

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH- COURT NO. I

Customs Appeal No. 50378 of 2021

(Arising out of Order-in-Appeal No. 14(15)ADG (ADJ)/DRI/N.DELHI/2020-21 dated 31.12.2020 passed by the Additional Director General (Adjudication), Directorate of Revenue Intelligence, New Delhi)

Rajdarbar Heritage Venture Limited,
(earlier know as M/s. Global Heritage Venture Limited)
12-Ring Road, Lajpat Nagar-IV
New Delhi-110096

...Appellant

VERSUS

Additional Director General (Adjudication),
Directorate of Revenue Intelligence,
Regional Unit, Room No. 214,
New Customs House, Near IGI Airport,
New Delhi-110037

...Respondent

APPEARANCE:

Shri Alok Agarwal, Shri Sharad Srivastav, Shri Rachit Mahajan and Shri Mohit Kalra, advocates for the appellant

Shri Nikhil Mohan Goyal, authorised representative of the department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 20.05.2026
Date of Decision: 01.06.2026

FINAL ORDER NO. 51005/2026

JUSTICE DILIP GUPTA:

Rajdarbar Heritage Venture Limited¹ (earlier known as M/s. Global Haritage Venture Ltd.) has filed this appeal to assail the order dated 31.12.2020 passed by the Additional Director General (Adjudication), Directorate of Revenue Intelligence, New Delhi² confiscating the goods

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1. the appellant
 2. the Additional Director General

imported by the appellant under 33 Bills of Entry from Inland Container Depot, Tughlakabad, New Delhi, for non-fulfilment of the conditions stipulated in the Notification No. 97/2004 dated 17.09.2004³. Likewise, goods imported through 9 Bills of Entry from Inland Container Depot, PPG, New Delhi and goods imported through 13 Bills of Entry from Air Cargo, New Customs House, New Delhi have also been confiscated for violation of the conditions of the Notification. The order also confirms the demand of customs duty foregone on the imported goods in terms of section 25 of the Customs Act, 1962⁴ and the Bonds/Bank Guarantees executed by the appellant under the aforesaid 55 Bills of Entry with interest in terms of the Notification and penalty under section 112(a)(ii) of the Customs Act.

2. The appellant was engaged in the business of hotel and hospitality. It obtained 27 Export Promotion Capital Goods Scheme⁵ authorizations between 2007 and 2009 from the Director General of Foreign Trade⁶ for the purpose of importing duty free capital goods to be used in the construction of a hotel in Sector-42, Gurugram, Haryana. The said capital goods were imported under the EPCG Scheme in terms of the Notification under 55 Bills of Entry. The appellant also submitted bonds with Bank Guarantees, as contemplated under the conditions stipulated in the Notification.

3. The appellant claims that because of delay in completion of the construction of the hotel for reasons beyond the control of the appellant, various creditors backed out of the project and the banks also withdrew

3. the Notification
4. the Customs Act
5. EPCGS
6. DGPT

the financial support resulting in initiation of proceedings under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest⁷ Act against the appellant for recovery of the dues. An order dated 20.09.2011 was consequently passed by the Debts Recovery Tribunal, pursuant to which the consortium of banks auctioned the capital goods imported by the appellant under the EPCG Scheme along with the hotel premises in September 2011 through a public auction.

4. The department, therefore, believed that as the appellant had failed to fulfil the export obligations against the import of capital goods, the appellant would have to pay eight times the duty saved on the goods imported in terms of the conditions stipulated in the Notification read with the provisions of import-export policy. The department also encashed the bank guarantees of Rs. 5,94,63,918/- at the respective port/air cargo to recover the duty foregone by the appellant.

5. This action of the department in encashing the bank guarantee was assailed by the appellant before the Delhi High Court in W.P.(C) 7706 of 2017. The Delhi High Court, by order dated 31.08.2017, directed the DGFT to examine the representation submitted by the appellant for extension of the period for completion of the export obligation. The appellant requested for relaxation of the policy by permitting the appellant to fulfil 100% export obligation as against the permissible 50% through alternative products or services provided by other group companies of the appellant. However, the DGFT, by order dated 28.09.2017, rejected the request of the appellant.

