

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 13.02.2013

+ **W.P.(C) 737/2013**

ZEST AVIATION PRIVATE LTD AND ANR.

.... Petitioners

versus

UNION OF INDIA AND ORS

.... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr.Tarun Gulati, Mr.Kishore Kunal,
Mr.Rony O John & Mr.Shashi Mathews

For the Respondent : Mr.B.V. Niren, CGSC for R-1/UOI.
Mr.Satish Kumar, Sr. Standing Counsel for
R-2 & 3.
Mr.Satish Aggarwala with Mr.Sushil
Kaushik, Advs. for DRI.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM No.1428/2013

Exemption allowed subject to all just exceptions.

The application stands disposed of.

W.P.(C) 737/2013 & CM1427/2013

1. This writ petition is directed against the seizure memo dated 29.12.2012 issued by the respondents whereby the petitioners Aircraft - Challenger – 604-MSN-5629 (with two General Electric CF-34-3B Engines Sr. No.950423 and 950422) from Bombardier Aerospace Inc., USA – has been seized. The writ petition is also directed against the order dated 29.01.2013 issued by the respondents whereby the said Aircraft, which was seized purportedly under Section 110 of the Customs Act, 1962 ('Act' for short) by the DRI, Ahmedabad, was directed to be provisionally released under Section 110A of the said Act subject to the fulfillment of the conditions as under: -

“2. In this regard, I am directed to inform you that competent authority has allowed provisional release of the above said Aircraft under Section 110A of the Customs Act, 1962, subject to the fulfilment of the following conditions: -

- (i) You will execute a bond for provisional release of the said Aircraft for Rs.70,00,00,000/- (Rupees Seventy Crores only);
- (ii) You will provide security in the form of a Bank Guarantee for a sum of Rs.16,00,00,000/- (Rupees Sixteen Crores only). The Bank Guarantee should contain a clause undertaking the self renewal of the Bank Guarantee till the final disposal of the case by the Customs.”

2. The petitioner had been issued a Non-Scheduled Operator's Permit (NSOP) and was entitled to carry on Non-Scheduled Air Transport Services.

The terms of the said services have been specified in the Civil Aviation Requirement (CAR) dated 01.06.2010 issued under Rule 133A of the Aircraft Rules, 1937 by the Director General of Civil Aviation. It is the case of the petitioner that a Non-Scheduled Operator is allowed to operate revenue charter flights for a company within its group companies, subsidiary companies, sister concerns, associated companies, own employees including Chairman and members of the Board of Directors of the company and their family members, provided it is operated for remuneration, whether such service consists of a single flight or series of flights over any period of time. In other words, what the petitioner is submitting is that even employees of the petitioner-company and family members of the Board of Directors of the company can use the services of the aircraft provided the same are for remuneration. On the other hand, the respondents alleged in the seizure memo that the aircraft was being used by the promoters of the petitioner-company and not for passenger service or charter service a NSOP-holder was required to do under the Civil Aviation Rules and the conditions of the notification under which the said aircraft was imported. The said aircraft was imported by the petitioner under the Customs notification No.12/2012 and the Central Excise Notification No.12/2012. The said aircraft was imported on 4.5.2012 and the bill of entry of that date was assessed to duty and the aircraft was cleared for home consumption on payment of the concessional rate of duty of 2.5% as against the normal 3% duty that was

applicable for imports of such aircrafts. The petitioner paid duty amounting to ₹ 1,67,95,428/-. According to the petitioner by virtue of the said exemption, the petitioner saved approximately ₹10.5 crores by way of duty. On the other hand, it is the case of the respondents that the differential duty amount was ₹12 crores.

