

SUPREME COURT OF INDIA

Pratibha Processors

Vs.

Union of India

C.A.Nos 2412-1.5 of 1993

(S.P.Bharucha and K.S.Paripoornan JJ.)

11.10.1996

JUDGEMENT

PARIPOORNAN, J:-

1. Leave granted in all the special leave petitions.

2. In this batch of 31 appeals a common question of law arises for consideration. It is regarding the interpretation to be placed on Section 61(2) of the Customs Act (hereinafter referred to as the 'Act'). The High Court of Bombay dismissed a batch of 36 writ petitions in the matter by a common judgment dated 19 th November, 1992. The question that arose for consideration was posed thus :-

"On importation of goods under OGL if the importers had kept the same in the warehouse under Section 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 under Section 68 of the Act (excluding the free period of three months)."

3. Writ Petition No. 1854 of 1991 was treated as the main case. The facts in the said case were adverted to in detail. The judgment in the said case was followed in all other cases, including Writ Petition Nos. 1908 of 1991, 1958 of 1991 and 3145 of 1991. The three appeals C. A. Nos. 2416-2418 of 1993 are preferred against the judgments in the said writ petitions. For convenience sake the facts relevant to Writ Petition No. 1854 of 1991 (the main judgment) will be adverted to since the facts are almost identical in all the other cases.

4. There are two petitioners in Writ Petition No. 1954 of 1991. The first petitioner is a public limited company incorporated under the Companies Act, 1956. The second petitioner is a shareholder. The company is engaged in the business as Importers, Exporters and Manufacturers. The first respondent is Union of India and the second and third respondents are officials of Customs Department. The petitioners imported Polyester Filament Yarn of Taiwan Origin. The said goods were shipped by the foreign suppliers from the port of shipment Keelung 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 Exhibit B-1 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 Advance Licence.

5. The action of the respondents to recover interest @ 18% per annum was challenged by the petitioners. According to them, no duty was payable a fortiori, no interest is also payable. The action is challenged as unauthorised, arbitrary and illegal. Section 81 (2) of the Act, as it stood at the relevant time is relied on to substantiate the plea. The thrust of the plea is that the goods cleared were duty free and if no duty was recoverable on the imported goods at the time of clearance, no interest can be charged much less at 18% under Section 61(2) of the Act.

6. In all these cases the assesseees have imported goods under OGL and filed Bills of Entry under Section 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 (earlier) at the time of warehousing the goods

7. The Division Bench of the Bombay High Court after referring to Sections 2(14), 2(15), 12, 15, 25(1) and (2), 59, 61 and 68, and the Exemption Notification (General Exemption No. 147) and Duty Exemption Entitlement Certificate (DEEC) (pages 168-170 and 176 of the paper book), came to the following conclusion in paragraph 20 of the judgment, thus :-

"..... until goods were sought to be cleared against 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 under Section 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 ware- house."

It further held thus :-

"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."

(Emphasis supplied)

It was concluded that the various assesseees - the importers - are liable to pay interest on the amount of duty withheld by them in respect of warehoused goods after the expiry of the period of three months till the date of clearance.

8. We heard counsel.

9. The main facts, relevant statutory provisions, the Notification and Scheme quoted hereinbelow are not in dispute. The assessee imported goods under Open General Licence and filed Bills of Entry under Section 59 for warehousing. The goods were kept in the warehouse. The assesseees obtained Advance Licence under DEEC Scheme at a later point of time. This was admittedly after the expiry of the three months period stipulated under Section 61 (1) of the Act. At the time of clearance of the goods from the warehouse against the respective licences, no duty was payable. The question posed is :- It is open to the Revenue to demand interest from the assesseees under Section 61 (2) of the Act ? We should make it clear that in these cases it is common ground that the assesseees have paid the charges due for the warehouses - the charges like rent, etc. due for the respective

warehouses.

10. The following statutory provisions are relevant in these cases :-

"2(14). "dutiable goods" means any goods which are chargeable to duty and on which duty has not been paid;

(15) "duty" means a duty of customs leviable under this Act."

