users. Another important point decided by the Hon'ble Supreme Court is that the plea of bonafide claim of the importers cannot be entertained in view of the fact that the Hon'ble High Courts of Madras, Gujarat and Madhya Pradesh had already upheld the notifications. He asserted that notwithstanding these High Court orders, the importers including the appellant herein took their chance, obviously for personal gains and profits and then they have to face consequences in law.

22. Pursuant to the decision of the Hon'ble Supreme Court in above stated Transfer Petition, two importers who were parties therein sought for adjudication of the imports made by them by waiving Show Cause Notice. The original authority ordered for release of the goods on payment of redemption fine and penalty. The department filed appeal before Commissioner (Appeals) who set aside the order of adjudicating authority granting option of redeeming the goods and ordered for absolute confiscation. An appeal was filed by the importers against the said order. The department carried the matter to the Hon'ble Supreme Court. Thus, in the case of Rajgrow LLP and Ors. vide judgment dated 17.6.2021, the Hon'ble Supreme Court held that the importers cannot claim any bonafide belief in effecting the imports under the cover of interim stay granted by the Hon'ble High Court.

23. The Hon'ble Supreme Court answered the moot question whether the goods are liable for confiscation or whether goods could be released with payment of fine in lieu of confiscation and held that the goods are liable for absolute confiscation. It is argued by the learned AR that the discretion given to the adjudicating authority under section 125 of Customs Act, 1962 as regards the present case could only be for absolute confiscation with levy of penalty. It was observed by the Hon'ble Supreme Court that no leniency in the name of equity can be claimed by these importers. However, citing the earlier judgment dated 18.3.2021, the Hon'ble Supreme Court allowed the importers therein to exercise the option of re-export on payment of redemption fine and discharging other statutory obligations within two weeks from 17.6.2021. This option is given to the importers therein only in view of the special circumstances existing therein. This option is in personam.

24. The Hon'ble Supreme Court has categorically held in the above two judgments (18.3.2021 and 17.6.2021) that the goods imported violating the Notifications and the Trade Notices become prohibited goods and thereby liable

for absolute confiscation. The order of the Hon'ble Supreme Court permitting re-export is applicable only to the litigants therein. The appellant vide letter dated 19.9.2021 sought release of the goods on payment of fine / penalty. They then had taken a stand that re-export is not contemplated in law. During the personal hearing also the appellants only sought for release of the goods on payment of fine / penalty for home consumption and did not put forward claim for re-export. Even before the Commissioner (Appeals) the appellant has not put forward the plea of re-export. For the first time, the appellant has made a plea for re-export before the Tribunal. The plea being belated cannot be considered in view of the decisions of the Hon'ble Supreme Court in the case of Raj Grow Impex LLP (supra).

25. The Tribunal in the cases of Mangla Trading co. Vs. Collector of Customs, Madras reported in 1996 (81) ELT 397 (Tri.), Micro Labs Ltd. Vs. Commissioner of Customs, Chennai - 2008 (227) ELT 579 (Tri. Chennai), Farokhs Todywalla Vs. Commissioner of Customs (Import), ACC, Mumbai - 2015 (319) ELT 165 (Tri. Mum.) held that it is not proper to raise the plea of re-export at the second appellate stage without raising the plea before the adjudicating authority or the first appellate authority. Therefore, the said plea of the appellant cannot be entertained.

26. The Hon'ble High Court of Madras in the case of ALM Enterprises Vs. Commissioner of Customs, Chennai - 2016 (338) ELT 563 (Mad.) held that once the goods are absolutely confiscated in terms of section 126 of the Customs Act, 1962, the goods shall thereupon vest with the Central Government. There is no provision in the Customs Act, 1962 for directing re-export of goods that are confiscated under section 125 of the Customs Act, 1962 unless it is held that the absolute confiscation is not correct.

27. In the case of Sarinsons Vs. Collector of Customs reported in 1993 (63) ELT 299 (Tri.), it was held that when the importer had no license at the time of the import, seeking for re-export of the same has been rightly rejected.

28. The learned AR has stressed that the judgment of the Hon'ble Supreme Court in the case of Raj Grow Impex (supra) insofar as the directions for re-export, is an order in personam and not an order in rem. That this is fortified by the fact that the Hon'ble Court has held that the only discretion available to the adjudicating authority under section 125 of the Customs Act, 1962 in respect of the subject goods is one of absolute confiscation. This being so, after confiscation, the title of the goods stands vested with the Central Government. The re-export allowed by the Hon'ble Supreme Court in Rajgrow Impex is in exercise of the powers vested under Article 142 of the Constitution of India and hence it is applicable only to the lis therein.

