

(2003) 07 BOM CK 0055

In the Bombay High Court

Case No : Writ Petition No. 2432 of 2002

Pratibha Syntext Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 28-07-2003

Acts Referred:

Customs Act, 1962 — Section 111, 25, 28AB

Citation : (2003) 4 ALLMR 25 : (2004) 1 BomCR 92 : (2003) 157 ELT 141

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : V.S. Nankani, N.S. Thakker, H. Modh and M.G. Gawade, for the Appellant; R.V. Desai, P. Jetly and D.H. Salvi, for the Respondent

Final Decision : Dismissed

Judgement

V.C. Daga, J.—This petition is directed against the final order bearing No. 21/2000, dated 3/10-5-2002 (Ex. E) passed by the Settlement Commission, Customs & Central Excise, Additional Bench, Mumbai ("the Commission" for short) (Respondent No. 2 herein) to the extent it awards interest at the rate of 10% p.a. on the customs duty found payable, from the date of import till the date of deposit and adjustment thereof.

The Facts :

2. The facts leading to the petition are that during the years 1994-95 and 1995-96, the petitioners applied for and were granted 15 advance licences for export of dyed fabric/sarees made from 100% polyester Filament Yarn ("PFY" for short); whereby petitioners were permitted to import inter alia, "PFY" and other inputs duty free under the said advance licences as per Notification No. 204/92-Cus., dated 19-5-1992.

3. On 5-7-1997, a show cause notice came to be issued by the Customs authorities to the petitioners. It was alleged in the show cause notice that the investigation carried out in the case of the petitioners, has revealed that the

petitioners resorted to manipulate the weight of the fabric as well PFY contained in the shipping bills and the petitioners failed to produce any documentary evidence of register to show proper utilisation of the exempt material cleared under Notification No. 204/92. By the said show cause notice the petitioners were called upon to show cause, why an amount of Rs. 1,11,25,570/- should not be demanded and recovered from them under proviso to Section 28(1) of the Customs Act ("the said Act" for short) coupled with the declaration given at the time of clearance in terms of Notification No. 204/92 and why penal action should not be taken against them under the provisions of the said Act.

4. On 31-3-2000, the show cause notice following principles of natural justice, came to be adjudicated upon against the petitioners. The said order dated 31-3-2000 was served upon the petitioners on 29-4-2000. Even before the said order was served, the petitioners had filed an application before the Settlement Commission admitting duty liability of Rs. 26,41,123.72. On receipt of the order of the Commissioner dated 31-3-2000, the petitioners preferred appeal before to the Customs, Excise and Gold (Control) Appellate Tribunal, Mumbai, ("Tribunal" for short) but withdrew the same for making application to the Commission in terms of the provisions of Section 127M of the said Act.

5. Accordingly, the application for settlement of the case before the Commission was taken up for hearing and on 23-8-2002, the Commission was to pleased to admit the application and allowed the same to be proceeded with. During the course of final hearing, the advocate for the petitioner conceded that he is agreeable to settle the case on the basis of the report of the Commissioner (Investigation) except claiming deduction in relation to the mistakes apparent from the records as pointed out by him.

6. The Settlement Commission vide its order bearing No. 21/2000 -Customs, dated 3/10th May, 2002 settled the case on payment of admitted amount duty liability in the sum of Rs. 1,17,41,107.86 and further ordered that the same shall be adjusted from and out of deposit made by the petitioners, in the sum of Rs. 1,25,12,000/- during the course of investigation. The Commission was also pleased to grant immunity from imposition of fine and penalty and from the prosecution under the provisions of the said Act and Indian Penal Code, 1860. The Commission, further directed the petitioners to pay interest @ 10% p.a. on the amount of duty for not complying with the declaration given as per the Exemption Notification No. 204/92, dated 19-5-1992.

7. The petitioners not being satisfied with the order of the Settlement Commission to the extent it directs payment and recovery of interest @ 10% p.a. on the customs duty, has filed this petition under Article 226 of the Constitution of India contending that neither the Notification No. 204/92 of which breach has been alleged nor the provisions of the Customs Act make any provision for levying interest on the duty amount found payable in respect of goods cleared during the period 1994 to 1996.