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"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 rate 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) The provisions of sub-section (1) shall apply in respect of all goods belonging to government as they apply in respect of goods not belonging to Government."

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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 the case of goods entered for home consumption under Section 46, on the date on which a bill of entry in respect of such goods is presented under that section;

(b) in the case of goods cleared from a warehouse under Section 68 on the date on which the goods are actually removed from the warehouse;

(c) in the 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."

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"25. Power to grant exemption from duty -(1) If the Central Government is satisfied that it is necessary in the public interest so to do it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance), as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable."

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"59. Warehousing bond - (1) The importer of any goods specified in sub-section (1) of Section 61, which have been entered for warehousing and assessed to duty under Section 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, -

(i) all duties, and interest, if any, payable under sub-section (2) of Section 61.

(ii) 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."

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"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-

(i) non-consumable store ; or

(ii) goods intended for supply to a foreign diplomatic mission; or

(iii) goods intended for use in any manufacturing process or other operations in accordance with the provisions of Section 65; or

(iv) goods intended for use in any hundred per cent. export-oriented undertaking; or

(v) goods which the Central Government may, if it is satisfied that it is necessary or expedient so to do, by notification in the Official Gazette, specify for the purpose of this clause, till the expiry of

one year

Explanation - For the purposes of sub-clause (iv) "hundred per cent. export-oriented undertaking" has the same meaning as in Explanation 2 to sub-section (1) of Section 3 of the Central Excises and Salt Act, 1944;

(b) in the case of any other goods, till the expiry of three months, after the date on which the proper officer made an order under Section 60 permitting the deposit of the goods in a warehouse :

Provided that -

(i) in the case any goods which are likely to deteriorate, the aforesaid period of one year or three months, as the case may be, may be reduced by the Collector of Customs to such shorter period as he may deem fit;

(ii) in the case of any goods which are not likely to deteriorate, the aforesaid period of 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 that when the licence for any private warehouse is cancelled, the owner of any goods warehoused therein shall, within seven days from the date on which notice of such cancellation is given or within such extended period as the proper officer may allow, remove the goods from such warehouse to another warehouse or clear them for home consumption or exportation.

(2) 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, 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 clearance of the goods from the warehouse:

Provided that the Board may, if it considers it necessary so to do in the public interest, waive, by special order and under circumstances of an exceptional nature to be specified in such order, the whole or part of any interest payable under this sub-section in respect of any warehoused goods."

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

(a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form ;

(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)"

(Emphasis supplied)

11. The General Exemption and Import-Export (Trade) Policy, 1990-93 regarding the scheme of import of items in advance of issue of licence (Para 355) provide as follows :-

GENERAL EXEMPTION NO. 147

Exemption to goods imported against advance licences- In exercise of the powers conferred by subsection(1) of section 25 of the Customs Act, 1962,(52 of 1962) and in superession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 116/88 - Customs (G.S.R. No. 406(E)), dated the 30th March, 1988, 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 manufacture of products (hereinafter referred to as the resultant products) or replenishment of materials having identical specifications and technical characteristics as these actually used in the manufacture of the resultant products exported or both or for export as mandatory spares along with the resultant products, for execution of one or more export orders or for transfer to another Advance Licence 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 additional duty leviable thereon under section 3 of the said Custom 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 :"

Explanation. - In this notification -

(i) to (iv)

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

(a) goods imported under any licence (including Open General Licence) issued under the Imports and Exports (Control) Act, 1974 (18 of 1947), for the time being in force, for which at the time of clearance out of custom's Control, a valid Advance Licence is produced by the importer ;"

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"IMPORT - EXPORT (TRADE) POLICY 1990-93 (Blue Book)

Import of items in advance of issue of licence

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 a valid licence issued subsequently under Duty Exemption Scheme. Clearance of the items from the Customs Bonds can, however, be effected after obtaining the licence under the said Scheme and without which the benefit of the 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 provision for import of items against other licence 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."

(Emphasis supplied).

