

(1992) 11 BOM CK 0010
In the Bombay High Court
Case No : Writ Petition No. 1854 of 1991

Shri Krishna Petro Yarns Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-11-1992

Acts Referred:

Customs Act, 1962 — Section 12, 14, 15, 17, 18
Customs Tariff Act, 1975 — Section 3

Citation : (1993) 3 BomCR 313 : (1995) 75 ELT 753

Hon'ble Judges : P. Kurdukar, J; B.N. Naik, J

Bench : Division Bench

Advocate : Shri E.P. Bharucha and Kamal Parsurampuriah, for the Appellant; Shri M.I. Sethna, L.S. Vyas and K.C. Sidhwa, for the Respondent

Judgement

S.P. Kurdukar, J.—This group of 36 writ petitions involves a common question as regards interpretation and scope of Section 61(2) of the Customs Act, 1962 (for brevity "Act"). All these petitions were notified on board under the caption "Matters for Interest on Duty & DEEC Scheme". We heard Counsel for the parties in all these petitions.

2. The question involved in these writ petitions is as under :-

"On importation of goods under OGL if the importers had kept the same in the warehouse u/s 59 of the Act and after expiry of statutory period of three months if they clear the goods under the Advance Licence issued under DEEC scheme, whether such importers are liable to pay interest on the amount of duty which was assessed and ascertained on the date of warehousing until the goods is cleared u/s 68 of the Act [excluding the free period of three months]."

In all these writ petitions, facts are almost identical. For the purpose of this judgment we may set out facts of Writ Petition No. 1854 of 1991.

3. The 1st petitioner is a Public Limited Company incorporated under the Companies Act, 1956. The 2nd petitioner is the Senior Accountant of the 1st

petitioner and also a share-holder. Petitioner-Company is engaged in the business as Importers, Exporters and Manufacturers. They are having their factory at the address shown in the title of the petition. The 1st respondent is the Union of India. 2nd and 3rd respondents are Assistant Collectors in the Customs Department at Bombay.

4. The petitioners imported Polyester Filament Yarn of Tiwan origin. The said goods were shipped by the foreign suppliers from the port of shipment, Keelunj and on removal of the goods the petitioners filed 6 Bills of Entry for warehousing. The goods were allowed to be warehoused under 6 Bonds all dated 4th December, 1990, expiring on 3rd March, 1991. On or about 9th May, 1991, the petitioners filed 6 Bills of Entry for Ex-bond clearance for home consumption. Copies of these Bills of Entry for Ex-bond are at Exhibits B-I to B-6. In view of the Advance Licence produced by the petitioners, they were entitled to clear the goods under Exemption Notification read with Duty Exemption Entitlement Certificate (DEEC). Respondents accordingly assessed these Bills of Entry to "Nil" duty but they endorsed thereon to recover interest at 18% on duty from 4th March 1991 till clearance although the duty assessed is Nil duty. The petitioners cleared the goods under DEEC under Advance Licence and copy of the said licence is at Exhibit C.

5. It is this action of the Respondents to recover interest at 18% per annum when admittedly, no duty was payable by the petitioners u/s 61(2) of the Act, is sought to be challenged on the ground that the respondents have no authority of law to recover the said amount of interest at 18% per annum. Petitioners also challenge that the action of the respondents is arbitrary and totally unrealistic in view of the factual position that the petitioners were not required to pay any duty at the time of clearance of the goods. In effect the contention is that the goods were cleared being duty-free and if there was no duty recoverable on the imported goods at the time of clearance, the action of charging interest at 18% per annum u/s 61(2) of the Act is illegal and contrary to the provisions of the Act.

6. As stated earlier, all these writ petitions were heard together. Mr. Bharucha, learned counsel appearing for the petitioners in some of the writ petition raised several contentions to which reference will be made shortly. The same arguments were adopted by Mr. Parsurampur, Mr. Patel and Mr. Nankani, in their respective petitions. Learned counsel for the petitioners also raised several diverse contentions to which reference will be made shortly and they will be treated to have been urged in all these writ petitions.

7. At the outset, it may be stated that all these petitioners have imported goods under OGL and filed Bills of Entry u/s 59 for warehousing. Accordingly, the imported goods were kept in warehouse. It is also common premise that all these importers have obtained Advance Licence under DEEC Scheme at a later point of time. It is also common premise that after expiry of three months' period, these importers cleared the warehoused goods against their respective licence without payment of duty and refused to accede to the request made by

the Respondents to pay interest on the duty assessed at the time of warehousing the goods.