The petition raises an important question of law as to the jurisdiction and power of the Settlement Commission to levy interest and the duty liability settled by the Commission. As such, this writ petition was taken up for final hearing at the stage of admission by consent of both parties.

The Submissions :

8. Shri V.S. Nankani, learned Counsel for the petitioners submits that there is no provisions in the notification of which breach has been alleged for demanding interest nor such permission exists in the Customs Act. The provisions of Section 28A of the said Act are also not applicable since the petitioners had deposited the entire amount much before the order dated 31-3-2000 passed by the respondent No. 4. In his submission, even the provisions of Section 28AB of the said Act are also not applicable as the same was brought on the statute w.e.f. 28-9-1998, whereas the imports are for the period prior to 28-9-1998 as such rightly interest was not demanded in the show cause notice dated 7-5-1997 u/s 28AB of the said Act.

9. The learned Counsel for the petitioners further submitted that the payment of interest being penal in nature, its imposition must be backed by the statute. Right of the Customs to demand must be authorised by law. He sought to place reliance on the Supreme Court judgment in *India Carbon Ltd. etc. Vs. State of Assam*, and *J.K. Synthetics Ltd. v. Commercial Taxes Officer - (1994) 94 STC 422*.

10. He also placed reliance on the judgments of different High Courts in support of his contention. He thus submits that the imposition of interest @ 10% p.a. is arbitrary, unreasonable and the amount of imposition is without the authority of law, hence violative of Article 265 of the Constitution of India. Learned Counsel for the petitioners addressed this Court in detail with the assistance of various decided cases as indicated hereinabove.

11. During the course of hearing, learned Counsel for the petitioner has placed before us one Customs Circular bearing No. 53/2000, dated 20th August, 2002, issued by the Board of Central Excise and Customs, hereinafter referred to as ("the circular" for short) reading as under :

"It has come to the knowledge of Board that the Mumbai Bench of Settlement Commission has entertain and finally settled duty liability in cases involving default in export obligation under Advance/EPCG Schemes. Under Advance licence EPCG Schemes, at the time of import of goods, the licence holder is made aware of his duty liability and to ensure fulfilment of specified obligation, he gives Bond/BG to DGFT/Customs. The said bond/BG clearly lays down that duty concession/exemption under Advancer License/EPCG Schemes is being extended to the licence holder provided that he fulfils the specified export obligation and in the event of failure he would be liable to pay differential customs duty plus interest @ 24% per annum on such duty. In other words, in all such cases, the licence holder is made aware of his liability right in the beginning at the time of import of goods.

In terms of Section 127(B) of the Customs Act, Settlement Commission is empowered to entertain applications for settling disputes only in those matters where the party had not made full and true disclosure of his duty liability before the proper officer. Since the cases involving default in EO under Advance Licence EPCG Scheme, the licence holder is well aware of his duty liability, DOR had felt that it is not correct on the part of the Settlement Commission entertain such cases. Since the provisions of Section 127A(b) and Section 127B(1) of the Customs Act were not very clear, this matter was referred to Ministry of Law for option. Vide option dated 29-7-2002 of the Ministry of Law they have clearly said that the Settlement Commission has no jurisdiction to entertain such applications in view of Section 127B(1) of the Customs Act and, therefore, the question of granting waiver of interest in such cases by the Settlement Commission also does not arise. Copy of opinion dated 29-7-2002 is enclosed for ready reference. In view of opinion of appropriate action should be taken to safeguard revenue interest.

3. Suitable standing order may also be issued for information/action of customs field formations under your charge.

4. Receipt of this circular may kindly be acknowledged."

12. Learned Counsel appearing for the petitioners based on the above circular urged that in terms of Section 127B(1) of the Customs Act, Settlement Commission is empowered to entertain application for settling disputes only in those matters where party has made true and correct disclosure of duty liability before the proper officer. In cases involving default in export obligation under Advance License/EPCG schemes, Section 127B(1) of the Customs Act is not applicable. As such, impugned order levying interest is without jurisdiction and without authority of law and to that extent, it being under challenge, the same is liable to be quashed and set aside and matter be left to the discretion of the Director General of Foreign Trade for being decided in accordance with law, if he decides to invoke the terms of the bond or the licence or both as the case may be. In that event, the petitioners would be at liberty to take appropriate defence. In this premise, he submits that the Commission has no jurisdiction to impose liability of interest. The ultimate submission of the petitioners is that question of granting or awarding interest in such types of cases by the Settlement Commission is without jurisdiction and, therefore, the impugned order to the extent it awards interest be set aside.