29. Countering the submissions of the learned counsel for appellant with regard to the order dated 30.6.2021 in Appeal F. No. C3/2/172/O/2021 passed by the Commissioner of Customs (Appeals) Chennai, wherein Commissioner (Appeals)

allowed re-export of goods, it is submitted by the learned AR that the department is intending to file appeal before CESTAT, Chennai. The same cannot be treated as the stand of the department. He prayed that the appeal may be dismissed.

30. Heard both sides.

31. The main relief prayed in the appeal is a permission to re-export the subject goods. The appellant has relied upon sub clause (f) of Para 97 of the judgment of the Hon'ble Supreme Court in the case of Raj Grow Impex LLP (supra). The said para has already been noticed above. The learned AR appearing for the Department contends that though the principle laid in the judgment is applicable in rem, the said direction is in personam and therefore applicable only to the parties to the litigation.

32. The said judgment arises out of an appeal filed by the department (UOI). In para 8.1 of the judgment, it is seen stated that apart from the two importers, who had filed writ petitions before the Hon'ble High Court and directly related to the order impugned, two more importers have moved the Hon'ble Court as intervenors asserting that they are also covered by similar interim orders of High Court. The said para 8.1 is reproduced as under:-

"8.1 Apart from the said two importers who had filed their respective writ petitions in the High Court and who are directly related with the orders in question before us, two more importers have moved impleadment/intervention applications while asserting that they have also imported under the cover of the interim orders of the High Court and their matters were pending at different stages with the authorities but, they are also likely to be affected by the decision in this set of appeals. They also support the stand that the goods in question are available for release and are not liable to absolute confiscation."

Para 98 which is part of the conclusions reads as under:-

"98. The matters relating to the interveners shall also be governed by the findings of this judgment and appropriate orders in their regard shall be passed by the authorities/Courts, wherever their matters relating to the subject goods are pending but, their options of further appeal, only in relation to the quantum of amount payable, including that of penalty, is left open.

33. The direction to seek re-export was thus available to these importers / intervenors who had approached the Hon'ble Supreme Court. At this juncture, it is also necessary to have a look into para 7 of the judgment, which reads as under:-

"7. The aforementioned SLPs against the orders so passed by the High Court were considered analogously on 20.01.2021 and, while issuing notice, this Court stayed the operation of the order impugned. Later on, these matters were taken up for hearing in priority looking to the nature of controversy and the goods involved. During the course of hearing, on 18.03.2021, this Court found no reason for continuation of contempt proceedings in the High Court and closed the same. On 18.03.2021, yet another observation was made by this Court with reference to the submission of learned ASG appearing for the appellants, that it was open to the private respondents to opt for re-export of perishable imported goods lying in the customs warehouse to outside India."

34. The learned AR has vehemently contended that the direction in the judgment of Hon'ble Supreme Court to seek re-export would be applicable only to the parties therein and that it is an order in personam. We have to say that the dispute that was pending before the Hon'ble Supreme Court between Government of India and the importers had no personal or individual element in it or nothing personal or peculiar to each importer. The challenge was with the validity of the Notification as well as the Trade Notices issued by DGFT which was on identical grounds common to all the importers. No doubt the judgment of Hon'ble Supreme Court upholding the validity of the notification is a judgment in rem. The learned AR has been at pains to argue that the part of judgment which pertains to upholding the validity of the Notification is a judgment in rem and the operative part of the order of the Hon'ble Supreme Court in respect of re-export is a judgment in personam only. True it may be, to say that the direction of the Hon'ble Supreme Court in the said judgment in respect of the option to re-export is binding on the parties of the said litigation. However, on similar set of facts and identical issue, the law laid down by the Hon'ble Supreme Court squarely applies and the directions given by the Hon'ble Supreme Court in resolving the dispute would have a persuasive application to litigants who are placed in similar situation.