8. Mr. Bharucha, learned counsel appearing for the petitioners urged that interest is essentially payable only if there is principal (duty). If on the date of clearance of the goods u/s 68 of the Act, the duty assessed was nil, then there was no question of paying any interest thereon. He then urged that even if exemption is conditional one, no interest is payable. He then contended that the date of actual removal of the goods from the warehouse would be relevant date for determining the duty amount under the Customs Tariff Act, [1975]. If any duty is payable then alone on such duty amount of interest could be charged. Since duty was nil, no question of charging interest would arise. Mr. Bharucha heavily relied upon Exemption Notification dated 30th March 1988 (No. 116/88) issued by Ist respondent u/s 25(1) of the Act. Relying upon this Exemption Notification and the DEEC scheme, Mr. Bharucha urged that by virtue of the Exemption Notification read with DEEC scheme, the importers who have obtained Advance Licence goods in question were not chargeable to any duty at the time of clearance from the warehouse. On true interpretation of Exemption Notification with DEEC scheme, counsel urged that the said exemption is deemed to have been granted to the importers at the time when they submitted Bill of Entry for warehousing u/s 59 of the Act. Mr. Bharucha also urged that interest is linked up with duty. When bills of entry for ex-bond clearance for home consumption was filed for clearance, the date of filing of such Bills of Entry was relevant date to determine the rate of duty and on such duty only interest is chargeable. Mr. Bharucha then urged that the view taken by the Kerala High Court in Thungabhadra Fibres Ltd. Vs. Union of India (UOI), , hold the field and the said judgment directly answers the question raised in this petition in favour of the importers. Mr. Bharucha also drew our attention to a couple of judgments of the CEGAT following judgment of the Kerala High Court. The Customs Act being all India statute and if one High court has taken one view and followed by the CEGAT, it would be in the interest of justice to follow uniform rule throughout India. In the alternative. Mr. Bharucha urged that DEEC Scheme, Procedure of Hand Book, notification and the Advance Licence issued to the importers clearly support the contention of the petitioners. Advance licence although issued after the incident of warehousing it must be deemed to have been issued on the date of warehousing and consequently exemption notification applies. There is no question of paying any interest on "Nil duty".

9. Mr. Parsurampuriah, learned counsel appearing for some of the petitioners while adopting the contentions raised by Mr. Bharucha, urged that if the judgment of the Kerala High Court is not followed, it will create anomalous situation which needs to be adopted. He urged that amount of interest cannot be separated from the principal amount i.e. duty. If no duty is paid, no interest can be recovered from the importers.

10. Mr. Patel, learned counsel appearing for some of the petitioners, urged that

Section 61(2) of the Act provides that the interest shall be payable on the amount of duty on the warehoused goods. Section 2(15) of the Act defines "duty" to mean a duty of customs leviable under the Act. [Conjoint] reading of this definition would be, counsel urged, that the interest is payable on the amount of duty leviable on the warehoused goods. The amount of duty i.e. quantum leviable on the goods has to be determined with reference to sub-section (b) of Section 15(1) of the Act, which provides that duty on warehoused goods is payable on the date on which the goods [are] actually removed from the warehouse. Hence interest is payable on the amount i.e., quantum of duty leviable at the rate in force when goods were actually removed from the warehouse. Mr. Patel further urged that interest is an accessory of the principal. If there is no principal, question of paying any interest would not arise since it is an accessory. Exemption Notification issued u/s 25(1) of the Act exempts goods imported into India against Advance Licence from the whole of the duty of customs leviable thereon. The true impact of Exemption Notification on DEEC Scheme and the Advance Licence is that the exemption must relate to the date of import and the goods must be deemed to have been imported against Advance Licence. Under the said notification, no duty was leviable on the goods when cleared from the warehouse and, therefore, no interest can be recovered from the importer.

10A. Mr. Nankani, learned counsel appearing for some of the petitioners urged that Section 59 of the Act does not define "levy of duty" under the Act. Hence assessment u/s 59 of the Act cannot be the basis for determining the amount of customs duty much less interest payable on such duty. Section 59(1) refers to the dutiable goods assessed to duty u/s 17 or Section 18. Sections 17 and 18 in turn refer to assessment of duty leviable under the Act. It means duty chargeable in terms of the provisions of Section 12 read with Section 15 of the Act. As per Section 12 read with Section 15 of the Act, duty of customs is leviable in case of goods entered for home consumption u/s 46 on the date of which the Bill of Entry is presented and in case of goods cleared from a warehouse u/s 68. In either case, the date on which the goods are actually removed from the warehouse is the relevant date for the purpose of determining the amount of duty under the Customs Act. Assessment can only take place after levy or imposition of tax and assessment cannot be levied on the presumed duty. Mr. Nankani relied upon the definition of "duty" in Section 2(15) of the Act with expression "amount of duty" used in Section 61(2) of the Act and urged that interest is payable on the amount of duty of customs leviable under the Act on the warehoused goods and since the duty of customs leviable on the warehoused goods is the duty on the date of actual removal, interest is also payable only on the amount of duty leviable at the time of actual removal and not at the time of assessment u/s 59 of the Act.

10B. Mr. Sethna, learned counsel appearing for the respondents urged that there is basic distinction in the language of Sections 59(1)(b) and 61(2) of the Act. He urged that scheme of Chapter IX which contains Sections 57 to 73, has to be

read together. Section 59(1)(b) operates in different situations whereas Section 61(2) operates in different circumstances. He urged that the key words used in Section 59(1)(b) of the Act are :

"..... demand all duties, rent and charges claimable on account of such goods under this Act, together with interest on the same from the date so specified at the rate of six per cent per annum or such other rate as is for the time being fixed by the Board."