3. The question, whether or not the petitioner has violated the conditions of the exemption under the said two notifications, has to be adjudicated upon. As of now, no show cause notice has been issued to the petitioner. According to the learned counsel for the respondents, the show cause notice would be issued in due course. That being the position, the issue as to whether the petitioner contravened any conditions of the exemption claimed by it would be adjudicated upon by the adjudicating authority and we do not wish to enter into that arena of controversy. The limited point that is before us is whether the conditions imposed under the provisional release order dated 29.01.2013 are reasonable or are they too harsh and burdensome on the petitioner. If we go back to the conditions which have been imposed by the provisional release order of 29.1.2013, we find that the petitioner has been required to execute a bond for the provisional release of the aircraft for the sum of ₹70 crores. According to the petitioner, the value of the aircraft is approximately ₹67 crores whereas according to the respondents, the market value of the aircraft is ₹70 crores and that is why the bond for the said amount of ₹70 crores has been

insisted upon by the respondents. The learned counsel for the petitioner submitted at the outset that he is not challenging this condition and that he is willing to execute the bond for the sum of ₹70 crores as required by the provisional release order dated 29.01.2013. The actual grievance is with regard to the condition which requires the petitioner to provide security in the form of a bank guarantee for a sum of ₹16 crores.

4. According to the learned counsel for the petitioner, this condition is extremely onerous, harsh and burdensome inasmuch as it is more than 100% of the differential duty even as per the revenue/respondents. The learned counsel for the petitioner submitted that there are no prescribed guidelines for the amount of security that ought to be insisted upon while making a provisional release under Section 110A of the said Act. It is because of this absence of any guidelines that this Court in the case of **Navshakti Industries Pvt. Ltd. vs. Commissioner of Customs: 2011 (267) ELT 483 (Del.)** took recourse to the guidelines as prescribed in Regulation 2 of the Customs (Provisional Duty Assessment) Regulations, 1963 where the importer was required to execute a bond for an amount equal to the difference between the duty that may be finally assessed and the provisional duty and to deposit with the proper officer such sum not exceeding 20% of the provisional duty as the proper officer may direct.

Taking a cue from the said regulation, this Court in Navshakti Industries

(*supra*) held as under:-

“9. Having heard learned Counsel for the parties and having perused the decision relied upon by learned Counsel for the Appellants, we are of the view that in the absence of any definite parameters having been laid down for the exercise of power by the Respondents under Section 110A of the Act, the only option that would be available to us would be to fall back on the Customs (Provisional Duty Assessment) Regulations, 1963. While it may be true that these Regulations would be applicable, *stricto sensu*, only in cases of provisional assessment under Section 18 of the Act, we are of the opinion that the guidelines laid down in these Regulations, in the absence of any other guidelines available to us, would equally apply in the case of a seizure under Section 110A of the Act, particularly in a case such as the present where the imported goods were unconditionally cleared by the Customs Authorities in the first instance.

10. That being the position, there is no option but to permit the release of the goods of the Appellants on their furnishing a bond of 20% of the differential duty that is to say the duty claimed by the Respondents minus the duty already paid by the Appellants in the first instance. Condition No. (i) imposed by the order dated 9th January, 2008 would stand modified to that extent.”

5. The decision in Navshakti Industries (*supra*) was not accepted by the Revenue and they filed a Special Leave Petition before the Supreme Court. Special leave was granted and the resultant Civil Appeal

No.3940/2011 was disposed of by the Supreme Court in the following manner:-

“Leave granted.

The present appeal is directed against the judgment and order dated 11th May, 2010 passed by the Division Bench of the High Court of Delhi directing the appellants herein to clear the goods of the respondents on their furnishing a bond of 20% of the differential duty to the satisfaction of the concerned Commissioner of Customs.

The appellants have filed the present appeal being aggrieved by the aforesaid order in respect of which it is being contended that the aforesaid order passed by the High Court is erroneous as the amount for which the bond is to be furnished by the respondents is on the lower side.

Having considered the facts and circumstances of the case and also taking notice of the fact that the goods in question are newsprint which is perishable in nature, we issue a direction that the goods of the respondents shall be cleared by the appellants herein on the respondents' furnishing a bank guarantee of 30% of the differential duty to the satisfaction of the Commissioner of Customs. The goods shall be released in terms of this order immediately on furnishing of the aforesaid bank guarantee and satisfaction of the concerned Commissioner of Customs. We also direct the Commissioner of Customs to hear the adjudication proceeding pending before him as early as possible, preferably within a period of three months, from the date of receipt of a copy of this order.

