

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANIL K. NARENDRA

THURSDAY, THE 1ST DAY OF OCTOBER 2015/9TH ASWINA, 1937

OP.No. 25199 of 2001 (Y)

PETITIONER:

RUCHI INFRASTRUCTURE LIMITED,
WITH ITS REG.OFFICE AT 706, TULSIAN CHAMBERS,
212 NARIMAN POINT, MUMBAI -400 021,
WITH ITS ADMINISTRATIVE OFFICE AT SURYA APARTMENTS,
5/2, SOUTH TUKOGANJ,
NATHA MANDIR ROAD, INDORE 0 452 001
REPRESENTED BY THE MANAGER THOMAS BABY.

BY ADV. SRI. GEORGE POONTHOTTAM
ADV. SRI G.L. RAWAL (SR)
ADV. SRI RAJESH RAWAL

RESPONDENTS:

1. UNION OF INDIA
REPRESENTED BY THE SECRETARY
IN THE MINISTRY OF FINANCE (DEPARTMENT OF REVENUE),
NORTH BLOCK, NEW DELHI.
2. COMMISSIONER OF CUSTOMS,
COMMISSIONERATE OF CUSTOMS,
COCHIN (KERALA).

R1 BY SRI N. NAGARESH, ASGI
ADV. SRI. S. KRISHNAMOORTHY, ADDL. CGSC
R2 BY ADV. SRI. THOMAS MATHEW NELLIMOOTTIL, SC, CB EX

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 31-7-2015, THE
COURT ON 01-10-2015, DELIVERED THE FOLLOWING:

APPENDIX IN OP NO.25199/2001

PETITIONER'S EXTs:

- EXT.P1: COPY OF CONTRACT NO.DOI0200253 DT.16.2.2001.
- EXT.P1(A) COPY OF CONTRACT NO.DO10500963 DT.30.5.2001.
- EXT.P2: COPY OF BILL OF LADING NO.SGP (BEL)/COC-01 DT.4.6.2001.
- EXT.P2(A): COPY OF BILL OF LADING NO.SGP (BEL)/COC-02 DT.4.6.2001.
- EXT.P2(B): COPY OF BILL OF LADING NO.SGP (BEL)DT.4.6.2001.
- EXT.P3: COPY OF BILL OF LADING NO.SGP (BEL)/COC-01 DT.13.7.2001.
- EXT.P3(A): COPY OF BILL OF LADING NO.SGP (BEL)/COC-02 DT.13.7.2001.
- EXT.P3(B): COPY OF BILL OF LADING NO.SGP (BEL)/COC-03 DT.14.7.2001.
- EXT.P4: COPY OF BILL OF ENTRY DT.9.6.2001.
- EXT.P5: COPY OF BOND DT.3.7.2001.
- EXT.P5(A): COPY OF BOND DT.20.7.01.
- EXT.P5(B): COPY OF BOND DT.23.7.2001.
- EXT.P6: COPY OF NOTIFICATION NO.36/2001 CUS (N.T) DT.3.8.2001.
- EXT.P7: COPY OF NOTIFICATION NO.52/2001 DT.9.10.2001.
- EXT.P8: COPY OF NOTIFICATION NO.62/2001 DT.7.12.2001.
- EXT.P9: COPY OF CIRCULAR F.NO.346/60/66-TRU DT.1.2.1990.
- EXT.P10: COPY OF LETTER NO.GAZETTE/161318/2001 DT.10.9.2001.
- EXT.P11: COPY OF JUDGMENT OF THE HIGH COURT OF KARNATAKA DT.3.9.02 IN W.A.NO.6030/2001 AND CONNECTED CASES.
- EXT.P12: COPY OF ORDER DT.14.7.2003 ISSUING NOTICE ON THE SLP FILED BY UNION OF INDIA AS AGAINST THE JUDGMENT OF THE HIGH COURT OF KARNATAKA.
- EXT.P13: COPY OF ORDER DT.16.11.2004 GRANTING LEAVE TO APPEAL AS AGAINST THE JUDGMENT OF THE HIGH COURT OF KARNATAKA.

RESPONDENTS' EXTs:

- EXT.R1(A): COPY OF NOTIFICATION No.36/2001-CUS (N.T) DT.3.8.2001 OF THE 1ST RESPONDENT.
- EXT.R1(B): COPY OF CIRCULAR No.22/2001 DT.6.8.2001 ALONG WITH ITS ANNEXURE.
- EXT.R1(C): COPY OF RELEVANT PORTION OF OFFICIAL GAZETTE DT.3.8.2001.
- EXT.R1(D): COPY OF LETTER DT.10.10.2001 ISSUED BY THE PUBLICATION OFFICER.

TRUE COPY

P.S.TO JUDGE

“CR”

ANIL K. NARENDRA, J.

O.P. No.25199 of 2001

Dated this the 1st day of October, 2015

JUDGMENT

The petitioner is a Company incorporated under the Companies Act, 1956 having its Registered Office at Mumbai and Administrative Office at Indore. The petitioner is engaged in the import of Edible Oil like RBD Palmolein, which is a refined, bleached and deodorised form of palm oil, through various Ports in India.