The wording of Section 61(2) is materially different and it provides that the interest of the duty amount from the expiry of period of three months as in the present case, is claimable by the respondents till the date of clearance of the goods from the warehouse. There cannot be any dispute that the warehoused goods can be cleared u/s 68 of the Act. Mr. Sethna further urged that when goods were imported into India, upon filing of Bills of Entry for warehousing u/s 59 of the Act, the Assistant Collector made assessment and also determined the amount of duty and it was so endorsed on Bills of Entry at the time of keeping goods in the warehouse. There is no challenge to the assessment made by the Assistant Collector and determination of the amount of duty made by him on the Bills of Entry. It is open to the Assistant Collector to recover the amount of duty together with interest thereon in exercise of powers u/s 59(1)(b) of the Act, but if no such notice is issued u/s 59(1)(b) of the Act it does not mean that liability of the importer to pay interest on the assessed duty amount ceases merely because warehoused goods were allowed to be cleared against Advance Licence. Mr. Sethna urged that the language used in Section 61 is quite clear and it permits the Respondents to claim interest on the duty amount so assessed at the time of warehousing the goods till warehoused goods are cleared by the importer against the Advance Licence. The amount of interest on duty amount has started accumulating day by day, until warehoused goods are cleared by the importer against the Advance Licence. Mr. Sethna contended that the amount of duty which was recoverable on the imported goods at the time of warehousing u/s 59(1)(b) of the Act was withheld by the importers (Petitioners) and as a result thereof, respondents were deprived of the said amount and consequently respondents are entitled to recover the interest. He also urged that interest is an independent liability u/s 61(2) of the Act and the same is recoverable at the time of permitting the importer to clear the goods from the warehouse against the Advance Licence. The interest is not linked up with principal i.e. duty amount. Mr. Sethna urged that the decision of the Kerala High Court is u/s 59(1)(b) of the Act and, therefore, the same is clearly distinguishable. Mr. Sethna also drew our attention to a decision of the Karnataka High Court in Bangalore Wire Rod Mills Vs. Union of India, . He fairly admitted that challenge before the Karnataka High Court was to the notice issued by the Assistant Collector u/s 59(1)(b) of the Act. The Karnataka High Court however, considered the ambit of not only Section 59(1)(b) but also Section 61(2) of the Act. The ratio as well as observations contained in the said judgment clearly support the submission of the respondents. Mr. Sethna urged that the decision of the Karnataka High Court is

rendered by two learned Judges of the said High Court and as on today must hold the field in preference to Kerala High Court judgment rendered by the learned Single Judge. Mr. Sethna also challenged the contention raised on behalf of the petitioners relating to deeming effect of notification, DEEC Scheme and Advance Licence. He urged that the Exemption Notification as well as Advance Licence issued under DEEC Scheme cannot have retrospective-effect but are prospective. He further urged that object of DEEC Scheme was to enable the importer to import goods under OGL or under any other valid licence and thereafter apply for Advance Licence, and if it is granted, claim benefit of exemption notification. Advance Licence will be effective only from the date when it is filed before the Assistant Collector for clearing warehoused goods. The importer, who has obtained Advance Licence may be entitled to claim exemption of duty under the Act. This Advance Licence cannot have the effect of erasing the liability of interest accrued till the date of clearing of goods. Mr. Sethna, therefore, urged that contentions raised on behalf of the petitioners are devoid of any substance and the same may be rejected.

11. In order to appreciate rival contentions it would be necessary to refer to relevant provisions under the Customs Act. Sec. 2(14) of the Act defines "dutiable goods" to mean any goods which are chargeable to duty and which has not been paid. Section 2(15) defines "duty" to mean a duty of customs leviable under this Act. Section 12 is a charging section and it reads thus :

"12. Dutiable goods. - (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs, shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods imported into, or exported from India.

(2)"

Section 14 deals with valuation of goods for the purposes of assessment. Section 15 deals with determination of rate of tariff valuation of imported goods and since we are concerned in this petition with this aspect, we may reproduce the same :

"15. Date for determination of rate of duty and tariff valuation of imported goods. - (1) The rate of duty and tariff valuation if any, applicable to any imported goods, shall be the rate and valuation in force :-

(a) in case of goods entered for home consumption u/s 46, on the date on which a Bill of Entry in respect of such goods is presented under this section;

(b) in case of goods cleared from a warehouse u/s 68, on the date on which the goods are actually removed from the warehouse;

(c) in case of any other goods, on the date of payment of duty :

Provided that if a Bill of Entry has been presented before the date of entry inwards of the vessel by which the goods are imported, the bill of entry shall be

deemed to have been presented on the date of such entry inwards.

(2) The provisions of this section shall not apply to baggage and goods imported by post."

Sec. 17 deals with assessment of duty and it prescribes procedure thereof. Sec. 25 gives powers to the Central Government to grant exemption from the duty if it is satisfied that it is necessary in the public interest to do so. Since there is no challenge to the Exemption Notification, it is not necessary to set out the said provision. Sec. 46 deals with entry of goods on importation and permit the importers of any goods, subject to exception therein to make entry thereof by presenting to the proper officer a Bill of Entry for home consumption or warehousing in the prescribed form. Sec. 48 prescribes procedure in case of goods, not cleared, warehoused or transhipped within two months after unloading. Section 49 permits storage of imported goods in warehouse pending clearance.