7. SARFAESI Act

6. Thereafter, a show cause notice dated 30.09.2019 was issued calling upon the appellant to pay customs duty of Rs. 5,07,83,188/- with interest against the duty free imports made in lieu of utilization of the 27 EPCG Licenses. The show cause notice also proposed to levy penalty upon the appellant under section 112(a) and (b) of the Customs Act and also proposed to confiscate the goods under section 111(o) of the Customs Act for failure on the part of the appellant to pay duty.

7. The appellant filed a detailed reply and denied the allegations made in the show cause notice.

8. However, the Additional Director General, by order dated 31.12.2020, not only confiscated the goods imported by the appellant but also confirmed the demand of duty with interest and penalty.

9. The Additional Director General framed the following five questions for determination:

- (a) Whether, in the facts and circumstance of the case, the proportionate customs duty amounting to Rs. 5,07,83,188/- foregone on import of capital goods under the Bills of Entry is demandable in terms of the Notification, as amended and the connected Bond executed, in pursuance of the said Notification is enforceable?
- (b) Whether, consequent to (a), interest is demandable under section 28AA of the Customs Act?
- (c) Whether, in the facts and circumstance of the case, the goods imported under the Notification covered under the Bills of Entry cumulatively valued at Rs.20,28,62,041/- are liable to be held liable to confiscation under section 111(o) of the Customs Act for non-fulfillment of conditions of the Notification and for contravention of provisions of the Customs Act?
- (d) Whether, in the facts and circumstance of the case, the amount of Rs. 5,94,63.918/- encashed by

enforcing Bank Guarantee(s) submitted in respect of import of capital goods under the Bills of Entry is required to be appropriated against the liability arising out of the show cause notice?

- (e) Whether, in the facts and circumstance of the case, penalty under section 112(a) and (b) of the Customs Act is imposable for import of goods which are liable to confiscation as the condition of the Notification was not fulfilled?"

10. The Additional Director General noticed that the aforesaid questions were interlinked and the answer to one would have a bearing on the others.

11. The Additional Director first examined the consequences of failure to produce the installation certificate as required under the Notification. In this regard the Additional Director General recorded the following finding.

"(c) I find that the Noticee was to submit the installation certificate as required under the said Customs Notification but it appears that even before the construction of the hotel building could be completed and while imported goods were being installed/fixed, the same were auctioned. I find there is no evidence adduced in the SCN of any misuse of the impugned goods. Therefore, I find that submissions of installation certificate as required under the said Customs Notification was not possible in the given situation."

(emphasis supplied)

12. The second issue that was examined by the Additional Director General was whether the appellant fulfilled the export obligation. In this connection, the Additional Director General examined whether the doctrine of frustration of contract under the Contract Act could be

availed by the appellant and in this connection the following findings were recorded:

"5.1.9 Moving further, I find that the Noticee-importer has pressed the doctrine of frustration to drive home the point that they were unable to fulfil the export obligations and their representations to the DGFT were unheeded and hence they were not under any obligation to discharge the duty demanded herein. At the outset, it is essential to record herein that the licence to import capital goods is an agreement between the DGFT and the Noticee-importer and the Department of Revenue issues exemption notification under section 25 of the Customs Act, 1962 as an enabling provision to fulfil the needs of the-importers (here the Noticee-importer). Accordingly, the Department of Revenue, through CBIC (earlier CBEC) and its field formations is bound to raise demand on account of the non-fulfillment of the conditions of the exemption notification and furthermore there is no privity of contract between the Noticee-importer and the Department of Revenue, through CBIC (earlier CBEC) and its field formations. I further find that it was for the Noticee-importer to approach the DGFT to get the matter regularized or get an extension, as the case may be or alternatively preferred a Writ Petition before the Competent Court having jurisdiction to press the doctrine of frustration and hence I am of the considered opinion that the quasi-judicial authority is not the right forum to press the same into service and that would be going beyond the mandate of the functions of the undersigned as a quasi judicial authority. **Hence, I am of the considered opinion this argument of the notice-importer is not only misdirected and misplaced but also does not aid and advance their case and is accordingly not legally sustainable.**

5.4.2. In this regard, I hold that the issue before me is limited to contravention of provisions of Customs Act, 1962. Therefore, i would not venture into various provisions under the

Contracts Act, 1872 which is entered into by customs on behalf of DGFT."

