

(2009) 04 MAD CK 0145

In the Madras High Court

Case No : C.M.A. No's. 3609 to 3611 of 2008

Tanfac Industries Ltd.

APPELLANT

Vs

The Assistant Commissioner of Customs, Customs Division

RESPONDENT

Date of Decision : 20-04-2009

Acts Referred:

Customs Act, 1962 — Section 15, 18, 25, 58, 59
Customs Tariff Act, 1975 — Section 3

Citation : (2009) 165 ECR 186

Hon'ble Judges : T.S. Sivagnanam, J;Prabha Sridevan, J

Bench : Division Bench

Advocate : M. Balagopal, for the Appellant; P. Bhuvaveswari, Senior Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Prabha Sridevan, J.—In these three appeals, the following Substantial Questions of Law arise for consideration.

- i) Whether the Customs Circular No. 26/07, dated 20.7.2007 is legally correct ?
- ii) Whether the appellant is liable to pay the interest u/s 61(2) of the Customs Act, when no duty is paid in cash, as having been exempted as per Notification 05/2002 and 96/2004 ?
- iii) Whether, adjustment of credit granted by the Government on export of goods in the DEPB towards import duty payable buy for the exemption is equivalent to payment of duty in cash ?
- iv) Whether clearance of goods from the warehouse after 90 days means that payment of duty due to the Government was delayed so as to earn interest by the Government ?

2. The appellant, who is the holder of private bonded warehouse licences No. 02/84 and 1/2005 issued u/s 58 of the Customs Act, 1962 received

Acid Grade Flourspar falling under Chapter heading 25 of the Customs Tariff Act, 1975 from the Customers Bonded warehouse situated at

Cuddalore under cover of a Transfer Bond. Subsequently, the warehoused goods are being cleared on payment of duty /DEEC/DEPB through

Ex-bond Bills of Entry.

3. In this particular case, the importers have effected clearance by utilising the DEPB scrips. The Bills of Entry were assessed u/s 18 of the

Customs Act (in short "the Act") In terms of Section 61(2(i), the importers were called upon to show cause why interest shall not be demanded

from them, since they had effected clearance beyond the interest free warehousing period of 90 days as per Section 61 of the Act.

4. The appellant replied that they were effecting clearance utilising the DEPB licence under the Notification issued u/s 25 of the Act and that the

Notification refers to exemption from payment of duty and so the liability to pay interest cannot arise on a non-existing duty. The Order in Original

held that debit in DEPB scrip tantamounts to payment of duty in cash, since the importer shall be entitled to avail CENVAT credit of additional

duty leviable u/s 3 of the Customs Tariff Act against the amount debited in DEPB. Therefore, whether the duty was paid by way of cash or by

DEPB scrip, if there is delay in clearance from warehouse, interest must be paid. The Appellate Authority confirmed the same and the Tribunal

also dismissed the appeal filed by the appellant.

5. The learned Counsel appearing for the appellant strenuously contended that the debit entries and the DEPB scrips shall be treated as payment of

duty only for the purpose of availment of CENVAT credit and as far as liability to pay duty under the Act is concerned, one should look Section

25 of the Act and the relevant Notification issued under this Act, which clearly speak of exemption from duty. Section 25 of the Act deals with the

power of the Central Government to grant exemption from duty, if it is necessary in public interest to do so, either absolutely or subject to such

condition as may be specified. The Duty Entitlement Pass Book-Customs Duty Exemption Notification, which deals with DEPB refers to

exemption from payment of duty as well as additional duty under Sub-section 3

of the Customs Tariff Act.

6. We are here concerned with the question, whether the debits under DEPB is equivalent to payment of duty in cash.

7. The learned Counsel for the appellant submitted that in *Pratiba Processors v. Union of India* 1966 (88) ELT 12 (SC) squarely applies to the

present case. There, the Supreme Court held as follows:

12. On a fair reading of the relevant provisions of the Act and in particular Sections 15, 25, 59, 61 and 68 and the General Exemption granted by

the Notification (Pages 169-170 of the paper book) and the Import-Export (Trade) Policy, 1990-93 (Blue Book) (Page 176 of the paper book),

we are of the opinion that the entire Scheme is in a "package" in allowing exemption to imported goods the Government had made it clear that

goods imported into India against the Advance Licence includes goods imported under any licence (including Open General Licence) for which at

the time of clearance out of Customs control a valid Advance Licence is produced by the importer. It is open to the importer to import the items in

advance under Open General Licence and keep the same in Customs Board for getting a clearance against the valid Licence issued subsequently

under Duty Exemption Scheme. When the notification granting the exemption and also the Import Policy has totally liberalised the entire process,