12. Now, we come to the relevant provisions which deal with warehousing. Sections 57 to 73 are contained in Chapter IX of the Act. For the purpose of this petition, relevant provisions are contained in Sections 59, 68 and 91. Section 59 reads thus :-

"59. Warehousing bond. - The importer of any dutiable goods which have been entered for warehousing and assessed to duty u/s 17 or section 18 shall execute a bond binding himself in a sum equal to twice the amount of the duty assessed on such goods -

(a) to observe all the provisions of this Act and the rules and regulations in respect of such goods;

(b) to pay on or before a date specified in a notice of demand all duties, rent and charges claimable on account of such goods under this Act, together with interest on the same from the date so specified at the rate of six per cent per annum or such other rate as is for the time being fixed by the Board; and

(c) to discharge all penalties incurred for violation of the provisions of this Act and the rules and regulations in respect of such goods.

(2) for the purposes of sub-section (1), the Assistant Collector of Customs may permit an importer to enter into a general bond in such amount as the Assistant Collector of Customs may approve in respect of the warehousing of goods to be imported by him within a specified period.

(3) A bond executed under this section by an importer in respect of any goods shall continue in force, notwithstanding the transfer of goods to any other person or the removal of the goods to another warehouse :

Provided that where the whole of the goods or any part thereof are transferred to another person, the proper officer may accept a fresh bond from the transferee in a sum equal to the twice the amount of duty assessed on the goods

transferred and thereon the bond executed by the transfer or shall be enforceable only for a sum mentioned therein less the amount for which a fresh bond is accepted from the transferee."

Section 60 comes into operation when provisions of section 59 have been complied with in respect of goods so imported. Thereupon the proper officer may make an order permitting the deposit of the goods in warehouse without payment of duty. Section 61 reads thus :

"61. Period for which goods may remain warehoused. - (1) Any warehoused goods may be left in the warehouse in which they are deposited or in any warehouse to which they may be removed -

(a) in the case of non-consumable stores, till the expiry of three years; and

(b) in the case of any other goods, till the expiry of one year; after the date on which the proper officer made an order u/s 60 permitting the deposit of the goods in a warehouse.

Provided that

(i)

(ii) in the case of any goods which are not likely to deteriorate, the aforesaid period (one year or three months) as the case may be, may, on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding ("six months") and by the Board for such further period as it may deem fit :

Provided further

(2) Where any warehoused goods remain in a warehouse beyond the period of one year or three months specified in Clause (a) of Clause (b) of sub-section (1) by reason of the extension of the aforesaid period or otherwise, interest at such rate, not exceeding eighteen per cent, per annum, as is for the time being fixed by the Board shall be payable on the amount of duty on the warehoused goods for the period, from the expiry of the period of one year, or as the case may be, three months, till the date of the clearance of the goods from the warehouse."

Section 68 reads thus :

"68. Clearance of goods for home consumption. - The importer of any warehoused goods may clear them for home consumption if -

(a)

(b) the import duty leviable on such goods and all penalties, rent, interest and other charges payable in respect of such goods have been paid; and

(c)"

Sections 59(1)(b) and 61(2) of the Act are to be read together with Exemption Notification and DEEC Scheme. The importers have imported the goods under

OGI and warehoused the same in terms of Section 59 of the Act. The goods so imported and warehoused were assessed to duty and the amount of duty was also determined at the rate prevailing under the Customs Tariff Act, 1975 at the time of warehousing. These importers thereafter in terms of DEEC Scheme applied for Advance Licence and obtained the same. The importers, therefore, at the time of clearance of goods from the warehouse, claimed the benefit of Exemption Notification dated 30-3-1988 as amended against Advance Licence. It is, therefore, necessary, at this stage to refer to DEEC Scheme and the Exemption Notification dated 30-3-1988 (116/88), Exhibit B as amended from time to time and last amendment is dated 20-2-1990. It reads thus :

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the Notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 44/87, Customs G.S.R. 101 (E) dated the 19th February, 1987, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts, goods imported into India against an Advance Licence issued under the Imports (Control) Order, 1955, being materials required to be imported for the purpose of manufacturing of products (hereinafter referred to as the resultant products) or replenishment of materials used in the manufacture of the resultant products or both, or for export as mandatory spares along with the resultant products, for execution of one or more orders or for transfer to another Advance Licence Holder or Pass Book Holder, from the whole of the duty of Customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty leviable thereon u/s 3 of the said Customs Tariff Act, subject to the following conditions, namely :-

(a)

(b) the importer at the time of clearance of the imported materials makes -

(i) a claim in writing to the Collector of Customs for such exemption and executes a bond or legal undertaking before such authority as may be approved by the Central Government for complying with the conditions specified in this Notification;

(ii) a declaration before the Assistant Collector of Customs binding himself to pay on demand an amount equal to the duty leviable but for the exemption, on the imported materials in respect of which the conditions specified in this notification have not been complied with.