(emphasis supplied)

13. The Additional Director General then examined whether the appellant would be liable to pay customs duty foregone on the import of capital goods and in this connection recorded the following findings:

"(ii) I find that this case is not that of a normal/routine import of goods, but the impugned goods have been imported under a specific scheme – EPCG – under which the importer has submitted a Bond & Bank guarantee, as required under the relevant notification, binding itself to pay the duty foregone along with interest in the event of failure of fulfilling the export obligation. The Bond remains in full force unless it is discharged.

(iii) **Therefore, I find that the liability to either discharge export obligation or payment of duty foregone along with the applicable interest remains on the importer i.e. the Noticee."**

(emphasis supplied)

14. The Additional Director General also examined whether interest could be demanded under section 28AA of the Customs Act when the duty was not confirmed under section 28 of the Customs Act. In this connection, the Additional Director General recorded the following findings:

"5.6.3. I find that the duty has been demanded under notification no. 97/2004-Customs dated 17.09.2004 whereas the applicable interest is demanded under Section 28AA of the Customs Act, 1962.

xxxxxxx

5.6.6. I also find that the para 7 of the Notification No. 97/2004-Cus dated 17.09.2004 binds the importer to pay the duty with interest @15% per annum in case of

default. The license holder/Noticee has declared in the executed bond that "We shall furnish evidence to the satisfaction of the Assistant/Deputy/Joint Commissioner of Customs of the fulfilment of export obligation within the time schedule prescribed in condition no. 4 of the above notification failing which we shall pay customs duty as provided in the said condition together with interest @15% per annum from the date of clearance of the goods till date of the payment of duty.

5.6.9. Therefore, even though the interest is demanded under section 28AA ibid, when the duty is not demanded under section 28 ibid, the demand does not gets vitiated. Therefore, I hold that the Noticee is liable to pay the interest as demanded under the SCN."

(emphasis supplied)

15. The Additional Director General also examined whether penalty could be imposed upon the appellant under section 112 of the Customs Act and the relevant finding is reproduced below:

"5.7.7.I find that either the penalty under section 112(a) or penalty under section 112(b) is imposable because of the use of "or" i.e. the clauses (a) and (b) are disjointed by the use of preposition "or". **Having come to this conclusion, the issue is whether the Noticee-importer is liable to penal action under section 112(a) of the Customs Act, 1962. I have already held in the preceding paras that the goods imported are liable for confiscation under section 111(o) of the Customs Act, 1962 and consequently penalty under section 112(a)(ii) flows automatically.** Taking into the gravity of the situation and particularly taking into consideration that there is no mens rea, I hold that penalty is rightly imposable under section 112(a)(ii) of the Customs Act, 1962. Needless to record here that there is no requirement of mens rea for imposition of section 112(a)(ii) of the Customs Act, 1962."

(emphasis supplied)

16. The Additional Director General then determined the amount to be appropriated by encashment of bank guarantees. In this connection, the following finding was recorded:

“5.10. xxxxxxxxxx
As discussed above, the duty demandable and amount available through already enforced Bank Guarantee/Bond, port-wise, is as under:

(Amount in Rs.)

S.No.	Port	BG enforced	Duty demandable	Balance amount available for appropriation towards interest payable and the penalty imposable.
1	ICD, Tughlakabad	3,74,73,218	3,40,30,665	86,80,730
2	ICD, Patparganj	17,67,200	87,62,459	
3	Air Cargo, New Customs House, New Delhi	2,02,23,500	79,90,064	
		5,94,63,918	5,07,83,188	

The surplus available in one port may be adjusted against the deficit amount first against the confirmed duty demand followed by confirmed interest demand and the penalty imposed, in that order, in another port.”

17. Shri Alok Agarwal, learned counsel for the appellant assisted by Shri Sharad Srivastav, Shri Rachit Mahajan and Shri Mohit Kalora made the following submissions:

- (i) The appellant is not contesting the demand of customs duty and is only contesting the levy of interest and imposition of penalty upon the appellant;
- (ii) Since the bank guarantee was enchashed and the duty amount was paid even before the issuance of the show cause notice on account of non-fulfilment of

the export obligation, interest could not have been levied nor penalty could have been imposed;