The principle of 'Stare Decisis' intends to achieve uniformity and consistency in applying the law. Even though a litigant may not be able to reach the highest forum of judicature, he will be bound by the principle of law laid by the highest court. Conversely, he cannot be denied a relief granted to a party in a similar situation during the same period of litigation. In the fitness of things, it is desirable that litigants on identical issue be extended the same relief. On coming to know of the judgment in the case of Raj Grow Impex LLP on 18.6.2021, the appellant has filed letter to the Commissioner of Customs, Visakhapatnam seeking permission to re-export the goods. The said letter reads as under:-

"18.6.2021

The Commissioner of Customs

Customs House

Visakhapatnam

Respected Sir

Sub : Imported Green Peas - Request for permission for export against OBL no's attached as per Annexure A - Regarding

Ref : Hon'ble Supreme Court Order vide no:2217-2218 of 2021 Dt: 17.06.2021

We M/s.Oscar Commodities Pvt. Ltd., herewith submit our request for export of Green Peas imported against OBLs details submitted as per attached annexure as directed by the Hon'ble Supreme Court vide order no: 2217-2218 of 2021 Dt: 17.06.2021

We herewith submit our willingness for export of Green Peas against your permission and under your command.

Thanking you

Yours faithfully

For Oscar Commodities Pvt Ltd.,

(Authorized Signatory)"

35. It is also to be said that the Commissioner (Appeals) Chennai vide order dated 30.6.2021 has ordered for re-export of the goods applying the direction in clause (f) of para 97 of the judgment of the Hon'ble Supreme Court.

"The Hon'ble Supreme Court in Para 97 (f) had held that the goods are liable for the Hon'ble SC order refers), in these appeals, it is provided that if the importer concerned opts for re-export, within another period of two weeks from today (i.e.17.06.2021) such a prayer for re-export may be granted by the authorities after recovery of necessary Redemption Fine and subject to the impoter discharging other statutory obligations. If no such option is exercised within two weeks from today, the goods shall stand confiscated absolutely.

12. The appellant vide letter dated 22.06.2021 had submitted a request to re-export the impugned goods. Being an agricultural product, the same is prone to decay due to insecticides, fungus and natural fury. I find that the impugned goods were imported during November - January 2020. Vide the impugned order of the LAA, the department had confiscated the goods, but had not allowed redemption as the LAA had held that the same is not obligatory. Considering the nature of the impugned goods which are prone to natural vagaries and shelf life restrictions, I am inclined to allow re-export in view of the present circumstances and in line with the order of the Hon'ble Supreme Court in Civil Appeal No:2217-2218 of 2021 dated 17.06.2021, under Section 125 of the Customs Act, 1962.

xxxx xxxxx xxxx xxxx

Accordingly, I modify the impugned order of the LAA and order as follows :

(i) I order for re-export of the impugned goods within a period of 90 days on payment of Redemption Fine of Rs.10,00,000/- under Section 125 of the Customs Act, 1962 by the appellant.

(ii) I impose penalty of Rs.5,00,000/- on M/s.Om Trading Company under

Section 112(a)(i) of Customs Act 1962.

(iii) The request of the appellant for waiver of detention/demurrage/warehousing charges to be considered in terms of Rule 6(1) of the Handling of Customs Cargo Regulations, 2009."

36. The learned AR has put forward an argument that there is no provision in the Customs Act, 1962 for re-export and therefore the request for re-export cannot be considered. The Bench raised a specific query to the learned AR as to what would be the prejudice caused to the department if the goods are re-exported. The learned AR submitted that the goods can be sold / auctioned in the domestic market and this would enable to earn revenue for the State. We cannot find any merit in this submission. The Notifications are fundamentally intended to protect the domestic agricultural market. In the case of Union of India & Ors. Vs. Agricas LLP and Ors. vide judgment dated 26.8.2020 reported in 2020 (373) ELT 752 (SC), the Hon'ble Court observed that any flow of the goods in the domestic market is going to have a serious impact on the market economy of the country. We therefore cannot accept the argument of the department that the goods can be absolutely confiscated and later sold by them in domestic market. As already stated, after considering all the aspects in detail, the Hon'ble Supreme Court having extended relief of re-export, we find no grounds to deny the relief to similarly placed litigant / importer.

