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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

DECIDED ON: 11.10.2012

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CUS.A.C. 3/2009

COMMISSIONER OF CUSTOMS Petitioner
Through: Dr. Ashwani Bhardwaj, Advocate.

versus

JASPREET SINGH JOLLY Respondent
Through: Mr. H.R. Khan Suhel, Mr. Archit
Upadhyay and Mr. Samar Khan, Advocates.

CUS.A.C. 4/2009

COMMISSIONER OF CUSTOMS Petitioner
Through: Dr. Ashwani Bhardwaj, Advocate.

versus

M.S.RAKSHA Respondent
Through: Mr. H.R. Khan Suhel, Mr. Archit
Upadhyay and Mr. Samar Khan, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% This common order will dispose of two appeals, involving similar questions of fact and law. The substantial question which the appellant urges is *whether the Central Excise and Service Tax Appellate Tribunal (the Tribunal) fell into error in reducing the redemption fine and penalty amount imposed upon the respondent/importer in respect of the Hummer H2 imported by each of them*. The brief facts are that the assessee respondent in the first case, Sh. J.S. Jolly and the respondent/assessee in the second case, Sh. M.S. Raksha filed bills of entry on 24.01.2008 and 11.02.2008 respectively, for the

car, described as “brand new car” Hummer H2 Right Hand Drive. In both cases, the cars were imported from the United Arab Emirates (UAE) at an identical unit price of US\$55,000 CIF. The goods were examined on first check basis and it was held that they confirmed with the invoice packing list and Bill of Lading. The duty determined was Rs.24,95,180/- in Sh. J.S. Jolly’s case and Rs.24,92,041/- in Sh. M.S. Raksha’s case.

2. The Customs authorities were of the opinion that the imports violated the conditions contained in Chapter 87 of the Customs policies, particularly, para 2(II)(a)(iv) and 2(II)(c). In both cases, the importers had declared that the country of manufacture was United States whereas the vehicles had been imported from Thailand. Furthermore, the Exim Policy conditions had exempted cars with FOB value of less than US\$40,000/- from conditions specified in para 2(II)(c) subject to importer furnishing tax approval as provided for by Policy Circular No. 26 dated 09.02.2004. The authorities determined that the vehicles were liable to be confiscated as per Section 1(11)(d) of the Customs Act and the importer was liable to pay penalty under Section 112(a)(i) of the Act.

3. The importers, by separate requests sought waiver of issuance of Show Cause Notice and requested personal hearing. After grant of such opportunity, the Commissioner, i.e. the Primary Adjudicating Authority, by order dated 18.06.2008, directed confiscation and penalty. In both cases, the penalty imposed was Rs. 2,25,000/- on each importer and redemption fine of Rs.5,50,000/-.

4. The importers as well as the Customs authorities felt aggrieved and approached the Tribunal by separate appeals. The Customs authorities’ appeals were not taken-up for hearing and the Tribunal heard the importers’ appeals separately. By the impugned order dated 22.08.2008, the Tribunal upheld the validity of the penalty and confiscation and imposition of the redemption fine. However, the quantum of both was reduced in each case. The redemption fine in both appeals was reduced to Rs.2,00,000/- and the penalty to Rs.1,00,000/-. The Tribunal’s reasoning is as follows:

“6. The contention of the ld. Advocate is that in this case, the country of manufacturer is U.S.A., which is not mentioned in Policy Circular No.26 dated 9.2.2004. The ld. DR had not disputed this fact. The ld. DR contended that as per Foreign Trade Policy (2004-2009), Para 9.6 of Chapter-9, the Appellant should have request seeking clarification on any provisions of importability of items issued I.T.C.(HS) may be made to

DGFT. I do not find force in the submission of the ld. DR. It has been alleged that the Appellant failed to produce Type Approval Certificate/COP of accredited agency as notified under Policy Circular No.26 dated 9.2.2004. The country of manufacturer U.S.A. is not mentioned in the said Circular and, therefore, the allegation falls through. The ld. Advocate contended that the manufacturers of the Motor vehicles in USA followed a system of Self-Certification of Vehicles. The appellant submitted copy of Conformity of Production (COP) issued by the manufacturer General Motor Corporation, U.S.A., certified the conformity the Vehicle Hummer H2 met. The Tribunal in the case of Shri J.S. Gujrati & Another Vs. Commissioner of Customs, New Delhi, vide Order No.1840-1841/07-SM(BR) dated 26.12.2007 held as under:-