- (iii) The export obligation under the EPCG Scheme can be waived in terms of clause 4 of the Notification that was inserted by Notification No. 72/2007-Cus dated 21.05.2007 that provides for waiver of export obligation in case of force majeure or other unforeseen circumstances/reasons due to which the exporter is unable to fulfil export obligation. To support this contention learned counsel placed reliance upon the decision of the Bombay High Court in **Writ Petition No. 2723 of 2008**⁸, and the decisions of the Tribunal in **Taurus Novelties Ltd. vs. Commissioner of Customs, Bangalore**⁹ and **Commissioner of Customs (Port), Kolkata vs. M/s. B R Marbles Pvt. Ltd.**¹⁰;
- (iv) The appellant had requested the DGFT for permission to fulfil 100% export obligation by export of other goods by group company, but this request was rejected. Even otherwise, exports amounting to USD 25,14,072 of other goods made through 7 export invoices by group companies were made, which account for authorisations permitted upto 50% under paragraph 5.4 of the EPCG Scheme;
- (v) The appellant acted in a bona fide manner and hence there is no mens rea. The imposition of penalty is, therefore, not justified; and

8. **Union of India vs. Customs and Central Excise Settlement Commission, Additional Bench, Kolkata & Anr. decided on 03.12.2009**
9. **2004 (173) E.L.T. 100 (Tri.-Bang.)**
10. **Customs Appeal No. 75151 of 2018 decided on 11.09.2023**

- (vi) The appellant had also applied under the Amnesty Scheme for closure of the 26 EPCG authorisations, but permission was not granted.

18. Shri Nikhil Mohan Goyal, learned authorised representative appearing for the department, however, supported the impugned order and made the following submissions:

- (i) As the appellant failed to fulfil the condition of the Notification, the demand of duty with interest and penalty is justified. In support of this contention, learned authorised representative placed reliance upon the decision of the Delhi High Court in **DSJ Communications vs. Union of India**¹¹;
- (ii) The decisions relied upon by learned counsel by the appellant are not applicable to the facts and circumstances of the case; and
- (iii) The appellant cannot claim the benefit of section 56 of the Contract Act or paragraph 4 of the Notification dealing with force majeure.

19. The submissions advanced by the learned counsel for the appellant and the learned authorised representative appearing for the department have been considered.

20. The appellant had obtained 27 authorisations under EPCG Scheme between 2007 and 2009 from the DGFT for the purpose of importing duty free capital goods to be used in construction of a hotel. In terms of the Notification, the appellant had also submitted a bond and bank guarantees.

11. 2014 (309) E.L.T. 230 (Del.)

21. It is not in dispute that proceedings under the SARFAESI Act had been initiated against the appellant and an order dated 20.09.2011 was passed by the Debts Recovery Tribunal. The consortium of banks, therefore, auctioned the capital goods imported by the appellant under the EPCG Scheme along with the hotel premises in September 2011 through a public auction. This took place before the end of the first block contemplated under the Notification.

22. It is also not in dispute that before the issuance of the show cause notice, the department had encashed the bank guarantees amounting to Rs. 5,94,63,918/- for recovery of the duty foregone.

23. It needs to be noted that under the Notification 50% of the export obligation could be fulfilled through exports by group companies. The group companies had made exports amounting to USD 25,14,072/- of other goods through 7 invoices which account for 7 EPCG authorisations. The appellant had requested for 100% obligation to be satisfied through group companies, but this was not accepted by the DGFT.

24. The submission of the appellant is that the export obligation in the case of the appellant should have been waived because of force majeure/other unforeseen circumstances or reasons as contemplated under paragraph 4 of the Notification amended on 21.05.2007. This contention of the appellant has not been accepted by the Additional Director General for the reason that he did not have the jurisdiction to examine this issue.

25. The Additional Director General also rejected the contention advanced on behalf of the appellant in connection with section 56 of the Contract Act for the reason that the issue before him was limited to

contravention of the provisions of the Customs Act and, therefore, he was not required to examine the provisions of the Contract Act.

26. Paragraph 4 that was inserted in the Notification after paragraph 3 of the Notification by Notification dated 21.05.2007 is reproduced below:

"4. Waiver of Export Obligation may be considered where, because of force majeure of other unforeseen circumstances/reasons, exporter is unable to fulfil export obligation. Such requests shall be consideration by a Committee comprising representative(s) of Department of Commerce and Department of Revenue under Directorate General of Foreign trade. Decision of this Committee shall be notified by Department of Revenue for implementation."

(emphasis supplied)

27. A perusal of the aforesaid clause shows that the export obligation may be waived because of force majeure or other unforeseen circumstances/reasons because of which the exporter is unable to fulfil export obligation.