13. Per contra, Shri R.V. Desai, learned Counsel appearing for the Revenue though tried to spell out from the provisions in the Customs Act so as to justify the impugned order passed by the Settlement Commission to the extent it directs payment of interest but found it difficult to take his submission any further faced with circular of the Board pressed into service by the learned Counsel for the petitioners; wherein the Board has clarified that the Settlement Commission is authorised or empowered only to entertain applications for settling disputes in those matters where the party had not made full and true

disclosure of his duty liability before proper officer. In the cases involving default in discharge of export obligations under Advance Licence or/EPCG Schemes, the licence holder is well aware of his duty liability as such it would be beyond the purview of the Settlement Commission to exercise its powers u/s 127A(b) of the Customs Act. Having faced with the above circular and the situation arising therefrom in present case and considering the binding nature of the circular of the Board on the Revenue, Shri Desai found it difficult to find fault with the submission advanced by the learned Counsel for the petitioners. Shri Desai submitted that if this Court was inclined to accept the submission advanced by the learned Counsel for the petitioners based on circular of the Board, then the issue sought to be raised in the petition with respect to chargeability of interest may not be decided on merits and issue be left open for being decided by the Director General of Foreign Trade, New Delhi, in his own discretion in accordance with law.

Consideration :

14. Having heard rival parties at length, one thing is clear that the petition raises an issue with respect to the chargeability of interest in the peculiar facts and circumstances of the case at hand. The petitioners are not challenging the entire impugned order which is in three parts. First part of the order settles the customs duty liability; second part of the order grants immunity to the petitioners from the penalty and prosecution under the Customs Act and I.P.C. and third part of order directs recovery and adjustment of interest @ 10% p.a. on the customs duty found payable. What is being challenged in the petition is last part of the order which directs levy of interest, recovery and adjustment thereof. The challenge to the order is that the same is without jurisdiction and without authority of law in view of the circular of the Board dated 20th August, 2002, which clarifies that the Settlement Commission has no jurisdiction to deal with disputes arising out of breach of the export obligations under Advance License/EPCG Schemes.

15. In our opinion, there is no merit in this contention. Admittedly, the goods imported by the petitioners were allowed to be cleared without payment of duty in view of Exemption Notification No. 204/92. At the time of clearance of the imported materials, it was obligatory on the part of the petitioners to produce proof of having executed a bond or a legal undertaking before the concerned licensing Authority for complying with the condition of Notification No. 204/92 and also make a declaration before the Assistant Collector of Customs binding himself to pay on demand the amount of duty leviable if the conditions of the Notifications are not complied with. In the present case, it is not in dispute the imported goods were cleared without payment of duty as per Notification No. 204/92. It is not in dispute that the bond and the legal undertaking given by the petitioners to the Licensing Authority and produced before the Customs authorities at the time of the clearance of the goods did contain a clause to the effect that if the export obligation is not fulfilled, then the customs duty payable

on the goods cleared under Notification No. 204/92 shall be paid with interest at the rate specified therein. It is also not in dispute that the petitioners have committed breach of the licence granted to them and have also committed breach of the conditions attached to Notification No. 204/92. When the Customs authorities initiated proceedings for recovery of duty, the petitioners have approached the Settlement Commission. Before the Settlement Commission, the petitioners have not disputed the jurisdiction of the Customs authorities to initiate proceedings under the Customs Act for recovery of customs duty. Therefore, the question to be considered is, having not disputed the jurisdiction of the Customs authorities to initiate proceedings under the Customs Act, is it open to the petitioners to challenge the grant of interest.