(c)

(d)

(e)

(f)

(g)

Explanation - In this Notification -

(i)

(ii)

(iii)

(iv)

(v) "Imported into India against an Advance Licence" includes -

(a) goods imported under any Open General Licence issued under the Imports and Exports (Control) Act, 1947 (18 of 1947) for the time being in force, for which at the time of clearance out of Customs" Control, a valid Advance Licence is produced by the importer."

Duty Exemption Scheme and the relevant provisions thereof are contained in Chapter XXI (see page 89 of the Compilation).

Para 344 of the Scheme deals with Export Obligation. There is no dispute before us on this issue. Para 355 prescribes procedure (see page 95 of the Compilation) which reads thus :

"355(1) Where the exporter is otherwise eligible to import an OGL item or other items against his own licences and also claim duty exemption benefits under this Scheme, it will be open to him to import such items in advance under OGL or against his own licence and keep the same in Customs Bond for getting clearance against valid licence issued subsequently under Duty Exemption Scheme. Clearance of the items from the Customs Bond can, however, be effected after obtaining the licence under the said scheme and without which the benefit of duty exemption will not be admissible. The declared supporting manufacturer of the applicant can also avail of this facility by effecting imports of OGL items as an Actual User and get the same cleared subsequently against a valid licence issued under the said scheme in favour of the applicant, provided the supporting manufacturer holds a valid letter of authority issued by the applicant in his favour in terms of para 352 above.

(2) The facility of the aforesaid provisions for import of items against other licences will be available subject to the condition that the licence in question debited at the time of import will not be re-credited after clearance made against a licence issued under Duty Exemption Scheme. It is, however, clarified that in case the applicant is already in possession of a valid licence issued under the said scheme on the date of arrival of the consignment, then such items will be cleared by the Customs with duty exemption benefits without insisting on keeping the goods in the Customs Bond before clearance."

The controversy centres around exemption notification and the advance licence obtained by the importers against which warehoused goods were cleared. It was

urged on behalf of the petitioners that object of Duty Exemption Scheme contained in para 229(1) of Chapter XIX of the Import Export Policy, 1990-93 is to make available to the registered exporters the necessary inputs needed for export production at international prices, without payment of customs duty as per the relevant Customs Notification issued in this regard, with a view to make exports competitive in the international market. This scheme envisages certain categories of licences. Under para 355 of the said policy, the exporter who is otherwise eligible to import an OGL item or other items against his own licences and also claim duty exemption benefit under this Scheme, may import such items in advance under OGL, keep them in the warehouse without payment of duty and apply for Advance Licence. After obtaining Advance Licence, the importer may clear the goods under Exemption Notification without payment of duty against Advance Licence. The object of this scheme, according to the petitioners is that the Advance Licence which was so obtained at a later point of time, be deemed to have been obtained at the point of time when goods were imported and kept in the warehouse. In this behalf, counsel for the petitioners drew our attention to Clause (v) to the Explanation to Exemption Notification and urged that goods imported under OGL, if at the time of clearance valid licence is produced by the importer, such importation will be deemed to be against the Advance Licence and the importers are entitled for benefit of Exemption Notification. Since no duty was payable on the imported goods, which are cleared against Advance Licence, it should be deemed that on the date when goods were warehoused, no duty was payable and, therefore, the question of payment of interest does not arise.

13. Mr. Sethna, for the respondents submitted that under this scheme, the importers were permitted to import goods under OGL, keep them in warehouse u/s 59 of the Act and apply for Advance Licence. If they get such Advance Licence, they may clear the goods thereafter without payment of duty but certainly Advance Licence cannot relate back as if effective from the date of importation of goods and/or date of warehousing because export obligations cannot be delinked. Date of export obligation starts from the date of clearance. This date cannot relate back to the date of importation and warehousing. If exemption Notification is read in the context of the scheme, counsel urged, that the importer will get benefit of this Advance Licence only against payment of duty at the time of clearance of goods from the warehouse.

14. After giving careful thought to the rival contentions and after perusing Exemption Notification and para 355 thereof, we are of the opinion that this facility is given to the importers to import the goods falling under OGL and keep them in the warehouse without payment of duty and thereafter apply for Advance Licence. If it is granted, the importer may clear the goods from warehouse without payment of duty. It is difficult to accept the contention of the petitioners that the said Advance Licence be deemed to have been issued on the date of the importation of the goods and/or keeping them in the warehouse. This will create anomalous situation. The contention raised by Mr. Sethna is well

founded and must be accepted.

15. Essentially, Exemption Notification and the Scheme are meant to give benefit to the importers to import goods under OGL and apply for Advance Licence. On receipt of the Advance Licence importer may clear the goods against such licence without payment of duty. Reliance of the petitioner on Clause 5 of Explanation to Exemption Notification dated 30-3-1988 does not advance the case of the petitioners any further.