2. The petitioner, in the course of its business, entered into Exts.P1 and P1(a) contracts dated 16.02.2001 and 30.05.2001 respectively with M/s.Aavanti Industries Private Limited, Singapore, for the import of RBD Palmolein (edible grade) in bulk. The foreign seller shipped the goods against various Bills of Lading during the period from 04.06.2001 to 14.07.2001 in vessels 'HOKUSHIN VOY. 13/01' and 'MTL SARAH V. 126'. According to the petitioner, 5755.482 MTs of subject consignment was loaded against those Bills of Lading in the vessel 'HOKUSHIN VOY. 13/01' against Ext.P1 contract, which arrived at Cochin Port and the Bills of Entry for 3155.428 MTs and 2600 MTs were submitted on 11.06.2001, in order to clear the goods for home consumption. Ex-Bond Bills of

Entry Nos.2880, 2915, 3167 and 3199 were submitted between 02.07.2001 and 23.07.2001, which were assessed and duty of ₹ 5,94,04,644/- has been paid on 02.07.2001, 06.07.2001, 23.07.2001 and 24.07.2001. On payment of the duty for the declared value of the goods, as assessed by the proper officer, the petitioner released 4437.278 MTs of goods. The balance quantity to be removed from the bonded warehouse was 1318.150 MTs out of Ex-Bond Bills of Entry Nos.2915, 3167 and 3199 dated 4.07.2001, 20.07.2001 and 23.07.2001, in respect of which duty has been paid on 06.07.2001, 23.07.2001 and 24.07.2001 respectively. In similar manner, a further quantity of 2540.346 MTs of subject consignment was loaded in the vessel 'MTL. SARAH V. 126' against Ext.P1(a) contract, on a negotiated/confirmed price of US\$ 248 per MT, and the entire quantity was discharged in Cochin Port during the period from 02.06.2001 to 3rd week of July, 2001. Bill of Entry for the said consignment was submitted on 23.07.2001, in order to clear the goods for home consumption. Ex-Bond Bill of Entry No.3407 dated 03.08.2001 was submitted on 03.08.2001, which was assessed and duty of ₹2,77,60,341/- was paid by cash on

04.08.2001. The warehousing of the subject consignment was in a private bonded warehouse at Wellington Island, Cochin. The bonds executed in terms of Section 59 of the Customs Act, 1962 in order to secure the revenue stood cancelled by operation of Section 73 of the Customs Act, once the duty has been rightly assessed, paid and accepted without any reservation by the Department on the basis of declared price.

3. As against the quantity of 2600 MTs of the subject consignment, as has been discharged by the vessel 'HOKUSHIN VOY. 13/01', a quantity of 1281.850 MTs had already been actually removed prior to 03.08.2001 on payment of duty on the declared price, which has been accepted to be the correct value. However, the 2nd respondent refused to release the balance quantity of 1318.150 MTs covered by Ex-Bond Bills of Entry Nos.2915, 3167 and 3199 dated 04.07.2001, 20.07.2001 and 23.07.2001 respectively, the duty in respect of which has already been paid and accepted on 06.07.2001, 23.07.2001 and 24.07.2001 respectively, on the premises of Ext.P6 notification No.36/2001-CUS (NT) dated 03.08.2001 of the 1st respondent, wherein the Central Government in exercise of powers vested in

it under sub-section (2) of Section 14 of the Customs Act, fixed the tariff value per MT of Crude Palm Oil, RDB Palm Oil and RDB Palmolein at US\$ 337, US\$ 351 and US\$ 372 respectively. In similar manner, the 2nd respondent refused to release 2540.346 MTs covered by Ex-Bond Bill of Entry No.3407 dated 03.08.2001, the duty in respect of which has already been paid and accepted on 04.08.2001. According to the 2nd respondent, the duty for the left over subject consignment has to be assessed at the tariff rate of US\$ 372 per MT, as against the declared price of US\$ 234 per MT.

4. It is mainly aggrieved by Ext.P6 notification the petitioner has approached this Court in this original petition, seeking a writ of certiorari to quash the said notification and seeking a declaration that the goods imported by the petitioner, in respect of which duty has been paid on 06.07.2001, 23.07.2001, 24.07.2001 and 04.08.2001 are entitled to be released without payment of any further duty pursuant to Ext.P6 notification. The petitioner has also sought for other consequential reliefs.

5. By order dated 22.08.2001 in I.A.No.41099 of 2001,

this Court issued an interim order directing release of the balance quantity of goods covered under Ex-Bond Bill of Entry No.3407 dated 04.08.2001, on the basis of the assessment made by the proper officer and the payment of duty made on 04.08.2001, provided the petitioner furnishes bank guarantee for the differential duty amount. By another order dated 24.08.2001 in I.A.No.41323 of 2001, this Court ordered release of the balance quantity of goods under Ex-Bond Bills of Entry Nos.2915, 3167 and 3199 dated 04.07.2001, 20.07.2001 and 23.07.2001 respectively, on the petitioner furnishing bank guarantee for 50% of the differential duty amount and executing bond for the differential duty for the entire quantity.