16. Exemption Notification No. 204/92 issued u/s 25 of the Customs Act clearly provides that before clearance of the imported goods, the petitioners shall produce proof of having executed a bond or a legal undertaking before the concerned Licensing Authority, for complying with conditions of the said Notification. Therefore, the terms and conditions of bond and legal undertaking executed before the Licensing authorities agreeing to pay customs duty with interest in case of breach, became part and parcel of the conditions of the exemption notification issued u/s 25 of the Customs Act, 1962. Since, there was breach of the terms of the Exemption Notification, the customs authorities were entitled to recover the duty with interest. Merely, because the Commission erroneously or otherwise had not levied interest in his order, it cannot be said that the Customs authorities had no jurisdiction to recover interest. If the petitioners were satisfied with the order of the Commissioner of Customs, there was no need for them to approach the Settlement Commission. Once the petitioners have voluntarily chosen the jurisdiction of the entire issue by the Settlement Commission afresh, in the light of the disclosure made by them it was open to the Settlement Commission to direct the petitioners to pay the customs duty with interest. Although the Settlement Commission has levied interest at a percentage, much less than what was agreed to pay by the petitioners in their bond and legal undertaking, the same being not an issue in this petition, we are not expressing any opinion in that behalf. Therefore, we have no hesitation in holding that once the petitioners committed breach of the terms of the exemption Notification No. 204/92, the Customs authorities were entitled to enforce the declaration with bond and legal undertaking given by the petitioners and recover customs duty with interest. If the customs authorities were entitled to recover duty with interest then no fault could be found with the Settlement Commission in directing the petitioners to pay customs duty with interest.

17. The question with which we are faced was faced by the Apex Court in the case of Sheshank Sea Foods Pvt. Ltd., Karnataka Vs. Union of India (UOI) and Others, wherein, it was contended that the Customs authorities had no right or authority nor did the Customs Act, 1962 empower them to go into question relating to the utilisation of raw materials that had been imported by the appellants under Advance Licences granted to them under the duty exemption

scheme. That the duty exemption scheme under which licence had been issued was a Code by itself and excluded any investigation by the Customs authorities. That the bond that had been executed by the appellants pursuant to licences had also provided for action by the licensing authority as such Customs authorities had no jurisdiction to investigate any breach of licences. In reply, it was contended by the Customs authorities in that case that the raw materials had been imported by the appellants therein without payment of duty and availed benefit of an exemption Notification dated 30th April, 1988 (No. 110/1988). The terms and conditions thereof had been violated. The investigation of the exemption notification as well as licences had been violated by the appellants as such investigation thereof by Customs authorities was well within their power and jurisdiction.

18. In the above case the petitioners had also relied upon a communication issued by the Board of Central Excise and Customs dated 13th May, 1969 on the subject of whether in the event of the contravention of post-importation condition of an import licence, it was open to the Customs authorities to confiscate imported goods u/s 111(o) of the Customs Act. The said communication stated that before Section 111(o) of the Act could be attracted there had to be "an exemption, subject to a condition, from a prohibition. Where valid licence had been issued cannot be treated as a case of an exemption from prohibition. Therefore, if a post-importation condition of a licence is contravened, it cannot be said that any condition of exemption is contravened. For the aforesaid reasons, the Ministry of Law advised that it may not be possible to take action u/s 111(o) of the Customs Act with respect to the breach of conditions of licence relating to use of goods after they were cleared from custom charge". While dealing with the aforesaid issue, based on communication from the Central Board of Excise and Customs, the Apex Court held as under :

"The communication of the Central Board of Excise and Customs, dated 13th May, 1969, licence to the breach of the condition of a licence and suggests that it may not be possible to take action u/s 111(o) in respect thereof. It is true that the terms of the said notification were made part of the appellant's licences and, in that sense, a breach of the terms of the said Exemption Notification is also a breach of the terms of the licence, entitling the licensing authority to investigate. But, the breach is not only of the terms of the licence; it is also a breach of the condition in the Exemption Notification upon which the appellants obtained exemption from payment of customs duty and, therefore, the terms of Section 111(o) enable the Customs authorities to investigate."