16. Reverting back to the submissions based on Section 59(1)(b) and Section 61(2) of the Act, the main thrust of the arguments on behalf of the petitioners is to the decision of the Kerala High Court. It is true that the Kerala High Court in the case of Thungabhadra (supra) had held that interest is linked up with the duty and if on the date of clearance, goods were exempted from duty, the question of payment of interest on such nil duty would not arise. This decision of the Kerala High Court is u/s 59(1)(b) of the Act. Section 59(1)(b) contemplates notice to the importers who have kept goods in the warehouse. The key words of sub-section (1) of Section 59 of the Act are that the Assistant Collector may specify in notice of demand all duties, rent and charges claimable on such goods together with interest on the same, from the date so specified at the rate of six per cent per annum or such other rate as is for the time being fixed by the Board. The entire judgment of the Kerala High Court is on the interpretation of the phraseology used in this sub-section i.e. "together with interest". In this reported decision, on the date when goods were sought to be cleared from the warehouse, the exemption notification u/s 25(1) of the Act was applicable and resultantly, no duty was payable. On these facts, the Kerala High Court has observed as follows :

"A reading of the relevant provisions of the Act would show that the liability to pay interest cannot be delinked or divorced from the liability to pay duty. Both are conjunctive and must go together. The words "together with interest" in Section 59(b) are sufficient to indicate that the interest is linked with duty. In other words, an importer has no liability to pay interest is an adjunct to a debt or liability. It has no separate existence. It is one of the incidents of a debt which in the absence of the latter has no sanction for enforcement. The importer's liability to pay duty is at the time of clearance of the goods from a warehouse. He has no obligation to pay duty as long as goods remained in the warehouse. When goods are exempted from duty before they are removed from the warehouse, the natural as well as legal corollary is that none can be mulcted with the burden to pay interest on a non-existing duty."

With respect, we are unable to agree with the aforesaid ratio, but, however, we must make it clear that we are not called upon to decide the scope of Section 59(1)(b) of the Act. Admittedly, in the case before us, no notice of demand was issued to the importers by the Assistant Collector in exercise of powers u/s 59(1)(b) of the Act. The decision of the Kerala High Court is clearly distinguishable and will not apply to the facts of the present case. As indicated earlier, language used

in Section 59(1)(b) and Section 61(2) is quite different.

17. Before we consider the petitioner's contention based on Section 61(2) of the Act, we must make it clear that there is no dispute before us that the imported goods were warehoused u/s 59 of the Act and after compliance of provisions of Section 59 an order for warehousing the same was issued by the Assistant Collector. Section 61 of the Act deals with the period for which the goods may remain warehoused. In the petition before us, warehoused goods remained in the warehouse for a period more than three months. After expiry of three months, the importers cleared the goods from the warehouse. The issue before us is as to whether the importers are liable to pay interest on the duty amount for the period in excess of three months till the date of clearance of the goods from the warehouse. In Writ Petition No. 1854 of 1991, the petitioners filed 6 Bills of Entry for warehousing on 4-12-1990. Ex-bond Bills of Entry were filed for clearance for home consumption on 9-5-1991. Obviously, they were filed after a period of three months. Respondents demanded amount of interest for the period after expiry of three months till the date of clearance of the goods from the warehouse. Petitioners denied their liability to pay interest as demanded and, therefore, they filed this petition on 27th May, 1991, and cleared goods under interim order in terms of prayer (c).

18. Counsel for the petitioners urged that notwithstanding that the warehoused goods were cleared after expiry of three months' period, they were not liable to pay interest till the date of clearance of the warehoused goods on the ground that Exemption Notification applies and they were entitled to clear the goods without paying any duty against Advance Licence. It was urged on behalf of the petitioners that the goods which were warehoused were not dutiable goods by virtue of Exemption Notification and since goods were not dutiable at the time of clearance, no interest was payable thereon. Expanding this proposition it was urged that Section 61(2) of the Act provides that interest shall be payable on the amount of duty on the warehoused goods. Section 2(15) of the Act defines "duty" to mean amount of duty leviable under the Act. Therefore, interest is payable on the amount of duty leviable on the warehoused goods. Since on the date of clearance of the goods no duty was leviable u/s 2(15) of the Act, the petitioners were not liable to pay any interest. This argument is also based upon Section 15(1)(b) relating to date for determination of rate of duty and tariff valuation of imported goods, viz. in the case of goods cleared from a warehouse u/s 68 of the Act, on the date on which goods are actually removed from the warehouse.

19. u/s 15 of the Act, rate of duty and valuation in force on the date when goods were cleared from the warehouse u/s 68 of the Act is applicable. Since no duty was payable on the date of clearance, petitioners were not liable to pay any interest u/s 61(2) of the Act. In our opinion, this submission again does not appeal to us. Section 2(14) defines "dutiable goods" and as soon as importation is complete under the Customs Act, goods become dutiable, see *Apar Private Ltd.*

and others Vs. Union of India and others, . The Full Bench of this Court held that import can be said to have taken place as soon as goods entered the territorial waters of India. Taxable event occurs as laid down by Section 12 when goods are imported into India. From the moment, the goods are imported continued to be imported goods as defined in Section 2(25) of the Act until they were cleared for home consumption. In other words, they acquire the character of imported goods within the meaning of Section 2(25) no sooner they enter the territorial waters of India and thus become subject to the levy of customs duty. The chargeability is not suspended until they are cleared for home consumption.