28. In the instant case, the appellant was unable to fulfil the export obligation because even during the construction of the hotel, the consortium of banks, pursuant to the order dated 20.09.2011 passed by the Debts Recovery Tribunal in proceedings initiated against the appellant under the SARFAESI Act, had auctioned the capital goods imported by the appellant along with the hotel premises on as is where is basis.

29. The contention of learned counsel for the appellant is that it is because of force majeure and other unforeseen circumstances/reasons

that the appellant was unable to fulfil the export obligation and so interest should not be charged from the appellant.

30. It needs to be noted that the learned counsel for the appellant made a categorical statement that the appellant is not contesting the demand of duty and its recovery through encashment of bank guarantee and the appellant is only contesting the levy of interest and imposition of penalty upon the appellant.

31. What transpires from the order is that interest has been levied upon the appellant in terms of the provision of the Notification and not under section 28AA of the Customs Act.

32. In **Customs and Central Excise Settlement Commission, Additional Bench Kolkata**, the Bombay High Court examined an order passed by the Settlement Commission on 09.05.2007 granting immunity from payment of interest to the holder of EPCG licence who had imported a plant at nil rate of duty with export obligation condition attached to the licence. The holder of the licence had also executed a bond and furnished bank guarantee to fulfil export obligation. The bond condition prescribed liability to pay duty with interest at the rate of 24% per annum. The Bombay High Court noticed that as the licence holder had failed to fulfill the export obligation, a show cause notice was issued to the licence holder but during the pendency of the adjudication of the show cause notice, bank guarantee was encashed for the principal amount. The licence holder then filed an application with the Settlement Commission for settlement of the interest component by granting waiver to the interest liability as it had suffered huge financial losses due to super cyclone. The Bombay High Court noticed that because of super cyclonic storm, the licence holder had suffered heavy damages

and huge financial loss and this aspect had been taken into consideration by the Settlement Commission. The Bombay High Court proceeded to hold that even if the Settlement Commission had no power to waive interest, the High Court itself could examine the entire issue. The Bombay High Court then examined section 56 of the Contract Act which deals with doctrine of frustration of contract and the relevant observations of the High Court are as follows:

"The law of frustration of contract is well settled. Section 56 of the Indian Contract deals with the Doctrine of frustration of contract. It laysdown that the contract becomes void upon the act being (i) unlawful or (ii) impossible, though there is no condition to that effect in the contract. A contract is discharged where its performance becomes impossible. The contract automatically stands determined and cannot be enforced through the legal process.

A contract is also discharged if a specific thing which is essential to the performance of the contract is destroyed. For example, the destruction of Music hall, where the performance was to be given. In the case of Taylor Vs. Caldwell, (1863 3 B. & S. 826) the defendant being the owners of a Music Hall, agreed to lend the use of the hall to the plaintiffs for the purpose of giving concerts therein. Before the time came for the delivery of the hall, it was destroyed by fire, so that the contract had to be abandoned after the plaintiffs had incurred considerable expenditure for its preparation. The plaintiffs sued the defendants for damages for the breach of the contract. It was held that the defendants were not liable. In delivering the judgment, Blackburn, J. observed: "The principle seems to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or of the thing shall excuse the performance.

The performance of the contract became impossible in the case of Appeleby Vs. Myers [(186173) All ER Rep.452] since factory premises in which machinery was installed was destroyed by fire. In the case of Howell V. Coupland [(1876) 1 QBD 258], performance of contract became impossible because a crop of potatoes to be grown on a particular field fails In the case of WJ Tatem Ltd. Vs. Gamboa [(1938) 3 All ER Rep.135], performance of contract became impossible because a ship under charterparty is seized by the enemy. In all these cases contracts were discharged.

The contract may also be discharged because the subject matter had greatly deteriorated. A cargo of dates was sunk and affected by water and sewage. The dates were saleable for some other purposes; but their merchantable character had been destroyed. Though the cargo was sold, the cargo owners' liability to pay freight was discharged in the case of Asfar & Co. V. Blundell [1896] 1QB 123]

In the case of VL Narasu V PSV Iyer, (AIR 1953 Mad.300), a cinema owner, agreed to exhibit a film produced by, P, as long as the weekly net collections did not fall down below a certain figure. After a few weeks, part of the rear wall of the cinema collapsed following heavy rain, and the police authorities condemned the building. Cinema owner pleaded section 56 of the Contract Act with success.