Reading of the above extracted para makes it clear that in case of breach of terms of licence coupled with breach of Exemption Notification upon which the appellant had obtained exemption from payment of customs duty and, therefore, the terms of Section 111(o) of the Act, the Customs authorities were entitled to investigate in terms of the said section, the Apex Court was of the view that breach of the terms of the licence would also constitute breach of terms of these

Exemption Notification empowering the Customs Authority to investigate. It was also held that if the exemption notification upon which petitioners had obtained clearance of goods without payment of customs duty was breached then in that event. In terms of Section 111(o) of the Act, the Customs Authorities were entitled to investigate in terms of the said section.

19. Turning to the facts of the present case, it is not in dispute that petitioners have as a fact committed breach of exemption Notification No. 204 of 2002, dated 19-5-1992 in addition to the breach of Advance Licences. If that be so, following the line of reasoning of the Apex Court one can safely say that the Customs authorities were well within their jurisdiction to issue show cause notice and adjudicate upon duty liability arising therefrom. If the Customs authorities had a power to determine duty liability, in that event, logically it must follow that the Settlement Commission has the same power.

20. In the above premise, in our view, the circular issued by the Central Board of Excise and Customs dated 20-8-2002 sought to rely upon by the petitioner will not be applicable to the facts of the present case, wherein the petitioners are guilty of committing breach of the terms of licence as also the breach of exemption Notification No. 204/92-Cus., dated 19-5-1992.

21. The circular issued by the Board dated 20-8-2002, at the most can be said to be applicable only those types of cases wherein the breach of terms of the licences, bereft of breach of exemption notification issued under the Customs Act alone is involved. But, where breach of terms of licence as also on the terms of exemption notification issued under the Customs Act is involved, the circular or the clarification of the Board would not be applicable. In this view of the matter, it cannot be said that the Customs authorities had no jurisdiction to recover duty with interest. In this view of the matter, we find it difficult to agree with the submission made by the learned Counsel for the petitioners, that neither the Customs authorities nor the Settlement Commission shall have jurisdiction to deal with case in hand. Consequently, order of the Settlement Commission cannot be said to be without jurisdiction. The circular issued by the Board has no bearing on the facts of this case. Apart from this, the instructions or circular issued by the Board is running counter to the law laid down by the Apex Court in the case of Sheshank Sea Food Pvt. Ltd. cited supra. If the Board's circular runs counter to the law laid down by the Supreme Court or the High Court, in that event, it will certainly be binding on the authorities under the Act but it will not be open to the Courts to direct that such a circular should be given effect to and not the view expressed in the decisions of the Supreme Court or High Courts, as held by the Apex Court in the case of M/s. Hindustan Aeronautics Ltd., Bangalore Vs. Commissioner of Income Tax, Karnataka- I, Bangalore, , as such we hold that the Board's circular is not applicable to the facts of the case in hand.

22. In the present case, duty liability has been admitted by the petitioners. As a matter of fact, duty liability has been recovered from the petitioners. Petitioners have not challenged this part of the impugned order which directs recovery and

adjustment of the duty liability from the petitioner. It was thus clear that the petitioners have committed breach of the exemption notification as well as the terms of the licences. In this view of the matter, no further opportunity was required to be given to the petitioners. The admission of the petitioners would bind them. Therefore, recovery of duty liability and adjustment thereof with interest was well within the jurisdiction of the Settlement Commission. Such order cannot be said to be in breach of principles of natural justice as sought to be faintly canvassed by the learned Counsel for the petitioners.

23. The rival parties addressed us on extenso so far as the absence of substantive provision under the Act authorising Customs authorities to levy interest on duty liability in the peculiar facts of this case. We do not think it necessary to examine those contentions in view of the terms of bond executed by the petitioners wherein petitioners held themselves liable to pay duty with interest. The terms and conditions of bond are very much binding on the petitioners. In the absence of legislative guidelines it was well within the jurisdiction of the Settlement Commission to direct recovery of duty with interest as the bond prescribes recovery of duty with interest from the licence holder. So far as rate of interest determined by the Settlement Commission is concerned, the same cannot be said to be arbitrary looking to the prevailing bank rate on deposits. It is not in dispute that rate of interest awarded by the Settlement Commissions is much below rate prescribed in the bond. In the circumstances, no fault can be found with order of the Settlement Commission.

In the result, petition is dismissed with no order as to costs.