20. As stated earlier, when the petitioners (Importers) filed Bills of Entry for warehousing, the goods were assessed and the amount of duty was determined on the basis of rate of duty under the Customs Tariff Act, 1975 prevailing at that point of time. There is no challenge to the said assessment as well as amount of duty. There is no dispute that on the date when the goods were warehoused, no importer was having Advance Licence. Goods remained in the warehouse after the period of three months. In the meantime, the importers obtained Advance Licence and sought to clear the goods after expiry of period of three months against the said Advance Licence claiming benefit of Exemption Notification. Therefore, until goods were sought to be cleared against the Advance Licence till then duty under the Customs Act was payable to the Respondents. By reason of facility under the DEEC scheme, the importers were permitted to apply for Advance Licence. The amount of interest therefore, started accruing and remained accumulated from the date when goods were warehoused and subject to statutory period of three months as provided u/s 61(1)(b) of the Act. In our opinion, the interest started automatically accruing to the amount of duty after expiry of period of three months till the date of clearance of goods from the warehouse. Mr. Sethna in support of this submission rightly drew our attention to a decision of the Karnataka High Court in Bangalore Wire Rod Mills Vs. Union of India, .

21. At the outset, it must be stated that the controversy before the Karnataka High Court again related to demand notice issued u/s 59(1)(b) of the Act. But, however, the Division Bench of the Karnataka High Court while construing the demand notice u/s 59(1)(b) of the Act also exhaustively dealt with scope and interpretation of Section 61(2) of the Act. The facts of the reported decision of the Karnataka High Court show that importers therein had imported goods and kept in the warehouse u/s 59(1) of the Act. Demand notice was issued on 1-3-1988 in respect of amount of duty and interest thereon calling upon the importer to pay duty at rate of 90% within two weeks. The said demand notice was subject matter of challenge before the Karnataka High Court. The learned Single Judge of the Karnataka High Court allowed the petition partly. Petitioner-importer as well as Union of India filed appeals and they were heard together by the Division Bench of the Karnataka High Court. It will be seen from the reported decision that there was variation in the rate of duty under the Customs Tariff Act. The Assistant Collector called upon the importer to pay interest on the amount of

duty u/s 59 of the Act at the rate of 90% under the Customs Tariff Act being the rate of duty then in force. It may be stated that prior to 1988, twice they were called upon to pay duty at 90% at the prevailing rate together with interest, u/s 59(1) of the Act. In para 12, the Karnataka High Court has given how variation occurred in the rate of duty under the Customs Tariff Act. In para 14, controversy between the parties has been set out. After analysing scheme of Section 59(1) (b) and unamended provisions of Section 61(1) and (2) of the Act, it is observed as under :

"Sub-section (2) of section 61 which was inserted to fix the date from which the liability to pay interest would automatically start, expressly refers to provisions of Section 61(1) of the Act. The opening words of sub-section (2) of section 61 are very significant for answering the point arising for our consideration. The opening words of sub-section (2) of section 61 are : "Where any warehoused goods remain in a warehouse beyond the period of one year or three months specified in clause (a) or clause (b) of sub-section (1) by reason of the extension of the aforesaid period or otherwise." From these words it is clear, sub-section (2) expressly refers to sub-section (1) of section 61 as amended by Act 11/83. If the intention of the legislature was that the provisions relating to computation of interest immediately after the expiry of the period specified in sub-section (1) of Section 61 as it stood prior to the amendment of that sub-section, sub-section (2) would have simply referred to the period referred to in sub-section (1) of Section 61. Instead, the opening words of sub-section (2) expressly refer to the period of one year and three months in sub-section (1) of Section 61 i.e. as it stood after its amendment. Therefore, in our opinion, there can be no doubt that sub-section (2) of Section 61 gets attracted only to cases to which sub-section (1) of Section 61 as it stood after its amendment gets attracted. It is not even the case of the respondents that sub-section (1) of Section 61 as amended with effect from 13-5-1983 applies to cases where goods were deposited in a warehouse when the unamended sub-section (1) of Section 61 was in force. In our opinion, when even according to the respondents sub-section (1) of Section 61 as amended has no application to the present case. Correct view to take as to the scope of sub-section (2) of Section 61 is it does not apply to the case of the petitioner. The resultant position is that the liability of the petitioner to pay interest arises u/s 59 of the Act i.e. from the date specified in the demand notice. In fact, it is because of this, the legislature inserted Section 61(2) which created the liability to pay interest from the date of expiry of the period specified in section 61(1). If even according to Section 59, the liability to pay interest arises from the date of expiry of the prescribed period of warehousing as specified in Section 61(1), it was unnecessary for the legislature to insert sub-section (2) in Section 61. Therefore, we find no merit in the stand taken by the learned Central Government Standing Counsel contrary to the stand taken by the respondents in the statement of objections."