As party is excused of non-performance, if it proves that non performance was due to an impediment beyond its control, and it could not have reasonably been foreseen by it at the time of making of the contract, nor could it have avoided or overcome it or its consequences. In other words due to act of god or act of nature, if the contract is frustrated party cannot be asked to perform the contract. The contract automatically stands determined and cannot be enforced through the legal process.

Assuming Mr. Jetly is right in his submission that Settlement Commission has no power to grant immunity from the payment of interest but in the facts and circumstances of the case, the Settlement Commission has no power to enforce the contract which is already frustrated or which does not exist in the eye of law. Had there been a dispute on a factual aspect we would have remanded the matter for investigation of the fact. But on admitted facts, the frustration of contract stands proved and if that be so, no useful purpose will be served by setting aside the order and restoring the Petition to the file of the Settlement Commission for consideration of the case.”

(emphasis supplied)

33. This issue was also examined by this Tribunal in **Taurus Novelties**. The Tribunal held that when the bank guarantee had been realised before issuance of the show cause notice, then the prayer for setting aside the redemption fine, penalty interest is justified. The relevant portions of the order are reproduced below:

“The appellants are aggrieved insofar as the Order of confiscation of the imported machineries, which were not utilised for the manufacture of goods for export of the same in terms of EPCG licence. The Redemption Fine is Rs. 20,00,000/-. However, before the issue of Show Cause Notice, the Bank Guarantees, which had been furnished to safeguard the duties, have been appropriated to an extent of Rs. 1,04,94,086/- and deposited by TR-6 challan dated 30-11-2000. The Show Cause Notice dated 15-1-2001, was issued thereafter. It is the contention of the appellant that in a circumstance, where the appellants have not violated any of the terms of the licence and the industry could not be established due to loss of export orders and fall in the foreign market, they are not required to pay the redemption fine, penalties and interest. The penalties imposed on the Company and the

Directors is being sought to be waived in the matter along with interest and redemption fine. In this regard, the learned Counsel relied on the following judgment wherein the Tribunal has set aside the Redemption Fine and Penalty on the ground that the violation of the licence was due to unavoidable and extenuating circumstances.

The Tribunal set aside the redemption fine and penalty also on the ground that the Bank Guarantees had been encashed and duty had been released. The Larger Bench has also taken a view that when the duty has been paid even before the issue of Show Cause Notice, then the penalty and interest is not leviable as held in the case of CCE, Delhi-III v. Machino Montell (I) Ltd. [2004 (168) E.L.T. 466 (T-LB) = 2004 (62) RLT 709 (CESTAT-LB)]. The judgments relied by the Counsel for non-imposition of penalty and redemption fine and interest are as follows:

- (i) Meirs Pharma (India) Pvt. Ltd. v. CC, Chennai - 2004 (167) E.L.T. 53 (Tri. - Chennai)
- (ii) Dyna Lamps & Glass Works Ltd. v. CCE, Chennai - 2003 (157) E.L.T. 73 (Tri. - Chennai)
- (iii) Fal Industries Ltd. v. CC, Chennai - 2003 (159) E.L.T. 215 (T) = 2002 (53) RLT 86 (CEGAT-Chennai)]
- (iv) Philips (India) Ltd. v. CCE, Mumbai - 2001 (137) E.L.T. 697 (Tri. -Mumbai)
- (v) Metropoli Overseas Ltd. v. CC, Bangalore - 2003 (154) E.L.T. 86 (Tri. - Kolkata)
- (vi) CCE, Mangalore v. Shree Krishna Pipe industries - 2004 (165) E.L.T. 508 (Kar.) = 2004 (61) RLT 17 (Karnataka)