37. The other objection raised by the department is that this plea put forward by the appellant is belated and that appellants have not made such a plea at the first stage of litigation. It is true that at the initial stage of proceedings, that is, when the matter was being adjudicated by the adjudicating authority, the appellant had requested for release on the ground that the goods were imported when there was an interim order of stay granted by jurisdictional High Court. The original authority after holding that there is violation of the notification ordered confiscation of the goods but however extended option to redeem the goods by payment of redemption fine of Rs. 2 crores in terms of section 125 of the Customs Act, 1962. At that time, the decision of the Hon'ble Supreme Court in the case of Raj Grow LLP (supra) was not available either to the appellant importer or the department. The said judgment came to be rendered only on 17.6.2021. The Hon'ble Supreme Court by the said decision made way for settling the dispute as to whether goods can be released for home consumption. After this judgment of the Hon'ble Supreme Court, the appellant has come up with the plea to allow them to redeem the goods for the purpose of re-export only. They were awaiting the outcome of the decision in Raj Grow Impex LLP case.

38. On 6.7.2021, they have given a further request for permission to re-export the cargo. On 25.6.2021, the department has replied to the appellant which reads as under:-

"F.No.GEN/LGL/HC/PA/201/2020-Legal Date: 25/28.06.2021

To,

M/s. Oscar Commodities Pvt. Ltd.,

H.No.64-16-3A, Balayogi Street,

Pratap Nagar, Kakinada,

E.G.District, Andhra Pradesh - 533 004.

Sir,

Sub : Improper import of Green Peas - Request for permission for export - reg.

***

Please refer to your letter dated 18.06.2021 on the subject matter. Also please refer to the Hon'ble Supreme Court Judgement dated 17.06.2021 in Civil Appeal Nos.2217-2218.

2. It is submitted that the Hon'ble Supreme Court judgement is specific to only the respondents and the Interveners who filed the impleadment applications in the subject Civil Appeals. The Hon'ble Supreme Court Judgement is not applicable for M/s.Oscar Commodities Pvt. Ltd. In view of the above, the importer request for export of the cargo cannot be considered in the absence of any specific order from the legal forum.

3. The Orders of the Commissioner (Appeals) in O-in-A VIZ-CUSTM-000-APP-076-20-21 dated 02.03.2021 are binding on the department. As no further appeal against the Commissioner (Appeals) order have been received in this office. The Learned Commissioner (Appeals) upheld the confiscation of the goods. However, the order regarding granting of redemption by the adjudicating authority is set aside.

4. In view of the above, as the goods are absolutely confiscated according to the Commissioner (Appeals) Order and as no documents pertaining to the appeal filed against the Commissioner (Appeals) Orders have been received in this Office, the disposal of the cargo is under process in accordance with the Boards guidelines on disposal. However if any further appeal against the Commissioner (Appeals) order is filed, the same may be intimated to this office.

Yours faithfully,

(VRS SASTRY)

Assistant Commissioner of Customs"

(Emphasis supplied)

39. Undisputably, the appellants were in the path of litigation when the judgment of the Hon'ble Supreme Court was rendered. Immediately on coming to know of the judgment of the Hon'ble Supreme Court in the case of Raj Grow Impex LLP

(dated 17.6.2021), they have requested for permission to re-export on 18.6.2021. The request was rejected by department vide letter dated 25.6.2021 stating that the judgment is applicable only to the parties therein. Consequent to the judgment of Hon'ble Supreme Court in the case of Agricas LLP, the Hon'ble Bombay High Court vide judgment reported in 2021 (375) ELT 90 (Bom.) gave directions for release of the goods. This was appealed before the Hon'ble Supreme Court and the appellants were awaiting the outcome.

40. Thus, it cannot be said that the plea for re-export is a belated one. The said plea cannot be put forward by them when the issue in respect of the validity of the Notification / Trade Notice is under consideration before the Hon'ble Supreme Court. Immediately on coming to know of the judgment, they have requested for permission to re-export in accordance with the direction in 97(f) of the judgment. The various decisions relied by the department in para 24 to 26 as above are not applicable and distinguishable on facts.

41. The Hon'ble Supreme Court in the case of Raj Grow Impex LLP case, after considering all aspects has granted permission to the importer to re-export. The very same relief cannot be denied to the appellants without cogent reasons. A party who has not been able to cross the miles should not be discriminated only for the reason that they did not join in the litigation. The directions are intended to resolve the dispute for importers who are similarly placed. We therefore are of the considered opinion that the appellants have to be granted permission to re-export the goods. We hold that the order of the Commissioner (Appeals) requires modification to this extent.