6. During the pendency of this Original Petition the Apex Court in its order dated 05.05.2015 in Civil Appeal Nos.7801-7811 of 2004 held that, Notification No.36/2001-CUS (NT) dated 03.08.2001 (Ext.P6) came into force only on 06.08.2001, in as much as it was offered for sale only on that date. Paras.1 to 4 of the order read thus;

"1. The respondents herein are engaged in the export and import of various edible oils. They have been importing

edible oils in bulks through various ports throughout the country. The respondent had imported RBD Palmolein which had arrived at the port of destination and the same were cleared after payment of import duty of 85 per cent of its value. This import duty was paid pursuant to the notification which was in existence on that date. The respondent had even removed major quantity of the goods under the aforesaid consignment from the warehouse after payment of the duty in the manner aforesaid. However, when it wanted to remove the balance quantity, the same was denied. Thereafter, a notice was received by the respondent which was issued by the appellant stating that with effect from 03.08.2001 (incidentally this is the date on which the bill of entry was filed and goods were cleared by the respondent as aforesaid), the tariff value in respect of RBD Palmolein had been raised to USD 372 per metric ton and therefore, the respondent was liable to pay the difference in the tariff which was paid on the basis of earlier notification. The respondent contested the aforesaid demand raised in the show cause notice by filing reply and contending that the notification which was issued under Section 14(2) of the Customs Act, raising the import duty had not come into effect from 03.08.2001. The respondent filed the writ petitions challenging the action of the appellant in determining the duty.

2. Suffice is to state that in these proceedings, the respondent has ultimately succeeded inasmuch as this plea has been accepted and the Division Bench of the High Court

has concluded that notification issued under Section 14(2) of the Customs Act cannot be held to have come into force with effect from 03.08.2001. There was some dispute as to whether the notification was published on 03.08.2011 itself or it was published on a later date. However, from the record, it gets revealed that the notification was sent for publication after the normal office hours, i.e., much after 5 p.m. on 03.08.2001. It was almost at the midnight, may be few minutes before 12 in the night. Even if it is to be treated as notification having been published on 03.08.2001 itself, i.e., just before the midnight, an issue has arisen as to whether it could be made effective qua the goods which were already cleared during the day time on the basis of earlier notification. However, it is not necessary to go into this issue at all.

3. What we find is that the High Court has stated that for bringing the notification into force and make it effective, two conditions are mandatory, viz., (1) Notification should be duly published in the official gazette, (2) it should be offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi. In the present case, admittedly, second condition was not satisfied inasmuch as it was offered for sale only on 06.08.2001, as it was published on 03.08.2001 in late evening ours and 04/05.08.2001 were holidays.

4. We are in agreement with the aforesaid view taken by the High Court which is in conformity with the law laid down by this Court in 'Harla v. The State of Rajasthan' [1952 (1)

SCR 110] wherein this Court formulated the aforesaid principle in the following manner;

"The principle underlying this question has been judicially considered in England. For example, on a some what lower plane, it was held in Johnson v. Sargant that an Order of the Food Controller under the Beans, Peas and Pulse (Requisition) Order, 1917 does not become operative until it is made known to the public, and the difference between an Order of that kind and an Act of the British Parliament is stressed. The difference is obvious. Acts of the British Parliament are publicly enacted. The debates are open to the public and the Acts are passed by the accredited representatives of the people who in theory can be trusted to see that their constituents know what has been done. They also receive wide publicity in papers and, now, over the wireless. Not so Royal Proclamations and Orders of a Food Controller and so forth. There must therefore be promulgation and publication in their cases. The mode of publication can vary; what is a good method in our country may not necessarily be the best in another. But reasonable publication of some sort there must be."

7. By the very same order, the Apex Court allowed Civil

Appeal Nos.1808-13 of 2013, 4875-76 of 2015 and 9661 of 2014 and the said order reads thus;

“On the facts of these appeals as well, we find that though the notification may have been published on the date when the goods were cleared, it was not offered for sale by the concerned Board, which event took place much thereafter. Therefore, it was not justified and lawful on the part of the Department to claim the differential amount of duty on the basis of said notification. These appeals are, accordingly, allowed only on this ground and it is not necessary to go into other issues at all.”

8. In view of the orders of the Apex Court referred to above, Sri.G.L.Rawal, the learned Senior Counsel appearing for the petitioner submitted that, the petitioner is not pressing the challenge made in this Original Petition against Ext.P6 notification No.36/2001-CUS(NT) dated 03.08.2001 issued by the 1st respondent and the only issue to be decided in this Original Petition is as to whether it was lawful on the part of the 2nd respondent in demanding differential amount of duty on the basis of Ext.P6 notification dated 03.08.2001, on the balance quantity of the subject consignment covered by Ex-Bond Bills of Entry Nos.2915, 3167 and 3199 dated 04.07.2001, 20.07.2001 and

23.07.2001 respectively, the duty in respect of which has already been paid and accepted on 06.07.2001, 23.07.2001 and 24.07.2001 respectively, and on the subject consignment covered by Ex-Bond Bill of Entry No.3407 dated 03.08.2001, the duty in respect of which has already been paid and accepted on 04.08.2001.

9. Sri.Thomas Mathew Nellimoottil, the learned Standing Counsel for the Central Board of Excise and Customs has fairly submitted that, the contention that Ext.P6 notification came into force only on 03.08.2001 is no more available to the respondents, in view of the above orders of the Apex Court.

10. Heard arguments of Sri.G.L.Rawal, the learned Senior Counsel assisted by Sri.Rajesh Rawal, the learned counsel for the petitioner and Sri.Thomas Mathew Nellimoottil, the learned Standing Counsel for the Central Board of Excise and Customs.

11. The only issue to be decided in this Original Petition is as to whether it was lawful on the part of the 2nd respondent in demanding differential amount of duty on the basis of Ext.P6 notification dated 03.08.2001, on the balance quantity of the subject consignment covered by Ex-Bond Bills of Entry Nos.2915,

3167 and 3199 dated 04.07.2001, 20.07.2001 and 23.07.2001 respectively, the duty in respect of which has already been paid and accepted on 06.07.2001, 23.07.2001 and 24.07.2001 respectively, and on the subject consignment covered by Ex-Bond Bill of Entry No.3407 dated 03.08.2001, the duty in respect of which has already been paid and accepted on 04.08.2001.