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 Bond forgetting 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 by 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. In fiscal Statutes, the import of the words- "tax", "interest", "penalty", etc. are well known. They are different concepts. Tax is the amount payable, as a result of the charging provision. It is a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty - which is penal in character.

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) prescribed 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 under Section 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 within the time granted under Section 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 beyond the time specified or granted under Section 61 (1) of the Act, interest not exceeding 18% per annum shall be payable 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 under Section 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 under Section 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 under Section 61 (2) is solely dependent upon the exigibility of 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.

15. Counsel for the Revenue placed heavy reliance on the decision of this Court in *Union of India v. Bangalore Wire Rod Mill*, 1966 (83) ELT 251:(1996 AIR SCW 2783). That was a decision rendered in appeal from the decision of the Karnataka High Court reported in 1992 (61) ELT 37 (Kar). In that case the assessee - M/s. Bangalore Wire Rod Mill - imported goods on which customs duty was

leviable under the Act, in the year 1982. On 11-11-1982 it warehoused the said goods without paying the duty as contemplated by Sections 58 and 59 of the Customs Act, 1962. On 7-3-1985, the authorities issued demand notice calling upon the assessee to clear the goods from the warehouse within 15 days after paying duty due thereon. On the date of warehousing the goods, the rate of customs duty chargeable on the imported goods was 40% ad valorem. For more than three years the assessee did not clear the goods. On 9-9-1988 the assessee paid the duty of Rs. 1.40 crores and interest of Rs. 81.49 lakhs as demanded by the authorities. On the date the goods were cleared from the warehouse, duty was leviable on the goods and the rate was 90%. The assessee contended that levy of interest can, if at all, be only after the period fixed or prescribed under Section 61 (1) (a). The said period was originally three years but was reduced by amendment Act w.e.f. 13-5-1983 to one year. The High Court held that interest is chargeable on expiry of 15 days from the date of notice dated 7-3-1985, that is for the period 22-3-1985 to 9-9-1988. It was further directed that the interest shall be calculated taking the rate of duty in force from time to time during the said period. The Revenue pleaded that it is entitled to interest from 11-11-1982 and the interest should be charged calculating the duty at 90% for the entire period, i.e., from 11-11-1982 to 9-9-1988. The plea of the Revenue was repelled. The High Court issued the following directions :-

"(a) The respondents are directed to re-compute the amount of interest payable by the petitioner at the prescribed rate with effect from 22-3-1985 up to 9-9-1988 on the basis of the amount of customs duty which the petitioner would have been liable to pay the Central Government at the rate, which was prevailing during the different period between 22-3-1985 to 9-9-1988;

(b) After computing the total amount of interest payable for the entire period as directed above, the respondents shall refund the balance of the amount of interest collected from the petitioner."

In appeal, this Court affirmed the said decision. This Court further held that according to the Act the duty payable would be the duty in force on the date of clearance of goods from the warehouse and not the one in force on the date of import or on the date of warehousing and the liability to pay interest arises only after the expiry of the period of 15 days from the date of demand notice. It was further held that since the rate of duty on the goods was not 90% throughout the period from 22-3-1985 to 9-9-1988, but was varying, the direction of the High Court to take the actual rate in force from time to time is reasonable. We fail to see how the said decision is applicable in the instant cases. That was a clear case where the goods were exigible to duty on the date of clearance from the warehouse. It was not a case where the goods were exempt from the levy of duty on the date of clearance. The interest was payable on expiry of 15 days from the date of demand notice on the duty payable. The facts in the said case are clearly distinguishable and can have no application to a situation such as the one in the present case where the goods are not exigible to duty at all on the date of clearance from the warehouse being totally exempt from the levy.

16. We are of opinion that the High Court erred in holding that the importers - assessee are liable to pay interest in the instant cases in respect of warehoused goods, though at the time of clearance the

goods were exempt from payment of duty. The common judgment of the Bombay High Court dated 19th November, 1992 is reversed. All the appeals are allowed with costs, including counsel fee Rs. 5,000/- in each case.

Appeals allowed.