42. The next question that would then arise for consideration is what could be the redemption fine levied for redeeming the goods for the purpose of re-export. The adjudicating authority vide Order in Original No. 8/2020 dated 20.11.2020 had given an option to redeem the goods on payment of redemption fine of Rs. Two crores. The discussions of the adjudicating authority in this regard are as under:-

"5. Now regarding the quantum of redemption fine, the act itself envisages that the redemption fine should not exceed the market value of the commodity. The Hon'ble Supreme Court in its judgment of CC Vs. Mani Impex - 2011 (8) TMI 470 -SC ad also in the case of Jain Exports 1993 (66) ELT 537 (SC) has categorically stated that a fixed percentage of redemption fine and penalty is not proper and every case has to be examined depending on the facts of the case.

6. The importer in his written submissions and during personal hearing has argued that since the circumstances prevailing during his import indicate his boafides, least redemption fine should be imposed. Since the imported value is Rs.30,393/- per ton, while the market value of the cargo is Rs.64,900/- per ton (as submitted by the importer). Keeping in view the current pandemic situation and prevailing market prices which are plummeting across all sectors due to lack of demand, too hefty redemption fine would not serve the ends of justice.

7. The import price i.e. invoice price is Rs.30.39/- per kg while customs duty at 50% duty is Rs.15.19/-. The whole idea of redemption fine is to ensure that the importer does not have any market advantage by importing such restricted items and also to act as a deterrent for future such violations. To ensure this it has to be made sure that the profit element is negated by virtue of the redemption fine. The import price i.e. landing cost + duty is Rs.30.39/- + Rs.15.19/- per kg while the costs incurred for other expenses like transportation, warehouse, fumigation, cold storage, packing etc. would amount to Rs.17.33/- (as per calculation furnished by the importer). I have perused the calculation sheet furnished by the importer regarding the landing cost and other expenses. As stated above, it appeared broadly in conformity to the existing market norms. As per the above calculation, the profit margin is Rs.2/- per kg. The total imported quantity is 6479 MTs. At this value, the profit element is around Rs.1.3 crores. The total value of the imported goods is approx. Rs.20 crores.

8. I observed that the normal redemption fine which is being levied and broadly accepted by most of the Tribunals is at 10% of the value of the goods. The Hon'ble Supreme Court in

i. CC Vs. Mani Impex 2011 (8) TMI 470-SC

ii. Jain Exports 1993 (66) ELT 537 (SC)

has categorically held that there cannot be fixed percentage for redemption fine and has to be based on specific circumstances of the case. In this case, applying 10% of the value works out to be Rs.2 crore. This amount serves the dual purpose of negating the profit quantum of Rs.1.3 crores as discussed supra and also acts as a deterrent to prevent such subsequent violations. Hence I find that 10% of the value of the goods is the appropriate redemption fine."

43. The appellant has not filed any appeal against such order of levy of redemption fine. This order has attained finality as against the appellant with regard to levy of redemption fine.

44. The learned counsel has prayed to take a lenient view in regard to the penalty imposed. In the previous paragraph, we have already stated that the appellant has not challenged the order passed by the adjudicating authority imposing penalty of Rs. One crore. We do not find any grounds to disturb the said penalty as the same has attained finality.

45. The appellant seeks direction for issuance of demurrage waiver certificate. He referred to Regulation 6(l) of the Handling of Cargo in Customs Area Regulation 2009. The said Regulation reads as under:-

"6. Responsibilities of Customs Cargo Service provider:

(1) The Customs Cargo Service provider shall -

(a) keep a record of imported goods, goods brought for export or transshipment, as the case may be, and produce the same to the Inspector of Customs or

Preventive Officer or Examining Officer as and when required;

(aa) Provide information regarding arrival of the imported goods to the Deputy Commissioner or Assistant Commissioner of Customs immediately on arrival of said goods in the customs area and also information about their departure after the clearance thereof.

(b) keep a record of each activity or action taken in relation to the movement or handling of imported or export goods and goods brought for transhipment;

(c) display or make available in any other manner, information of process or movement or handling of imported or export goods and goods brought for transhipment;

(d) demarcate separate areas for unloading of imported goods for their storage with respect to the category of importers, nature of goods, place of destination, mode of transportation or any other criterion as the Commissioner of Customs may specify having regard to the custody and handling of imported goods in a customs area;

(e) demarcate separate areas for loading of export goods for their storage with respect to categories of exporters, nature of goods, examined and sealed containers or other criterion as the Commissioner of Customs may specify having regard to the custody and handling of export goods in a customs area;

(f) not permit goods to be removed from the customs area, or otherwise dealt with, except under and in accordance with the permission in writing of the Superintendent of Customs or Appraiser;