12. It is not in dispute that, 5755.482 MTs of subject consignment loaded in the vessel 'HOKUSHIN VOY. 13/01' against Ext.P1 contract, arrived at Cochin Port and the Bill of Entry No.2512 for 3155.428 MTs and Bill of Entry No.2511 for 2600 MTs were submitted on 11.06.2001, in order to clear the goods for home consumption. Ex-Bond Bills of Entry Nos.2880, 2915, 3167 and 3199 were submitted between 02.07.2001 and 23.07.2001, which has been assessed and duty of ₹5,94,04,644/- paid on 02.07.2001, 06.07.2001, 23.07.2001 and 24.07.2001. On payment of duty on the declared value of the goods, as assessed by the proper officer, the petitioner released 4437.278 MTs of the subject consignment. The balance quantity to be removed from the bonded warehouse was 1318.150 MTs out of Ex-Bond Bills of Entry Nos.2915, 3167 and 3199 dated

04.07.2001, 20.07.2001 and 23.07.2001 respectively, in respect of which duty has been paid on 06.07.2001, 23.07.2001 and 24.07.2001 respectively. Similarly, a further quantity of 2540.346 MTs of the subject consignment loaded in the vessel 'MTL. SARAH V. 126' against Ext.P1(a) contract, on a negotiated/confirmed price of US\$ 248 per MT, was discharged in Cochin Port during the period from 02.06.2001 to 3rd week of July, 2001. Bill of Entry No.1825 for the said consignment was submitted on 23.07.2001, in order to clear the goods for home consumption. Ex-Bond Bill of Entry No.3407 dated 03.08.2001 was submitted on 03.08.2001, which has been assessed and duty of ₹2,77,60,341/- has been paid by cash on 04.08.2001.

13. However, the 2nd respondent refused to release the balance quantity of 1318.150 MTs covered by Ex-Bond Bills of Entry Nos.2915, 3167 and 3199 dated 04.07.2001, 20.07.2001 and 23.07.2001 respectively, in respect of which duty has been paid on 06.07.2001, 23.07.2001 and 24.07.2001 respectively, on the premises of Ext.P6 notification No.36/2001-CUS (NT) dated 03.08.2001 of the 1st respondent. Similarly, the 2nd respondent refused to release 2540.346 MTs covered by Ex-Bond Bill of Entry

No.3407 dated 03.08.2001, the duty in respect of which has already been paid and accepted on 04.08.2001. In Ext.P6 notification No.36/2001-CUS (NT) dated 03.08.2001, the Central Government in exercise of powers vested in it under sub-section (2) of Section 14 of the Customs Act, fixed the tariff value per MT of Crude Palm Oil, RDB Palm Oil and RDB Palmolein at US\$ 337, US\$ 351 and US\$ 372 respectively. According to the 2nd respondent, Ext.P6 notification came into force with effect from 03.08.2001 and as such, the duty for the left over subject consignment has to be assessed at the tariff rate of US\$ 372 per MT, as against the declared price of US\$ 234 per MT. The said contention, relying on Ext.R1(b) Circular No.22/2001 issued by the Deputy Commissioner of Customs (Tariff Unit), Cochin and Ext.R1(b)(2) Circular No.46/2001-CUS dated 10.08.2001 issued by the 1st respondent is no more available to the 2nd respondent in view of the law declared by the Apex Court in its order dated 05.05.2015 in Civil Appeal Nos.7801-7811 of 2004 that, Ext.P6 notification No.36/2001-CUS (NT) dated 03.08.2001 came into force only on 06.08.2001, in as much as it was offered for sale only on that date.

14. Section 15 of the Customs Act, 1962 (hereinafter referred to as 'the Act') prescribes the date for determination of rate of duty and tariff valuation of imported goods. Sub-section (1) of Section 15 of the Act, as it stood prior to Finance Act, 2003 (Act 32 of 2003), reads thus;

"**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 or the arrival of the aircraft by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be."

15. In **Commissioner of Customs, Calcutta v. Biecco Lawrie Ltd. [2008 (223) ELT 3 (SC) : 2008 (3) SCC 264]** a

three-Judge Bench of the Apex Court held that, in the case of goods cleared from warehouse under Section 68, clause (b) of sub-section (1) of Section 15 of the Act provides that the rate of duty and tariff valuation applicable to any imported goods shall be the rate and valuation in force on the date on which the goods are actually removed from the warehouse. The relevant date for determination of rate of duty and tariff valuation is the date on which a Bill of Entry in respect of such goods is presented for home consumption. The subsequent storage of the goods in warehouse was under the provisions of Section 49 of the Act. Therefore, the clearance of warehouse goods for home consumption under Section 68 of the Act will be complete once duty on warehoused goods is paid and out of charge order for home consumption is made by the proper officer in compliance of the provisions of Section 68 of the Act. On clearance for home consumption the goods ceased to be imported goods within the meaning of the Act and the provisions of Section 15(1)(b) could not be applicable. The Apex Court held further that, when the full duty stood paid and the Customs Officer had also permitted clearance of the goods, such goods cannot be held to be the

warehoused goods merely for the reason that the same were allowed to be kept in the warehouse on account of an application made in terms of the provisions of Section 49 of the Act. Where duty on the warehoused goods is paid and out of charge order for home consumption is made by the proper officer in compliance of the provisions of Section 68 of the Act, the goods removed in smaller lots have to be treated as cleared for home consumption.