In paragraph 18 of the judgment it was further observed as follows :

"The answer to the question depends upon true meaning of Section 59(b). It speaks of the liability of the importer to pay interest on the amount of excise duty claimable. It is well-settled position of law that the interest is compensatory in character and it has to be paid by a party, who has withheld the payment of principal amount payable to the person to whom he has to pay the same."

For this proposition, the Karnataka High Court relied upon a decision of the Supreme Court in Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, , and in particular para 23 thereof. Following the above principles, the Karnataka High Court at page 39 of the report worked out the amount of duty recovered from the petitioners-importers from time to time and thereafter directed that the amount of duty on the said basis be recovered together with interest and not at the rate of 90%, the rate then prevailing at the time when demand notice was issued. We are in agreement with the above proposition laid down by the Karnataka High Court as regards interpretation of Section 61(2) and following the same, we hold that the petitioners are liable to pay interest on the amount of duty payable at the time when goods were warehoused till they are cleared at the rate then prevailing under Customs Tariff Act, if one compares Section 59(1)(b) gives powers to the Assistant Collector to call upon the importer of the warehoused goods to pay all duties, rent and charges claimable under the Act, together with interest on the same from the date so specified at the rate of 6 per cent per annum, or such other rate as is for the time being fixed by the Board. Demand notice u/s 59 of the Act can be issued after expiry of free statutory period provided u/s 61. u/s 59(1)(b) question of clearing warehoused goods does not arise. Section 59 applies prior to the date of clearance of warehoused goods but after expiry of free statutory period provided under Sec. 61(2) and also where the importer has not paid duty, rent and charges, claimable under the Act for such period whereas Sec. 61(1) deals with period for which goods may remain in warehouse. Periods are prescribed in Sec. 61(1)(b) of the Act. Then follows sub-section (2) and it reads thus :

"Where any warehoused goods remain in a warehouse beyond the period of one year or three months specified in clause (a) or clause (b) of sub-section (1) by reason of extension of the aforesaid period or otherwise, interest at such rate, not exceeding eighteen per cent annum, as is for the time being fixed by the Board, shall be payable on the amount of duty on the warehoused goods for the period from the expiry of the period of one year, or, as the case may be, three months, till the date of the clearance of the goods from the warehouse."

The key words are liability accrued to pay interest after expiry of three months till the date of clearance of the goods from the warehouse. Fair reading of this provision is that till the date of clearance of goods from the warehouse whatever amount of duty on the basis of rate then prevailing under the Customs Tariff Act, liability to pay interest thereon starts accruing till the date of clearance. It is this, counsel for the Respondents urged, the material difference in Section 59(1)(b)

and 61(2) of the Act. After reading these provisions we are of the opinion that u/s 59(1)(b) of the Act, duty and interest are linked up and, therefore, notice of demand has to be for all duties, rent charges, etc. together with interest, whereas u/s 61(2) of the Act, interest is delinked from the principal amount i.e. duty amount and interest thereon is recoverable at the time of clearance of goods from the warehouse. Unless we read this distinction between Sections 59(1)(b) and 61(2) of the Act, it would not be possible to construe both these sections harmoniously. If we accept the contention of the petitioners, it will lead to anomalous situation. In a given case, where demand notice u/s 59(1)(b) of the Act is issued to the importer who has not cleared warehoused goods would be required to pay interest on the duty amount so determined at the prevailing rate under the Customs Tariff Act. But, where no notice is issued u/s 59(1)(b), but such demand is made at the time of clearance of the warehoused goods u/s 61(2) of the Act, the importer would escape without payment of interest. This would create artificial distinction between the two importers of the warehoused goods and, therefore, it is not possible to accept the contention raised on behalf of the petitioners while construing provisions of Sections 59(1)(b) and 61(2) of the Act.

22. We may also add that this could not be the intention of the legislature while enacting Sections 59(1)(b) and 61(2) of the Act. In this view of the matter, contention raised on behalf of the petitioners relating to Section 61(2) cannot be accepted.

23. Coming to the next contention raised on behalf of the petitioners that the interest is an accessory of the principal and if principal is not recoverable or ceased to be recoverable by reason of operation of law interest cannot be recovered. Counsel for the petitioners in support of this submission drew our attention to a decision of the English Court in *Elder v. Northcott* - 1930 (2) Ch D 422. This decision is clearly distinguishable on facts because provisions of law fall for consideration were different and did not deal with the situation arising before us.

24. It may be stated that some more decisions were cited on behalf of the parties appearing before us, but either those decisions are clearly distinguishable on facts or do not deal with interpretation of Section 59(1)(b) or Section 61(2) of the Act.

25. In view of the above discussion, we are of the opinion, that the importers are liable to pay interest on the amount of duty withheld by them in respect of warehoused goods after expiry of period of three months till date of clearance.

26. In the result, writ petition fails and rule is discharged with costs.

Mr. Bharucha appearing for one of the petitioners orally applies for leave to appeal to the Supreme Court of India. Leave refused.

On the application of the counsel for the petitioners, operation of our order is

stayed till 1st March, 1993.

Counsel for the petitioners assure the Court that they will give two weeks" notice to the respondents before they move the Supreme Court for interim reliefs.