the mere fact of warehousing the goods on an anterior date and clearing the same on the basis of a subsequent Advance Licence, validly obtained

under Duty Exemption Scheme cannot be any stretch of imagination import the idea of levy of interest for the period the goods were kept in the

warehouse. The liability of the assessee to pay the duty arises only on clearance of the goods from a warehouse. The assessee has no obligation to

pay duty as long as the goods were kept or remained in the warehouse. It is only in cases where the goods kept in the warehouse are exigible to

duty and they are so kept in the warehouse for more than the permitted period and the said goods are cleared subsequently and duty paid, interest

is chargeable for the period of delay in the clearance of the goods. Since the goods warehoused are kept for a longer period such delay entails

delayed payment of duty payable and so interest is charged for such delayed payment of duty.

13. ...

14. In the above backdrop, let us consider the scope and content of Section 61(2) of the Act as it existed at the relevant time. Section 61(1)

prescribes the period during which the goods imported may remain in the warehouse. The normal period in different cases are provided therein.

Extension of time in special cases is also provided. If the goods imported remain in warehouse beyond the period provided or extended u/s 61(1),

the consequences are specified in Section 61(2) of the Act. As per the provisions of the Act duty is payable (only when the goods are cleared. If

the goods are not cleared when the time granted u/s 61(1) of the Act, and the goods are cleared later, the payment of duty exigible on the goods

gets automatically delayed. It is to meet the said contingency. Section 61(2) provides that if the goods warehoused are cleared on the amount of

duty on the warehoused goods. It is implicit from the language of Section 61(2) of the Act that the interest shall be payable on the amount of duty

"payable or due" on the warehoused goods for the period from the expiry of period specified or granted till the date of clearance of the goods

from the warehouse. In this case, on the date of clearance of the goods, no duty is payable. The goods are not exigible to duty at that time.

Calculation of interest is always on the principal amount. The "interest" payable u/s 61(1)(2) of the Act is a mere- "accessory" of the principal and if

the principal is not recoverable/payable, so is the interest on it. This is a basic principle based on common sense and also flowing from the language

of Section 61(1)(2) of the Act. The principal amount herein is the amount of duty payable on clearance of goods. When such principal amount is

nil because of the exemption, a fortiori, interest payable is also nil. In other words, we are clear in our mind that the interest is necessarily linked to

the duty payable. The interest provided u/s 61(2) has no independent or separate existence. When the goods are wholly exempted from the

payment of duty on removal from the warehouse, one cannot be saddled with the liability to pay interest on a non-existing duty. Payment of interest

u/s 61(2) is solely dependent upon the exigibility or factual liability to pay the principal amount, that is, the duty on the warehoused goods at the

time of delivery. At that time, the principal amount (duty) is not payable due to exemption. So, there is no occasion or basis to levy any interest,

either. We hold accordingly.

8. The learned Counsel submitted that in that case, the Supreme Court held that importers are not liable to pay interest, since the goods were exempted from payment of duty at the time of clearance.

9. The learned Senior Standing Counsel for the respondent submitted that the judgment in Pratiba's case will not apply to the present case, since

those goods were covered under the DEEC Scheme which is totally different. The learned Counsel submitted that as per para 4.3.5 of Foreign

Trade Policy 2004-07, the additional duty of customs paid in cash or through DEPB license shall be adjusted in a CENVAT credit for payment of

interest duty on the imports and therefore, this would clearly show that the debit under DEPB license amounts to payment of duty, the only

difference is that it is not paid in cash and therefore, in respect of the warehousing goods which remain beyond the time stipulated, the liability to

pay interest will arise. The learned Counsel also relied on the Tribunal's judgment in Seshasayee Paper and Boards Ltd. and submitted that the

impugned order does not require any interference.

10. The Duty Entitlement Pass Book Scheme has the objective of neutralising the incidence of Customs duty on the import content of the export

product and it is provided by way of grant of duty credit against the export product and the additional customs duty/excise duty paid in cash or

through debit under DEPB shall be adjusted as CENVAT Credit or Duty Drawback. The important paragraphs of the Circular dated 20.7.2007

are extracted hereunder:

Interest payable on clearance of warehoused goods when duty paid through DEPB debit.

Circular No. 26/2007-Cus., dated 20.7.2007

F. No. 475/04/2006-LC

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi.

Subject : Waiver of interest on goods cleared from a warehouse when duty is paid by way of debit in DEPB licenses-Regarding

I am directed to refer to instructions contained in Board's Circular No. 10/2006-Customs, dated 14.2.2006 (F. No. 473/07/2005-LC) (2006

(194) E.L.T. T23) regarding waiver of interest on Customs duty on warehoused goods and to say that a reference was received in the Board

seeking clarification whether interest on warehoused goods is chargeable, if the Customs duty is paid by way of debit in DEPB.