Paras.14, 15 and 20 of the judgment read thus;

"14. Section 15(1) provides for the date for determination of rate of duty and tariff valuation of imported goods. In the case of goods cleared from warehouse under Section 68, Section 15(1)(b) provides that the rate of duty and tariff valuation applicable to any imported goods shall be the rate and valuation in force on the date on which the goods are actually removed from the warehouse. The relevant date for determination of rate of duty and tariff valuation is the date on which a Bill of Entry in respect of such goods is presented for home consumption. In the present case, the goods were cleared for home consumption upon payment of full duty thereon as applicable on 28th May, 1998. The subsequent storage of the goods in warehouse was under the provisions of Section 49. Clearance of warehouse goods for home consumption under Section 68 was, therefore, complete prior to 2nd of June, 1998. The Bill of Entry for home consumption had been presented in the prescribed

form much prior to the coming into force of the amended provisions providing for enhanced rate of duty. The import duty leviable had been paid and the order of clearance of the goods for home consumption had been made by the proper officer. On the fulfilling of the requirements of Section 68, Section 15(1)(b) would cease to operate. Section 49, provides that in the case of imported goods, whether dutiable or not, which have been cleared for home consumption on an application filed by the importer, the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, on being satisfied that the goods cannot be cleared within a reasonable time, may permit the storage of such goods in a public warehouse, or in a private warehouse if facilities for deposit in a public warehouse is not available and such goods shall not be deemed to be warehoused goods for the purposes of the Act and, accordingly, the provisions of Chapter IX shall not apply to such goods. Section 68 falls in Chapter IX. Section 15(1)(b) expressly refers to the clearance from the warehouse under Section 68 and the same would not be applicable to the present case.

15. Section 15(1) provides for the rate of duty and tariff valuation applicable to any 'imported goods'. The term 'imported goods' is defined in Section 2(25) of the Act to mean any goods brought into India from a place outside India, but does not include goods, which have been cleared for home consumption. In view of the fact that the imported goods in the present case had been cleared for home

consumption on 28th of May, 1998, they ceased to be imported goods within the meaning of the Act and the provisions of Section 15(1)(b) could not be applicable.

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20. There is no dispute that where the imported goods are allowed to be warehoused under Section 68 of the Act and are subsequently cleared from the warehouse, the rate as applicable on the date of actual removal of the goods from the warehouse, is applicable. But where the goods are cleared for home consumption under Section 46, the duty payable would be as on the date the goods were cleared for home consumption. In the present case, not only the full duty stood paid by the respondent, but the Customs Officer had also permitted clearance of the same, as is evident from the endorsement made on the back of the bill of entries. As such, the goods cannot be held to be the warehoused goods and the same were allowed to be kept in the warehouse only on account of an application made by the appellants in terms of the provisions of Section 49 of the Act. The respondents have been clearing the goods from the storage tank as and when required. They were permitted to store the goods in a private warehouse as if it was their own godown. The goods were stored in the IBP storage tank under an agreement entered into by the respondent with IBP and the storage charges were paid by the respondent. Thereafter, the Preventive Officer Charges were discontinued to be levied. Where duty on the warehoused goods is paid and out of charge order for home

consumption is made by the proper officer in compliance of the provisions of Section 68, the goods removed in smaller lots have to be treated as cleared for home consumption.”

16. In *Biecco Lawrie Ltd.'s case* (supra), the three-Judge Bench relied on the judgment in **Bharat Surfactants (Private) Ltd. and another v. Union of India (UOI) and another [1989 (4) SCC 21]**, in which a Constitution Bench of the Apex Court held that, the provisions of Section 15 of the Act are clear in themselves and the date on which a Bill of Entry is presented under Section 46 of the Act is, in the case of goods entered for home consumption, the date relevant for determining the rate of duty and tariff valuation. The principle laid down in the above judgment of the Constitution Bench was followed in *Shah Devchand & Co. and another v. Union of India and another* [1991 (55) ELT 3 : 1991 Supp (2) SCC 86], *D.C.M. and another v. Union of India and another* [(1995) Supp (3) SCC 223], *Dhiraj Lal H. Vohra and others v. Union of India and others* [1993 Suppl.(3) SCC 453] and *Union of India and others v. Apar Private Ltd. and others* [1999 (6) SCC 117].

17. In **Priyanka Overseas (P) Ltd. v. Union of India**

[1991 (51) ELT 185 (SC) : 1991 Supp (1) SCC 102] the Apex Court held that, if the Bills of Entry were filed under Section 68 of the Customs Act and the Customs Officer refused to allow release of the goods on an erroneous assumption, the revised rate of duty would not be applicable and the rate of duty applicable would be the rate on date of filing the Ex-Bond Bill of Entry. Paras 32 and 36 of the judgment read thus;