2. The learned SDR reiterated the departmental view.

3. **On a careful consideration of the submissions, we notice that the appellants had imported capital goods under concessional rate of duty under EPCG Notification No. 110/95, dated 5-6-1995. But, they could not set up the industry to fulfil the export obligation due to total collapse of Korean economy and hence could not procure the order for manufacture and export of ceramic**

goods. The value of Korean company fell drastically and affected the appellants' project. As they could not get the support from the Korean collaboration for buy back of production and due to stiff competition from Chinese competitors, the factory could not be established for commercial production and export of goods. **The appellants, due to these factors, approached the Commissioner and requested him to permit them to encash the Bank Guarantee and deposit these amounts due to the department. The same was granted and the amounts were deposited by TR-6 Challan on 30-11-2000. The same has been appropriated in the impugned order.** The Show Cause Notice alleging violation of the Notification under Section 124 of Customs Act was issued on 15-1-2001. In terms of the adjudication order, the machineries were confiscated and granted redemption under fine of Rs. 20,00,000/- besides a penalty on the Company of Rs. 20,00,000/- and penalty of Rs. 5,00,000/- each on the Managing Director and the Executive Director. **The question in this appeal is as to whether the goods can be confiscated and redemption fine imposed besides penalties and interest. In a like situation, the Tribunal, in the citations referred to by the Counsel, has held that confiscation cannot be ordered in a circumstance when the export obligation became an impossibility. Further it has been held that when the Bank Guarantee has been realized before the issue of Show Cause Notice, then in such a circumstance, the redemption fine, penalty and interest is not imposable.** We have perused these judgments and find that the appellants' prayer for setting aside the redemption fine, penalty and interest, in terms of these judgments, is justified. **The ratio of the judgments clearly applies to the facts and circumstances of this case. Respectfully following the same, the impugned order, confiscating the machinery and imposing redemption fine and penalty on the Company and the Directors including the levy of interest, is set aside by allowing the appeal."**

(emphasis supplied)

34. In **B R Marbles**, the order passed by the Commissioner (Appeals) setting aside the order imposing penalty and demanding interest from the respondent was assailed by the department. The respondent had obtained EPCG authorisation to import duty free capital goods for mining of marbles and for exporting the same. It was, however, unable to fulfil the exports obligation for reasons beyond the control of the respondent. A demand noticed was served on the respondent seeking to recover duty foregone after the expiry of the obligation period. The Tribunal upheld the order passed by the Commissioner (Appeals) for waiver of interest and penalty as the principal amount towards duty had been paid. The relevant observations are:

"5. xxxxxxxx. **The fact that the respondents could not discharge their export obligation and hence failed to meet the export commitments leading to nonissue of the EODC is understandably beyond the control of the respondent.** It is also on record that the respondent did approach the department to permit them to make the payment of duty foregone in terms of the EPCG Licence issued, in installments and waive the requirement/imposition of interest and penalty as was proposed in the show cause notice. **It is on record that the respondent has paid the total duty due in terms of the EPCG in two installments Rs.18,00000/- (Rupees Eighteen lakh only) before filing of the appeal before the Commissioner (Appeals) and the balance amount of Rs. 9,396/- (Rupees Nine thousand three hundred ninety six only) on 2nd November 2017, pursuant to the order passed by learned Commissioner (Appeals).**

6. **The compelling circumstances beyond their control pointed out by the respondents, have**

been admitted by the authorities. Therefore, no blame or aspersions can be cast on the respondents that they had malicious intent to defraud the revenue. This argument of the revenue is rejected summarily. We also note that this is not the first time that any importer has not been able to fulfill the export obligation for reasons beyond his control. Thus in the wake of global economic crisis in Asia and particularly so in Southeast Asia, this Tribunal in the case of **Sanghi Industries Ltd. Vs. CC (Export Promotion), Mumbai 2010 (259) ELT 223 (Tri.-Bang)**, had set aside the penalty interest and fine imposed where export obligation under the EPCG Licence could not be fulfilled by the importer due to global economic crisis. Likewise, in the case of **Taurus Novelties Ltd. vs. C.C. Bangalore 2004 (173) ELT 100 (Tri.- BNG)** , wherein the importers had not met the export obligation cast upon them, due to collapse of the Korean economy and therefore, could not procure the requisite orders and export the Ceramic goods manufactured, this Tribunal had allowed the plea for waiver of redemption fine, penalty as well as interest. We also note that the revenue has totally failed to establish any aspect of mens rea on part of the respondent. **The ratio of the aforesaid case laws is thus squarely applicable to the present matter."**

(emphasis supplied)

35. The aforesaid decisions hold that if a person who has obtained EPCG authorisation for the purpose of importing duty free capital goods is unable to fulfill the export obligation for good and valid reasons, then levy of interest and imposition of penalty can be waived. In the present case paragraph 4 of the Notification also deals with such a situation.