2. The issue was examined and necessary clarification in the matter has been issued vide F. No. 605/85/2006-DBK, dated 21.7.2006 to the

Commissioner concerned. Having regard to the general implications of the matter, a copy of the same is enclosed for information and necessary

action.

3. In brief, the issue involved is, whether the duty paid through debits under DEPB is to be treated as payment of duty of exemption from duty.

Hitherto, the stand taken by the Department was that goods cleared through debit under DEPB are exempted goods and, accordingly, no

CENVAT or drawback was allowed for such payments. Para 4.3.5., of the Foreign Trade Policy, 2004-09 was amended allowing additional

Customs duty paid through debit under DEPB to be adjusted as Cenvat credit or duty drawback. The said position was clarified vide Circular No.

59/2004-Cus., dated 21.10.2004 (2004 (173) E.L.T. T9). It implies that the goods cleared by debits through DEPBs are not to be treated as

exempted but duty paid.

4. Section 61 of the Customs Act, 1962 provides for charging of interest on duty payable on clearance of warehoused goods. Section 61(d)(i) and

(ii) provides that the interest shall be payable on the amount of duty payable at the time of the clearance of the goods from the warehouse. In case

of clearances under DEPB Scheme, the amount of duty payable is required to be debited from DEPB scrip. Therefore, it cannot be considered

that the duty payable is nil or exempted. This is further supported by the fact that the CENVAT credit or duty drawback is available even when the

additional Customs duty is debited under DEPB.

5. The issue regarding interest on warehoused goods has already been clarified by the Board vide Circular No. 10/2006-Cus., dated 14.2.2006

clarifying, inter alia, that interest on warehoused goods is not payable where the principle amount (duty) itself is not payable following the Apex

Court Judgment in the case of Pratibha Processors and others Vs. Union of India and others, on this issue. In the case of notification governing

imports under DEPB Scheme, the situation is slightly different. As explained above, the notification issued under DEPB Scheme provides for

exemption subject to debit of duties in DEPB scrips. It is thus not a case where the goods are unconditionally exempt from duty.

6. In the light of the position explained above, it is clarified that interest is chargeable on duty paid by way of debit in DEPB on goods cleared from the warehouse.

11. We are informed that in 2008(223) ELT 287 (Commissioner v. Kanoongo Estate P. Ltd.,) has been appealed against. In Sanjay Dhanuka Vs.

Collector of Customs, and in Pratibha Processors" case, the matter was covered by DEEC Scheme and not DEPB Scheme. It was in those

circumstances, that it was held that when no duty is payable, no interest liability would arise. The differences between DEEC and DEPB Scheme

has been explained in Commissioner of Customs, Calcutta v. Indian Rayon & Industries Ltd. reported in 2008(10) Scale 499, which reads as

follows:

DEEC Scheme

Under this scheme, the importer is issued an Advance Licence to procure the raw material for a manufacturer of the export product. The goods

which are cleared under Advance Licence are meant for use in the manufacture of export product or replenishment of the raw materials already

used. The clearance is allowed duty free. The details of items allowed product are published by the Ministry of Commerce in their Input Output

Norms which are part of the Exim Policy.

DEPB Scheme

Under this scheme, the exporters are issued DEPB scrips which allows them the specific amount to be utilized for payment of Customs duty. The

amount for which DEPB scrip is issued depends upon the rate for a particular export product. The Ministry of Commerce notifies DEPB credit

rates for export of all item. The DEPB scrip is freely transferable and can be used to debit the payment of duty at the time of clearance of goods

except capital goods and goods mentioned in negative list.

12. In fact, in that case, there were three bills of entries, only one of them was goods exported under DEEC Scheme and other two were under the

DEPB Scheme. The difference drawn by the Supreme Court in the above judgments make it clear that under the DEEC Scheme, the clearance is allowed duty free, whereas under DEPB Scheme, the exporters are issued DEPB scrips which allows them specific amounts to be utilised for payment of Customs duty. Therefore, the importers, who use DEPB scrips, pay duty not by cash but only by way of credit. This is clear from the judgment of the Supreme Court extracted above. Therefore, the goods cleared under DEPB Scheme cannot be treated as exempted goods, but they can only be treated to be duty-paid goods and therefore, the interest is payable as per Section 61(2) of the Act. The debit of any amount under the DEPB Scheme is a mode of payment of duty on the imported goods and cannot be treated as exempted goods, unlike the goods under DEEC Scheme. We are unable to answer the questions raised by the appellant in its favour. Therefore, the civil miscellaneous appeals are dismissed.