"32. Section 15 of the Act provides for determination of rate of duty on imported goods. The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force in the case of goods cleared from a warehouse under Section 68, the date on which the goods are actually removed (emphasis added) from the warehouse. There can be no manner of doubt that the term 'actual removal' is even more stronger than the term 'physical removal' and the intention of the Legislature in using these words clearly stipulates the actual removal of the goods from the warehouse. The rate of duty and tariff valuation on the imported goods may be changed from time to time and as such the Legislature has clearly expressed its intention under Section 15 as to on what date the rate of duty and tariff valuation is to be determined. We cannot introduce the concept of deeming provision while determining the question of actual removal of the goods from the warehouse. The rate has to be determined on the

basis of the date on which the goods are actually removed from the warehouse and thereafter the question would be examined as to how the relief is to be moulded in case it is found that the Customs authorities were themselves responsible in preventing the importer of goods from actually removing the goods from the warehouse. In a case of the present kind where there is no ambiguity in the expressed intention of the Legislature in determining the date for applying the rate of duty, no juristic principle of deemed removal of the goods can be applied as contended by Mr. Sen. Many contingencies may happen in between the filing of bill of entry and actual removal of the goods from the warehouse for which sometimes the importer of goods may himself be responsible, in some cases the responsibility may lie on the Customs authorities and there may also be contingencies beyond the control of both the parties. In any case the intention of the Legislature being clear, rate of duty is to be applied, as may be in force on the date of actual removal of goods from the warehouse under Section 15(1) (b) of the Customs Act.

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36. The question is whether the appellant is liable to pay duty on the balance quantity of 6746.468 MT of Palm Kernel and if so, what should be the rate of duty. In determining this question it must be borne in mind the statutory principle that if a party discharges its liability by complying with the requirement of law, and presents papers for clearance of goods, it is obligatory on the Revenue

authorities to pass the order immediately thereon. If the Revenue authorities either refuse to pass the order on some erroneous or imaginary grounds or on account of any misconception of law, the department cannot take advantage of its own wrong in demanding higher rate of duty from the importer. Under Sections 68 and 71 of the Act, goods placed in a warehouse can be taken out only after clearance for home consumption. Admittedly, the appellant had done its part of legal duty by presenting bills of entry and complying with Section 68(a) of the Act on 28.1.88. But the Customs Officer refused to release the goods on an erroneous assumption that the appellant was liable to pay redemption fine and since it had not paid the said amount, the goods were not liable to be released. The High Court held that the imposition of redemption fine was non est and the petitioner was within its right to claim release of goods without paying any redemption fine, on the day it complied with the formalities under Section 68 of the Act. Section 68(c) of the Act prescribes an official function which was not performed by the Customs authorities due to entertainment of a wrong and illegal notion regarding the payment of redemption fine which resulted into a wrong order by the department. In the circumstances the department cannot be allowed to take advantage of its own wrongful and illegal act,. In moulding relief, this Court has always applied principles of equity in order to do complete justice between the parties.

18. In Priyanka Overseas (P) Ltd.'s case (supra) the Apex

Court held further that, whenever the Customs authorities permit storage of imported goods in a private warehouse, the provisions of Sections 58, 59, 68 and 73 of the Act would be applicable. After referring to Para.15 of the Central Manual published by the Director of Publications, Customs and Central Excise, which contains directions for determining the actual date of removal of goods from warehouse in terms of Section 15(1)(b) of the Act, the Apex Court held that, for purposes of Section 15(1)(b) of the Act, if the goods are in private warehouse the date of cancellation of the licence of the private warehouse should be taken as the actual removal of the goods for the purposes of Section 15(1)(b) of the Act. Merely because the officer failed to discharge his duties by making illegal demand for deposit of redemption fine the appellant therein could not be held liable to pay duty. Paras.38 and 39 of the judgment read thus;

"38. On the question of actual removal of goods for the purposes of determining the rate, of duty payable by the importer under Section 15(1)(b) of the Act it is necessary to bear in mind that the Act provides for two classes of warehouses, under Chapter IX of the Act. Section 58 provides for licensing of private warehouses. Section 59 requires an importer to execute a warehousing bond.

Section 68 provides for clearance of warehoused goods for home consumption. Section 73 provides, for cancellation and return of warehousing bond. Whenever, the Customs authorities permit the storage of imported goods in a private warehouse, these provisions would be applicable. The appellant filed bills of entry for home consumption as required by Section 68 of the Act with a prayer for debonding the goods of 3935.364 MT on 17.12.81 which were stored in a private warehouse. The Customs authorities on that very day namely 17.10.87 cancelled the licence for warehousing the quantity of goods in respect of which the bills of entry were filed by Cancelling the bond and deleting the said godown from the relevant licence issued for the quantity of 11500 MT. Endorsement to that effect was made on the licence of warehouse and keys of the godown were also handed over to the appellant simultaneously, as a result of which though the goods remained in the said godown but not as a warehouse, instead it was treated to be a private godown of the appellant, and it was allowed to remove the goods without payment of any duty.

39. There is no dispute that the remaining goods were also stored in a private warehouse and the appellant had filed the bills of entry and complied with all the required formalities for debonding and clearance of the goods on 28.1.88, therefore the appellant was entitled to an order cancelling the licence of the private warehouse enabling it to remove the goods. Had the Customs authorities passed

an order, in accordance with law the same result would have followed as had been done on 17.12.87. The Central Manual published by the Director of Publications, Customs and Central Excise contains directions for determining the actual date of removal of goods from warehouse in terms of Section 15(1)(b) of the Act. The functioning of private warehousing has been elaborated therein. Clause 10 of the Manual prescribes the type of buildings which can be approved as private warehouses under Section 58 of the Act. Para 15 of the Manual provides for purposes of Section 15(1)(b) of the Act, that if the goods are in private warehouse the date of cancellation of the licence of the private warehouse should be taken as the actual removal of the goods for the purposes of Section 15(1)(b) of the Act. Para 15 as already stated was followed in the appellants own case on 17.12.87 in releasing the goods. There is no valid reason as to why the same procedure should not have been followed in respect of the remaining goods in the respect of which the bills of entry were filed on 28.1.88 for debonding and clearance of goods. Merely because the officer failed to discharge his duties by making illegal demand for deposit of redemption fine the appellant could not be held liable to pay duty. The appellant is therefore entitled to the delivery of goods without paying any duty on 28.1.88 no duty was payable on the goods."