In terms of the aforesaid order, the appeal stands disposed of. We, however, make it clear that while passing the aforesaid order, we have not expressed any

opinion or views on the merits of the dispute which shall be independently considered by the competent authority.”

6. It is apparent from the above that while this Court had required the furnishing of a bond of 20% of the differential duty, the Supreme Court had altered that condition by requiring a bank guarantee for 30% of the differential amount. The situation which obtained in **Navshakti Industries Pvt. Ltd.** (*supra*) was somewhat similar to the fact situation of the present case. In **Navshakti Industries** (*supra*) the importer had imported newsprint. The said newsprint has been cleared for home consumption on payment of the requisite duty. It is only subsequently that it was alleged that there was a violation of the import conditions and, therefore, the said newsprint was made the subject matter of a seizure. It is thereafter that a conditional release order was passed and it is those conditions which were objected to by the importers. The High Court had, as already mentioned above, required the importer to, *inter alia*, furnish a bond of 20% of the differential duty for the release of the goods. That condition was enhanced by the Supreme Court by requiring a bank guarantee for 30% of the differential duty amount. The learned counsel for the petitioner before us has submitted that, at best, the Revenue could ask for a bank guarantee of 30% of the differential duty amount. He

submitted that the requirement of furnishing bank guarantee of ₹16 crores, which was approximately 130% of the alleged differential duty amount, was clearly arbitrary as it was harsh, burdensome and onerous.

7. The learned counsel appearing on behalf of the respondents contended that it was well within the rights of the respondents to require the furnishing of a bond as also a security while directing provisional release of goods under Section 110A of the said Act. It was also contended that the Bombay High Court in *Apollo Cranes (P) Ltd. vs. Union of India: 2012 (275) ELT 148 (Bom.)* had taken a different view and had sought to distinguish the case of *Navshakti Industries* (*supra*) as decided by this Court. We have gone through the said decision of the Bombay High Court in the case of *Apollo Cranes Pvt. Ltd.* (*supra*). We may point out straightaway that the said decision has been rendered without noticing the decision of the Supreme Court in *Navshakti Industries* (*supra*) which was rendered on 4.5.2011. Moreover, the decision of the Bombay High Court, with respect, appears to have misread the decision of this Court in *Navshakti Industries* (*supra*). What this Court said was there was no prescribed procedure or guidelines for imposing conditions with regard to the furnishing of a security and,

therefore, as a fall back measure they had adopted Regulation 2 of the Customs (Provisional Duty Assessment) Regulations, 1963. This Court in Navshakti Industries (*supra*) has not applied the said regulations as such because that was not a case of provisional assessment under Section 18. This Court had only applied the analogy of the said regulation in the absence of any other guidelines under Section 110A of the said Act. Therefore, to that extent also, we feel that Bombay High Court decision in Apollo Cranes (*supra*) would be of no use to the respondents.

8. Having considered the arguments advanced by the counsel for the parties and having examined the matter at some length, we are of the view that the condition of furnishing a bank guarantee in the sum of Rs.16 crores is clearly harsh and burdensome being far in excess of even the differential duty amount as computed by the respondents. Therefore, that condition has to go. However, a reasonable condition may be imposed. In the case of Navshakti Industries (*supra*) the Supreme Court imposed the condition of furnishing a bank guarantee to the extent of 30% of the differential duty. We feel that such a condition would be appropriate in the present case also. Consequently, this writ petition is disposed of with the direction that the petitioner would be entitled to seek

release of the Aircraft in question under section 110A of the said Act on executing a bond for a sum of ₹70 crores and, in addition, on providing a security in the form of a bank guarantee for the sum of ₹3.6 crores (being 30% of the alleged differential duty amount of ₹12 crores). The bank guarantee may, of course, contain a clause undertaking the self renewal of the same till the final disposal of the case by the Customs. The petitioner shall execute the said bond and furnish the bank guarantee within one week. On furnishing the said bond and the bank guarantee to the satisfaction of the concerned Commissioner, the Aircraft shall be provisionally released to the petitioner forthwith. The writ petition stands disposed of.

9. A copy of this order be given to the learned counsel for the parties *dasti* under the signatures of the Court Master.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

February 13, 2013
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