“5. In the ratio of the above orders and noting that the importer has been asked to fulfil the condition which is impossible for him to fulfil, namely, procuring Type Approval Certificate from the International Accredited Agency which has declined to issue the certificate for the reasons stated in its reply on 7.2.07, I hold that the confiscation and penalty are not sustainable and hence, set aside the impugned orders and allow the appeals with consequential relief, if any, due to the appellants, in accordance with law.”

Hence, the allegation of violation of Para 2(II)(C) of Licensing Note read with Policy Circular No. 26 dated 9.2.2004 is not maintainable and it is set aside.

7. Regarding the violation of Para-2(II)(a)(iv) of the Licensing Note of Chapter 87 of the ITC(HS) Policy, which provides that the vehicle shall be imported from the country of manufacture. It is revealed from the Bill of Lading that the vehicle was loaded at Thailand. There is no evidence produced by the Appellants that the vehicles were imported from USA. So, the confiscation of the vehicles on this ground is justified.

8. In view of the above discussions, it is held that confiscation of the vehicles for violation of Para 2(II)(a)(iv) of the import Licensing Note to Chapter 87 of the ITC (HS) Policy is upheld. Considering the facts and circumstances of the case, the redemption fine and penalty are reduced to Rs.2,00,000.00 and Rs.1,00,000.00 respectively in each appeal. Both the appeals are disposed of in the above terms.”

5. The Commissioner argues through his counsel that the Tribunal’s reasoning is unsound; even while upholding the confiscation as well as the penalty, the Tribunal chose to exercise its discretion and reduced the quantum of the redemption fine and penalty in both cases. It was emphasized that the declared value of the car in either case

was just Rs.22 lakhs and that the duty payable was close to Rs. 25 lakhs. Having regard to these facts, the penalty imposed, i.e. Rs .5 lakhs was just over 5% of the total value, whereas the redemption fine was 25% of the declared value. In these circumstances, further reduction to less than half of the confiscation and penalty amounts was unwarranted.

6. In any event, the Tribunal, it was argued, has not given any reason or justification for such vital reduction. Learned counsel for the respondent, on the other hand, argues that this Court should not exercise its jurisdiction since in fact no substantial question of law has been revealed. It was urged that the Tribunal has the authority to reduce or even completely waive any amounts directed either by way of redemption fine or penalty; that the Tribunal chose to exercise such power in this case, it surely cannot be a matter worthy of appeal and cannot be subject to interference by this Court.

7. The above discussion would show that the Tribunal was of the opinion that of the two grounds which persuaded the Commissioner to hold the imports to be in violation of Exim Policy, one was unsubstantial. The assessee does not argue that the surviving ground was unjustifiably upheld by the Tribunal. In these circumstances, the least that the Tribunal ought to have done was to indicate why the redemption fine amount and the quantum of penalty required to be reduced. An overall conspectus of the facts of the case would show that the redemption fine was barely 25% of the total amount which could have been recovered; likewise, the penalty was a fraction of the total value of the goods, including the different component. A further reduction, in the opinion of this Court, should have been resorted to only if there were certain unusual or exceptional features indicating hardship or benefits or complete good faith on the part of the importers. There is, however, no material on record to suggest that these elements were present in the cases of the respondents/assesseees. The reduction directed by the Tribunal was, therefore, in clear error of law as it was not informed by any reason. Whilst the authority may possess the power to do something, there ought to be a justification for the exercise of that authority. Without such justification, action would be based on mere caprice or whim – a proposition unacceptable in our legal system.

8. For the above reasons, the Court is of the opinion that the question of law framed

has to be answered in favor of the appellants. The appeals are consequently allowed; the order of the Commissioner of Customs is accordingly restored in both the cases. No costs.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

OCTOBER 11, 2012