19. In the case on hand, the fact that the warehousing of the subject consignment was in a private bonded warehouse at

Wellington Island, Cochin, is not in dispute. Sri.G.L.Rawal, the learned Senior Counsel for the petitioner would submit that, on payment of duty on the declared value of the goods, as assessed by the proper officer, the petitioner obtained 'out of charge' from Customs, much prior to 06.08.2001, the date on which Ext.P6 notification No.36/2001-CUS (NT) issued by the 1st respondent, fixing the tariff value of RDB Palmolein at US\$ 372 came into force. The balance quantity to be removed from the bonded warehouse was 1318.150 MTs out of Ex-Bond Bills of Entry Nos.2915, 3167 and 3199 dated 04.07.2001, 20.07.2001 and 23.07.2001 respectively, in respect of which duty has been paid on 06.07.2001, 23.07.2001 and 24.07.2001 respectively, and 2540.346 MTs out of Ex-Bond Bill of Entry No.3407 dated 03.08.2001, in respect of which duty has been paid by cash on 04.08.2001 and obtained 'out-of charge' from Customs on 04.08.2001 itself. Though a copy of Ex-Bond Bill of Entry No.3407 dated 03.08.2001 is not on record, the learned Senior Counsel made available a copy of the same for perusal of this Court, after furnishing copy to the learned Standing Counsel for the Central Board of Excise and Customs.

20. In Biecco Lawrie Ltd.'s case (supra) the Apex Court held that, clearance of warehouse goods for home consumption under Section 68 of the Act will be complete once duty on warehoused goods is paid and 'out of charge' order for home consumption is made by the proper officer in compliance of the provisions of said Section. On clearance for home consumption the goods ceased to be imported goods within the meaning of the Act and the provisions of Section 15(1)(b) could not be applicable. When the full duty stood paid and the Customs Officer had also permitted clearance of the goods, such goods cannot be held to be warehoused goods merely for the reason that the same were allowed to be kept in the warehouse on account of an application made in terms of the provisions of Section 49 of the Act. The Apex Court held further that, where duty on the warehoused goods is paid and out of charge order for home consumption was made by the proper officer in compliance of the provisions of Section 68 of the Act, the goods removed in smaller lots have to be treated as cleared for home consumption. Further, as held by the Apex Court in Priyanka Overseas (P) Ltd.'s case (supra), for purposes of Section 15(1)(b) of the Act, if the goods

are in private warehouse the date of cancellation of the licence of the private warehouse should be taken as the actual removal of the goods for the purposes of Section 15(1)(b) of the Act.

21. The contention of the 2nd respondent that Ext.P6 notification came into force with effect from 03.08.2001 and as such, the duty for the left over subject consignment has to be assessed at the tariff rate of US\$ 372 per MT, as against the declared price of US\$ 234 per MT, is mainly relying on Ext.R1(b) Circular No.22/2001 issued by the Deputy Commissioner of Customs (Tariff Unit), Cochin dated 6.8.2001 and also Ext.R1(b)(2) Circular No.46/2001-CUS dated 10.08.2001 of the Central Board of Excise and Customs. Ext.R1(b) circular states that, in view of Ext.P6 notification dated 03.08.2011, all warehouse Bills of Entry wherein the goods still remain warehoused and all Ex-Bond Bills of Entry wherein the goods are pending physical removal from bond as on 03.08.2001 may be re-submitted forthwith to Appraising Officer (Imports) for re-assessment and collection of differential duty. Similarly, Ext.R1(b) (2) Circular dated 10.8.2001 provides among other things that, if the actual clearance of goods from a warehouse take place on or

after 03.08.2001, Tariff Values in Ext.P6 notification will be applicable for determining value for assessment purpose, even if Ex-Bond Bill of Entry may have been presented earlier to 03.08.2001.

22. In **Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries [2008 (231) ELT 22 (SC) : 2008 (13) SCC 1]** a Constitution Bench of the Apex Court held that, circulars and instructions issued by the Central Board of Excise and Customs are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in the decision of the Supreme Court or the High Court. The Apex Court held further that, a circular which is contrary to the statutory provisions has really no existence in law. Paras.2 and 6 of the judgment read thus;

“2. It was noted by the three Judge Bench that the effect of the aforesaid observations was noted in several decisions. In *Kalyani Packaging Industry v. Union of India* and another (2004 (6) SCC 719 : 2004 (168) ELT 145), it was noted as

follows;

"We have noticed that para 9 (para 11 in SCC) of Dhiren Chemical case (2004 (6) SCC 722) is being misunderstood. It, therefore, becomes necessary to clarify para 9 (para 11 in SCC) of Dhiren Chemical case (2004 (6) SCC 722). One of us (Variava, J.) was a party to the judgment of Dhiren Chemical case and knows what was the intention in incorporating para 9 (para 11 in SCC). It must be remembered that law laid down by this Court is law of the land. The law so laid down is binding on all Courts/ Tribunals and bodies. It is clear that circulars of the Board cannot prevail over the law laid down by this Court. However, it was pointed out that during hearing of Dhiren Chemical case because of the circulars of the Board in many cases the Department had granted benefits of exemption notifications. It was submitted that on the interpretation now given by this Court in Dhiren Chemical case the Revenue was likely to reopen cases. Thus para 9 (para 11 in SCC) was incorporated to ensure that in cases where benefits of exemption notification had already been granted, the Revenue would remain bound. The purpose was to see that such cases were not reopened. However, this did not mean that even in cases where the Revenue/