(g) not permit any export cargo to enter the customs area without a shipping bill or a bill of export having been filed with the Deputy Commissioner or Assistant Commissioner of Customs;

(h) not permit any import cargo to enter the customs area or be unloaded therein without the import report or the import manifest having been filed with the Deputy Commissioner or Assistant Commissioner of Customs;

(i) be responsible for the safety and security of imported and export goods under its custody;

(j) be liable to pay duty on goods pilfered after entry thereof in the customs area;

(k) be responsible for the secure transit of the goods from the said customs area to any other customs area at the same or any other customs station in accordance with the permission granted by the Deputy Commissioner or Assistant Commissioner of Customs;

(l) subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or Appraiser or Inspector of Customs or Preventive officer or examining officer, as the case may be;

(m) dispose off in the manner specified and within a time limit of ninety days, the imported or export goods lying unclaimed, uncleared or abandoned:

Provided that the period of ninety days may be extended by the Commissioner of Customs by such further period as may be allowed, on sufficient cause being shown for delay in the disposal;

(n) not make any alteration in the entry or exit points or boundary wall without the permission of the Commissioner of Customs;

(o) shall bear the cost of the customs officers posted by the Commissioner of Customs on cost recovery basis and shall make payments at such rates and in the manner specified by the Government of India in the Ministry of Finance unless specifically exempted by an order of the said Ministry;

(p) shall observe the Central Government holidays as followed by the jurisdictional Customs formations and in case of any variation in the working days, intimate the same to Commissioner of Customs and the trade, at least seven days in advance, and

(q) abide by all the provisions of the Act and the rules, regulations, notifications and orders issued thereunder.

(2) The Customs Cargo Service provider approved for custody of imported or export goods and for handling of such goods shall not lease, gift, sell or sublet or in any other manner transfer any of the premises in a customs area; or sub contract or outsource functions permitted or required to be carried out by him in terms of these regulations to any other person, without the written permission of the Commissioner of Customs.

(3) The Customs Cargo Service provider shall publish and display at prominent places including website or webpage of the Customs Cargo Service provider the schedule of charges for the various services provided by him in relation to the imported goods or export goods in the customs area.

7. Power to relax and regulate:

(1) If the Commissioner of Customs is satisfied that in relation to the custody and handling of imported or export goods in a customs area, the Customs Cargo Service provider, for reasons beyond his control, is unable to comply with any of the conditions of regulation 5, he may for reasons to be recorded in writing, exempt such Customs Cargo Service provider from any of the conditions of regulation 5.

Provided that no exemption shall be granted in respect of any of the conditions referred to in regulation 5, where the overall safety and security of the premises are likely to be affected thereby.

(2) The Commissioner of Customs may regulate the entry of goods in a customs area for efficient handling of such goods."

(Emphasis supplied)

46. It has to be stated that the goods have been confiscated for violation of the Notification / Trade Notice. These are serious infractions on the part of the appellant importer. After the issuance of the notification, the appellant approached the Hon'ble jurisdictional High Court and on the basis of interim stay of the notification, he proceeded to import the subject goods. There were decisions rendered by various other High Courts (Madras, Gujarat) which upheld the validity of notification. The appellant was aware that there were decisions against him. The appellant has taken a chance of importing the goods after filing the writ petition and obtaining a stay from the jurisdictional High Court. The Hon'ble Supreme Court in para 47 of the judgment in the case of Agricas LLP (supra) held that when importers have taken such chance there cannot be any bonafide belief on their part. The appellant was fully aware that they may have to face a dispute in regard to the notification. Ultimately, the appellant has not been able to justify the import, the Notification having been upheld by the Hon'ble Supreme Court. The goods were detained due to violation on his part. The decisions relied by the learned counsel on this issue are not applicable to the facts of this case. In the present case, the Hon'ble Supreme Court has categorically held that there cannot be any bonafide belief when the importers have taken their chance to import the goods. In such circumstances, we do find that the appellant stands any favourable chance for issue of a certificate of waiver of demurrage charges. This issue is found against the appellant.

47. In the result, the appeal is partly allowed. The impugned order passed by the Commissioner (Appeals) is modified to the limited extent of allowing the appellants to re-export the impugned goods on payment of redemption fine of Rs. Two crores. The imposition of penalty of Rs. One crore is sustained. Ordered accordingly. Appeal disposed in above terms.

(Pronounced in open court on 13.10.2021)