36. As noticed above, the appellant is not disputing the confirmation of demand and is only challenging the levy of interest and imposition of penalty. Demand of interest has been confirmed by the Additional Director General not under section 28AA of the Customs Act but under

the provisions of the Notification and the bond executed by the appellant. Once interest is charged under the provisions of a contract, then section 56 of the Contract Act would come into play. The Bombay High Court in **Customs and Central Excise Settlement Commission** examined this issue at length and this Tribunal in **Taurus Novelities** and **B R Marbles** also held that interest could not be levied and penalty could not be imposed if the fulfillment of export obligation became an impossibility.

37. It is not possible to accept the contention advanced by the learned authorised representative appearing for the department that the aforesaid three decisions cited by the appellant will not apply to the facts and circumstances of the case. The decisions deal with situation where the export obligation could not be met because of impossibility. In the present case, also the export obligation could not be met because the goods imported and the premises of the hotel were auctioned. The appellant, therefore, could not have fulfilled the export obligation within the period prescribed in the first block. The bona fides of the appellant are also clear as the appellant did carry out some exports through group companies to the extent of 50% which was permissible under the Notification. The appellant had requested for grant of 100% obligation, but this plea was rejected.

38. The decision of the Delhi High Court in **DSJ Communications** will not come to the aid of the department as this decision was rendered in respect of EPCG Licence that was issued in 1995 when there was no provision in the Notification for waiver of export obligation on account of force majeure or other unforeseen circumstances. A finding was also recorded that the capital goods were always in the possession of the

assessee for more than 14 years and the assessee had not made efforts to export the goods even after obtaining extension of the export obligation.

39. In the present case, as noticed above, paragraph 4 that was inserted by Notification dated 21.05.2007 provides for waiver of export obligation because of force majeure or for other unforeseen circumstances. The appellant also had lost possession and control of the imported goods. The group company, however, had also made exports of other goods amounting to USD 25,14,072/-.

40. In such circumstances, and more particularly when the bank guarantee for payment of customs duty had already been encashed by the department much before the issuance of the show cause notice, interest could not have been levied upon the appellant for violation of the terms of the Notification as the appellant failed to meet the export obligation. This view find support from the three decisions referred to above in **Union of India, Taurus Novelties** and **B R Marbles**.

41. Penalty has been levied upon the appellant under section 112(a)(a) of the Customs Act for the reason that the goods were held liable to confiscation under section 111(a) of the Customs Act. The Additional Director General held no mens rea was required for imposition of penalty under section 112(a) of the Customs Act.

42. Apart from the fact that penalty could not have been imposed upon the appellant under section 112(a) of the Customs Act because of the aforesaid three decisions relied upon by learned counsel for the appellant, even otherwise mens rea is required for imposition of penalty as was held by this Tribunal in **Meirs Pharma (India) Pvt. Ltd. vs.**

Commissioner of Customs, Chennai¹². The relevant portion of the decision is reproduced below:

"7. **So far as the confiscation of the goods and imposition of penalty is concerned, it is settled law that mens rea is a necessary requirement for imposition of penalty under Section 112 of the Customs Act, 1962.** We have noted above that in the instant case, there was sincere efforts on the part of the appellants to fulfil the export obligations but the circumstances were beyond their control and they could not fulfil the export obligations in spite of their best efforts. It is not the case of the Department that appellants have made any deliberate attempt to avail of the benefit of Notification. The machinery was in fact installed at the factory, as noted by the adjudicating authority, in Para 4 of the impugned order. Production of the goods was also started some time in March, 1994 and they could only meet the export obligation to the extent of 1.5% only. There is no material to doubt their bona fides."

(emphasis supplied)

43. The confiscation of goods under section 111(o) of the Customs Act cannot also be justified as the appellant had reasons beyond his control for not fulfilling the terms of the Notification. Once the goods are not held liable to confiscation, penalty under section 112(a) of the Customs Act cannot be imposed.

44. Thus, for all the reasons stated above, the confiscation of goods under section 111(o) of the Customs Act is set aside. The levy of interest upon the appellant under the terms of the bond and the imposition of penalty upon the appellant under section 112(a) of the Customs Act are also set aside. The appellant has not contested the

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confirmation of demand of customs duty in terms of the Notification and, therefore, the confirmation of demand of customs duty is upheld. The order passed by the Additional Director General is, accordingly, set aside to the extent indicated above and the appeal is allowed to this extent.

(Order pronounced on **01.06.2026**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Jyoti