Department had already contended that the benefit of an exemption notification was not available, and the matter was sub judice before a Court or a Tribunal, the Court or Tribunal would also give effect to circulars of the Board in preference to a decision of the Constitution Bench of this Court. Where as a result of dispute the matter is sub judice, a Court/Tribunal is, after Dhiren Chemical case, bound to interpret as set out in that judgment. To hold otherwise and to interpret in the manner suggested would mean that Courts/Tribunals have to ignore a judgment of this Court and follow circulars of the Board. That was not what was meant by para 9 of Dhiren Chemical case."

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6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the Court. It is for

the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

23. In the case on hand, the Apex Court in its order dated 05.05.2015 in Civil Appeal Nos.7801-7811 of 2004 has held that, Notification No.36/2001-CUS (NT) dated 03.08.2001 (Ext.P6) came into force only on 06.08.2001, in as much as it was offered for sale only on that date. In view of the law declared by the Apex Court in its order dated 05.05.2015 in Civil Appeal Nos.7801-7811 of 2004, Ext.R1(b) Circular No.22/2001 issued by the Deputy Commissioner of Customs (Tariff Unit), Cochin dated 6.8.2001 and Ext.R1(b)(2) Circular No.46/2001-CUS dated 10.08.2001 of the Central Board of Excise and Customs have no existence in law and therefore, can only be ignored.

24. As I have already noticed, the fact that the warehousing of the subject consignment was in a private bonded warehouse at Wellington Island, Cochin, is not in dispute. The fact that the petitioner paid duty in respect of Ex-Bond Bills of Entry Nos.2915, 3167 and 3199 dated 04.07.2001, 20.07.2001 and 23.07.2001 respectively, on 06.07.2001, 23.07.2001 and

24.07.2001 respectively, and that duty in respect of Ex-Bond Bill of Entry No.3407 dated 03.08.2001 was paid on 04.08.2001, are also not in dispute. The duty in respect of Ex-Bond Bills of Entry Nos.3199 and 3407 dated 23.07.2001 and 03.08.2001 respectively, were paid in cash on 24.07.2001 and 04.08.2001 respectively. As held by the Apex Court in Biecco Lawrie Ltd.'s case (supra), the clearance of warehouse goods for home consumption under Section 68 of the Act will be complete once duty on warehoused goods is paid and 'out of charge' order for home consumption is made by the proper officer in compliance of the provisions of said Section. Further, as held by the Apex Court in Priyanka Overseas (P) Ltd.'s case (supra), if the goods are in private warehouse the date of cancellation of the licence of the private warehouse should be taken as the actual removal of the goods for the purposes of Section 15(1)(b) of the Act.

25. In that view of the matter, the conclusion is irresistible that, if the petitioner had obtained 'out of charge' order for home consumption issued by the proper officer in compliance of Section 68 of the Act and the licence of the private warehouse stood cancelled before 06.08.2001, the date of which Ext.P6 notification

No.36/2001-CUS (NT) dated 03.08.2001 issued by the 1st respondent fixing the tariff value of RDB Palmolein at US\$ 372 came into force, the petitioner cannot be held liable to pay differential duty in respect of the balance quantity of 1318.150 MTs out of Ex-Bond Bills of Entry Nos.2915, 3167 and 3199 dated 04.07.2001, 20.07.2001 and 23.07.2001 respectively, in respect of which duty has been paid on 06.07.2001, 23.07.2001 and 24.07.2001 respectively, and 2540.346 MTs out of Ex-Bond Bill of Entry No.3407 dated 03.08.2001, in respect of which duty has been paid by cash on 04.08.2001.

26. In the result, this Original Petition is disposed of declaring that, if the petitioner had obtained 'out of charge' order for home consumption issued by the proper officer in compliance of Section 68 of the Act and the licence of the private warehouse stood cancelled before 06.08.2001, the date of which Ext.P6 notification No.36/2001-CUS (NT) dated 03.08.2001 issued by the 1st respondent came into force, the petitioner cannot be held liable to pay differential duty in respect of the balance quantity of 1318.150 MTs out of Ex-Bond Bills of Entry Nos.2915, 3167 and 3199 dated 04.07.2001, 20.07.2001 and 23.07.2001

respectively, in respect of which duty has been paid on 06.07.2001, 23.07.2001 and 24.07.2001 respectively, and 2540.346 MTs out of Ex-Bond Bill of Entry No.3407 dated 03.08.2001, in respect of which duty has been paid by cash on 04.08.2001.

27. If the petitioner had obtained 'out of charge' order for home consumption issued by the proper officer in compliance of Section 68 of the Act in respect of the balance quantity of the subject consignment and the licence of the private warehouse stood cancelled before 06.08.2001, the 2nd respondent shall pass appropriate orders releasing the bank guarantee/bond for the differential duty amount furnished by the petitioner in terms of the orders of this Court dated 22.08.2001 in I.A.No.41099 of 2001 and that dated 24.08.2001 in I.A.No.41323 of 2001, within a period of one month from the date of receipt of a certified copy of this judgment.

No order as to costs.

Sd/-
ANIL K. NARENDRAN,
JUDGE